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1 CROWN OFFICE ROW

The Liability of Private Hospitals and Clinics

Lessons from the Paterson Litigation:

Developments in the law relating to vicarious liability.

22nd February 2018

Contents

Programme

Discussion of the Case Study chaired by The Hon. Mrs Justice Lambert

Speakers for the Claimant: Lizanne Gumbel QC, Robert Kellar & Dominic Ruck Keene

Speakers for the Defendant: John Whitting QC, Jeremy Hyam QC, Hannah Noyce

Case Study

John, a recently divorced, successful property developer, is about to marry the new love of his life, Claudia. Ahead of their wedding, he embarks on a series of procedures to ensure he is 'match fit.'

• Hair transplants done at the 'Eeyzehair Clinic' in Harley Street. The 'Clinic' is a limited company wholly owned by a member of the institute of Trichologists, Mr Leamas. It has one employee, who is responsible for booking appointments, sending invoices (payable to the Eeyzehair Clinic Ltd) and placing adverts on the Tube. The Clinic rents two rooms from a private landlord. Mr Leamas did the 6 procedures personally with no assistant. Unfortunately, the transplants are done negligently, leaving John with less hair than previously.

• Removal of a tattoo of his ex-wife's name from his chest done by a plastic surgeon, Dr Jebedee, at the 'Be The Best Centre in Victoria. The Centre is a limited company. A number of shares are held by clinicians who practise at the Centre, but the majority shareholder is a venture capital fund. The Centre owns its premises. There are a total of 6 clinicians of varying cosmetic disciplines working at the Centre, all of whom also work in the NHS. Dr Jebedee performed the laser tattoo removal personally, although a nurse employed by the Centre was present in the room. Dr Jebedee pays an annual rent to the Centre for his room and a fixed fee per procedure performed. Invoices are in the name of Dr Jebedee, but are sent out by the Centre's receptionist. Unfortunately, the removal was done negligently, leaving John with a prominent scar.

• A nose implant done by a plastic surgeon, Dr Mendel at the Krupa private hospital. The hospital is owned by the Krupa private health group, a publicly listed company. The procedure was performed in a theatre at the hospital, with theatre nurses present who were employed by the private hospital. Invoices are in the name of the hospital. The hospital pays Dr Mendel for the procedure, less a 25% charge for use of the theatre and staff. John heard of Dr Mendel through looking on the Krupa health group website list of consultants who work at their hospitals. Unfortunately, the procedure was done negligently, leading to the collapse of John's nose cartilage.

• John also had a health MOT. This is part paid for by his own employer who has an approved GP, and requires its employees to have a health MOT every 5 years. The employee contributes 50% of the cost. The MOT is performed by Dr Tarr at her GP practice. Unfortunately Dr Tarr fails to notice obvious signs of cancer.

The Liability of Private Hospitals and Clinics

Lessons from the Paterson Litigation

1 Crown Office Row

Vicarious Liability: Recap

The two-stage test: *Various Claimants v Barclays Bank PLC* [2017] EWHC 1929 (QB) at [27]:

i) Is the relevant relationship one of employment or **"akin to employment"?**

ii) If so, was the tort **sufficiently closely connected** with that employment or quasi-employment?

Stage One: Relationship akin to employment

The five criteria: *Barclays Bank* at [45]

i) D is more likely than the tortfeasor to have the **means and insurance** to compensate the victim;

ii) The tort will have been committed as a result of **activity by the tortfeasor on behalf of D**;

iii) The tortfeasor's activity is likely in reality to be an integral part of **D's business activity, carried out for D's benefit**;

iv) D, by employing the tortfeasor to carry on the activity, will have **created the risk** of the tort committed;

v) The tortfeasor will, to a greater or lesser degree, have been under the **control of D**, in particular with regard to **what** the tortfeasor does.

Relationship akin to employment: factors to consider

- Degree of oversight by the clinic or hospital.
- Does the clinic have responsibility for assigning work to a particular doctor?
- Can the clinic direct the doctor regarding quantity and/or quality of work?
- Could the clinic take action to prevent future negligence?
- What is the contractual and commercial relationship between the clinic and the doctor? Who bears the commercial risk?
- Would the clinic be classified and regulated as a private hospital under relevant legislation?

Stage Two: Sufficiently close connection

- Means the connection between a) the relationship which is akin to employment and b) the tort.
- *Lister v Hesley Hall Ltd* [2001] UKHL 22:

  "*The question is whether the warden's torts were so closely connected with his employment that it would be **fair and just to hold the employers vicariously liable**.*" – Lord Steyn at [28].

  *"The sufficiency of the connection may be gauged by asking **whether the wrongful actings can be seen as ways of carrying out the work** which the employer had authorised."* – Lord Clyde at [37]

  *"Not only do the purpose and the nature of the act have to be considered but the **context and the circumstances** in which it occurred have to be taken into account."* – Lord Clyde at [43].

Sufficiently close connection: factors to consider

- *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11 :

  *"…the court has to consider two matters. The first question is what functions or "field of activities" have been entrusted by the employer to the employee, or, in everyday language, **what was the nature of his job**. As has been emphasised in several cases, this question must be addressed broadly…*

  *Secondly, the court must decide **whether there was sufficient connection** between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice."* – per Lord Toulson at [44-45].

- Clinical negligence committed during the course of a consultation or treatment is highly likely to a sufficiently close connection.
- Might be different if the tort is unrelated to treatment, committed out of hours, and/or away from the clinic's premises…

Non-Delegable Duty: Recap

The five characteristics in *Woodland v Swimming Teachers Association* [2014] AC 537 at [23]:

1) C is a patient, child, or for some other reason is **especially vulnerable or dependent** on D's protection;
2) There is an **antecedent relationship between C and D**, independent of the negligent act or omission itself, which (i) places C in D's custody, charge or care, and (ii) from which it is possible to impute to D the assumption of a positive personal duty to protect C from harm.
3) C has **no control** over how D chooses to perform those obligations.
4) D has **delegated to a third party** some function which is an integral part of that positive duty; and for that purpose the third party is exercising D's custody or care of, and corresponding control over, C.
5) **The third party has been negligent** in the performance of the very function delegated by D to him.

Non-delegable duty: factors to consider

- All Hospitals (probably) owe a non-delegable duty to patients : *Lister* at [55], *Woodland* at [15]-[16], *Farraj* at [88]. Query – meaning of 'hospital'
- Generally applicable factors making a duty likely:
  - Legislative and regulatory context.
  - Inherent vulnerability of patients.
  - Direct connection between clinical negligence, and the core function of a hospital/clinic to care for patients.
- Factors to consider in an individual case:
  - Antecedent, independent relationship between patient and clinic?
  - Degree to which the clinic takes responsibility for actual provision of care vs its arrangements
  - Degree of patient control – of doctor, type of treatment, timing of appointments...

Remember the Contractual context

Always check the contract(s): what has the hospital/clinic actually agreed to do? For whom?

- One end of the spectrum – obligation to the patient to provide appropriate treatment by a safe and competent doctor.
- The other end – obligation to the doctor to provide rooms or facilities, leaving all other arrangements to be made between patient and doctor.
- Other variables – e.g. obligation to provide nursing or medical staff to assist the doctor; to facilitate introduction between patient and doctor but no responsibility for any treatment thereafter…

Key Cases: Vicarious Liability and Non-Delegable Duty

1. *Lister v Hesley Hall Ltd* [2001] UKHL 22

2. *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151, [2006] Q.B. 510

3. *Farraj and another v King's Healthcare NHS Trust and another* [2009] EWCA Civ 1203

4. *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56, [2013] 2 A.C. 1

5. *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938, [2013] Q.B. 722

6. *Woodland v Swimming Teachers Association and others* [2014] A.C. 537, [2014] A.C. 537

7. *A v The Trustees of the Watchtower Bible and Tract Society* [2015] EWHC 1722 (QB)

8. *Cox v Ministry of Justice* [2016] UKSC 10, [2016] A.C. 660

9. *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] A.C. 677

10. *Various Claimants v Barclays Bank PLC* [2017] EWHC 1929 (QB)

11. *Armes v Nottinghamshire CC* [2017] UKSC 60; [2017] 3 W.L.R. 1000

Lister v Hesley Hall Ltd

House of Lords, 03 May 2001

Case Analysis

Where Reported

[2001] UKHL 22; [2002] 1 A.C. 215; [2001] 2 W.L.R. 1311; [2001] 2 All E.R. 769; [2001] I.C.R. 665; [2001] I.R.L.R. 472; [2001] Emp. L.R. 819; [2001] 2 F.L.R. 307; [2001] 2 F.C.R. 97; (2001) 3 L.G.L.R. 49; [2001] E.L.R. 422; [2001] Fam. Law 595; (2001) 98(24) L.S.G. 45; (2001) 151 N.L.J. 728; (2001) 145 S.J.L.B. 126; [2001] N.P.C. 89; Times, May 10, 2001; Independent, June 11, 2001; Daily Telegraph, May 8, 2001; Official Transcript;

Case Digest

Subject: Torts

Keywords: Employers' liability; Negligence; Residential care; Sexual abuse; Vicarious liability

Summary: A warden's tortious acts in sexually abusing children in his care were so closely connected with his employment as to warrant the imposition of vicarious liability on his employer, T v North Yorkshire CC [1999] I.R.L.R. 98 overruled.

T, who had been subjected to sexual abuse by D, the warden of a residential home, appealed against a decision (Times, October 13, 1999) that the owner of the home, HH, was not vicariously liable for the tortious acts of D, its employee and the home's warden, in sexually abusing children in his care. The matter had proceeded before the Court of Appeal, upon the basis that HH was liable for D's failure to report the risk of or actual harm caused to the children since, bound by the decision in *T v North Yorkshire CC [1999] I.R.L.R. 98* , it had not been open to the court to consider whether HH had been vicariously liable for the actual abuse. T challenged the validity of the decision in *T v North Yorkshire CC* submitting that employers might be vicariously liable for

the sexual torts of an employee even though the sexual abuse could not be considered as an unauthorised mode of carrying out an authorised act.

Held, allowing the appeal, that the line of authority relating to vicarious liability for intentional torts as exemplified by *Morris v CW Martin & Sons Ltd [1966] 1 Q.B. 716* was of general application and was not restricted to bailment cases, *T v North Yorkshire CC* overruled. When applying the test laid down in Salmond and Heutson on Torts, 21st edition (1996) p.443 in respect of whether a wrongful act was outside the scope of employment, the Court of Appeal in *T v North Yorkshire CC* had wrongly categorised the sexual assaults which took place as far removed from an unauthorised mode of carrying out a teacher's duty and failed to acknowledge the close connection between the employment and the tort, *Bazley v Curry (1999) 174 D.L.R. (4th) 45* and *Jacobi v Griffiths (1999) 174 D.L.R. (4th) 71* considered. In applying the *Salmond* test it was crucial to focus on the right act of the employee and its connection with the tortious act *Rose v Plenty [1976] 1 W.L.R. 141* considered. The court must not simply consider whether the acts of sexual abuse were modes of doing an authorised act but must also consider whether there existed a close connection between the tort and the employee's duties. In the instant case, HH had undertaken to care for the resident children and had entrusted that obligation to D. D's torts were so closely connected with his employment that it would be fair and just to hold HH vicariously liable.

Judge: Lord Steyn; Lord Clyde; Lord Hutton; Lord Hobhouse of Woodborough; Lord Millett

Counsel: For L: Richard Maxwell Q.C. and Rosalind Coe. . For H: Andrew Collender Q.C. and Andrew Miller.

Solicitor: For L: Last Cawthra Feather (Shipley). . For H: Beachcroft Wansbroughs (Leeds).

Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd

[2005] EWCA Civ 1151, [2006] Q.B. 510, Court of Appeal (Civil Division), 10 October 2005

Case Analysis

Where Reported

[2005] EWCA Civ 1151; [2006] Q.B. 510; [2006] 2 W.L.R. 428; [2005] 4 All E.R. 1181; [2006] I.C.R. 327; [2005] I.R.L.R. 983; [2005] 42 E.G. 235 (C.S.); (2005) 102(44) L.S.G. 31; [2005] N.P.C. 114; Independent, October 12, 2005; Official Transcript;

Case Digest

Subject: Negligence **Other related subjects:** Employment

Keywords: Contribution; Employers' liability; Vicarious liability

Summary: Two separate employers could both be vicariously liable for the negligence of a single employee.

The appellant (D3) appealed against the decision that it was vicariously liable for the negligence of a fitter's mate who had caused a flood at a factory. The claimant (C) had engaged the first defendant (D1) to install air conditioning in C's factory. D1 had subcontracted ducting work to the second defendant (D2) and D2 had contracted with D3 to provide fitters and fitters' mates on a labour only basis. A fitter's mate supplied by D3, who was working with a fitter supplied by D3, both under the supervision of a fitter contracted to D2, negligently caused a flood. The judge determined that D3 and not D2 was vicariously liable for the negligence of the fitter's mate. The issue on appeal was whether both D2 and D3, rather than only one of them, could be vicariously liable for the negligence of the fitter's mate. D3 submitted that dual vicarious liability was not a legal possibility and that D2 alone should be liable. D2 submitted that D3 alone should be liable but that dual vicarious liability was a legal possibility.

Held, allowing the appeal, that (1) correctly formulated, the question to determine vicarious liability was who was entitled to exercise control over the relevant act or operation of the fitter's mate. To look for a transfer of a contract of employment was distracting and misleading. The fitter's mate's employment was not transferred. The inquiry should concentrate on the relevant negligent act and then ask whose responsibility it was to prevent it: who was entitled and obliged to give orders as to how the work should or should not be done. Entire and absolute control was not a necessary precondition of vicarious liability, *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd [1947] A.C. 1* and *Denham v Midland Employers Mutual Assurance [1955] 2 Q.B. 437* considered. (2) On the facts of the instant case both D2's fitter and D3's fitter had been entitled, and if they had had the opportunity obliged, to prevent the mate's negligence. (3) It had been assumed since the early 19th century to be the law that where an employee who was lent by one employer to work for another was negligent, liability had to rest on one employer or the other, but not both. But the foundation on which that rested was a slender one and the contrary had never been properly argued. There was no authority binding the court to hold that dual vicarious liability was legally impossible, *Donovan v Laing Wharton and Down Construction Syndicate Ltd [1893] 1 Q.B. 629* and *Esso Petroleum Co Ltd v Hall Russell & Co Ltd (The Esso Bernicia) [1989] A.C. 643* considered. (4) Dual vicarious liability was legally possible and both D2 and D3 were vicariously liable for the mate's negligence. (5) If the relevant relationships led to the conclusion of dual control over the employee, it was likely that the measure of control was equal. That was so in the instant case and, applying the Civil Liability (Contribution) Act 1978 , the just and equitable division of responsibility between D2 and D3 was equal. D2 and D3 should contribute 50 per cent of their several liabilities to C.

Judge: May LJ; Rix LJ

Counsel: For the claimant: Andrew Prynne QC, Toby Riley-Smith. For the defendants: Patrick Field QC.

Solicitor: For the claimant: Watson-Burton. For the defendants: James Chapman & Co.

Farraj and another v King's Healthcare NHS Trust and another

[2009] EWCA Civ 1203, Court of Appeal (Civil Division), 13 November 2009

Case Analysis

Where Reported

[2009] EWCA Civ 1203; [2010] 1 W.L.R. 2139; [2010] P.T.S.R. 1176; [2010] P.I.Q.R. P7; [2010] Med. L.R. 1; (2010) 11 B.M.L.R. 131; (2009) 106(46) L.S.G. 19; Official Transcript;

Case Digest

Subject: Negligence **Other related subjects:** Health

Keywords: Blood disorders; Causation; Clinical negligence; Duty of care; Genetic testing; Hospitals; Laboratories; Wrongful birth

Summary: A hospital did not owe a non-delegable duty of care in respect of the genetic testing of a tissue sample which was sent to be cultured by a reputable independent cytogenetics laboratory.

Abstract: The appellant NHS trust appealed against a decision that it was liable in a wrongful birth case and the respondent parents (P) cross-appealed.

P were carriers of a gene which could cause an inherited blood disorder. When the wife was pregnant she was advised to undergo DNA testing to detect whether the child would suffer from the disorder. A chorionic villus sample was taken and sent to the trust's London hospital. From there it was sent to an independent specialist cytogenetics laboratory (C) for foetal cells to be cultured. That was done and the sample returned to the hospital for testing. The test was negative. However, when the baby was born it was found to have the disorder. P sued the trust and C. The judge held both defendants liable. C was liable because it had had doubts about the viability of the sample but had not communicated them to the hospital. That failure of communication was negligent. The trust was also liable because the hospital ought to have enquired of C whether the sample was a reliable source of material for genetic testing. If the hospital had so enquired it would have learned of C's doubts and then asked for a further sample. The judge held C two-thirds liable and the trust one-third liable. The trust appealed on liability, causation and apportionment and P cross-appealed on the ground that even if the trust was not negligent it was liable for the negligence of C because the trust's duty was non-delegable.

Held: Appeal allowed, cross-appeal dismissed.

(1) The judge had erred. The only conclusion open to him on the evidence was that the hospital and C had a clearly understood arrangement by which the hospital was entitled to assume that the sample was satisfactory unless C informed it to the contrary.

Therefore the hospital and trust had not been negligent. (2) The holding of liability was also flawed because the judge failed to make a reasoned finding to support the conclusion that, if the hospital had enquired of C, C's doubts about the sample would have been communicated. There was evidence that, if an enquiry had been made, C would have replied that it would let the hospital know if there was a problem with the sample. (3) In view of the conclusion that the trust was not liable the issue of apportionment fell away. C was liable for 100 per cent of the damages and P's costs of the action. (4) The general rule was that where a person under a duty of care entrusted the performance of the duty to an apparently competent contractor he was not under a duty to check the contractor's work, being entitled to rely on its proper performance, *D&F Estates Ltd v Church Commissioners for England [1989] A.C. 177* followed. The general rule did not apply in relation to the duty of care owed by an employer to his employees, which had been held to be non-delegable, *Wilsons & Clyde Coal Co Ltd v English [1938] A.C. 57* considered. Assuming, without deciding, that the concept of a non-delegable duty extended to hospital cases, that did not justify the conclusion that, on the facts of the instant case, the hospital owed a non-delegable duty to P in respect of genetic testing, *Gold v Essex CC [1942] 2 K.B. 293*, *Cassidy v Ministry of Health [1951] 2 K.B. 343*, *Robertson v Nottingham HA [1997] 8 Med. L.R. 1* and *A (A Child) v Ministry of Defence [2004] EWCA Civ 641, [2005] Q.B. 183* considered. There was a significant difference between treating a patient who was admitted to hospital for that purpose and carrying out tests on samples. The special duty that existed between a patient and a hospital arose because the hospital undertook the care, supervision and control of persons who, as patients, were in special need of care. P were not admitted to the hospital for treatment. The instant case concerned the provision of analytical and diagnostic laboratory services. There was no need to depart from the general rule and find that any special duty was owed.

Judge: Sedley LJ; Dyson LJ; Smith LJ

Counsel: For the claimants: Harry Trusted. For the first defendant: Martin Spencer QC, Jane Mishcon. For the second defendant: Andrew Prynne QC.

Solicitor: For the claimants: Bolt Burdon Kemp. For the first defendant: Hempsons. For the second defendant: CMS Cameron McKenna LLP.

Various Claimants v Institute of the Brothers of the Christian Schools

[2012] UKSC 56, [2013] 2 A.C. 1, Supreme Court, 21 November 2012

Also known as:

Catholic Child Welfare Society v Various Claimants

Various Claimants v Catholic Child Welfare Society

Case Analysis

Where Reported

[2012] UKSC 56; [2013] 2 A.C. 1; [2012] 3 W.L.R. 1319; [2013] 1 All E.R. 670; [2013] I.R.L.R. 219; [2013] E.L.R. 1; [2013] P.I.Q.R. P6; (2012) 162 N.L.J. 1505; (2012) 156(45) S.J.L.B. 31; Times, December 18, 2012; Official Transcript;

Case Digest

Subject: Negligence

Keywords: Child sexual abuse; Denominational schools; Religious groups; Unincorporated associations; Vicarious liability

Summary: Vicarious liability attached to the Institute of the Brothers of the Christian Schools, a religious order, in respect of sexual abuse perpetrated or allegedly perpetrated by brother teachers at a residential school for boys, even though the Institute had not managed the school.

Abstract: The appellant (C) appealed against a decision (*[2010] EWCA Civ 1106*) that the respondent Institute of the Brothers of the Christian Schools (the Institute) was not vicariously liable for alleged physical and sexual abuse perpetrated by brother teachers at a residential school for boys in need of care between 1958 and 1992.

C represented the various boards of managers which had carried out the day-to-day management of the school from 1973 until its closure in 1994. The Institute was an unincorporated association of lay brothers of the Catholic Church. For the purposes of administration, the Institute was divided into districts called Provinces, each

headed by a "Provincial". At all material times, the headteacher and some other teachers at the school were supplied by the Institute. The alleged abusers included Institute brothers as well as non-Institute members of staff. C had been held to be vicariously liable for acts of abuse by the brother teachers. It now sought to challenge the finding that the Institute was not also vicariously liable.

Held: Appeal allowed.

Vicarious liability involved a two-stage test. First, it was necessary to consider the relationship between the defendant and the tortfeasor to see whether it was one that was capable of giving rise to vicarious liability. Second, regard should be had to the connection that linked the relationship between the defendant and the tortfeasor and the act or omission of the latter. The relationship between the teaching brothers and the Institute was sufficiently akin to that of employer and employees to satisfy the first stage of the test: the Institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body; the teaching activity of the brothers was undertaken because the Provincial directed them to undertake it; although the brothers entered into contracts of employment with those managing the school, they did so because the Provincial required them to do so; the teaching activity undertaken by the brothers was in furtherance of the objective, or mission, of the Institute; further, the manner in which the brother teachers were obliged to conduct themselves as teachers was dictated by the Institute's rules (see paras 21, 56, 60 of judgment). As to the second stage of the test, the precise criteria for imposing vicarious liability for sexual abuse were still in the course of refinement by judicial decision, but a common theme arose from the authorities. Vicarious liability was imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to

further its own interests, had done so in a manner which had created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involved a strong causative link. Those were the criteria that established the necessary "close connection" between relationship and abuse. It was not right to say that creation of risk was simply a policy consideration and not one of the criteria. It was not enough, of itself, to give rise to vicarious liability for abuse but it was always likely to be an important element in the facts that gave rise to such liability. Here, both the necessary relationship between the brothers and the Institute and the close connection between that relationship and the abuse committed at the school had been made out. As to the former, the relationship between the Institute and the brothers enabled the Institute to place the brothers in teaching positions and, in particular, in the position of headmaster at the school. The standing that the brothers enjoyed as members of the Institute led the managers of that school to comply with the decisions of the Institute as to who should fill that key position. It was particularly significant that the Institute provided the headmasters, for the running of the school was largely carried out by the headmasters. The brother headmaster was almost always the Director of the Institute's community, living on the school premises. There was thus a very close connection between the relationship between the brothers and the Institute and the employment of the brothers as teachers in the school. There was also a very close connection between the brother teachers' employment in the school and the sexual abuse that they committed or must be assumed to have committed. There was no Criminal Records Bureau at the time, but the risk of sexual abuse was recognised, as demonstrated by the prohibition in the Institute's rules on

touching children. The placement of brother teachers at the school, a residential school in the precincts of which they also resided, greatly enhanced the risk of abuse by them if they had a propensity for such misconduct (paras 85-88, 91, 93).

Judge: Lord Phillips JSC; Lady Hale JSC; Lord Kerr JSC; Lord Wilson JSC; Lord Carnwath JSC

Counsel: For the appellant: George Leggatt QC, Nicholas Fewtrell. For the respondent: Lord Faulks QC, Alastair Hammerton.

Solicitor: For the appellant: Hill Dickinson LLP. For the respondent: Wedlake Bell LLP.

E v English Province of Our Lady of Charity

[2012] EWCA Civ 938, [2013] Q.B. 722 Court of Appeal (Civil Division)

12 July 2012

Also known as:

JGE v English Province of Our Lady of Charity

JGE v Portsmouth Roman Catholic Diocesan Trust

Case Analysis

Where Reported

[2012] EWCA Civ 938; [2013] Q.B. 722; [2013] 2 W.L.R. 958; [2012] 4 All E.R. 1152; [2013] P.T.S.R. 565; [2012] I.R.L.R. 846; [2012] P.I.Q.R. P19; Times, August 13, 2012; Official Transcript;

Case Digest

Subject: Torts **Other related subjects:** Ecclesiastical law; Personal injury

Keywords: Child sexual abuse; Employees; Ministers of religion; Personal injury; Roman Catholic Church; Vicarious liability

Summary: The relationship between a Roman Catholic parish priest and a bishop was sufficiently close in character to that of employee and employer to make it just and fair to hold a diocese vicariously liable for the wrongful acts of one of its priests.

Abstract: The appellant Roman Catholic diocese (D) appealed against a decision (*[2011] EWHC 2871 (QB), [2012] 2 W.L.R.709*) that it could be vicariously liable for the alleged torts of one of its parish priests (B).

The court below had reached the decision in determination of a preliminary issue relating to a claim for damages for personal injury by the respondent (J) against D. J alleged that she had been sexually abused and raped by B. The judge below acknowledged that vicarious liability involved the synthesis of two elements, the first stage being the relationship between the employer and the employee and the second being

whether the act was within the scope of the employment. In relation to the first stage, it was accepted that a priest was not an employee, but that vicarious liability could be founded on a relationship other than employment. On the basis of the decision in *Doe v Bennett [2004] 1 S.C.R. 436*, the judge concluded that the relationship was akin to employment because of the close connection between the tortfeasor and the person against whom liability was sought. The issue was whether the law could be extended to relationships akin to employment; whether the close connection test was appropriate; and whether it was enough that the result was just and fair.

Held: Appeal dismissed.

(Tomlinson L.J. dissenting) The law of vicarious liability had moved beyond the confines of a contract of service. However, it was wrong to conclude that the relationship between the tortfeasor and the person against whom liability was sought had to be sufficiently close. If there was a close connection test, it was that the relationship between the defendant and the tortfeasor had to be so close to a relationship of employer and employee that for vicarious liability purposes it could fairly be said to be akin to employment, *Doe v Bennett* considered. The test was whether the relationship of the bishop and B was so close in character to one of employer and employee that it was just and fair to hold the employer vicariously liable (see paras 61-63 of judgment). Applying the control test, a priest was subject to no direct control in the sense of the bishop checking what he did every single day, but there was a level of control in the sense that if certain things did not happen then action could be taken. Moreover, under canon law, priests were bound by special obligation to show reverence and obedience to their ordinary. Abuse of a child was a gross breach of ecclesiastical law and if it came to the bishop's knowledge, he would be bound to dismiss the priest from

his office. A priest also operated within a pre-existing framework of rights and obligations set out in the Code of Canon Law and was ultimately subject to the sanctions and control of his bishop to whom he was accountable, *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd [2005] EWCA Civ 1151, [2006] Q.B. 510* applied, *Bazley v Curry (1999) 174 D.L.R. (4th) 45* considered (paras 74-76). The problem in relation to the organisation test was in identifying the employer's business. However, the Roman Catholic Church looked like a business and operated like one. The Pope was in the head office; there were "regional offices" with appointed bishops; and the "local branches" were parishes with their appointed priests (para.77). In relation to the integration test, the role of the parish priest was wholly integrated into the organisational structure of the Church's enterprise. He was part and parcel of the organisation, not only accessory to it, *Viasystems* and *Stevenson Jordan & Harrison v MacDonald & Evans [1952] 1 T.L.R. 101* applied (para.78). The question in relation to the entrepreneur test was whether the priest was more like an independent contractor than an employee. He was not paid a salary directly, but was dependent on what he could take from collections given at Mass. However, any surplus formed part of the parish funds. His situation was akin to being paid a wage and certainly did not resonate with being an entrepreneur (para.79). B did not match every facet of being an employee, but the result of each test led to the conclusion that he was more like an employee than an independent contractor. The relationship was akin to employment within the meaning which an ordinary person would give the words, *Cassidy v Ministry of Health [1951] 2 K.B. 343* applied. He was in a relationship with his bishop which was close enough and sufficiently akin to that of employer and employee to make it just and fair to impose vicarious liability. Justice and fairness was used as a salutary check on the

conclusion, but was not a stand-alone test (paras 80-84).

Judge: Ward LJ; Tomlinson LJ; Davis LJ

Counsel: For the appellant: Lord Faulks QC, Nicholas Fewtrell. For the respondent: Elizabeth-Anne Gumbel QC, Justin Levinson.

Solicitor: For the appellant: CCIA Services Ltd. For the respondent: Emmott Snell & Co.

Woodland v Swimming Teachers Association and others

[2014] A.C. 537, [2014] A.C. 537, Supreme Court, 23 October 2013

Also known as:

Woodland v Essex CC

Case Analysis

Where Reported

[2013] UKSC 66; [2014] A.C. 537; [2013] 3 W.L.R. 1227; [2014] 1 All E.R. 482; [2014] E.L.R. 67; (2013) 16 C.C.L. Rep. 532; [2014] P.I.Q.R. P6; (2013) 163(7582) N.L.J. 15; (2013) 157(41) S.J.L.B. 39; Times, November 1, 2013; Official Transcript;

Case Digest

Subject: Negligence **Other related subjects:** Education; Personal injury

Keywords: Delegation; Duty of care; Local education authorities; Negligence; Pupils; Schools

Summary: The Supreme Court set out the criteria which would give rise to the existence of a non-delegable duty of care; in the instant case, the local education authority had owed a non-delegable duty of care to ensure that reasonable care was taken to secure the safety of a pupil who was attending a swimming lesson conducted through an independent contractor.

Abstract: The appellant (W) appealed against a decision (*[2012] EWCA Civ 239, [2013] 3 W.L.R. 853*) that the respondent local authority did not owe her a non-delegable duty of care to ensure that reasonable care was taken to secure her safety during a swimming lesson.

W was a pupil at a school for which the local authority was responsible. The national curriculum, in its then form, included physical training, which in turn included swimming. W attended a swimming lesson in school hours. The group to which she assigned was taught by a swimming teacher (B), with a lifeguard (M) in attendance.

W got into difficulties and was found "hanging vertically in the water". She was resuscitated but suffered a serious brain injury. W alleged, among other things, that her injuries were due to the negligence of B or M. Neither of them was employed by the local authority. Their services had been provided to the authority by an independent contractor (S).

Held: Appeal allowed.

If the highway and hazard cases were put to one side, the following were the criteria which would give rise to the existence of a non-delegable duty of care. First, the claimant was a patient or a child, or for some other reason was especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples were likely to be prisoners and residents in care homes. Second, there was an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, which placed the claimant in the actual custody, charge or care of the defendant, and from which it was possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, not just a duty to refrain from conduct which would foreseeably damage the claimant. It was characteristic of such relationships that they involved an element of control over the claimant, which varied in intensity from one situation to another, but was clearly very substantial in the case of schoolchildren. Third, the claimant had no control over how the defendant chose to perform the relevant obligations (whether personally or through employees or third parties). Fourth, the defendant had delegated to a third party some function which was an integral part of the positive duty which he had assumed towards the claimant; and the third party was exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that went with it. Fifth, the third party

had been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him. In *A (A Child) v Ministry of Defence [2004] EWCA Civ 641, [2005] Q.B. 183*, the court had suggested that a non-delegable duty had only been found to exist where the claimant suffered an injury while in an environment over which the defendant had control. Control of the environment in which injury was caused was not an essential element in the kind of case with which the court was presently concerned; rather, the essential element was control over the claimant for the purpose of performing a function for which the defendant had assumed responsibility, *A (A Child)* considered, *Myton v Wood Times, July 12, 1980* and *Farraj v King's Healthcare NHS Trust [2009] EWCA Civ 1203, [2010] 1 W.L.R. 2139* approved. In the instant case, the local authority had assumed a duty to ensure that W's swimming lessons were carefully conducted and supervised, by whomever it might get to perform those functions. W was entrusted to the school for certain essential purposes, which included teaching and supervision. The swimming lessons were an integral part of the school's teaching function. They did not occur on school premises, but they occurred in school hours in a place where the school chose to carry out that part of its functions. The teaching and the supervisory functions of the school, and the control of the child that went with them, were delegated by the school to S and through her to B, and probably to M as well, to the extent necessary to enable them to give swimming lessons. The alleged negligence occurred in the course of the very functions which the school assumed an obligation to perform and delegated to its contractors. It had to follow that if the latter were negligent in performing those functions and W was injured as a result, the local authority was in breach of duty (see paras 23, 24, 26 of judgment).

Judge: Lady Hale JSC; Lord Clarke JSC; Lord Wilson

JSC; Lord Sumption JSC; Lord Toulson JSC

Counsel: For the appellant: Christopher Melton QC, Ian Little. For the respondent: Steven Ford QC, Adam Weitzman.

Solicitor: For the appellant: Pannone LLP. For the respondent: In-house solicitor.

A v Trustees of the Watchtower Bible and Tract Society

Queen's Bench Division, 19 June 2015

Case Analysis

Where Reported [2015] EWHC 1722 (QB); Official Transcript;

Case Digest

Subject: Negligence **Other related subjects:** Personal injury

Keywords: Breach of duty of care; Causation; Children; Delay; Foreseeability; Jehovah's Witnesses; Knowledge; Limitations; Ministers of religion; Prejudice; Proximity; Sexual abuse; Vicarious liability

Summary: Trustees of a society of Jehovah's Witnesses were vicariously liable for sexual assaults carried out by a ministerial servant on a child in the congregation between 1989 and 1994, and for the failure of the elders to take reasonable steps to protect her from the abuser once they knew of his abuse of another child in 1990. The limitation period was disapplied in relation to the complaint against the elders because the claimant did not have sufficient knowledge within the meaning of the Limitation Act 1980 s.14(1) until the service of the defendants' statements in 2014.

Abstract: The claimant (C) brought an action for damages for personal injury arising out of sexual assaults committed by a ministerial servant (S) of a religious society of Jehovah's Witnesses when she was a child.

C, who was born in 1985, had been subjected to regular sexual abuse by S from 1989 until 1994 when engaged in religious activities with him. In 1990, S admitted that he had abused another child in the congregation (M). According to the defendants' witness statements given in 2014, the elders had warned parents of the need to supervise their children and told them that S had been removed as a ministerial servant. According to C's

mother, however, no such warning had been given and S had returned to his previous duties after a few weeks as though nothing had happened. C stated that she had heard her parents talking about the abuse of M around 2002 and had repeatedly sought clarification as to whether the elders knew about it at the time, but to no avail. She brought proceedings in 2013, claiming that the trustees of the society of Jehovah's Witnesses were vicariously liable for the sexual assaults (the assault claim) and for the actions of the elders who had negligently failed to take reasonable steps to protect her from S once they knew of the abuse of M (the safeguarding claim). C sought the disapplication of the limitation period under the Limitation Act 1980 s.33 in relation to the assault claim but contended that the safeguarding claim had been brought within the primary limitation period pursuant to s.11 and s.14 on the basis that she did not have the requisite knowledge to bring that claim until the defendants' witness statements were received. The defendants accepted that S had sexually abused C but denied vicarious liability.

Held: Judgment for claimant.

(1) C's complaints up to 2013 had produced no confirmation upon which to act. Her belief that the elders knew of the abuse of M was no more than a suspicion and was not sufficient to justify the issue of proceedings. Accordingly, C did not have sufficient knowledge within the meaning of s.14(1) until the statements were served in March 2014 (see paras 47, 58 of judgment). (2) In relation to the assault claim, the psychiatric damage suffered by C justified her inability to focus on the prospect of bringing proceedings until 2013, *A v Hoare [2008] UKHL 6, [2008] 1 A.C. 844* followed. Since S had died and she had no redress against any other prospective defendant, a refusal to disapply the limitation period would mean the end of the action for her. The prejudice she would suffer was not outweighed by any

prejudice to the defendants in allowing the claim to proceed. A fair trial remained possible. Accordingly, s.11 was disapplied (paras 53, 55). (3) The high level of control over all aspects of the life of a Jehovah's Witness by the judicial committee was at least akin to a relationship between employer and employee. A ministerial servant assisted and deputised for the elders and played an integral role in the organisation. Therefore, the relationship between elders and ministerial servants on the one hand and the Jehovah's Witnesses on the other was sufficiently close in character to an employment relationship that it was just and fair to impose vicarious liability. Notwithstanding S's removal from the position of ministerial servant in 1990, he had continued to hold himself out as having ostensible authority to carry out his duties in the same manner as before. Therefore, S's sexual abuse of C did not result from mere opportunity, but from his specific role as a Jehovah's Witness, *Lister v Hesley Hall Ltd [2001] UKHL 22, [2002] 1 A.C. 215*, *Maga v Birmingham Roman Catholic Archdiocese Trustees [2010] EWCA Civ 256, [2010] 1 W.L.R. 1441*and *Various Claimants v Institute of the Brothers of the Christian Schools [2012] UKSC 56, [2013] 2 A.C. 1* followed. Accordingly, vicarious liability had been established with regard to the assault claim (paras 59, 65, 69, 71, 76-77, 86, 89-90). (4) By reason of S's admitted conduct towards M in 1990, it was foreseeable that his continued presence within the congregation presented a risk of abuse and harm to other children. The elders had assumed responsibility to take steps to protect members' children from that risk, so that there was a sufficient relationship of proximity between the elders and those children. It was therefore fair, just and reasonable to impose a duty of care upon the elders to protect the children from sexual abuse by S. The scope of the duty assumed by the elders was to warn the congregation and individual parents about the risk posed by S. However, those warnings had either not

taken place at all or were inadequate. The defendants, who had overall responsibility for the society, were vicariously liable for the actions of the elders in relation to their breach of duty in 1990 and were therefore responsible for the abuse of C in the safeguarding claim (paras 91, 95, 112, 122-125).

Judge: Globe J

Counsel: For the claimant: James Counsell, Benjamin Bradley. For the defendants: Adam Weitzman, Jasmine Murphy.

Solicitor: For the claimant: Kathleen Hallisey AO Advocates. For the defendants: In-house solicitor.

Cox v Ministry of Justice

Supreme Court, 02 March 2016

Case Analysis

Where Reported

[2016] UKSC 10; [2016] A.C. 660; [2016] 2 W.L.R. 806; [2017] 1 All E.R. 1; [2016] I.C.R. 470; [2016] I.R.L.R. 370; [2016] P.I.Q.R. P8; Times, March 10, 2016; Official Transcript;

Case Digest

Subject: Negligence **Other related subjects:** Personal injury

Keywords: Employers' liability; Ministry of Justice; Prisoners; Prison Service; Vicarious liability

Summary: The Supreme Court considered the approach to be adopted in deciding whether a relationship other than one of employment can give rise to vicarious liability, in a judgment complementary to its judgment in *Mohamud v Wm Morrison Supermarkets Plc [2016] UKSC 11, [2016] A.C. 677*. The Ministry of Justice was vicariously liable for injury caused by a negligent act of a prisoner undertaking paid kitchen work.

Abstract: The Ministry of Justice appealed against a decision (*[2014] EWCA Civ 132, [2015] Q.B. 107*) that it was vicariously liable for injury caused to the respondent (C) by the negligent act of a prisoner undertaking paid kitchen work.

C had been a catering manager at a prison. Prisons were required by statute to ensure that prisoners did useful work. The prisoner responsible for the injury had earned a nominal wage. The Court of Appeal, applying the criteria listed in *Various Claimants v Institute of the Brothers of the Christian Schools [2012] UKSC 56, [2013] 2 A.C. 1* (*Christian Brothers*) for imposing vicarious liability where a relationship was other than one of employment, held the Prison Service, and therefore the ministry, vicariously liable.

The ministry argued that the relationship between the Prison Service and prisoners was fundamentally different from an employer/employee relationship in that the Prison Service's primary purpose was not a business or profit, but prisoners' rehabilitation, and prisoners had no interest in furthering the Prison Service's objectives; it was always necessary to ask whether it would be fair, just and reasonable to impose vicarious liability; and there was a risk of further claims arising should vicarious liability be imposed.

Held: Appeal dismissed.

(1) The *Christian Brothers* approach extended the scope of vicarious liability beyond an employer's responsibility for the acts of its employees, but did not impose liability where a tortfeasor's activities were entirely attributable to an independent business. The defendant did not have to carry on commercial activities, nor did it need to derive a profit from the tortfeasor's activities. It was sufficient that there was a defendant carrying on activities in furtherance of its own interests. Defendants could not avoid liability by technical arguments about the employment status of the tortfeasor, *Christian Brothers* explained, *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd [2005] EWCA Civ 1151, [2006] Q.B. 510* and *E v English Province of Our Lady of Charity [2012] EWCA Civ 938, [2013] Q.B. 722* applied (see paras 29-31 of judgment).

(2) The Christian Brothers requirements were met and the ministry was vicariously liable, *Christian Brothers* applied. The Prison Service carried on activities in furtherance of its aims. The fact that the aims were not commercially motivated, but served the public interest, was no bar to imposing vicarious liability. Prisoners working in the kitchens were integrated into the operation of the prison, so that the activities assigned to them by the Prison Service formed an integral part of the activities it carried on, in particular the activity of

providing meals for prisoners. The prisoners were placed in a position where there was a risk that they could commit a variety of negligent acts within the field of activities assigned to them. Further, they worked under the direction of prison staff. C had been injured as a result of negligence by the prisoner in carrying on the activities assigned to him (para.32). The fact that setting prisoners to work was one means by which the Prison Service sought to rehabilitate prisoners did not alter that conclusion. Rehabilitation was not the only objective: the Prison Service also intended that prisoners should contribute to the cost of their upkeep by providing services. The prisoners' activities formed part of the operation of the prison and were of benefit to the Prison Service itself. It was not essential to the imposition of vicarious liability that the defendant should seek to make a profit. Nor did it depend on alignment of the objectives of the defendant and the tortfeasor. The fact that prisoners were required to serve part of their sentence in prison and to undertake work there for nominal wages, bound them into a closer relationship with the Prison Service than would be the case for an employee. The fact that payments were below commercial level reflected the context in which prisoners worked, but did not mean that vicarious liability should not be imposed. Payment of a wage was not essential, *Christian Brothers* applied. The fact that prison operators were under a statutory duty to provide prisoners with useful work was not incompatible with vicarious liability. The *Christian Brothers* criteria were designed to ensure that vicarious liability was imposed where it was fair, just and reasonable to do so; where the criteria were satisfied, it would not generally be necessary to reassess the fairness of the result. However, where a case concerned circumstances which had not previously been the subject of authoritative judicial decision, it could be valuable to consider fairness. The instant appeal was such a case; however, for the Prison Service to be liable to

compensate for negligence by the prison catering team appeared just and reasonable whether the tortfeasor was a civilian or a prisoner. The court rejected arguments based on the risk of further claims being brought (paras 34-45).

Judge: Lord Neuberger PSC; Lady Hale DPSC; Lord Dyson JSC; Lord Reed JSC; Lord Toulson JSC

Counsel: For the appellant: James Eadie QC, Kate Grange, Stephen Kosmin. For the respondent: Robert Weir QC, Robert O'Leary.

Solicitor: For the appellant: Government Legal Department. For the respondent: Thompsons.

Mohamud v Wm Morrison Supermarkets Plc

Supreme Court, 02 March 2016

Case Analysis

Where Reported

[2016] UKSC 11; [2016] A.C. 677; [2016] 2 W.L.R. 821; [2017] 1 All E.R. 15; [2016] I.C.R. 485; [2016] I.R.L.R. 362; [2016] P.I.Q.R. P11; Times, March 14, 2016; Official Transcript;

Case Digest

Subject: Torts **Other related subjects:** Employment

Keywords: Assault; Employers' liability; Shops; Vicarious liability

Summary: There was nothing wrong with the "close connection" test of vicarious liability adumbrated in *Lister v Hesley Hall Ltd [2001] UKHL 22, [2002] 1 A.C. 215* and the law would not be improved by a change of vocabulary. Applying that test, the employer of a petrol kiosk attendant who had subjected a customer to an unprovoked assault was liable for his actions.

Abstract: A supermarket customer appealed against a decision (*[2014] EWCA Civ 116*) that the respondent supermarket was not vicariously liable for an assault perpetrated by one of its employees.

The customer had attended a petrol station kiosk run by the supermarket and had approached one of the staff members (K) with an enquiry. K, whose job was to serve customers and see that the petrol pumps and kiosk were kept in good running order, responded with foul-mouthed abuse and ordered the customer to leave. He then followed him onto the forecourt where he told him to keep away and subjected him to a violent and unprovoked assault. The customer brought proceedings against the supermarket, claiming that it was vicariously liable for the assault. The trial judge held that it was not liable because there was no sufficiently close connection between the assault and what K was employed to do.

The Court of Appeal upheld his decision, finding that while K's employment involved interaction with customers, that was insufficient to fix the supermarket with vicarious liability for his violence: his duties did not involve him being placed in situations where there was a clear possibility of confrontation.

The customer submitted that there should be a new test of vicarious liability in which the courts applied a "representative capacity" rather than a "close connection" test. He argued that the question should be whether a reasonable observer would consider the employee to be acting in the capacity of a representative of the employer at the time of committing the tort.

Held: Appeal allowed.

(1) After reviewing the development of the doctrine of vicarious liability, the court indicated that the "close connection" test adumbrated in *Lister v Hesley Hall Ltd [2001] UKHL 22, [2002] 1 A.C. 215* and *Dubai Aluminium Co Ltd v Salaam [2002] UKHL 48, [2003] 2 A.C. 366* had been followed in a line of cases, including several at the highest level. There was a risk in attempting to lay down criteria for determining what precisely amounted to a sufficiently close connection to make it just for an employer to be held vicariously liable. A simplification of the essence was more desirable, and in its simplest terms, two matters had to be considered: (a) what functions had been entrusted by the employer to the employee (which had to be addressed broadly); and (b) whether there was sufficient connection between the employee's wrongful conduct and the position in which he was employed to make it right for the employer to be fixed with vicarious liability. The cases in which the necessary connection had been found to exist were those in which the employee had used or misused his position in a way which injured the third party, *Lloyd v Grace Smith & Co [1912] A.C. 716*, *Pettersson v Royal Oak Hotel [1948] N.Z.L.R. 136* and *Warren v Henlys Ltd*

[1948] 2 All E.R. 935 considered. There was nothing wrong with the close connection test as such and the law would not be improved by a change of vocabulary, *Lister* and *Dubai Aluminium* followed (see paras 42- 46 of judgment). The test should only be abrogated or refined if a demonstrably better test could be devised. However, the proposed "representative capacity" test was hopelessly vague. Moreover, while the instant court had suggested in *Various Claimants v Institute of the Brothers of the Christian Schools [2012] UKSC 56, [2013] 2 A.C. 1* that the law of vicarious liability was on the move, such change was a response to changes in the legal relationships between enterprises and members of their workforces, *Christian Brothers* referred to. There had been no changes in societal conditions requiring a change in the law governing the circumstances in which an employer should be held vicariously liable for the torts of an employee (paras 53-55).

(2) It was K's job to attend to customers and respond to their inquiries. His conduct in answering the claimant's request in a foul-mouthed way and ordering him to leave was inexcusable but was within the field of activities assigned to him. What happened thereafter was an unbroken sequence of events. It was not right to regard K as having metaphorically taken off his uniform when he followed the customer onto the forecourt. Moreover, once on the forecourt, K had repeated his order to leave. That was not something personal between him and the customer; he was ordering him to keep away from his employer's premises, and he reinforced that order by violence. In doing so he was purporting to act in the furtherance of his employer's business. While it was a gross abuse of his position, it was in connection with the business in which he was employed. Since the supermarket had entrusted him with the position of serving customers it was just that it should be held responsible for his abuse of that position. Finally, it was

irrelevant that it looked as if K was motivated by personal racism rather than a desire to benefit his employer's business (paras 47-49, 57).

(3) Although the claims and issues in the instant case were separate from those in *Cox v Ministry of Justice [2016] UKSC 10, [2016] A.C. 660*, that and the instant judgment were intended to be complementary in their legal analysis. The instant court agreed with the reasoning and conclusion of Lord Reed in that case (para.1).

Judge: Lord Neuberger PSC; Lady Hale DPSC; Lord Dyson JSC; Lord Reed JSC; Lord Toulson JSC

Counsel: For the appellant: Joel Donovan QC, Adam Ohringer. For the respondent: Benjamin Browne QC, Roger Harris, Isabel Barter.

Solicitor: For the appellant: Bar Pro Bono Unit. For the respondent: Gordons LLP.

Various Claimants v Barclays Bank Plc

Queen's Bench Division, 26 July 2017

Case Analysis

Where Reported

[**2017**] **EWHC 1929** (**QB**); [2017] I.R.L.R. 1103; Official Transcript;

Case Digest

Subject: Employment **Other related subjects:** Torts

Keywords: Conditions of employment; Doctors; Employers' liability; Job applicants; Medical examinations; Sexual assault; Vicarious liability

Summary: A bank which had required job applicants to attend a medical examination was vicariously liable for sexual assaults committed by the doctor during those examinations.

Abstract: In 126 claims for damages against the defendant bank for sexual assault, the court was required to determine a preliminary issue on vicarious liability.

The claimants were job applicants and existing employees of the bank. Most were young women. As part of the bank's application process they were required to attend a medical assessment with a doctor nominated by the bank. The assessments took place between 1967 and 1984 at a consulting room in the doctor's home. The claimants alleged that he sexually assaulted them by inappropriate breast, vagina or anal examinations. The doctor later died. A 2013 police investigation into the cases of 48 victims found sufficient evidence to prosecute, had the doctor been alive.

The court was required to determine whether the bank was vicariously liable for assaults committed by the doctor. The bank asserted that the doctor was not an employee but an independent contractor, and it was therefore not vicariously liable. It also argued that his examinations were not part of the bank's business and

he was not integrated into the bank.

Held: Preliminary issue determined in favour of claimants.

(1) **Test to be applied** - The court had to look at the reality of the relationship between the person causing the harm and the organisation for which they worked, in particular the control mechanism and purpose of the organisation, *E v English Province of Our Lady of Charity [2012] EWCA Civ 938, [2013] Q.B. 722* and *Various Claimants v Institute of the Brothers of the Christian Schools [2012] UKSC 56, [2013] 2 A.C. 1* followed. Vicarious liability depended on a two-stage test: was the relevant relationship one of employment or "akin to employment"; if so, was the tort sufficiently closely connected with that employment or quasi-employment, *Cox v Ministry of Justice [2016] UKSC 10, [2016] A.C. 660* followed (see paras 24, 27 of judgment).

(2) **Stage one: employment or akin to employment** - The five criteria identified in *Christian Schools* and *Cox* were relevant, although the first and fifth criteria were not as significant as the others.

(a) Was the employer more likely to have the means to compensate the victim than the employee, and to have insured against that liability? The doctor was dead and his estate had been distributed. The claimants had no recourse against him, and his medical insurers would not indemnify for alleged sexual assaults. The bank and its insurers had the means to meet such claims.

(b) Was the tort committed as a result of activity being taken by the employee on behalf of the employer? The medical examination and subsequent report to the bank were performed for the benefit of the bank and on its behalf. The bank chose the doctor; prospective employees were given no choice. The bank made arrangements for the examinations, and the claimants felt compelled to attend because they understood that it

was an essential stage of the bank's recruitment process. They had no other reason to be examined by the doctor, and the examination was paid for by the bank. It was for the bank's benefit, to ensure that its employees had the health to carry out its work.

(c) Was the employee's activity part of the business activity of the employer? The medical assessment enabled the bank to be satisfied that a prospective employee was physically suitable for the work. A workforce was an intrinsic part of the bank's business activity. In conducting the assessment, the doctor was acting for the benefit of the bank and was an integral part of the bank's business activity.

(d) Had the employer, by employing the employee to carry on the activity, created the risk of the tort committed by the employee? The claimants had no choice as to the doctor and were directed by the bank to be examined at his home. The bank directed the doctor to perform a physical examination which included a chest measurement. The claimants were young women who saw the doctor alone in his room and were asked to remove clothing. Given the factual circumstances, the bank had created a risk of the tort allegedly committed by the doctor.

(e) Was the employee, to a greater or lesser degree, under the control of the employer? The fact that the doctor organised his own professional life and carried out other medical activities did not negate the argument that he was under the bank's control. Nor did the fact that he performed the examinations in his home. The significance of control was that the defendant could direct what the tortfeasor did, not how he did it. The bank had exerted more control than was usually found in the context of a doctor's examination; it identified the questions to be asked and the physical examinations to be carried out. Control was also manifested in directing the claimants to a particular doctor. The stage one

criteria were all met (para.45).

(3) **Stage two: sufficiently close connection to employment or quasi-employment** - The alleged sexual assaults occurred during the course of a medical examination which the bank required in respect of present or future employment. The claimants were in physical proximity to the doctor by reason of the nature of the examination. He was likely to be viewed by them as being in authority. The sexual abuse took place when the doctor was engaged in duties at the time and place required by the bank. It was inextricably interwoven with the carrying out of his duties. The tort was so closely connected with that engagement as to satisfy the second stage (para.46).

(4) **Just and fair test** - Had the claims been made earlier, the doctor's estate could have had the financial means to meet them. However, the ability of any person to make a claim of sexual abuse was never straightforward. The action against the bank was the only legal recourse now available to the claimants. The claims were made many years after the alleged abuse and the bank had taken a point on limitation. Balancing those factors and applying the just and fair test did not alter the court's conclusion. The bank was vicariously liable for any assaults that the claimants might prove to have been perpetrated by the doctor in the course of the examinations (para.47).

Judge: Nicola Davies J

Counsel: For the claimants: Lizanne Gumbel QC, Robert Kellar. For the defendant: Lord Faulks QC, Nicholas Fewtrell.

Solicitor: For the claimants: Slater and Gordon LLP. For the defendant: Hill Dickinson LLP.

Armes v Nottinghamshire CC

Supreme Court, 18 October 2017

Case Analysis

Where Reported

[2017] UKSC 60; [2017] 3 W.L.R. 1000; [2018] 1 All E.R. 1; [2017] P.T.S.R. 1382; (2017) 20 C.C.L. Rep. 417; Times, November 6, 2017; Official Transcript;

Case Digest

Subject: Family law **Other related subjects:** Local government; Negligence

Keywords: Child abuse; Duty of care; Foster care; Foster carers; Local authorities' powers and duties; Vicarious liability

Summary: Local authorities were not subject to a non-delegable duty to ensure that reasonable care was taken for the safety of children in care, while they were in the care and control of foster carers. However, *Cox v Ministry of Justice [2016] UKSC 10, [2016] A.C. 660* pointed towards the imposition of vicarious liability on local authorities for torts committed by foster carers against such children. A local authority was held to be vicariously liable for physical and sexual abuse committed by foster carers in the 1980s.

Abstract: The appellant, a former foster child, appealed against a decision that the respondent local authority was not liable for physical and sexual abuse she had suffered at the hands of her foster parents while in care in the 1980s.

It was accepted that the local authority had not been negligent in the selection or supervision of the foster parents. The issue was whether it was nevertheless liable to the appellant, either on the basis that it was in breach of a non-delegable duty of care, or on the basis that it was vicariously liable for the foster parents' wrongdoing.

Held: Appeal allowed.

(Lord Hughes dissenting on vicarious liability) **(1) Non-delegable duty of care -** The proposition that a local authority was under a duty to ensure that reasonable care was taken for the safety of children in care, while they were in the care and control of foster parents, was too broad, and the responsibility with which it fixed local authorities was too demanding, *Carmarthenshire CC v Lewis [1955] A.C. 549*, *Harris v Perry [2008] EWCA Civ 907, [2009] 1 W.L.R. 19* and *Surtees v Kingston upon Thames RBC [1991] 2 F.L.R. 559* considered. Although there were differences between the position of local authorities and that of parents, children in care had the same needs as other children. In particular, it might be in their best interests to spend time staying with their parents, grandparents, relatives or friends. That was specifically permitted by the Child Care Act 1980 s.21(2). If a local authority which reasonably decided that it was in the best interests of a child to allow him to stay with his family or friends was to be held strictly liable for any want of due care on the part of those persons, the law of tort would risk creating a conflict between the local authority's duty towards the child under s.18(1) and its interests in avoiding exposure to such liability. Furthermore, since a non-delegable duty would render the local authority strictly liable for the tortious acts of the child's parents or relatives, if the child was living with them following a decision reasonably taken under s.21(2), the effect of a care order, followed by the placement of the child with his family, would be a form of state insurance for the actions of the child's family members. Section 21 was relevant in another respect. It required the local authority to "discharge" its duty to provide accommodation and maintenance for a child in its care in whichever of the specified ways it thought fit, including "boarding him out" by placing him with foster carers. The implication of the word "discharge" was that the placement of the child constituted the performance of the local authority's duty to provide accommodation and

maintenance. That suggested that the duty of the local authority in the instant case was not to perform the function in the course of which the appellant was abused (namely, the provision of daily care), but rather to arrange for, and then monitor, its performance, *Woodland v Swimming Teachers Association [2013] UKSC 66, [2014] A.C. 537* applied. Section 22 was also relevant. It enabled the secretary of state to make regulations imposing duties on local authorities in relation to the boarding-out of children. Section 22 implied that the continuing responsibility of the local authority for the care of the child was discharged in relation to the boarding-out of children by means of the prior approval of households where children were boarded out, the subsequent inspection and supervision of the premises, and the removal of children from the premises if their welfare appeared to require it. The statutory regime did not impose on the local authority any other responsibility for the day to day care of the child or for ensuring that no harm came to him in the course of that care (see paras 39-49 of judgment).

(2) Vicarious liability - Consideration of the factors discussed in *Cox v Ministry of Justice [2016] UKSC 10, [2016] A.C. 660* pointed towards the imposition of vicarious liability on the local authority for the torts committed by the appellant's foster carers: (a) the appellant's foster parents could not be regarded as carrying on an independent business of their own. The torts committed against the appellant were committed by the foster parents in the course of an activity carried on for the benefit of the local authority; (b) in terms of risk creation, the local authority's placement of children in their care with foster parents created a relationship of authority and trust between the foster parents and the children, in circumstances where close control could not be exercised by the local authority, and so rendered the children particularly vulnerable to abuse; (c) the local authority exercised powers of approval, inspection,

supervision and removal without any parallel in ordinary family life. By virtue of those powers, it exercised a significant degree of control over both what the foster parents did and how they did it, in order to ensure that the children's needs were met; (d) most foster parents had insufficient means to be able to meet a substantial award of damages. The local authorities which engaged them could more easily compensate the victims of abuse (paras 52-64).

(3) (Per Lord Hughes) - It seemed to follow that if vicarious liability applied to ordinary foster carers, it also had to apply to "family and friends" placements. The prospect of vicarious liability in those circumstances would be apt to inhibit the generally laudable practice of such placements. It would also result in increased litigation of family activity in the courts, which was undesirable (paras 76-90).

Judge: Lady Hale JSC; Lord Kerr JSC; Lord Clarke JSC; Lord Reed JSC; Lord Hughes JSC

Counsel: For the appellant: Christopher Melton QC, Philip Davy. For the respondent: Steven Ford QC, Adam Weitzman QC.

Solicitor: For the appellant: Uppal Taylor. For the respondent: Browne Jacobson LLP.

The Honourable Mrs Justice Lambert

Year of call: 1988

Year of silk: 2009

The Hon. Mrs Justice Lambert was appointed as a Justice of the High Court on 11th January 2018 after 13 years at 1 Crown Office Row. She developed a specialist practice in Clinical Negligence and Professional Discipline, acting for both Claimants and Defendants. She frequently handled high value claims involving complex legal and/or medical issues. She has particular experience in claims for wrongful birth having been involved in many of the reported decisions in this field. Christina also has an established inquiries practice having been counsel to the Dame Janet Smith and Dame Linda Dobbs Reviews and leading counsel in the Hillsborough Inquiry.

Elizabeth-Anne Gumbel QC

Year of call: 1974

Year of silk: 1999

lizanne.gumbel@1cor.com

Profile Overview:

Lizanne Gumbel is a leading practitioner in Clinical Negligence and Personal Injury claims.

Lizanne has a distinguished reputation for representing Claimants with highly complex claims for catastrophic injury.

Frequently her work involves multi-party actions.Recently Lizanne was instructed in the Mr Paterson (breast surgeon) litigation.

She has developed particular expertise for her work on sensitive child abuse cases and cases that attempts redress for Claimants of abuse in institutions.

Lizanne Gumbel is recognised as a Star Silk by the Legal Directories. In 2016 she won both the Legal 500 Personal Injury and Clinical Negligence Silk of the Year, and also the Chambers and Partners Clinical Negligence Silk of the Year. For the second year running, Legal 500 named her Personal Injury and Clinical Negligence Silk of the Year for 2017.

Memberships:

PNBA
PIBA
APIL
AVMA

Qualifications:

Ma (Oxon)

Publications:

Joint author of "Clinical Negligence – A Practitioner's Handbook", published by OUP
Joint author of "Child Abuse Compensation Claims", published by the Law Society and *"Guide to Child Abuse Compensation Claims"* published by Jordans

Contributor to *"Risk Management and Litigation in Obstetrics and Gynecology"* edited by Roger Clements, published by RSM Press

Awards:

2017 Legal 500 Personal Injury and Clinical Negligence Silk of the Year

2016 Chambers and Partners Clinical Negligence and Personal Injury Silk of the Year.

2016 Legal 500 Personal Injury and Clinical Negligence Silk of the Year

Directories:

Recommended as a leading silk in both the clinical negligence (Band 1/Star) and personal injury (Band 1/Star) fields by Chambers & Partners and in Legal 500.

"She is just phenomenal, she's got a brain the size of the Shard and works extremely hard on behalf of her clients."

"She is a powerhouse with a phenomenal work ethic and a huge heart."

"She's just quality from start to finish."

"She's hugely compassionate with clients and passionate about getting the right results. She has an incredible legal brain."

"She's willing to take on Herculean legal tasks in very complex cases, and she's successful in it."

John Whitting QC

Year of call: 1991

Year of silk: 2011

john.whitting@1cor.com

Profile Overview:

John is an experienced specialist in clinical and general professional negligence. His broad practice encompasses clinical negligence, product liability and inquests. He is familiar with representing construction professionals with noted expertise in engineering and also has considerable experience in solicitors' negligence.

In the clinical sphere, he has represented claimants and defendant Trusts and MDO's in an extremely wide range of complex and high value claims; his experience also extends into inquests / coronial law as well as product liability in the health context.

Appointments:

Welsh Government Panel of Queen's Counsel

Memberships:

PNBA
TECBAR

Qualifications:

LLM, Kings College London
BA (Hons) Oxon in Jurisprudence

Publications:

Co-author of chapter “The Trial” in Powers & Harris’ Clinical Negligence.

Directories:

"An excellent advocate who knows how to win and is easy to deal with." "Well prepared and self-assured." Chambers & Partners 2018

"A really excellent leader." Legal 500 2018

"He's one of the fiercest and brightest cross-examiners I've ever seen. He's a real destroyer in cross-examination." Chambers & Partners 2017

‘‘*He doesn’t miss a trick, but at the same time is extremely relaxed and personable*.’ Legal 500 2016

‘*John Whitting’s cross-examination is the best I’ve ever seen.’ ‘He is an extremely experienced and authoritative clinical negligence advocate.*’ Chambers & Partners 2016

‘One of the best trial advocates; determined and a true warrior.’ Legal 500 2015

‘Cool as a cucumber, he’s incredibly calm and never misses a trick…Intellectually superior, he cuts to the quick and doesn’t get sidetracked by irrelevant issues.’ Chambers & Partners 2015

‘A silk with a growing reputation, who is considered to be amongst the best at cross-examination in the London market: “I think he’s probably the most devastating cross-examiner I’ve ever seen in court – it’s like a courtroom television programme! He’s a very, very bright guy.” “A real fighter with high standards, he’s a truly gifted trial advocate who gets the right result for his clients’ Chambers & Partners 2014

‘*Praised for the value he brings to maximum severity claims’ and described as ‘delightful to deal with, very good with clients’ with an ‘uncommon ability to produce first-rate advice with seeming effortlessness and to great effect.*’ Chambers & Partners 2013

‘A real fighter’ with ‘exceptional advocacy skills.’ Chambers & Partners 2012

Jeremy Hyam QC

Year of call: 1995

Year of silk: 2016

Jeremy.hyam@1cor.com

Profile Overview:

Jeremy Hyam QC is a specialist in Administrative and Public Law, Human Rights, Clinical Negligence, Public Inquiries, Professional Discipline and Environmental Law. He has particular experience in all aspects of health law, including Mental Health, the regulation and discipline of doctors; GMS contracts, the Health and Social Care Act, the Care Standards Tribunal, and cases concerning eligibility for and access to treatment including cases concerning community care.

Jeremy is ranked as a leading silk in Clinical Negligence, Civil Liberties, Environmental Law and Professional Discipline in Chambers and Partners and as a leading silk in Civil Liberties and Environmental Law in the Legal 500.

Appointments:

Attorney General's A Panel of Counsel (present)

Attorney General's B Panel of Counsel

Special Advocate (present)

Publications:

Supreme Court Yearbook (Public Law) with Philip Havers QC (2017)

Supreme Court Yearbook (Public Law) with Philip Havers QC (2016)

Clinical Negligence (APIL) Medical Treatment and Human Rights (2013) with Philip Havers QC
"Human Rights and Mental Health" (Chapter in Human Rights and the Common Law: Hart Publishing 2000)

Directories:

"Jeremy is a smooth operator in court." "He is clever, sees all the angles and is reasonable. He will tell you if an argument won't fly." (Chambers & Partners 2018)

"Authoritative and commanding." "He has a fantastic legal mind." (Chambers & Partners 2018)

"*Good on strategy and an excellent negotiator."* (Chambers & Partners 2017)

'He has superb judgement and an astonishing work ethic.' (Legal 500 2017)

"Incredibly bright. He always sees the argument when it may not be immediately apparent." "A reflective, imaginative and creative barrister, with a very attractive advocacy style. He's always thinking of new ways in which the law can be deployed." (Chambers & Partners 2017)

"*Highly intelligent. He is an excellent advocate and superb on his feet." "He's very good and very cerebral. It's like being against an academic."* (Chambers & Partners 2017)

"People fight over him to get him to be their junior. There's something about his manner that makes you feel like you shouldn't disagree with him." (Chambers & Partners 2016)

"Intellectually he's very creative, and understands a wide area of law. He's very careful and exceptionally responsive – a 24/7 person who's easy to talk to" (Chambers & Partners 2015)

"Very good in court. He's dogged and determined." (Chambers & Partners 2014)

Jeremy Hyam is a favourite of instructing solicitors as he "is very methodical, and works well to a tight deadline." (Chambers & Partners 2013)

"A valued option for claims that involve knotty legal problems." (Chambers & Partners 2011)

Solicitors are appreciative of the work Hyam puts into their cases, with one stating: "I find Jeremy to be an invaluable ally on my cases; he is extremely bright and an excellent person to bat ideas off." (Chambers & Partners 2010)

Robert Kellar

Year of call: 1999

Robert.kellar@1cor.com

Profile Overview:

Robert has a broad civil, regulatory and public law practice which encompasses: clinical negligence, personal injury, professional discipline, judicial review/human rights, healthcare inquests and employment law.

In clinical negligence he is instructed by both Claimants and Defendants and has considerable experience in complex, multi-party and high value claims. He deals with all types of case including claims involving brain injury, spinal injury, vascular injury and missed cancer diagnoses. He was recently instructed as junior counsel for the Claimants in the Paterson Group ligation.

Robert is recognised as a leading junior in personal injury law and is instructed by both Claimants and Defendants, including by major Government Departments. He has experience in all types of personal injury, road traffic cases and accidents at work. Robert is also instructed in cases involving allegations of historic assault and sexual abuse.

He is highly recommended as a leading junior in the Legal 500 and Chambers & Partners.

Appointments:

Junior Counsel to the Crown (A Panel)

Panel of External Advisers to the Legal Services Board

Qualifications:

LLM (Cantab) (First Class) – Queens College, Cambridge

BA (Oxon) – Magdalen College, Oxford

Academic Awards: Scholar of Queens' College, Cambridge; Scholar of Magdalen College, Oxford; Winner of Lee Essay Prize, Gray's Inn

Directories:

"Detailed and gives good practical advice. He was clear in advising clients while also being sensitive given the nature of the cases." "Calm and can make what might seem complicated simple." (Chambers and Partners 2018)

'An exceptional talent.' He is very approachable and gives excellent practical advice.' 'Always very thorough and detailed, and very approachable too.'
(Legal 500 2017)

"I find him very easy to deal with, very pragmatic and a good communicator. He always turns things around on time." (Chambers and Partners 2017)

"Extremely persuasive, charming and affable." (Legal 500 2016)

Dominic Ruck Keene

Year of call: 2012

dominic.ruck-keene@1cor.com

Dominic Ruck-Keene

Profile Overview:

Dominic is developing a varied practice in all areas of Chambers' work, in particular inquests, human rights and public law, personal injury and clinical negligence, environmental law, disciplinary and employment.

Dominic appears for both Claimants and Defendants, and regularly advises and drafts pleadings across the entire spectrum of personal injury and clinical negligence, including construction site accidents.

Appointments:

Attorney General's C Panel of Counsel (1st March 2018)

Memberships:

PIBA
PNBA
ALBA
ELF

Qualifications:

ADR Group Accredited Mediator (2012)
Bar Vocational Course, Very Competent – BPP, London (2012)
MA War in the Modern World, Merit – King's College London (2011)

Graduate Diploma in Law, Distinction – City University (2005)
MA (Oxon) Modern History First Class – St Peter's College, Oxford (2004)

Awards:

Lord Denning Scholarship - Lincoln's Inn (2011)
Lord Haldane Scholarship - Lincoln's Inn (2005)
Smith Prize for History and College Scholar - St Peter's College (2002)
British Army University Bursar (2001)
British Army Sixth Form Scholar (1998)
Eton College Oppidan Scholarship (1995)

Hannah Noyce

Year of call: 2013

hannah.noyce@1cor.com

Profile Overview:

Hannah has a broad practice across the main areas of Chambers' work, with particular experience in clinical negligence, inquests, personal injury, and public law and human rights. She acts for both Claimants and Defendants in clinical negligence cases and is regularly instructed in a range of matters. Hannah was recently instructed by the claimants in the Paterson litigation.

Qualifications:

Bar Professional Training Course (Outstanding), City Law School (2013)
Bachelor of Civil Law (Distinction), Lincoln College, Oxford (2012)
BA (Hons) Jurisprudence (First Class), Wadham College, Oxford (2010)
Certificat Supérieur de Droit Français, Mention Assez Bien, Université Paris II (Panthéon-Assas) (2009)

Awards:

Inner Temple Pegasus Award (2017)
Phoenicia Scholarship, Bar European Group (2014)
Certificate of Honour, Middle Temple (2013)
Queen Mother Scholarship, Middle Temple (2012)
Law Faculty Prize for Best Performance in Constitutional Theory on the BCL, Oxford University (2012)
BCL Studentship, Arts and Humanities Research Council (2011)
Peter Carter Prize, Wadham College, Oxford (2010)
Awards for excellent performance in Final Honour Schools (2010)
Academic Scholarships, Wadham College, Oxford (2008 & 2009)
Awards for excellent performance in Moderations (2007)

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