Insight 193

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

Welcome to this week's edition of Insight in which we report on the development of vicarious liability through a number of court decisions over the last year, and consider the recent Court of Appeal judgment in ***Barry Congregation of Jehovah's Witnesses v BXB [2021] EWCA Civ 356 (15 March 2021)*** in that context.

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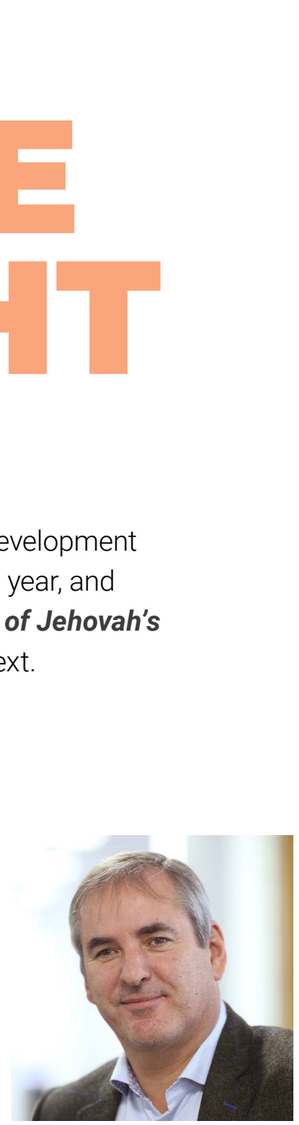

Vicarious Liability: The latest chapter

Vicarious liability in the courts – an eventful 12 months

Background

Although other notable judgments have been circulated during lockdown, whether exposing the marital strife of prominent public figures *(Depp v News Group Newspapers)* or addressing the economic consequences of lockdown (the FCA business interruption policies litigation), it is not unreasonable to suggest that the fundamental legal principle of vicarious liability has kept the courts as busy as any other issue.

As readers know, in April 2020 the Supreme Court handed down two very significant judgments in which each of the two recognised stages of the test for establishing vicarious liability was examined in detail.

Those cases, *Barclays Bank plc v Various Claimants [2020] UKSC 13 and WM Morrison Supermarkets plc v Various Claimants [2020]* UKSC 12, were anticipated to represent yet further watershed decisions in this complex area. Those judgments did, to some extent, provide clarification for insurers, lawyers, and parties as to how the courts will approach the vexed question of whether vicarious liability arises in a particular set of circumstances.

It is the vast range of different fact-specific circumstances that lends this area its undoubted complexity and prevents the courts from issuing more definitive guidance on how these cases should be decided. Rarely has it been truer to say that a case turns on its own facts than in the context of vicarious liability.

Here are a few examples of how judges in the High Court and the Court of Appeal have wrestled with different factual scenarios since January 2020:

London Borough of Haringey v FZO [2020] EWCA Civ 180

The Court of Appeal upheld a finding by Cutts J that the appellant local authority remained vicariously liable for abuse by a teacher not only whilst the claimant was a pupil in the local authority's school, but also (1) during an intervening period when the claimant attended a non-state school and (2) after the claimant had finished his education. This is a controversial decision that continues to generate much debate but is generally regarded as having been determined on its own very unusual facts.

DSN v Blackpool Football Club [2020] EWHC 670 (QB)

Griffiths J held that the defendant football club was vicariously liable for abuse committed by a football scout, despite there being no evidence that the club had employed the scout or otherwise engaged him to carry out scouting activities on the club's behalf. It had been argued by the defendant that even if a fair trial was still possible, the club could not be vicariously liable as the scout and the claimant met when the claimant played for the scout's own football team, Nova Juniors, and the abuse occurred during a Nova Juniors trip to New Zealand that had no connection to the defendant. Permission to appeal to the CA has recently been granted on various issues, including vicarious liability.

EXE v Governors of the Royal Naval School [2020] EWHC 596

Coincidentally Griffiths J also heard this case less than three weeks after the conclusion of DSN. Having found for the claimant in DSN, he dismissed FXF's claim. Although he did so primarily for limitation reasons, he also made it clear that he would have found that the defendants could not be vicariously liable for abuse of a female pupil by a kitchen porter. There was nothing in the duties and responsibilities of the abusive porter that had any reference or relevance to any of the school's pupils. The porter and the claimant had first met in an area of the school premises that was out of bounds to pupils. Further, any abuse that had occurred within the school grounds had taken place during covert meetings arranged secretively between the claimant (who had attended out of hours not for any organised activity but solely to see the porter) and the off-duty porter.

Barry Congregation of Jehovah's Witnesses v BXB [2021] EWCA Civ 356 (15 March 2021)

Chamberlain J held the defendants vicariously liable for rape of the claimant by one of the defendants' elders, Mark Sewell, in April 1990. The judge also extended the limitation period to allow the claimant to proceed out of time and awarded her £62,000. The defendants limited their appeal to the judge's decision to hold them vicariously liable for the rape by the elder. The Court of Appeal heard the appeal on 11 February 2021 and handed down judgment on 15 March 2021.

The BXB appeal – the material facts

The claimant was baptised as a Jehovah's Witness in 1986. In 1990 she was raped by one of the defendants' elders, Mark Sewell. The fact of the rape was not disputed, as in July 2014 Sewell was tried and convicted of raping the claimant and indecently assaulting a 14-year-old girl.

The claimant gave evidence at her civil trial. She explained how she and her husband had been proud to count Sewell and his wife as their friends due to Sewell's standing in the congregation. As an elder, Sewell carried not only seniority but also authority. By definition, the fact that he led the status of elder meant that he had been identified as someone who was not only a trusted member of the congregation but in a position to give advice and guidance.

It became clear to the claimant that Sewell was however abusing his position. He was flirting with her, kissing her on the lips as a form of greeting at services, using sexual innuendo and holding her hand. When the claimant complained to Sewell's father, who was also an elder, she was advised that Sewell was depressed and in need of greater love and support.

As this direction had come from an elder (even if it was Sewell's father) the claimant felt obliged to comply. But Sewell's behaviour deteriorated, especially when he was drunk.

On the afternoon of 30 April 1990, during a conversation between the claimant and a drunken Sewell at the latter's house, Sewell forced the claimant to the floor and raped her. Observing the obligations imposed upon her by the teaching of the Jehovah's Witnesses, she did confront Sewell but felt under pressure to forgive him if she felt he was truly repentant. As a result, she did not take the matter any further at that stage.

Even when the claimant did eventually report the rape to the elders, they found her allegation not proven and demanded that she move congregation and tell nobody else about her allegation. She could not even rely for support upon the account of the 14-year old girl who had confided in the claimant that Sewell had indecently assaulted her. It was not until 2014 that all those allegations were accepted by a jury and Sewell was sentenced to 14 years' imprisonment.

Vicarious liability – determination at trial

The reader will be very familiar with the established two stage test for vicarious liability:

Stage 1: whether the relationship between the tortfeasor and the party said to be vicariously liable is one that is capable of giving rise to liability. If the answer is 'yes' then stage 1 is satisfied, and we move to stage 2.

Stage 2: whether there is a sufficiently close connection between the relationship between the tortfeasor and the party said to be vicariously liable and the act or omission of the tortfeasor.

The claimant contended that vicarious liability must attach. Sewell was at all material times an officer of the defendant, vested with power and authority over others. Stage 1 of the vicarious liability test was thus satisfied. Further, Sewell was acting at all material times as an elder and the only basis upon which the claimant and Sewell had known each other and subsequently interacted was in the context of the life of the congregation. The claimant was continuing to engage with Sewell specifically because another elder had directed that she was obliged to do so in accordance with the defendants' teachings. The rape occurred in a situation where both were present out of duty and responsibility to the defendants and not for any other reason unconnected with the work of Sewell on behalf of the defendants. Thus stage 2 of the vicarious liability test was also satisfied.

The defendants denied that either stage of the test had been satisfied. They argued that Sewell was not performing any religious duty at the time of the assault. They also argued that the power and authority of an elder was not as extensive or oppressive as the claimant contended. The teachings of the Jehovah's Witnesses did not require or encourage individuals to follow instructions from an elder if those instructions were not in harmony with bible teachings and principles. Further, elders were under specific direction to provide advice and guidance to a member of the opposite sex in twos, and never alone.

In addition, elders were advised to make clear to anyone coming to them with allegations of abuse that there was nothing to prevent a report being made to the statutory authorities, including the police. Thus, Sewell was acting beyond the scope of his duties and responsibilities.

The trial judge, Chamberlain J, held that both stages of the test were satisfied and that the defendants were vicariously liable.

Stage 1 was satisfied because as an organisation the defendants acted through their elders, all of whom were integral to the defendants' activities and acting for its benefit. Although the elders were not employees, they were in a position sufficiently akin to employment to satisfy stage 1. In addition, the defendants created the risk that the rape could occur through the way in which elders had been empowered and deterred independent thinking, and whenever and wherever power was conferred, there was a risk that power could be abused.

Stage 2 was satisfied even though Sewell was not performing any religious duty at the time. But that was not a complete answer. There were five factors underpinning the judge's conclusion that stage 2 was satisfied:

1. Sewell and the claimant had met when Sewell was already a junior official in the congregation. That status, which was then enhanced to that of elder, was a factor in their relationship.
2. When Sewell began to act inappropriately, the claimant accepted what he was doing as she believed, according to teaching, that his motives were pure. Not only that, but there would be repercussions if she reported his behaviour.
3. She maintained the interaction because she had been told to do so by another elder.
4. The assault occurred later in a day during which Sewell and the claimant (and their spouses) had been out together performing the central religious duties of the Jehovah's Witnesses.
5. Finally, the judge accepted the claimant's assertion that Sewell had told her he wanted a divorce but also understood that – according to organisational teachings - there had to be an act of adultery for divorce to be secured.

The bases of the appeal

The defendants raised various arguments in relation to how the judge had decided each of the two stages of the test.

Stage 1: The judge had not examined adequately or at all the true nature of the connection between the defendants and Sewell to establish whether it could really be said to be sufficiently akin to employment to satisfy stage 1. Nor had the judge any evidence before him to confirm how integral an elder was to the activities of the defendants. Finally, Mark Sewell was a volunteer, the defendants did not control what he did and thus he was more akin to an independent contractor than an employee.

Stage 2: There had been no examination of the limits on what Sewell was authorised to do. The judge had failed to take into account that although Sewell and the claimant had undertaken religious duties on the morning of 30 April 1990, there had then been a number of intervening events including lunch, drinking and collection of respective children before the rape occurred. And, finally, Sewell was pursuing a frolic of his own, not an authorised activity within the role of an elder.

The Court of Appeal's judgment

The appeal was unanimously and succinctly dismissed. Indeed, Bean LJ caustically described the appeal as:

'the latest episode in the attempts of religious organisations to escape vicarious liability in claims for damages for sexual offences committed by those whom they have placed in positions of responsibility and moral authority.'

Nicola Davies LJ delivered the lead judgment, in which she praised the trial judge for 'clear, cogent' findings that reflected the evidence and he was entitled to reach all of the evidential findings that he had set out in his judgment. The Court of Appeal's findings were very much to the point:

Stage 1: The judge had identified the role of power, authority and influence of elders, correctly finding them to be very much integral to the defendants' business activities. The defendants could not argue that Sewell did not have such power and authority as they had not produced any evidence to that effect.

The judge was entitled to conclude that stage 1 had been satisfied. All three Court of Appeal judges adopted Nicola Davies LJ's reasoning on this issue.

Stage 2: The judge had focused correctly on the test being one of connection (or lack thereof) between the abuse and the relationship between Sewell and the defendants. In this context, what was important was the conferral of authority on Sewell by the defendants plus the opportunity for physical proximity with members such as the claimant. The judge had clearly and cogently identified several factors, set out earlier in this note, which taken together meant that stage 2 was satisfied.

Males LJ added further comments on stage 2, emphasising that in his view the key to answering the stage 2 question correctly was whether the rape was an abuse of Sewell's authority over the claimant conferred on him by virtue of his status as an elder (our emphasis). He then lists four key factors which, taken together, satisfy the stage 2 test:

1. Ordinary members of the congregation were required to be obedient and submissive to elders.
2. On the facts, the elders of the congregation had already known of and permitted inappropriate behaviour by Sewell (specifically, greeting the claimant by kissing her on the lips).
3. Sewell's father, in his capacity as an elder, instructed the claimant to provide support to Sewell even after the claimant had reported Sewell's inappropriate behaviour.
4. But for Sewell's status as an elder, and the instruction from Swell's father in his capacity as another elder, the claimant would have broken off contact.

Males LJ accepted that there was an argument that the rape did not occur in the context of religious work, and that the claimant did not in any way acquiesce, but the four factors that he listed were in his view clear evidence of sufficient closeness of connection between (a) the relationship between Sewell and the defendants and (2) the context in which the rape occurred, because on the facts Sewell had abused the authority conferred upon him as an elder by the defendants, who should thus be vicariously liable.

Commentary:

Although this might at first have appeared to be a relatively straightforward exercise in satisfying the two stages of the vicarious liability test, the factual matrix was rather more nuanced. The comments of Males LJ, who also produced an impressive analysis of vicarious liability in the well-known case of *Armes*, are cogent and instructive.

Cases involving wrongdoing carried out by an individual who could have been wearing one or more of a number of different metaphorical hats will continue to test practitioners and the courts, but this judgment is a very useful reminder of how the connection test inherent in stage 2 is defined and how it should be analysed.

The cases will continue as different contexts are examined. Most prominently, several cases concerning vicarious liability for football scouts are heading towards trial over the next few months. Those cases may well be shaped not only by decisions such as BXB but also the DSN v Blackpool FC appeal, which is presently awaiting a date from the Court of Appeal.

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