

# Insight 199

from Horwich Farrelly's Large & Complex Injury Group



# WELCOME TO INSIGHT

Welcome to this week's edition of Insight! In his first article since joining Horwich Farrelly our new Head of Abuse, Alastair Gillespie, analyses a recent High Court decision on non-delegable duty in a case which, in its original form, Alastair had handled for insurers in the early 2000s.



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# Vicariously liable?

## **SKX v Manchester City Council [2021] EWHC 782 (QB)**

### **Executive Summary**

SKX contended that the defendant local authority was vicariously liable for abuse that he had suffered in a privately-owned children's home at which the local authority had placed him. Alternatively, that SKX could rely upon a non-delegable duty that the defendant owed him even though the home in question was not owned or operated by the defendant.

The High Court (Cavanagh J) rejected both arguments. The important section of his judgment is a clear and cogent analysis of when a non-delegable duty will arise and why no such duty was owed in this case.

### **Background and facts**

It is rare indeed to find a case that you thought had been concluded many years earlier coming back to life, albeit on a different legal basis. It is surely even rarer, then, for that case to go to a High Court trial. But that is exactly what happened in *SKX v Manchester City Council [2021] EWHC 782 (QB)*.

SKX was born in 1974. Due to a troubled childhood he was placed in the defendant's care. In 1989 he was placed at the Bryn Alyn Community ('BAC'), a private company which ran several children's homes in North Wales and Shropshire. During his brief stay he was seriously sexually abused by the chief executive and majority shareholder of BAC, John Allen.

Following the publication of the Waterhouse report in February 2000, SKX was one of several claimants who joined a group action against BAC and its insurer, Royal & Sun Alliance. I acted for the insurer in all those cases, including SKX. The insurer had been joined separately due to various coverage issues, one of which was to have a fundamental bearing on SKX's original claim. Following trial and appeal involving 14 lead cases (not including SKX) the insurer refused to pay several awards due to a policy exclusion. In subsequent enforcement proceedings (in which I acted for the insurer) the Court of Appeal agreed that the insurer did not have to pay for abuse by Allen. Many claims, including that of SKX, fell away.



The insurer was not liable to indemnify. BAC was in liquidation. There was nobody to pay any judgment.

SKX then gave evidence against Mr Allen in the criminal court. In late 2014 Mr Allen was convicted of four counts of sexually abusing SKX (and a further 29 sexual assaults of others). But Mr Allen did not have any money either. All SKX's routes to compensation seemed to have been closed. Even his application to the Criminal Injuries Compensation Authority was rejected because he had unspent criminal convictions.

SXK could be forgiven for being disillusioned with the compensation process. But in 2017, on the advice of his legal team, he instituted a novel claim against the defendant authority which had placed him at BAC. Several other claimants from BAC, who had been thwarted by the same policy exclusion as SKX, issued similar claims and it was decided that SKX should be tried as the lead case of this small group. Arguments were limited to vicarious liability, non-delegable duty and limitation. It was not alleged that the defendant had been negligent.

### **The issues in the claim**

The parties agreed that the court should try three issues:

- Was the defendant authority vicariously liable for the abuse by John Allen?
- Was the duty of care owed by the defendant to SKX non-delegable?
- Should the claim be struck out or allowed to proceed even though it is brought out of time?

### **Was the defendant vicariously liable?**

This question was considered first as if vicarious liability arose then there was no need to consider non-delegable duty. The judge dealt with this question in short order. He correctly identified that in order to establish vicarious liability SKX first had to demonstrate that either Mr Allen was an employee of the defendant or was acting in a capacity akin to an employee of the defendant.

Mr Allen was clearly not an employee of the defendant. Nor could he be regarded as akin to an employee. Mr Allen was a businessman running BAC for profit. The defendant was simply another client of BAC. BAC was an independent contractor and Mr Allen was acting akin to an employee of BAC and not of the defendant. Applying Lady Hale's judgment in *Barclays Bank v Various Claimants* [2020] UKSC 13 (in which I acted for the bank and its insurers) the judge concluded that because BAC was an independent contractor no vicarious liability could arise between the defendant and BAC or, by extension, any of BAC's employees including Mr Allen.

The present case, involving the engagement of an independent contractor by a public body to perform a function within its statutory responsibility, bore significant similarities to the factual matrix in *Woodland*, in which no vicarious liability arose for the tort committed by the independent contractor's employee.

Although this finding in *SKX* is in direct contrast to the finding of vicarious liability on the part of the local

authority in *Armes v Nottinghamshire County Council* [2017] UKSC 60, the reasons for distinguishing the two cases are clear. In *Armes* there was a direct contract between the abusive foster parents and the local authority. No such contract existed between Mr Allen and the defendant. Further, in *Armes* the local authority had specifically recruited the foster parents just as an employer would recruit employees, paid them allowances and provided equipment and training. Those factors (all absent from SKX) illustrated that the foster parents were akin to employees and not independent contractors.

### **Was the duty of care owed by the defendant to SKX non-delegable?**

In short, no. Having analysed *Woodland* and *Armes*, the two leading Supreme Court decisions, the judge applied the five defining features of non-delegable duty:

- The claimant's vulnerability;
- An antecedent relationship;
- The claimant has no control over the way the defendant performs its obligations to him;
- The defendant has delegated to a third party some function that is a positive part of the duty it has assumed towards the claimant; and the third party is exercising (for the purpose of that function) the defendant's care of the claimant and the control that goes with it; and
- The third party has been negligent in performing that delegated function.

Picking up the judgment of Lord Reed in *Armes*, the judge identified that the critical question in *Armes* was also the critical question in this case:

*'whether the function of providing the child with day-to-day care, in the course of which the abuse occurred, was one which the local authority were themselves under a duty to perform with care for the safety of the child, or was one which they were merely bound to arrange to have performed, subject to a duty to take care in making and supervising those arrangements.'*

Following Lord Reed's analysis, the judge concluded that the defendant's statutory duty, imposed by the provisions of the Child Care Act 1980 (superseded in name but not in relevant principle) by the Children Act 1989, was to arrange, supervise and pay for SKX's care. The duty did not extend to providing the care. At the point where SKX had been placed with BAC, then pursuant to section 21(1) of the 1980 Act the defendant had not delegated its duty but had in fact discharged it (my emphasis). SKX argued that as section 21(1) referred to the provision of 'accommodation and maintenance' this included what BAC was entrusted to do.

The judge agreed that the section reflected the fact that the defendant had a duty to receive SKX and keep him in its care and encompassed the general duty to safeguard SKX and promote his welfare. But this did not change the fact that the duty, however wide, was discharged and not delegated when SKX was placed at BAC. There was no non-delegable duty through which the defendant could be strictly liable for the abuse.

**Should the claim be struck out as time-barred, or permission granted to proceed out of time?**

The judge held that but for his earlier rulings he would have allowed the claim to proceed out of time. The delay was long but understandable and SKX had begun his pursuit of compensation in 2000. Further, he had been informed of the potential to pursue the defendant only in 2016. The issue of whether abuse occurred had been resolved. Vicarious liability and non-delegable duty were questions of law and not prejudiced by lack of documentation - there was enough circumstantial evidence. Causation had its challenges, not least that SKX had been abused at another home, but those challenges had been dealt with by the medical experts. Ultimately, however, this was a pyrrhic victory for SKX as the claim was being dismissed.



### Commentary:

This case represents only the second occasion since the seminal Supreme Court ruling in *Woodland v Essex County Council* [2013] UKSC 66 that a court has been asked to consider whether a local authority that had placed an individual in a private home (at which he was then abused by the owner of the home) owed a non-delegable duty to the victim. The previous case of *Armes* concerned a foster home, and in that case the Supreme Court had found the local authority vicariously liable, thereby rendering the non-delegable duty argument somewhat redundant (albeit that the Supreme Court did find that no such duty arose).

Thanks to *Armes* and this ruling the limits of vicarious liability of a local authority in the context of abuse in placements have been clarified, at least for the time being. Perhaps more significantly in terms of the potential for further claims, the limits on the local authority's duty to a child, set down in *Armes*, have been endorsed and cogently applied in this case.

This judgment is not the final word in the development of our understanding of when a non-delegable duty will or will not arise. But it does contain a clear and helpful application of the test laid down by the Supreme Court which will be helpful to practitioners who apply that test to a novel set of circumstances. And it may well be that in the context of abuse cases non-delegable duty arguments are no longer pursued.

Finally, however, spare a thought for SKX (and those whose claims will have fallen with his own). Over 20 years SKX and others have battled diligently through various parts of the criminal and civil justice systems. SKX has proved beyond reasonable doubt that he was abused. But on three separate occasions, whether for legal or regulatory reasons, the system has thwarted him. The fact that someone who has been abused is unable to recover any compensation was described by his counsel as '*unconscionable*'; that is an emotive submission, and the judge countered that there are remedies under the law but SKX finds himself shut out from obtaining redress. The law is not there to create a further remedy purely out of sympathy. But sympathy for SKX is certainly warranted.



