All England Reporter/2020/February/*BXB v Watch Tower Bible and Tract Society of Pennsylvania and another - [2020] All ER (D) 133 (Feb)

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*BXB v Watch Tower Bible and Tract Society of Pennsylvania and another

[2020] EWHC 156 (QB)

Queen's Bench Division

Chamberlain J

30 January 2020

Personal injuries – Rape – Vicarious liability

Abstract

Notwithstanding a delay of more than 24 years, it was equitable to extend time to allow the claimant's claims, alleging that the first defendant worldwide governing body of the Jehovah's Witnesses and the second defendant trustees of a congregation of Jehovah's Witnesses were vicariously liable for the rape of the claimant by one of the congregation's elders in 1990; and that the defendants were liable in negligence for failing adequately to investigate and to conduct a proper inquiry into the rape allegation. The Queen's Bench Division further ruled that, applying settled law to the facts, the defendants were vicariously liable for the claimant's rape; that the psychiatric injuries for which the claimant sought compensation were attributable to the rape; and that she should be awarded £62,000 by way of general damages.

Digest

The judgment is available at: [2020] EWHC 156 (QB)

Background

In 1984, the claimant (Mrs B) and her husband (Mr B) started attending the meeting place of a congregation of Jehovah's Witnesses (the congregation). The second defendants were the trustees of the congregation. The first defendant was the worldwide governing body of the Jehovah's Witnesses, which had offices in New York.

In 1986, Mrs B was baptised as one of Jehovah's Witnesses. Those who were so baptised were known as 'publishers'. Mr and Mrs B became friendly with another couple, MKS and MYS. MKS was then a 'ministerial

servant', namely a member of the congregation with special responsibilities. He later became an 'elder' or one of the spiritual leaders of the congregation.

In 1990, the two couples went door-to-door evangelising in the UK. At lunchtime, MKS drank heavily. The two couples returned to MKS's family home where, in a back room, he raped Mrs B. Mrs B did not report the rape immediately. In 1991, after discovering that MKS had also been sexually abusing a young girl, Mrs B reported both matters to the elders, who appointed investigators. An investigation followed.

Decades later, long after Mrs B had ceased to be one Jehovah's Witnesses, MKS's alleged offences were investigated by the police. Mrs B suffered from several episodes of depression and, during MKS's trial for the rape, she suffered from post-traumatic stress disorder (PTSD).

In 2017, Mrs B issued a claim, alleging that the defendants were vicariously liable for the rape committed by MKS (the vicarious liability claim). Second, she contended that the defendants were liable in negligence for the failure of the elders of the B Congregation, and other elders appointed by them, adequately to investigate, and to conduct a proper inquiry into her allegation of rape and to take appropriate steps, having done so. In particular, Mrs B contended that the defendants had had a duty to conduct the investigation in such a way as to avoid causing harm to her (the investigation claim). Mrs B claimed damages for the injuries she suffered and for losses of earnings.

The defendants accepted that MKS had raped Mrs B. However, they denied that they were vicariously liable for his tort, and they relied on a limitation defence, contending that it would be wrong to extend time under s 33 of the Limitation Act 1980 (LA 1980).

Issues and decisions

(1) The court considered the proper role of the court in relation to religious doctrine.

The defendants submitted that there were limits to the extent to which the court should pronounce on such matters.

The cases to which the defendants referred showed that art 9 of the European Convention on Human Rights conferred a right on religious communities to decide for themselves the rules governing who was entitled to be a member or to be recognised as a leader of the community. Any interference with that right had to be justified as proportionate to a legitimate aim. However, those cases were dealing with a set of problems quite different from the one at issue in the present case. State recognition of religious groupings gave rise to particular difficulties in the context of a human rights convention to which states with different attitudes to the relationship between church and state were party. One prominent strain in the political and jurisprudential philosophies of many of the contracting states was a strong separation of church and state (see [26] of the judgment).

None of that was directly relevant to the issue with which the present case was concerned – namely, the proper limits of the secular courts when adjudicating on matters of religious doctrine. On that, the UK Supreme Court had been clear as to the position in English, Welsh and Scots law. The courts would not resolve disputes about matters of religious doctrine, unless the determination of the dispute was necessary in order to decide a matter of disputed legal right. However, where it was so necessary, and there were objective standards by which the dispute could be resolved, not only could they do so – they had to. That

position was wholly consistent with the principle that the state should be neutral with regard to the membership, internal organisation and leadership of religious groupings (see [27] of the judgment).

It followed that where the resolution of the disputes was required in order to resolve questions of disputed legal right, applying settled principles, the present court was obliged to resolve them, provided that there was an adequate objective standard by which it could properly do so. It would be inappropriate for the present court to reach its own views about what the scriptures required in particular situations. The key issue in the present case, however, was not what the scriptures required, but what Jehovah's Witnesses believed and taught that they required. On that, the evidence did supply the present court with an objective basis on which to reach a view (see [30] of the judgment).

Shergill v Khaira [2014] UKSC 33 considered; *Otuo v Watch Tower Bible and Tract Society of Britain; Otuo v Morley and another* [2019] EWHC 344 (QB) considered; *Otuo v Watch Tower Bible and Tract Society of Britain; Otuo v Morley and another* [2019] EWHC 1349 (QB) considered.

(2) Whether the three-year time limit for bringing the present action should be extended under LA 1980 s 33 in respect of either or both of the vicarious liability and investigation claims.

Applying settled law to the facts, for the purposes of s 33(1), it would be equitable to allow the action to proceed in respect of both the vicarious liability claim and the investigation claim (see [131] of the judgment).

On any view, the delay was substantial. The claim form had been issued more than 24 years after the expiry of the primary limitation period for vicarious liability claim. It was for Mrs B to explain the delay. She stated that she had not reported the rape immediately, because she had been taught to forgive a brother who was truly repentant and because she had been terrified of bringing shame of Jehovah's name. Mrs B's evidence that she had been humiliated and upset and, as a result, had felt that she would not have been believed if she had reported the matter to the police was accepted. That was consistent with the medical evidence, which suggested that the investigation itself had triggered at least one episode of depression and that the trial in 2014 had triggered another such episode, with additional symptoms of PTSD (see [122], [123] of the judgment).

Further, a key factor in the case was the effect of the delay on the cogency of the evidence. Concerning the vicarious liability claim, unlike many civil cases in which sexual abuse was alleged, in the present case, the fact of rape was admitted. Concerning the investigation claim, it was common ground that Mrs B had been expected to attend meetings at which she had been questioned by elders about how the rape had occurred. The defendants had been able to call the two elders who they said had undertaken the investigation (see [125], [126] of the judgment).

The present case was not one where it could be said that Mrs B's evidence, in its essentials were so inconsistent as to be obviously reliable. In all the circumstances, extending time under s 33 would not cause significant prejudice to the defendants (see [128], [129], [217] of the judgment).

A v Hoare and other appeals [2008] UKHL 6 considered; *Cain v Francis; McKay v Hamlani* [2008] EWCA Civ 1451 considered; *AB v Nugent Care Society; R v Wirral Metropolitan Borough Council* [2009] EWCA Civ 827 considered; *JL v Bowen* [2017] EWCA Civ 82 considered; *Catholic Child Welfare Society (Diocese of Middlesbrough) and others v CD* [2018] EWCA Civ 2342 considered; *Murray v Devenish (Provincial Superior of the London Province of the Sons of the Sacred Heart of Jesus sued on his own behalf and as a representative of all other members of the unincorporated association known as the Sons of the Sacred Heart of Jesus)* [2018] EWHC 1895 (QB) considered.

(3) Whether the defendants vicariously liable for MKS' rape of Mrs B.

It was settled law that, when considering the imposition of vicarious liability, it was necessary to ask two inter-related questions: (i) whether the relationship between the tortfeasor and the party was said to be vicariously liable one that was capable of giving rise to vicarious liability; and (ii) whether there was a sufficient connection between that relationship and the act or omission of the tortfeasor for vicarious liability to be imposed (see [134]-[147] of the judgment).

At the first stage of the test for vicarious liability, the question was whether the relationship between the defendants and MKS, one of their elders, was capable of giving rise to vicarious liability. The key questions were: (i) whether MKS had carried on activities as an integral part of the 'business' activities carried on by the defendants and for its benefit; and (ii) whether the commission of the rape had been a risk created by the defendants by assigning those activities to MKS. On the facts, the answer to both questions was 'yes'. Elders were the spiritual leaders of the congregation. An elder was as integral to the 'business' of a congregation of Jehovah's Witnesses as a priest was to the 'business' of the Catholic church (see [157], [158] of the judgment).

The second question was whether the commission of the rape had been a risk created by the congregation by having assigned those activities to MKS. On the facts, the answer to that question was also 'yes'. Among other things, any organisation that conferred on its leaders power and authority over others created a risk that those leaders would abuse that power and authority (see [161]-[163] of the judgment).

It followed that the relationship between the defendants and MKS had been capable, in principle, of giving rise to vicarious liability for acts of sexual abuse perpetrated by him on members of the congregation. Whether the particular act of sexual abuse at issue in the present case, his rape of Mrs B in 1990, had been sufficiently connected to his status as elder was a different question (see [164] of the judgment).

The question at stage two of the inquiry overlapped, to some extent, with the second question at stage one. It focused, however, on the relationship between the tort committed by MKS and his position as elder. In the present case, the rape had not occurred while MKS had been performing any religious duty. However, that was not a necessary ingredient of liability in cases of the presents kind. The test was more open-textured and required an analysis of all aspects of the relationship between the tort and the abuser's status (see [165], [167] of the judgment).

On the facts, the rape had been sufficiently closely connected to MKS's and TS's (his father's) positions as elders to make it just and reasonable that the defendants should be held vicariously liable for it (see [168]-[174], [217] of the judgment).

Ilkiw v Samuels [1963] 2 All ER 879 considered; *Maga v Roman Catholic Archdiocese of Birmingham* [2010] EWCA Civ 256 considered; *Catholic Child Welfare Society v Various Claimants (FC)* [2012] UKSC 56 considered; *A v The Trustees of the Watchtower Bible and Tract Society and others* [2015] EWHC 1722 (QB) considered; *Mohamud v WM Morrison Supermarkets plc* [2017] 1 All ER 15 considered; *Cox v Ministry of Justice* [2016] UKSC 10 considered.

(4) In relation to the investigation claim: (i) whether the defendants owed Mrs B a duty of care; and (ii) if so, whether they had breached that duty.

In the light of the conclusion on issue (3), it was unnecessary for the court to decide the points in dispute under issue (4) (see [176], [187], [217] of the judgment).

Caparo Industries plc v Dickman [1990] 1 All ER 568 considered; *Yapp v Foreign and Commonwealth Office*

[2014] EWCA Civ 1512 considered; *Robinson v Chief Constable of West Yorkshire Police* [2018] 2 All ER 1041 considered.

(5) To what extent were the psychiatric injuries for which Mrs B sought compensation attributable to: (i) the rape; and/or (ii) any breach of duty in relation to the investigation. Further, the court considered the amount of damages Mrs B should be awarded.

The episodes of depression suffered by Mrs B in 1991, 1993, 1994, 1996, 2010 and 2014 were all attributable (in the relevant sense) to the rape, as was the PTSD suffered in 2014, some of the symptoms of which had continued to date (see [195] of the judgment).

Mrs B should be awarded £62,000 by way of general damages. If it were necessary to make separate awards for the psychiatric injury and for aggravated damages, the court would apportion £40,000 to the former, and £22,000 to the latter (see [208], [217] of the judgment).

Concerning special damages, Mrs B's claim for loss of earnings was based on a contention that, but for the psychiatric injuries attributable to the rape, she would have retrained and become a teacher. That claim was rejected. Accordingly, the disputed claims for special damages, insofar as they were dealt with in the present judgment, failed (see [209], [211], [217] of the judgment).

There would be judgment for the claimant in an amount to be assessed following discussion between the parties and, if necessary, short, written submissions on any remaining disputed issues (see [218] of the judgment).

Smith v Manchester City Council (or Manchester Corpn) 17 KIR 1 considered; *Blamire v South Cumbria Health Authority* [1993] PIQR Q1 considered; *Richardson v Howie* [2004] EWCA Civ 1127 considered.

Observed: 'There is no case law establishing that a religious organisation which chooses to investigate an allegation against one of its members owes a duty of care to a complainant not to cause her psychiatric harm. The question whether such a duty should be imposed therefore falls to be answered by applying the three-stage test in Caparo v Dickman [1990] 2 AC 605 ([1990] 1 All ER 568), bearing in mind the note of caution sounded by Brennan J in the High Court of Australia in Sutherland Shire Council v Heyman (1985) 60 A.L.R. 1 … At the first stage, I would readily accept that it is foreseeable that a rape or sexual assault complainant might suffer psychiatric damage as a result of the conduct of an investigation and/or hearing convened to determine her allegation ...Turning to the second stage of the Caparo analysis, where the requirement of foreseeability is satisfied, the law has for some time recognised the existence of a duty of care owed by an employer not to cause foreseeable psychiatric harm to an employee who is subject to a disciplinary procedure ... The difficulty arises at the third stage of the Caparo analysis, which requires consideration of whether the imposition of liability in this case is fair, just and reasonable' (see [177], [181] of the judgment).

James Counsell QC (instructed by Bolton Burdon Kemp) for Mrs B.

Catherine Foster (instructed by Legal Department Watch Tower) for the defendants.

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