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Vicarious Liability

Child sexual abuse – Vicarious liability – Whether an unincorporated association could be vicariously liable for torts committed by its members – Test for establishing vicarious liability other than in an employment context – Test for establishing vicarious liability for sexual assault

CATHOLIC CHILD WELFARE SOCIETY V VARIOUS CLAIMANTS AND THE INSTITUTE OF THE BROTHERS OF THE CHRISTIAN SCHOOLS AND OTHERS [2012] UKSC56

(Supreme Court; Lord Phillips of Worth Matravers, Lady Hale of Richmond, Lord Kerr of Tonaghmore, Lord Wilson of Culworth and Lord Carnwath of Notting Hill; 21 November 2012) [2013] ELR 1

The **case** involved claims of physical and/or sexual abuse by about 170 claimants who had been pupils at St William's school. The abuse was said to have been perpetrated by staff at the school. One of the 35 defendants to the claim was an individual alleged abuser. The remaining defendants were sued on the basis that they were in one way or another responsible for what had happened at the school. Among these defendants were the Child Welfare Society (CWS), which had been responsible for managing the school, and the Institute of the **Brothers** of the **Christian** Schools (the Institute), whose members taught at the school. The Institute was an unincorporated association of its members which, however, was organised on hierarchical lines and contained a number of corporate bodies. The CWS did not dispute its own vicarious liability for the actions of staff at the school, but appealed against a ruling by the Court of Appeal that the Institute was not vicariously liable for acts of abuse perpetrated by its members at the school between 1958 and 1992.

On appeal to the Supreme Court,

Held – allowing the appeal –

(1) Adopting the analysis of the Court of Appeal in *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [**2012**] EWCA Civ 938, vicarious liability would be imposed in an employment context where: (i) there was a true relationship of employer/employee between the defendant and the tortfeasor; and (ii) the tort was committed in the course of the tortfeasor's employment.

(2) On the existing **case**-law: (i) an unincorporated association could be liable for the tortious acts of its members; (ii) vicarious liability could be established even where the tortious act was a violation of the duty owed by the member to the association and even though it was a criminal offence; (iii) vicarious liability could also be established in respect of a criminal act of sexual assault; and (iv) two defendants could each be vicariously liable for a single tortious act of another.

(3) The Institute, although an unincorporated association, would be treated as if it were a corporate body which existed to provide a **Christian** education to boys, which could and did own property.

(4) Where dual liability was in issue, the proper approach to determining vicarious liability was not to focus on the degree of control exercised over the tortfeasor but rather to consider whether the defendant ought to bear the burden of an organisational or business relationship which had been undertaken for the defendant's benefit.

(5) By analogy with vicarious liability arising from employment, such liability could be imposed other than on an employer where the relationship between tortfeasor and defendant satisfied the following criteria: (i) the defendant was more likely to have the means to compensate the victim than the tortfeasor and could be expected to have insured against that possibility; (ii) the tort was committed as a result of activity carried out by the tortfeasor on behalf of the defendant; (iii) the tortfeasor's activity was likely to have been part of the defendant's business activity; (iv) the defendant has created the risk of the tort being committed by the tortfeasor; and (v) the tortfeasor will, to a greater or lesser extent, have been under the control of the defendant.

(6) The relationship between the Institute and the alleged abusers in this **case** had all the essential elements of a relationship between employer and employee in that: (i) the Institute had a hierarchical structure and conducted its activities as if it were a corporate body; (ii) the teaching activity of its members was undertaken by reason of the Institute's instructions, albeit under contracts of employment with third parties; (iii) that teaching activity was in furtherance of the Institute's objectives; and (iv) the Institute's members were obliged to conduct themselves by the Institute's rules. As against this, the fact that the **brothers** were bound to the Institute by their vows rather than by any employment contract, and that the **brothers** transferred all their income to the Institute rather than being paid by it, was not material but served only to render the relationship between them more akin to one of employment. This being the **case**, the matter satisfied stage 1 of the test of vicarious liability.

(7) Having reviewed the Canadian and domestic jurisprudence, stage 2 liability for sexual assault could be imposed where a sufficiently close connection existed between the abuse, on the one hand, and the relationship between abuser and defendant, on the other. This would be satisfied where the defendant, whose relationship with the abuser put it in a position to use the abuser to carry on or further its business, did so in a manner which created or significantly enhanced the risk that the victim would suffer the relevant abuse.

(8) In the instant **case** there was a very close and hierarchically organised relationship between the **brothers** and the Institute, both having a common mission in the **Christian** education of boys. This relationship enabled the Institute to place the **brothers** in teaching roles, in which their standing enabled them to abuse the children in their care. Such abuse was diametrically opposed to the objectives of the Institute and the **brothers** but this very fact was one of the factors that provided the necessary close connection between the abuse and the relationship between the **brothers** and the Institute that gave rise to vicarious liability on the part of the latter.

Comment

This is an important decision on vicarious liability, although in some ways it moves the law on very little. Putting it shortly, the Supreme Court decided (i) that an unincorporated association could be vicariously liable for the acts of its members; (ii) even where those acts constituted the criminal offence of sexual assault; and (iii) even where another body was also vicariously liable. None of these points is new to the law. Thus it has been established since *Heaton's Transport (St Helens) Ltd v Transport and General Workers' Union* [1973] AC 15 that an unincorporated association could be vicariously liable for the acts of its members. Further, the House of Lords in *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2001] ELR 422 confirmed that liability could extend even to the criminal act of sexual assault. And in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151, [2006] QB 510 the Court of Appeal held that it was possible for two different defendants to be vicariously liable for a single tortious act.

However, this is the first case in which all those elements have come together and it is important because of the careful analysis that Lord Phillips (giving the judgment of the court) gives to the relationship between the brother teachers and the Institute of the Brothers of the Christian Schools – an association founded in France in 1680 in order 'to teach children, especially poor children, those things which pertain to a good and Christian life'. The organisation remains an unincorporated association, which operates internationally with lay brother members around the world. It provides teachers to schools. In some cases, as in this one, those teachers are employed under contract of employment to a local trust or association, but the brothers pay their earnings to the Institute, which in turn provides for their communal welfare.

By the time the matter reached the Supreme Court there was no challenge to the finding that the local organisation that employed the defendant brother teachers under contracts of employment was vicariously liable for any acts of sexual assault they may have committed. However, that local organisation sought to establish that the Institute itself (which has substantial assets despite having no legal personality) was also vicariously liable.

The Supreme Court considered, first, whether there was the necessary relationship between the brother teachers and the Institute to make it appropriate that the Institute should be vicariously liable. It concluded there was. The Supreme Court confirmed that it is no longer necessary for the relationship to be one of employment before vicarious liability arises, but it must be 'akin to employment'. In this case, the Supreme Court considered that the relationship between the brothers and the Institute was in fact *closer* than one of employment. This is because the brothers were not only bound by the rules of the Institute when teaching but could be required to go anywhere in the world by the Institute, were joined with the Institute in vows to pursue a common aim, and relinquished their earnings to the Institute in return for being provided by the Institute with the necessities of life. (The point about earnings here is interesting: although volunteers will not be employees – see *X v Mid Sussex Citizens Advice Bureau* [2012] UKSC 59 – in the light of this decision they may well be people in respect of whom vicarious liability can be incurred.)

The Supreme Court then considered, secondly, whether or not the Institute could be liable for the criminal acts of the brother teachers. Given the state of the case-law, there could never have been much doubt about the Supreme Court's judgment in this respect. Nonetheless, one interesting point emerges: Lord Phillips was keen to emphasise that it is a very important factor in such cases that the 'employer' has put the 'employee' in a position where the risk of them committing the particular offence has been significantly increased. In the present case, the fact that the Institute's rules made express provision regarding not touching children served to underline that the increased risk presented by the teaching of children in residential schools (in particular vulnerable children as in this case) was an obvious one.

Finally, so far as dual liability was concerned, the Supreme Court held that what mattered was the nature of the relationship between the tortfeasor and each possible defendant – if the tests for vicarious liability were satisfied then it appears from this judgment that there is no limit to the number of defendants who could share liability for the same tortious act.

With the recent widespread concern about sexual abuse of children within the entertainment industry, this is a timely decision from the Supreme Court on the circumstances in which a person may be held vicariously liable for a sexual assault committed by another. That said, Lord Phillips was careful to note that this case was not concerned with the entertainment industry but 'with the liability of bodies that have, in pursuance of their own interests, caused their employees or persons in a relationship similar to that of employees, to have access to children in circumstances where abuse has been facilitated'. Readers may form their own opinion about whether that fact distinguishes the present case from that of the entertainment industry or not.

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