Sexual and Physical Abuse: Vicarious Liability

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Introduction

1. Vicarious liability has long been a central part of the landscape in claims arising out of alleged physical and/or sexual abuse. The person(s) committing the abuse may well lack the means to satisfy any judgement. If there is no responsible body which can be held directly liable for the acts of the person(s) committing the abuse, then there will often not be a claim which are viably can be pursued.


3. This article seeks to summarise the legal conclusions from that case.

Basic principles

4. The court regarded it as uncontroversial that:

   a. It is possible for an unincorporated association to be vicariously liable for the tortious acts of one or more of its members.

   b. A second defendant may be vicariously liable for the tortious act of a first defendant even though the act in question constitutes a violation of the duty owed to the second defendant by the first defendant.

   c. Vicarious liability can even extend to liability for a criminal act of sexual abuse.

   d. It is possible for two different defendants each to be vicariously liable for the single tortious act of another.

5. The court identified the criteria for vicarious liability as being a “synthesis of two stages”:

   a. The first stage is to consider the relationship of the first defendant and the second defendant to see whether it is one that is capable of giving rise to vicarious liability.
b. The second stage requires an examination of the connection between the relationship between the first defendant and the second defendant and that the act or omission of the first defendant.

The background to the appeal

6. Some 170 claimants alleged that they had been sexually and/or physically abused at St William's boarding school in Market Weighton in Yorkshire between 1958 and 1992. With the exception of the school's headmaster (who had been convicted of numerous counts and sentenced to a term of imprisonment) none of the defendants were alleged personally to have committed any acts of abuse. They fell into two categories:

   a. Having a connection with the diocese which had been responsible at certain times for the management of the school (“the Middlesbrough defendants”).

   b. Representatives (“the De La Salle defendants”) of the worldwide lay religious teaching order to which most of the alleged abusers, including the headmaster of the school, had belonged (“the Institute”).

7. At first instance the learned judge, whose judgement was upheld by the Court of Appeal, determined that only two of the Middlesbrough defendants, being organisations which were responsible for managing the school, were liable for the alleged abuse. Those two Middlesbrough defendants appealed, seeking to challenge the finding at first instance, upheld on appeal, that the De La Salle defendants were not also vicariously liable for the acts of abuse committed by members of the Institute.

8. It was the Institute's case that the relationship of the individual brothers to the Institute, considered as a body, was insufficiently close to give rise, of itself, to vicarious liability on the part of the Institute for sexual abuse by brother teachers. The Institute contended that only a body managing a school, and employing the brother teachers in that school would have sufficiently close relationship to be vicariously liable, which was why the Middlesbrough defendants were liable, and the De La Salle defendants were not.
On the other hand, it was the Middlesbrough defendants’ case that on a proper understanding of the law relating to vicarious liability the De La Salle defendants were also liable.

**The first stage of the vicarious liability test: the nature of the relationship which is capable of giving rise to vicarious liability**

9. Usually the relationship which gives rise to vicarious liability in the ordinary run of cases is that of employer and employee. As Lord Phillips of Worth Matravers (with whom Baroness Hale of Richmond, Lord Kerr of Tonaghmore, Lord Wilson and Lord Carnwath JJSC agreed) stated at paragraph 35 there is no difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability upon an employer for torts committed in the course of his employment:-

   a. The employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability.

   b. The tort will have been committed as a result of activity being undertaken by the employee on behalf of the employer.

   c. The employee's activity is likely to be part of the business activity of the employer.

   d. The employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee.

   e. The employee will, to a greater or lesser degree, have been under the control of the employer (with the significance of control today being that the employer can direct what the employee does, not how he does it - please see paragraph 36).

10. However, it is not only relationships of employer and employee which can give rise to vicarious liability. "Where the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the ground that it is ‘akin to that between an employer and an employee‘. Please see paragraph 47.

11. On the facts of the appeal the court found that the relationship between the teaching brothers and the Institute had many elements, and all the essential elements, of the relationship between employer and
employee, and that the differences were immaterial, and indeed rendered the relationship between the brothers and the Institute in fact closer than that of employer and employee.

The second stage of the vicarious liability test: the connection between the relationship between the individual tortfeasor and the responsible body and the act of the individual tortfeasors.

12. Where an employee commits a tortious act his employer will be vicariously liable if the act is done “in the course of the employment” of the employee. As the Court held at paragraph 62 this plainly covers the situation where the employee does something that he is employed to do in a manner that is negligent.

13. The difficulty with which courts have always had, however, to grapple, in abuse cases, is that abuse is intentional and not negligent. Abuse can never be a negligent way of performing a requirement of the employer. Courts have therefore had to consider the circumstances in which acts of abuse can give rise to vicarious liability, which has not proven to be an easy question to answer.

14. The seminal decision of the courts of England and Wales in this regard is Lister v. Hesley Hall Limited [2002] 1 AC 215 (hereafter “Lister”). The House of Lords held that the owners and managers of a school were vicariously liable for sexual assaults committed by the warden of the boarding house who was employed by them. The reasoning of the various law lords was not identical and, according to Lord Phillips in the Various Claimants case, at paragraph 74, “it is not easy to deduce from the Lister case the precise criteria that will give rise to vicarious liability for sexual abuse. The test of ‘close connection’ approved by all [of the law lords] tells one nothing about the nature of the connection”. The case did draw upon the judgement of the supreme court of Canada in Bazley v. Curry (1999) 174 DLR (4th) 45 (hereafter “Bazley”), in which McLachlin J said that “there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer’s enterprise) and the wrongful act. It must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks”. Lord Phillips said that there were “echoes of the ‘enterprise risk’ approach” of the Canadian Supreme Court in the later House of Lords commercial case of Dubai Aluminium Co. Limited v. Salaam [2003] 2 AC 366.
15. The present Various Claimants case makes clear at paragraph 85 that “the precise criteria for imposing vicarious liability for sexual abuse are still in the course of refinement by judicial decision”. The case does, however, attempt to lay down some criteria. Crucially, at paragraphs 86 and 87, the court stated that “vicarious liability is 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, has done so in a manner which has created or significantly enhance 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 involves a strong causative link. These are the criteria that establish the necessary ‘close connection’ between relationship and abuse. I do not think that it is right to say that creation of risk is simply a policy consideration and not one of the criteria. Creation of risk is not enough, of itself, to give rise to vicarious liability for abuse but it is always likely to be an important element in the facts that give rise to such liability”.

16. On the facts of the present case the brother teachers were placed in the school to care for the pupils. “The necessary relationship between the brothers and the Institute and the close connection between that relationship and the abuse committed at the school [was] made out”. That was so even though abusing the boys in the brothers’ care was diametrically opposed to the objectives of the Institute. There was a very close connection between the brother teachers’ employment in the school and the sexual abuse that they were alleged to have committed. The court found that “this is not a borderline case. It is one where it is fair, just and reasonable, by reason of the satisfaction of the relevant criteria, for the Institute is to share with the Middlesbrough defendants vicarious liability for the abuse committed by the brothers”.

Dual vicarious liability

17. In reaching the above conclusion, the court considered that there was no justification for applying the stringent test of Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Limited [1947] AC 1 regarding the “transfer” of vicarious liability for the tortious act of a workman from his employer to a third person who was using the employee’s services under a contract or other arrangement with the employer (“a test that was so stringent as to render a transfer of vicarious liability almost impossible in practice”). Instead, the approach of Rix LJ in Viasystems (Tyneside) Limited v. Thermal Transfer (Northern) Limited [2006] QB 510 was to be preferred. What one is looking for is “a situation where the employee in question, at any rate
for relevant purposes, is so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence”.

Conclusions

18. The following conclusions can be drawn from this case:-

a. The criteria for vicarious liability as being a “synthesis of two stages”:-

I. The first stage is to consider the relationship of the first defendant and the second defendant to see whether it is one that is capable of giving rise to vicarious liability.

II. The second stage requires an examination of the connection between the relationship between the first defendant and the second defendant and that the act or omission of the first defendant.

b. With regard to the “first stage” it is not just a relationship of employment which is capable of creating vicarious liability, but also relationships which have the same incidents which are “akin to that between an employer and an employee”.

c. With regard to the “second stage” we can probably expect further guidance from the higher courts in due course as to the criteria for imposing vicarious liability for sexual abuse, which criteria are “still in the course of refinement by judicial decision”. However, what one is looking for is a case 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, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse.

d. There is no conceptual or practical difficulty with dual vicarious liability. What one is looking for is “a situation where the employee in question, at any rate for relevant purposes, is so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence”.
Jonathan Owen was called to the Bar in 2004.

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