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FOIL UPDATE

16 March 2021



Vicarious liability: *Christian Brothers* test applied to Jehovah's Witness case.

The Trustees of the Barry Congregation of Jehovah's Witnesses v BXB (2021) EWCA Civ 356

This was an appeal from the decision at first instance that the appellant/defendants were vicariously liable for the rape of the respondent/claimant, by one of their elders, Mark Sewell.

The grounds of appeal were:

- i) In his application of stage 1 of the test for vicarious liability the judge erred by his conclusion that the activities undertaken by Mark Sewell were an integral part of the "business" activities carried on by the defendants and that the commission of the rape was a risk created by the defendants assigning those activities to Mark Sewell;
- ii) In his application of stage 2 of the test for vicarious liability, the judge erred by his conclusion that the rape was sufficiently closely connected to Mark Sewell's position as an elder to justify the imposition of vicarious liability.

Mark Sewell had raped the claimant in a room in his house. The house was an approved venue for meetings. There was a long history of inappropriate behaviour by him towards her.

IN BRIEF

The Court of Appeal upheld the judgment in the High Court that the Jehovah's Witnesses could be vicariously liable for a rape committed by an elder of the church.

As to the stage 1 test, the Court of Appeal held that the judge's findings of fact were clear. The crucial finding was that "*But for Mark Sewell's and Tony Sewell's [his father's] position as elders, the claimant and her husband would probably not have remained friends with Mark Sewell by the time of the rape.*" It followed logically that absent his status as an elder, Mark Sewell would not have raped the claimant. The judge found there was a strong causative link between Mark Sewell's status as an elder and the rape. The findings were careful, logical, in accordance with the law and founded upon the evidence which he had heard.

The test for vicarious liability was identified by Lord Phillips in *Christian Brothers (2012)*. Two questions were posed:

- i) whether the relationship between the tortfeasor and the party said to be vicariously liable was one that was capable of giving rise to liability;
- ii) whether there was 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.

Christian Brothers had identified five policy reasons which were relevant to the imposition of vicarious liability but, critically, identified specific elements of the relationship between the teaching brothers in that case and the defendant Institute which reflected the relationship between an employer and employee. It was of note that they included the hierarchal structure of the Institute, the fact that the teaching activity was in furtherance of the mission of the Institute and that the manner in which the brothers were obliged to conduct themselves as teachers was dictated by the Institute's rules. These and other factors were relevant to the court's finding that this was a relationship sufficiently akin to that of employer and employee to satisfy stage 1 of the test of vicarious liability.

The core findings made by the judge here were that:

- i) elders were the spiritual leaders of the congregation;
- ii) an elder might be removed if he failed to maintain the high standards expected of him, whether in performance of his duties as an elder or in his personal life;
- iii) elders were the principal conduit through which the teachings of the faith were disseminated to congregations;
- iv) in so far as a congregation of Jehovah's Witnesses acted as a body, it acted through its elders;
- v) 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.

The appellate court accepted these findings.

As to the second question, namely whether the commission of the rape was a risk created by the defendants in assigning the activities of an elder to Mark Sewell, the judge was entitled to conclude that the relationship between elders and the Jehovah's Witnesses was one that could be capable of giving rise to vicarious liability.

As to the stage 2 test, the judge's identification of the relevant test as focusing on the relationship between the tort committed by Mark Sewell and his position as an elder of the organisation reflected the essence of the test identified by Lord Phillips in *Christian Brothers*, namely whether there was a sufficiently close connection between the relationship between the tortfeasor and the organisation and the act or omission of the tortfeasor.

In analysing the relationship between the rape committed by Mark Sewell and his position as an elder, the judge identified five relevant pieces of undisputed evidence, from which he reached the following conclusions. Mark Sewell's status as an elder was one factor in the couple's developing relationship and the claimant tolerated his inappropriate behaviour towards her because he was an elder, which meant that she assumed he would be acting from pure motives and that there could be repercussions if she were to call out his inappropriate behaviour. Of particular note was the judge's identification of Mark Sewell's perception of the significance of his status as an elder, reflected in his response when confronted by the claimant about his sexual abuse of a teenage member of the congregation, namely that "*he told us he could do what he liked because he was an elder and that he was not answerable to us*".

These findings of fact led the judge to conclude that:

"(a) The fact that Mark Sewell held a position in the congregation (initially, ministerial servant) was an important part of the reason why the claimant and her husband started to associate with Mark and Mary Sewell (his wife).

(b) But for Mark Sewell's and Tony Sewell's position as elders, the claimant and her husband would probably not have remained friends with Mark Sewell by the time of the rape. There was, therefore, the 'strong causative link' referred to by Lord Phillips in the *Christian Brothers* case.

(c) The defendants created or significantly enhanced the risk that Mark Sewell would sexually abuse the claimant by creating the conditions in which the two might be alone together through (i) Tony Sewell's implied instruction that she continue to act as his confidante, (to provide support to Mark Sewell who had been suffering from depression, an instruction which carried the authority conferred by the defendants because of his position as an elder) and (ii) investing Mark Sewell with the authority of an elder, thereby making it less likely that the claimant (or others) would question his motives and emboldening him to think that he could act as he wished with little fear of adverse consequences.

These three conclusions of the judge provided the basis for satisfying the test of close connection in respect of Mark Sewell's position as an elder, his role and authority within the organisation and the power which it engendered so as to make it just and reasonable for the defendants to be held vicariously liable for his act in raping the claimant.

The appeal was dismissed.

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