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Vicarious liability

Blackpool Football Club Limited v DSN (2021) EWCA Civ 1352

In June 1987, while on a footballing tour for young boys to New Zealand, which also visited Thailand on the way home, the claimant was sexually abused by a Mr Roper, who was in charge of the tour and was the only adult leading the trip. Mr Roper was a convicted sex offender, having convictions for indecent assaults on males.

The claimant was 13 years old when he was abused by Mr Roper. These proceedings were issued on 19 January 2018, over thirty years later. The trial judge held that the applicable primary limitation period should be disapplied and the action be permitted to proceed pursuant to the discretion conferred by S33 Limitation Act 1980; and he held that the defendant was vicariously liable for the acts of Mr Roper when he abused the claimant.

The permitted grounds of appeal were:

i) Ground 2: the decision that S11 Limitation Act 1980 should not apply to this action was founded on a perverse conclusion that there was no real possibility of significant prejudice to the defendant from the delay.

ii) Ground 4: the judge misdirected himself as to the significance of the evidence said to be consistent in supporting the claimant's case on vicarious liability.

IN BRIEF

Reversing the decision at first instance, the Court of Appeal held that the defendant football club was not vicariously liable for a sexual assault on the claimant, carried out by a man who was a 'scout' for the club. The assault had taken place on a tour organised by the man but in which the defendant had limited involvement.

The judge had been right, however, to exercise his discretion under S33 Limitation Act 1980 in favour of the claimant.

iii) Ground 7: the judge was wrong on the facts and in law to hold that Frank Roper was at any material time in a relationship with the defendant that was capable of imposing vicarious liability on the defendant for his torts.

iv) Ground 8: the judge was wrong in law and in fact to hold that there was a sufficient connection between the claimant's assault and any relationship between Frank Roper and the defendant.

The court reversed the order of these grounds and dealt with vicarious liability before limitation.

Having reviewed in detail the two-part test for establishing vicarious liability and the existing authorities, the Court of Appeal allowed the appeal on grounds 7 and 8.

On the evidence before the judge and his findings of fact, it could not be said, as the judge had, that the trip was "as close to an official trip as makes no difference." The judge's finding that the defendant had inadequate resources and was never going to be able to run the trip as an official trip was of itself significant in making clear that the trip was essentially Mr Roper's trip both in relation to its funding and its running. Leaving on one side the question of endorsement, the defendant had no involvement at all apart from providing something in the order of 2% of the funding and the use of a room for meetings. There was no evidence that the trip was even in any sense the defendant's idea, or that they asked Mr Roper to organise and finance it for them, or that they had any hand in choosing who went on the trip. At least the great majority of the boys had no existing connection with the defendant. The tour party did not refer to itself as being connected with the defendant; and they wore Everton or England colours, not Blackpool tangerine.

Describing the trip as being "as close to an official trip as makes no difference" ignored the reality that this was Mr Roper's trip in every sense and, specifically, ignored the Thailand leg of the trip. On any view, that leg had nothing to do with the defendant; but its significance went further by demonstrating the complete control being exercised by Mr Roper, including his determination of how the trip would be funded and how he would be reimbursed his outlay.

The evidence justified the judge's conclusion that "parents only allowed Mr Roper to take their sons on this tour because *they saw it as* part of a Blackpool FC operation." However, they were wrong. Not only was it not in any real sense a defendant’s operation, neither it nor anyone else had held it out as being one.

The idea that a person employed as a scout by a football club (great or small) would be required single-handedly to promote, organise, run and fund a trip for young boys lasting a month, during ten days of which no football would be played but the employee would pursue their own independent commercial interests seemed to be unlikely in the extreme. To suggest that undertaking such a trip would be part of the ordinary course of such a scout's work seemed to be quite unreal. This immediately called into question the validity of the judge's view that Mr Roper's involvement with the boys on the tour might fairly and properly be regarded as taking place in the ordinary course of his work for the defendant. That he took the opportunities that this role afforded him to ingratiate himself with club and players, and to groom and ultimately abuse children, did not provide any support for the suggestion that the trip was something that occurred in the normal course of his work for the club; nor did the fact that his association with the club might have reassured some parents who, for very good reason, had their doubts and suspicions about a trip that seemed too good to be true.

The appellate court was unable to identify any statement of principle in the various authorities that supported the submission that there was the requisite close connection linking the relationship between the club and Mr Roper and the sexual abuse he inflicted upon the claimant while in New Zealand. Those cases where vicarious liability has been imposed in the absence of a relationship of employment were clearly distinguishable on their facts.

As to the appeal on grounds 2 and 3, the judge identified the correct principles to be applied, asked himself the right questions, analysed the evidence upon which the parties relied, formed an assessment based upon that analysis of the potential prejudice to the defendant, and then conducted the requisite balancing exercise that led him to conclude that it was equitable to allow the action to proceed. In the course of doing so he expressly considered the impact of the loss of documentation and the deaths of Mr Roper and another witness, which formed the bedrock of defendant's submissions on these grounds. Although the burden rested on the claimant in the court below to satisfy the judge that the limitation period should be disapplied, before this court it is for the defendant to satisfy the court that the conclusion the judge reached was perverse in the sense of being outside the generous ambit of a proper exercise of the judge's discretion.

Viewed overall, the judge was entitled to conclude that, at least so far as the primary facts were concerned, no real risk of substantial (or significant) prejudice had been caused by the delay in the defendant receiving notice of the claimant's claim, or in the issue of proceedings so long after the primary limitation period. That conclusion was not perverse. There was no reason to suppose that the judge simply ignored or failed to appreciate the significance of the absence of witnesses or documents when conducting the balancing exercise that led to his conclusion that it was equitable to disapply the limitation period and it is clear that he did not do so. He was entitled and right to give weight to his finding that the claimant was for practical purposes disabled from commencing proceedings before he did. There was ample material on the basis of which he could reasonably exercise his discretion in favour of disapplying the limitation period.

The appeal on grounds 2 and 4 were dismissed.

Ian Carroll a partner and Head of Abuse at **Keoghs** and a member of the **Abuse SFT** acted for the defendant and comments:

There has been a spate of claims in recent times which have looked to expand the boundaries of the doctrine of vicarious liability. This case is yet a further example. Significantly, this was also the first case in which the courts had been asked to assess the liability of professional football clubs for the actions of independent scouts.

In *Various Claimants v Barclays Bank plc [2020] AC 973* Barclays, Lady Hale established that when considering vicarious liability, we must look at the nature of the relationship itself, and that is exactly what the Court of Appeal has done here. This emphasises the importance of available evidence addressing the nature of the relationship in contrast to evidence that merely deals with people's perception of the relationship. In this case, there was plenty of evidence that Roper held himself out as being a representative of the Club, but this had little importance when evaluating the true nature of Roper's relationship with the Club for the purposes of establishing the issue of vicarious liability.

It has long been established that control over how individuals carry out their duties on an employer's behalf is not necessarily required for the imposition of vicarious liability. However, this judgment acts as a welcome reminder to organisations and insurers that there must at least be an element of control over what these individuals do on the organisation's behalf for

liability to attach: it is not enough that the organisation had the power to terminate the individual's association.

The judgment is also a forceful reminder that mere creation of risk is insufficient to engage the doctrine of vicarious liability and that creation of risk needs to be accompanied by a degree of control. Professional football clubs are not the only organisations which rely on the services of such individuals and the Court of Appeal's guidance will equally apply to those situations as well.

The full case report is at: Blackpool Football Club Ltd v DSN [2021] EWCA Civ 1352 (09 September 2021) (bailii.org)