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Vicarious liability reigned in

Trustees of the Barry Congregation of Jehovah's Witnesses (Appellant) v BXB (Respondent)

On 16th March 2021 we reported the Court of Appeal judgment in this case, which upheld the judgment in the High Court that the Jehovah's Witnesses (the defendants) could be vicariously liable for a rape committed by an elder of the church. The Supreme Court has now allowed the defendants' appeal.

The Supreme Court was asked to decide whether the defendant/appellants' organisation was vicariously liable for a rape committed by Mark Sewell, a former elder.

In 1984, Mr and Mrs B began attending services of the Barry Congregation. There, they made friends with Mark Sewell, his wife Mary, and their children. The families became close, visiting each other's houses for tea and going on holidays and days out together. Mrs B considered Mark Sewell to be her best friend.

Towards the end of 1989, Mark Sewell's behaviour changed. He began abusing alcohol and appeared depressed. He began flirting with Mrs B, including hugging her, holding hands and kissing her. He also confided in her. Concerned, Mrs B spoke to Mark Sewell's father, Tony, who like his son was an elder. Tony explained that Mark was suffering from depression and needed love and support. It was accepted at trial that, had it not been for the fact that Mark Sewell was an elder and Mrs B had received this instruction from Tony Sewell,



IN BRIEF

The UKSC has allowed the defendants' appeal against the finding in the courts below that it was vicariously liable for a rape carried out by a church elder.

While the first part of the test for vicarious liability had been satisfied by the claimant, the Supreme Court found that she failed to satisfy the second stage.

their friendship would have come to an end. Mr and Mrs B continued providing Mark Sewell with support. At one point, he asked Mrs B to run away with him.

On 30 April 1990, Mr and Mrs B and Mark and Mary Sewell were taking part in door-to-door evangelising. Afterwards they all went to a local pub for lunch, where Mark and Mary Sewell argued. Later the families returned to Mark and Mary's house. There, Mark Sewell went into a back room. Mrs B was asked by Mary if she could talk some sense into him. Mrs B decided that she should go to speak to Mark to try to convince him that he should go to the elders about his depression. A conversation ensued during which Mark Sewell pushed Mrs B to the floor, held her down and raped her.

On 2 July 2014, Mark Sewell was convicted of raping Mrs B and seven counts of indecently assaulting two other individuals. He was sentenced to 14 years' imprisonment. By this time Mark Sewell had been expelled as a Jehovah's Witness for unrelated conduct and Mrs B had ceased her association with the Jehovah's Witnesses.

Mrs B commenced an action for damages for personal injury, including psychiatric harm, against the Watch Tower and Bible Tract Society of Pennsylvania (which is a charitable corporation that supports the worldwide religious activities of the Jehovah's Witnesses) and the Trustees of the Barry Congregation, alleging that they were vicariously liable for the rape committed by Mark Sewell. The trial judge found them vicariously liable for the rape and awarded Mrs B general damages of £62,000. The Court of Appeal upheld the trial judge's decision.

The Supreme Court unanimously allowed the appeal and held that the defendants were not vicariously liable for the rape committed by Mark Sewell.

Vicarious liability is an unusual form of liability by which the defendant is held liable for a tort (a civil wrong) committed by a third party. The law in this area has been subject to an expansive redrawing of boundaries in the 21st century. There are two stages of the inquiry, both of which have to be satisfied to find vicarious liability. The same two tests apply to cases of sexual abuse as they do to other cases on vicarious liability.

In the vast majority of cases the tests can be applied without considering the underlying policy justification for vicarious liability. In difficult cases it can be a useful final check on the justice of the outcome to stand back and consider whether that outcome is consistent with the underlying policy.

Stage One

The test at stage one is concerned with the relationship between the defendant and the tortfeasor (the third party, here Mark Sewell, who committed the tort).

The first stage test was whether the relationship between the defendant and the tortfeasor was one of employment or akin to employment. In applying the "akin to employment" aspect of this test, a court needs to consider carefully features of the relationship that are similar to, or different from, a contract of employment. The "akin to employment" expansion does not undermine the traditional position that there is no vicarious liability where the tortfeasor is a true independent contractor.

The Supreme Court agreed with the lower courts that the relationship between the Jehovah's Witness organisation and Mark Sewell was akin to employment. The important features here rendering the relationship akin to employment were: that as an elder Mark Sewell was carrying out work on behalf of, and assigned to him by, the Jehovah's Witness organisation; that he was

performing duties which were in furtherance of, and integral to, the aims and objectives of the Jehovah's Witness organisation; that there was an appointments process to be made an elder and a process by which a person could be removed as an elder; and that there was a hierarchical structure into which the role of an elder fitted [66].

Stage Two

The test at stage two asks, whether the wrongful conduct was so closely connected with acts that the tortfeasor was authorised to do that it can fairly and properly be regarded as done by the tortfeasor while acting in the course of the tortfeasor's employment or quasi-employment [58(iii)]. The application of this "close connection" test requires a court to consider carefully on the facts the link between the wrongful conduct and the tortfeasor's authorised activities.

At the second stage of the inquiry, the courts below erred by failing to set out the correct "close connection" test and taking into account incorrect factors.

The Supreme Court decides that the claimant had failed to satisfy the stage two test for the following reasons: (i) the rape was not committed while Mark Sewell was carrying out any activities as an elder; (ii) the primary reason the offence took place was that Mark Sewell was abusing his position as a close friend of Mrs B when she was trying to help him; (iii) it was unrealistic to suggest, as counsel for the claimant submitted, that Mark Sewell never took off his "metaphorical uniform" when dealing with members of the Barry Congregation; (iv) although Mark Sewell's role as an elder was a "but for" cause of Mrs B's continued friendship and hence of her being with him when the offence occurred, this is insufficient to satisfy the close connection test; (v) the appalling rape was not an objectively obvious progression from what had gone on before but was rather a shocking one-off attack; and (vi) other factors, such as the role played by Mark Sewell's father, and the failure of the Jehovah's Witness organisation to condemn Mark Sewell's inappropriate kissing of members of the congregation when welcoming them, were not relevant except as background.

As a final check, consideration of the policy of enterprise liability or risk that may be said to underpin vicarious liability confirmed that there was no convincing justification for the Jehovah's Witness organisation to bear the cost or risk of the rape committed by Mark Sewell. The fact that it has deeper pockets is not a justification for extending vicarious liability beyond its principled boundaries.

Ian Carroll, Partner with **Keoghs** and a member of the FOIL Abuse SFT comments:

This decision represents a faithful application of the corrective Supreme Court guidance in Barclays and Morrisons provided in April 2020. It represents a clear rebalancing of the tests which for some time had been "on the move" into ever expanding circumstances in which vicarious liability would apply. However, following the more restrictive approach recently taken by the Supreme Court in relation to stage 1, the Supreme Court have taken this opportunity to provide much needed clarity to similarly restrict the scope of the close connection test under stage 2. It is also significant that the Supreme Court have now made it clear that there will be no special rules for sexual abuse cases when considering issues of vicarious liability and the same tests apply to cases of sexual abuse as they do to other cases on vicarious liability. As a result and whilst previously "on the move", it does seem to suggest, so far as the Supreme Court is concerned, that the law on vicarious liability may now have come to a much needed rest.

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