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FOIL UPDATE 30th August 2023



Vicarious Liability

IN BRIEF

MXV v A Secondary School (2023) EWCA Civ 996

In FOIL Voice 8 for 2022, we reported the first instance decision in this case, in which the defendant was a co-educational secondary school. When aged 13, the claimant joined the school as a Year 8 pupil. For one week only, one of the defendant's former pupils ("PXM") undertook a Work Experience Placement ("WEP") at the defendant's school. He was then 18 years old and attending college hoping to qualify as a Physical Education ("PE") teacher.

It was the claimant's case that the defendant was vicariously liable for torts committed against her by PXM. The torts relied on were those of assault and battery and intentional infliction of injury. The claimant relied on the convictions of PXM at the Crown Court to prove that serious sexual offences were perpetrated against her.

The defendant admitted that torts of assault and battery were committed by PXM against the claimant but the defendant did not admit that the elements required to be proved for the tort of intentional infliction of injury were present, but if proved, the defendant argued they post-dated the WEP by some time. The issue of vicarious liability was the main area of contention in this trial.

On the evidence, the Deputy High Court Judge held that PXM was liable for both assault and battery and the intentional infliction of harm.

However, there was an issue between the medical experts as to whether the claimant suffered a recognised psychiatric illness as a consequence of the sexual activity that took place. There was no

Although the Court of Appeal found that the perpetrator's acts had been committed at a time when his relationship with the defendant was 'akin to employment', it went on to hold that the torts were not sufficiently closely connected with his relationship with the defendant so as to give rise to vicarious liability.

sufficient evidence to show or from which it could be inferred that she sustained physical harm from the sexual abuse. Ultimately, whether or not the consequence element for this tort was satisfied did not advance the claim. That was because of the judge's conclusions that neither the completed tort nor any element of it was committed during the WEP.

As to the issue of vicarious liability, PXM was neither an employee of the defendant nor an independent contractor. On the evidence, the judge concluded that his relationship with the defendant was not capable of giving rise to vicarious liability and he was not in a relationship with the defendant that was "akin to that between an employer and an employee".

Even if the first stage of vicarious liability had been established, the second stage of the test for vicarious liability was not satisfied. The entirety of the wrongdoing occurred many weeks after PXM's relationship with the defendant had ceased. That was a fundamentally different factual matrix from wrongful conduct that began while the tortfeasor was in a relationship with a defendant and continued outside or beyond the scope of that relationship. The most that could be said about the relationship between the defendant and PXM was that it provided an opportunity for PXM to meet the claimant. That was not sufficient for the second stage of the test.

Permission to appeal was granted on four grounds.

Ground 1.

The judge was wrong to conclude that the entirety of the wrongdoing occurred many weeks after PXM's relationship with the defendant had ceased.

The Court of Appeal held that appellate courts would not interfere with the findings of fact by a trial judge unless compelled to do so. However, in considering the limited evidence as to the events which took place during the course of the WEP, this court found that the judge overlooked evidence, or aspects of the evidence. There was relevant evidence which was at the core of the claimant's case as to what took place during the WEP. The evidence should have been considered by the judge and its implications addressed. The absence of any such consideration by the judge represented a demonstrable failure to consider relevant evidence.

It followed that the appeal on ground 1 was allowed.

Ground 2

The judge was wrong to find that the conduct and mental element of the tort of intentional infliction of injury were not made out until after the end of PXM's placement at the school.

The Court of Appeal held that the judge was satisfied that the tort of intentional infliction of injury was made out. The only issue in contention were her findings that neither the completed tort nor any element of it was committed during the WEP.

The appellate court found that the conduct and mental elements of the tort of intentional infliction of injury were made out during PXM's placement at the school. Accordingly, on the assumption that the finding of fact underpinning ground 1 was made, the appeal on ground 2 also succeeded.

Ground 3

The judge was wrong to find that the relationship between the defendant and PXM was not akin to employment.

The Court of Appeal considered in detail the two-stage test for vicarious liability and the relevant authorities. It was accepted that the judge correctly set out the law as to the two stages of vicarious liability and correctly identified the test for stage one, namely whether the relationship between the defendant and PXM was "akin to employment". *BXB* was subsequently determined by the Supreme Court but the approach of the judge was accepted as being consistent with that authority, but the judge was wrong to find that the relationship between the defendant and PXM was not akin to employment. The stage one test for vicarious liability was made out and the appeal on ground 3 was allowed.

Ground 4

The judge was wrong to find that PXM's torts were not sufficiently closely connected with his relationship with the defendant so as to give rise to vicarious liability.

The judge's starting point was identified as her finding that the entirety of the wrongdoing occurred many weeks after PXM's relationship with the defendant had ceased. Given this court's conclusion in respect of ground 1, this was no longer applicable. The judge thereafter considered the position upon the basis that PXM was in a relationship with the defendant that was akin to employment but found his role was extremely limited. He had no caring or pastoral responsibilities in relation to the claimant and he was not placed in a position of authority over the pupils. The judge found that it had not been proved that the claimant was influenced even by a perception that PXM had authority or status within the defendant's organisation.

The findings and assumptions of this court on grounds 1 to 3 as to the time when the grooming started and the role of PXM during the WEP differed from those of the judge. It followed that this court approached stage two of the vicarious liability test on the basis that grooming commenced when PXM was at the school, and his role at the school was akin to employment.

In respect of stage two, the Court of Appeal agreed with the assessment of the judge as to the limited nature of PXM's role at the school. He had no caring or pastoral responsibility for the pupils, a factor to which considerable weight was given in previous cases. PXM's access to the claimant at school was limited as he was, or should have been, kept under close supervision at all times. Even allowing for the fact that PXM was to be addressed as if he was a member of staff, he held no position of authority over the pupils in the school. It was not until PXM left the school that any communication took place on Facebook and such communication was specifically prohibited by the school.

Given the limited nature of PXM's role during the course of one week, the facts did not begin to satisfy the requirements of the close connection test. The grooming which led to the sexual offending was not inextricably woven with the carrying out by PXM of his work during his week at the defendant's school such that it would be fair and just to hold the defendant vicariously liable for the acts of PXM. It followed that ground 4 of the appeal was dismissed.

The full judgment may be found at: [MXX v A Secondary School \[2023\] EWCA Civ 996 \(25 August 2023\) \(bailii.org\)](#)

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