

# The expansion of Vicarious Liability: *Armes v Nottinghamshire County Council* [2017] UKSC 60

In determining whether to impose vicarious liability the court has to consider what sort of relationship has to exist between an individual and a defendant before the defendant can be made vicariously liable in tort for the conduct of that individual? (The first requirement) A classic example of a relationship which gives rise to vicarious liability is that of employer and employee.

The second requirement considers in what manner does the conduct of that individual have to be related to that relationship, in order for vicarious liability to be imposed on the defendant?

The case of *Armes (Appellant) v Nottinghamshire County Council (Respondent)* [2017] UKSC 60 concerns the first requirement.

## Facts

The facts of *Armes* were that the appellant was in the care of the respondent local authority from the ages of seven to eighteen. The local authority placed her into foster care with Mr and Mrs A between March 1985 and March 1986, and with Mr and Mrs B between October 1987 and February 1988. She was physically and emotionally abused by Mrs A, and sexually abused by Mr B.

## Issues

In relation to liability, there was no case that the local authority had failed to exercise reasonable care in the selection of the foster parents or in the supervision and monitoring of the placements.

The claimant's case was that the local authority was responsible in law for the tortious conduct of the foster parents, either on the basis of vicarious liability, or on the basis of a non-delegable duty of care.

It was conceded that, if the relationship between the local authority and the foster parent is one which can give rise to vicarious liability, then the abuse of the child is a tort for which vicarious liability is imposed. (If the second requirement was satisfied)

Her claim under both heads was dismissed by the High Court and the Court of Appeal.

The Supreme Court allowed the appeal by a majority of 4-1. They rejected the argument that the local authority was liable on the basis of a non-delegable duty but found the local authority vicariously liable for the abuse committed by the foster parents.

Lord Reed gives the lead judgment, with which Lady Hale, Lord Kerr and Lord Clarke agree. Lord Hughes gives a dissenting judgment

This article deals with the issue of vicarious liability only and not the issue of non - delegable duty.

### Test

The test to be applied is not in dispute. The court has to consider the five factors as said by Lord Philips in Various Claimants v Catholic Child Welfare Society [2012] UKSC 56. (The Christian Brothers case)

They are: -

- (i) 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;
- (ii) The tort will have been committed as a result of activity being taken by the employee on behalf of the employer;
- (iii) The employee's activity is likely to be part of the business activity of the employer;
- (iv) The employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; and
- (v) The employee will, to a greater or lesser degree, have been under the control of the employer.

Lord Hughes, dissenting, identified the principal issues in this case to be (v) control and (ii) integration.

### Why did the claim fail at first instance?

In relation to vicarious liability, the judge at first instance considered the law as stated in Lord Phillips of Worth Matravers' judgment in Various Claimants v Catholic Child Welfare Society [2012] UKSC 56; [2013] 2 AC 1 (the Christian Brothers case), and focused on the question whether the relationship between the local authority and the foster parents was akin to that between an employer and an employee. He concluded that it was not.

Considering the five features listed by Lord Phillips in para 35 of the Christian Brothers judgment, he accepted that the first and fourth features were present: the local authority were more likely to have the means to compensate a claimant and would have insurance (i) , and by placing the child with the foster parents the local authority would have created the risk of abuse being committed by the foster parents. (iv)

On the other hand, he considered that the remaining features were not satisfied. Treating the activity of the foster parents as the provision of family life, they did not in his view provide family life on behalf of the local authority, and their provision of family life was not part of the activity of the local authority: (ii)/(iii). The foster parents were not, in his view, under the control of the local authority to any material degree. (v)

In agreement with the majority of the Supreme Court of Canada in *KLB v British Columbia* [2003] 2 SCR 403, the first instance Judge considered the lack of control to be decisive. In his view, the local authority not only did not have control over the foster parents, whether to direct what they did or how they did it, but it was essential to the whole concept of foster parenting that the local authority should not have that control. The foster parents' role was to provide family life, bringing up the child as a member of their own family. That was only possible if a foster parent enjoyed independence from direction by the local authority and autonomy to determine how the child should be parented. That reasoning emphasised that the degree of control which could be exercised over foster parents was *insufficient to prevent abuse from taking place*, and that the imposition of vicarious liability would not result in the deterrence of such abuse.

### **Why did the claim fail at the Court of Appeal?**

An appeal against the judge's decision was dismissed by the Court of Appeal: [2015] EWCA Civ 1139; [2016] QB 739. In relation to vicarious liability, Tomlinson LJ considered that the local authority *did not exercise sufficient control over the foster parents for vicarious liability to arise*. The provision of family life could not be part of the activity of the local authority or of the enterprise upon which they were engaged, because inherent in it was a complete absence of external control over day to day family routine. The control retained by the local authority was at the "higher or macro level", as opposed to "micro-management of the day to day family environment" (para 15). It was therefore "irrelevant to the risk of abuse occurring during the unregulated course of life in the foster home" (ibid). Black LJ also rejected the imposition of vicarious liability, for similar reasons, and Burnett LJ agreed with both judgments on this issue. On the other hand, it was said, it might discourage the

use of foster care in favour of residential care: an alternative which would be less effective in promoting the welfare of children.

The key reason for the claimant's claim failing at first instance and at the Court of Appeal is the absence of sufficient control to justify the imposition of vicarious liability.

### The Supreme Court Decision

The Supreme Court considered the regulations which applied at the time (The Children and Young Persons Act 1969, the Child Care Act 1980, and the Boarding-Out of Children Regulations 1955 (SI 1955/1377) and concluded that although the local authority did not exercise day-to-day control over the manner in which the foster parents cared for the claimant, they nevertheless had powers and duties of approval, inspection, supervision and removal without any parallel in ordinary family life.

The Supreme court noted there were other aspects of the life of a child in foster care which were decided by the local authority, reflecting the fact that it was the local authority, not the foster parents, which possessed parental powers in relation to the child. These included, medical treatment of the child, the level of contact between the child and her family, whether or not the child could go on holiday, whether the child could have a passport, and whether the child could go on school trips or on overnight stays with friends. According to the evidence, if the foster parents needed child care because they were working, generally the social worker would make the arrangements because of the need to ensure that any substitute carer was suitable. Sometimes extended members of the foster family were "approved" to care for the child in the foster carer's absence.

A few matters, including the religion in which the child was brought up, remained under the control of the child's parents. Areas where either the foster parent or the social worker could become involved included attending parents' evenings at the child's school, making arrangements for contact with members of the child's family, and buying clothes and equipment for the child. The foster parents were expected to undertake the daily care of the child and to take the child to the dentist and the optician."

The Supreme Court analysed control and said, "It is important not to overstate the extent to which external control was absent from the fostering with which this case is concerned, as explained earlier. The local authority controlled who the foster parents were, supervised their fostering, and controlled some aspects of day to day family life, such as holidays and medical treatment. **More fundamentally, it is important not to exaggerate the extent to**

which control is necessary in order for the imposition of vicarious liability to be justified....It is not necessary for there to be micro-management, or any high degree of control, in order for vicarious liability to be imposed..."

### Further considerations

The Supreme court rejected the idea that the imposition of vicarious liability might discourage local authorities from placing children in care with foster parents, and encourage them instead to place them in residential homes because local authorities are vicariously liable for the abuse of children by those whom they employ in residential care homes.

The Supreme court noted that, not only is private residential care more expensive than foster care, but the operators of residential care homes might be expected to pass on to the local authorities the costs arising from their own vicarious liability. This was another factor which mitigated against the concern that the local authority might choose residential care in preference to foster care.

The local authority appear to have argued that vicarious liability would result in opening the floodgates on claims. The Supreme Court did not find that was a good reason not to impose vicarious liability but quite the opposite, saying, "there is every reason why the law should expose how this has occurred. It may be - although this again is empirically untested - that such exposure, and the risk of liability, might encourage more adequate vetting and supervision. It is all very well to point to the cost of such precautions, and to the cost of compensating the victims, and to complain that this will divert the resources of local authorities from other channels. That is a point which might be made in relation to many claims against public bodies, including claims against local authorities arising from the abuse of children in residential homes."

"As the New Zealand Court of Appeal pointed out in *S v Attorney General* at paras 71-72, there is also a considerable cost to society if appropriate mechanisms are not put in place to protect vulnerable children. As they noted, the victims of abuse commonly experience a range of long-term emotional and behavioural problems, are disproportionately represented both in the criminal justice system and in users of mental health services, often need to receive state benefits because they are unable to take up employment, and are often entitled to compensation from public funds under the criminal injuries compensation scheme. More fundamentally, the problem with the resources argument is that, if it is accepted, the greater the problem, the less likely there is to be a remedy."

### The dissenting Judgment

Lord Hughes, dissenting, considered Lord Phillips's five policy factors (Christian Brothers paras 35 and 47) He said, "In the present case, the third factor (business activity) does not apply. The first (deep pockets or insurance), as Lord Reed explained in Cox at para 20, cannot by itself be a principled ground for vicarious liability and tends to be circular. The fourth (creation of risk) will in practice apply to virtually all situations in which A asks or authorises B to deal in some manner with C. The principally relevant factors here would seem to be factors 2 (integration), and 5 (control)."

Lord Hughes drew a distinction between residential care and foster care: "Once the decision to place has been made, the care of the children is in practice committed to the foster parents....The foster carers do not do what the authority would otherwise do for itself; they do something different, by providing an upbringing as part of a family. The children live in a family; a family life is not consistent with the kind of organisation which the enterprise test of vicarious liability contemplates." This is essentially the reasoning which was adopted by the Supreme Court of Canada in *KLB v British Columbia* [2003] 2 SCR 403 when confronting the same issue as now faces this court and in concluding that vicarious liability does not attach to the Government for the acts or omissions of foster parents. It seems to me both principled and realistic.

Lord Hughes also considered that if vicarious liability applied to "ordinary" foster parents, on the basis that they are doing the local authority's business, then it must apply also to family and friend's placements with connected persons. Lord Reed disagreed saying, obiter, that the local authority was unlikely to be vicariously liable for family placements as the family would not have been recruited, selected or been trained by the local authority so as to enable it to discharge its child care functions. They would have been carrying on an activity (raising their own child) which was much more clearly distinguishable from, and independent of, the child care services carried on by the local authority than the care of unrelated children by foster parents recruited for that purpose.

Lord Hughes thought imposing vicarious liability would inhibit family placements. "It is not impossible that if such liability were to exist, insurers would insist on additional safeguards in relation to family placements, which would discourage their being made. With or without that factor, the liability is likely to make placement panels more cautious. Almost by definition, family placements are likely to carry a somewhat greater risk of failure - and of tortious wrongdoing - than safer placements with foster parents who have greater independence and greater experience of bringing up other people's children."

Lord Hughes was also concerned that by imposing vicarious liability for deliberate assault that would lead to negligence claims saying, “If, however, the placement of children with foster parents is to be attended by vicarious liability, it will not only or even chiefly be this kind of fortunately relatively rare behaviour which will generate liability on the part of the local authority. It is more likely to be generated by complaints of acts or omissions said to have been negligent. Since the limitation period does not run during a child’s minority, such claims will be possible many years after the event on which they rely. Such claims are theoretically possible, of course, within any natural family, but they are not made, nor is it generally in the interests of family unity that they should be.”

Lord Hughes concluded, “Vicarious liability is strict liability, imposed on a party which has been in no sense at fault. It is necessary, and fair and just, when it applies to fix liability on someone who undertakes an activity, especially a commercial activity, by getting someone else integrated into his organisation to do it for him. Employment is the classic example, but other situations may be analogous. But the extension of strict liability needs careful justification. Once one examines the nature of fostering, its extension to that activity does not seem to me to be either called for or justified, but, rather, fraught with difficulty and contra-indicated. Accordingly, I would uphold the decision of the Court of Appeal and dismiss this appeal.”

### Conclusion

In terms of application of the 5-point Christian Brothers test the Supreme Court has clarified that the extent of control required to impose vicarious liability does not have to be sufficient to prevent abuse, or by inference the tortious act. There does not need to be micro - management of the tortfeasor, but there must be some control.

That the claimant’s claim was dismissed at first instance by a single judge and thereafter, unanimously by three judges in the Court of Appeal and by Lord Hughes, dissenting in the Supreme Court and upheld by four Judges in the Supreme Court indicates the difficulty in applying the test.

Caroline Wood is experienced in EL claims involving the 6 pack regulations and also disease claims, including limitation hearings. She successfully defended a local authority in respect of a claim arising from an assault by a teaching assistant on a lunchtime supervisor, both of whom were employees at the same school.