

Child Abuse -Legal Update

Malcolm Underhill, specialist personal injury solicitor and member of the Association of Child Abuse Lawyers, comments on the most recent judgement of the Court of Appeal, in this developing area of civil law.

The Court of Appeal, in its most recent pronouncement on child abuse law, has limited the extent to which organisations may be liable for the physical and sexual misconduct of its members.

Various Claimants v The Catholic Child Welfare Society and Ors and The Institute of the Brothers of the Christian Schools and Ors [2010] EWCA Civ 1106 is the latest in a number of judgements establishing the principles by which victims of physical and sexual abuse are able to recover damages, as well as the limit of liability upon the engaging organisation of the paedophiles.

The allegation that 150 Claimants had suffered abuse while at a school was not the issue for the court to consider. The issue before the court was the extent to which, if it all, the Second Defendant was vicariously liable for the actions of its brothers.

The judgement is long. It may appear unnecessary to set out so much of the history. However, this is important, to appreciate the involvement of the Second Defendant running the school which the Claimants attended, and for which the Child Welfare Society contended were legally liable for the actions of staff.

The school had begun life in the nineteenth century as a reformatory for delinquent boys founded by charitably minded local Catholics. At the time when the abuse was carried out, it was constituted as an Approved School or Assisted Community Home. It had a board of managers. Throughout the periods of abuse the Headmaster and some, but not all, the teachers were supplied by the Institute of the Brothers of the Christian Schools (“Institute”).

The liability to be considered was that of vicarious liability, derivative liability, without fault, under which the Institute carries liability for the tort of The Catholic Child Welfare Society (“Society”), without being a tortfeasor, on the grounds of the relationship between the Society and the Institute. The judge, at first instance, held the board of managers (the Society) were vicariously liable (for the actions of staff), but the Institute was not. The appeal was to determine whether the Institute were liable.

As to the involvement of the Institute, Institute brothers, who were on the teaching staff, including one Headmaster, were alleged abusers. Others were lay members of the teaching staff, social work staff, domestic staff, eg gardeners and kitchen staff, chaplain and voluntary workers. The Headmaster had been convicted of serial offences.

The mission of the Institute has always been teaching, principally of the poor. This apostolate, or mission, had been undertaken by founding houses, where teaching was provided. The brothers are bound together by solemn lifelong vows of chastity, poverty and obedience. The vow of obedience carries the obligation to obey the superiors of the Institute. The orders from the superiors will include instructions where to live and work. This included the deployment of brothers for teaching purposes. The Institute can recall a brother. The Institute also had authority to inspect a school where a brother was sent.

The school was founded by well meaning local Catholics. The management initially comprised of local people. This was found to be poor at the beginning of the twentieth century so a new agreement was reached between the bishop and the Institute. The Bishop was an integral part of management. The management committee retained the right to inspect the school but it was the Institute brothers who taught the children. The Institute never ran St. William’s School, whereas all other schools where brothers taught, were also owned by them. By the 1950’s there were around 5 teaching brothers and 5 lay teachers. The proportion of Institute brothers declined over the years, until the school closed in 1994.

In the late 1960’s there was a requirement under the Children and Young Persons Act 1969 to identify a responsible organisation. For St. William, this was to be the

Society. The Society (or rather its predecessor in title- as there were various changes in the identity of the managers over its life of 150 years) were the managers of the school, issuing contracts of employment, for example. In 1976 Mr Carragher became Headmaster, until his behaviour was discovered and he was dismissed in 1990.

Vicarious Liability

There was some discussion about the limit of the principle. The Court of Appeal reminded itself that the principle expounded by Lord Denning MR in **Morgans v Launchbury [1973] 1 A C 127**, ie that “It is to put the responsibility onto the person who ought to bear justice to bear it”, had been rejected. The limits are succinctly set out in **Bernard v Attorney General of Jamaica [2004] UKPC 47**, where Lord Steyn said:

“Vicarious liability is a principle of strict liability. ..This consideration underlines the need to keep the doctrine within clear limits.....the Board is firmly of the view that the policy rationale on which vicarious liability is founded is not a vague notion of justice as between man and man. It has clear limits.....The principle of vicarious liability is not indefinitely extendable”.

The Institute submitted that the classic relationship which gives rise to vicarious liability is that of employment. They submitted it did not go further. Hughes LJ rejected this submission.

In order to determine whether vicarious liability existed in any particular case, firstly the relationship between the defendants had to be examined, and then the connection between the Institute and the act or omission of the Society had to be examined.

Vicarious liability could exist as between one member of an unincorporated association and another: vicarious liability could exist as between partners, and a partnership was simply one form of unincorporated association, **Dubai Aluminium Co Ltd v Salaam (2002) UKHL 48, (2003) 2 AC 366, Heatons Transport (St Helens) Ltd v Transport and General Workers Union (1973) AC 15 HL** and **Thomas v National Union of Mineworkers (South Wales Area) (1986) Ch 20 Ch D** were applied.

The second stage of the inquiry is fact sensitive. It is now well established, through the child abuse case of **Lister v Hedley Hall Limited [2001] UKHL 22** that even where one Defendant commits a tort outside his authority, as in Lister, where the warden sexually abused children, it is not necessarily a bar to vicarious liability. The test emerging from Lister involves two questions:

1. Did the employer entrust to the warden the performance of a task which they, the employers, had undertaken, and
2. If so, was there sufficiently close connection between the torts and the warden's employment for it to be fair and just to hold the employers vicariously liable?

All speeches in Lister make it clear that each case must be examined for the closeness of the connection between the tort and the employment. Again in Lister, Lord Millett, quoting from Atiyah, *Vicarious Liability in the Law of Torts*, "The master ought to be liable for all those torts which can fairly be regarded as incidental risks to the type of business he carries on".

Hughes LJ stated liability will arise where the risk is inherent to an operation which the second defendant is carrying out for his own purposes.

Submissions by the Society to the Court of Appeal

It was argued that

- a) liability is not confined to employment;
- b) no obstacle because it arose as between members of an unincorporated association;
- c) the fact it arose out an unauthorised criminal act does not prevent vicarious liability arising;
- d) there may be concurrent dual vicarious liability;
- e) Institute ran and controlled the school, alongside the Society;

- f) alternatively, the brother teachers functioned not only as employees of the managers but as members of the Institute carrying out its apostolate;
- g) the Institute placed the brothers in a position in which the risk of sexual abuse was inherent, so there was the necessary close connection between their relationship and the torts;
- h) therefore, the Institute was vicariously liable as well as the school managers.

The Court of Appeal dismissed the simplicity that the last proposition followed from the previous ones, even if they were all made out. That would involve treating other relationships as simply equivalent to that of employment, which they are not.

In the case of unincorporated associations, vicarious liability arises only where the activity which gives rise to the tort is one which one member thus acts on behalf of others. It is not enough that there is an inherent risk of the torts in question; the risk must be inherent in a business or operation carried on by one Defendant, entrusted by him to the second Defendant, if the necessary close connection between the second Defendant and the tort is to be established.

The trial judge rejected the submission that the Institute was running the school and similarly dismissed the notion that it exercised effective control of a brother-teaching's carrying out of his job. The Judge came to his view on an assessment of the facts and the Court of Appeal reminded itself that they should be slow to interfere with the decision of a judge who saw and heard the evidence.

Analysis of the constitution of St. William's revealed that certainly from the 1930's the Institute could not be manager of the school. By this time the school was regulated and permitted women to be on the board. Further the staff were employed by others than the Institute. Furthermore, following the Children and Young Persons Act 1969, a responsible organisation was constituted, under which the managers would act. A positive decision was taken that the Institute should not take this role, but that the Society should.

In arguing the Institute were vicariously liable, the Society relied on the facts that the Institute supplied and recalled the head teacher and other teachers. Further, the

Institute carried out inspections of the school and held some authority in respect of discipline.

However, the Court of Appeal found that this was not evidence of control. The managers, of the Society, ran the school, as evidenced by the fact (by example) that when one brother left the Institute to marry, he was re-appointed, by the Society. Further, discipline of itself was not tantamount to control.

Consequently, the court concluded the Institute did not run the school and that it did not exercise effective control over a brother-teacher's carrying out of his job.

Nor did the Court of Appeal accept vicariously liability could be derived on the basis that the brother-teachers were carrying out its purpose and acting in the capacity of members of it. It did not follow that the Institute was engaged in the business of running the teaching at St. William's.

Applying the first stage of *Lister*, the Institute had not undertaken a duty of caring for the pupils and then delegated or entrusted it to the brother-teachers. Those brothers who taught at St. William's were not doing so on behalf of the other members of the Institute.

If the second stage of *Lister* had been reached, then those members, scattered all over the world, did not have the required interest in the business of St. William's such as would create the necessary close connection between them and the torts committed by any brother-teacher on its staff.

Therefore, the Institute was not vicariously liable for the actions of those who committed the abuse.

Comment

This Court of Appeal decision has received a lot of coverage in the national and legal press, chiefly because it is another historical child abuse case, for which there remains a great deal of public interest. However, from a legal prospective, this decision does not progress the law on child abuse. It is quite clear from the judgment of Pill, Hughes and Tomlinson LJs, that this is a fact sensitive decision and thus does not rule

out the possibly, in other cases of those providing of staff, of being found vicariously liable for the acts of its members.

Consequently, while in this case the Institute was exonerated, it does not automatically follow that similar, charitable, organisations will evade liability. Most important of all is that the victims of child abuse continue to be heard and have their complaints aired in court.

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