Browne Jacobson

Vicarious liability – don't overlook the importance of close connection

15 May 2023 Laura Broadhead

In many ways a vicarious liability claim can be more simple to prove than, for example, a professional negligence claim.

After all, there is no need to prove a breach of duty by the Defendant, nor to prove **Bolam** negligence. This can save costly expert fees. In general, a Claimant might also find an employer (and its insurer) to have deeper pockets than a primary tortfeasor.

The test for vicarious liability is well established. It is a two-stage test requiring a Claimant to prove:

1. That there is a relationship of either employment or which is akin to employment.
2. That the wrongful conduct was so closely connected to the acts an employee was authorised to do, that it can fairly and properly be seen as acting in the course of that employment (or quasi-employment).

There have been a host of cases pushing at the boundaries of these tests with the law of vicarious liability described by Lord Philips as "*on the move*" as long ago as 2012 in his analysis in **Various Claimants v Catholic Child Welfare Society** [2012] UKSC 56.

More than 10 years later, last month's decision of the Supreme Court in **Trustees of the Barry Congregation of Jehovah's Witnesses v BXB** [2023 UKSC 15] ("**BXB**") demonstrates that there clearly remains some debate on the application of these tests.

Whilst there was discussion by Lord Burrows (with Lord Reed, Lord Hodge, Lord Briggs and Lord Stephens agreeing) in **BXB** as to stage 1 of the test above, it is the second stage over which discussion centred – the close connection test.

The key to the close connection test is not to assume that opportunity is sufficient to prove a close connection. The mere fact that someone was employed by the Defendant in the same location as the Claimant, giving them opportunity for wrongdoing, is not enough to prove a close connection as affirmed by the Supreme Court in **BXB**.

This distinction in vicarious liability claims is not a new concept. Looking back to **Lister and others v Hesley Hall** [2001] UKHL 22, the then House of Lords flagged that when looking at the abuse of children in care, whilst there would be a sufficiently close connection for a warden, there would not be a close enough connection for a groundsman. Both would be employed by the Defendant, but only one was entrusted to care for children. In other words, where the warden was authorised to care for and be around the children, the groundsman's employment only gave the opportunity for abuse.

BXB

The Claimant – Mrs B - is a former Jehovah's witness. She and her husband became close friends with Mark Sewell and his wife due to Mr Sewell's position firstly as a Ministerial Servant and then an Elder. The families were close, with lots in common and would go for holidays together, eat dinners together, go on days out and attend concerts. Mrs B and Mr Sewell became best friends.

At the end of 1989, Mr Sewell's behaviour changed. He began to abuse alcohol and appeared depressed. He was frequently arguing with his wife and at the same time began to flirt with Mrs B including hugging, holding hands and kissing her as well as confiding in her. Mrs B and Mrs Sewell sought the advice of Mr Sewell's father, another Elder, around this time who said that his son was depressed and needed extra love and support. At first instance, Chamberlain J accepted that if it was not for the fact that Mr Sewell was an Elder and that another Elder had told her to support him, Mrs B's friendship with the Sewell's would have come to an end around this time.

On the morning of 30 April 1990, the two couples were working together door to door evangelising before they went for a pub lunch. Mr Sewell drank wine and beer and had an argument with his wife before storming off when she threw a drink at him. Mr B later found him saying he wanted a divorce. When Mr B reminded Mr Sewell that divorce was only allowed for Jehovah's Witnesses where there had been adultery, he stated that he would convince his wife that was made out.

Later that afternoon, at the Sewell house, Mr Sewell went to a back room. His wife asked Mrs B to check on him. Once there he pushed Mrs B to the floor and raped her. He was convicted of this rape in July 2014.

At both first instance and at the Court of Appeal, the Court agreed with the Claimant's position that both stages of the test for vicarious liability were made out. The Supreme Court disagreed on stage 2.

In coming to their decision, the Supreme Court noted:

1. The rape did not occur when Mr Sewell was carrying out any of his activities as an elder. It was in his own home and he was not working.
2. At the time of the rape he was not exercising control over the Claimant due to his position as an elder. They had a close relationship and when she went into the room, it was to give him emotional support – their friendship was the driving force for her being in the room, not his role as an elder.
3. That it was unrealistic to suggest that Mr Sewell never took off his "metaphorical uniform". To suggest that he never did so in his dealings with Mrs B would be to suggest that, for example, if he were driving Mrs B to the airport for a holiday and there was an accident from his negligent driving, the organisation would be vicariously liable.
4. Although his role was a "but for" cause of their continued friendship, that is not enough to satisfy the test.
5. This was not equivalent to the gradual grooming of a child. It was a violent and appalling rape which was not an obvious progression from the previous flirting but a shocking one-off attack. In any event, the flirting was more due to their friendship than his role as an elder in any event.
6. His role or involvement in the general practice of kissing female members on the lips when joining the congregation was not relevant.

Close connection test

This case is a timely reminder that when dealing with vicarious liability claims, it is important not to assume that a close connection will be established once employment is proven. There are many examples of relationships in which opportunity might be proven but close connection will require more careful consideration, such as:

- The groundskeeper, as described above in **Lister**
- A colleague, acting outside of their expected role
- The teacher, who met a Claimant as a family friend
- A youth club volunteer, who is also a next-door neighbour

It is important therefore in all vicarious liability claims that litigants turn their mind expressly to close connection and consider:

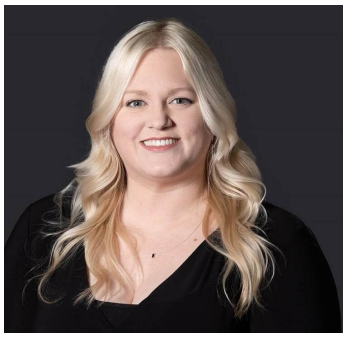
1. What was the tortfeasors role?
2. What were their expected tasks within that role?
3. Did they step outside of their role to commit the tort?
4. Did their role give mere opportunity?

For more information about this decision, or vicarious liability generally, please contact Laura Broadhead.

Key contact

Laura Broadhead

Senior Associate



laura.broadhead@brownejacobson.com

+44 (0)115 908 4818

Related expertise

Abuse and social care claims

Children's services

Claims and liability in the education sector

Dispute resolution and litigation

Employers and public liability

Employment practices liability claims

Insurance claims defence

Social care services