

SKX-v-MANCHESTER CITY COUNCIL [2021] EWHC 782 (QB)

In the absence of fault, a local authority was not liable for sexual assaults committed by an employee of the private residential care home at which it placed the claimant. The relationship between the abusive employee and the placing authority was not akin to employment and the duty of care owed by the authority to the claimant was not non-delegable.

In 1989 C, a child in D's voluntary care under s.2 of the Child Care Act 1980, had been placed by D at the Bryn Alyn Community, a privately owned community of Children's Homes situated in North Wales. During his placement C was sexually abused by John Allen, the Chief Executive of the company that owned and operated Bryn Alyn (Allen was subsequently convicted of assaulting C).

C was one of a number of claimants who brought successful damages claims against the company in 2001 but who did not recover damages because the company's insurer relied upon a clause which operated to exclude liability for the acts of any person who was to be regarded as "in effect the company, as opposed to the acts of those who are mere employees" (see **KR & others-v-Royal & Sun Alliance plc [2006] EWCA Civ 1454**), which included Allen.

This claim, one of a group of similar claims issued in 2017, was brought against MCC, the local authority to whose voluntary care he had been committed and which placed him at Bryn Alyn under s.21 of the 1980 Act, on the ground that it was liable without fault for assaults committed by Allen (i) because it was vicariously liable for his conduct and (ii) because the duty of care it owed the claimant was non-delegable. It was not alleged that MCC had been negligent.

Cavanagh J dismissed the claim.

Vicarious liability

It was clear that more than one person could be vicariously liable for the same tortious conduct. The fact that the company would have been vicariously liable for Allen's conduct did not in itself mean that MCC was not [36]. The cases of **Christian Brothers [2012] UKSC 56**, **Cox-v-Ministry of Defence [2016] UKSC 10** and **Armes-v- Nottinghamshire County Council [2017] UKSC 60** had extended the law of vicarious liability beyond the traditional bounds of the employer/employee relationship: "It is now clear in light of these authorities that there has been an incremental change in the scope of the law of vicarious liability, so that it can arise in the context of relationships that are not employment but which are sufficiently akin to employment to make it just to impose such liability" [40].

In **Christian Brothers** Lord Phillips had identified five “policy reasons” or “incidents” which usually make it fair, just and reasonable to impose vicarious liability upon an employer for the torts committed by an employee in the course of his employment [42]. However, as the Supreme Court made clear in **Barclays Bank-v-Various Claimants [2020] UKSC 13**, there had been a tendency to elide the five incidents identified in Christian Brothers and the principles which should guide the development of the law of vicarious liability into relationships other than employment [43]. “The central question” is whether the relationship between the wrongdoer and the person who is alleged to have vicarious liability is akin to employment. “If the wrongdoer is carrying out an independent business of his own or that of a third party, then there will be no vicarious liability and there will be no need to consider the five incidents” [50].

The relationship between MCC and the company was “a classic client/independent contractor relationship” [53]. The company was an independent business with a well-defined corporate structure. It looked after children for a large number of local authority clients and entered into separate commercial agreements with their clients in order for children to be placed in the Community. The company was not part of MCC or incorporated into MCC’s organisational structure [53]. Unlike the foster carers in **Armes**, Allen was running a recognisably independent business [57]. This was not a borderline case and it was not necessary to consider the 5 incidents. MCC was not vicariously liable for the tortious conduct of Allen [54].

Non-delegable duty

In **Armes** the Supreme Court had considered whether a local authority owed a non-delegable duty to ensure that reasonable care was taken for the safety of children in care when they were placed in the care and control of foster parents, under s.21 of the 1980 Act. The Supreme Court rejected the argument, holding that the statutory regime did not impose responsibility upon the authority for the day-to-day care of the child whilst in the placement, or a duty to ensure that no harm came to the child in the course of that care [63].

Lord Reed had said in **Armes** that “the critical question” was whether the function of providing the child with day-to-day care, in the course of which the abuse occurred, was one which the local authority were themselves under a duty to perform with care for the safety of the child, or was one which they were merely bound to arrange to have performed, subject to a duty to take care in making and supervising those arrangements. That was the critical question in this case too, which concerned a placement made under the same statutory provision [82]. The answer to that question, for the same reasons as in **Armes**, was that the authority was not itself under a duty to perform the relevant function. Those reasons were that:

(i) At common law, parental powers and duties (which, when the child was in care, were vested in the local authority by s.10 of the 1980 Act) involved the exercise of reasonable care only; there was no authority supporting the suggestion that parental duties extended to ensuring that reasonable care was taken “by anyone else to whom the safety of the children may be entrusted”; such a duty on the authority would create conflict and give rise to a form of state insurance for wrongdoing [86].

(ii) The implication to be drawn from the use of the word “discharge” in s.21 of the 1980 Act was that the placement of the child constituted the performance of the local authority’s duty to provide accommodation and maintenance. It follows that the local authority did not delegate performance of that duty to the persons with whom the child is placed [92]. The fourth of Lord Sumption’s criteria for establishing a non-delegable duty in **Woodland-v-Essex County Council [2013] UKSC 66** was therefore not met, and the duty of care was not non-delegable [105].

Steven Ford QC

Steven Ford QC appeared for the defendant with Nicholas Fewtrell of Deans Court Chambers, Manchester, instructed by Catherine Dorey of Manchester City Council Neighbourhood Services