SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 36
PD216/21
PD219/21

Lord Justice Clerk
Lord Malcolm
Lord Pentland

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the reclaiming motions

by

C & S

Pursuers and Reclaimers

against

(1) NORMAN SHAW and (2) LIVE ACTIVE LEISURE

Defenders and Respondents

Reclaimers: G Middleton KC; Bergin; Slater & Gordon, Solicitors
First Defender: No appearance
Second Defenders and Respondents: L Shand KC; Pugh KC; Clyde and Co, Solicitors

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13 October 2023

Introduction

[1] The issue that arises for determination in this reclaiming motion (appeal) is whether an employer should be held vicariously liable for sexual abuse perpetrated upon two children by one of their employees between 1983/84 and 1986. There is no dispute that the

employee, Norman Shaw, sexually abused the reclaimers. He has been convicted and sentenced in respect of doing so and is serving a sentence in HMP Perth. There is, further, no dispute that the second defenders employed him as Head Caretaker at Bell's Sports Centre in Perth for a period during which abuse occurred; and that some of the abuse occurred on the second defenders' premises. The case turns on whether there is a sufficiently close connection between the first defender's employment with the second defenders and the abusive acts in question. The case went to proof on liability, restricted to issues of whether abuse of S occurred (a) in the reclaimers' home; (b) in the caretaker's house at Bell's Sports Centre; and (c) within Bell's Sports Centre; whether abuse of C occurred in locations (a) and (b); whether the first defender is liable to make reparation for said abusive acts and whether the second defender is vicariously liable for any abuse in locations (b) and (c)?

Background

[2] The Lord Ordinary heard evidence from both reclaimers and the first defender. The reclaimers resided with their single mother and two older half-brothers. Their mother knew the first defender, who ran the local garage in the 1970s when they first became acquainted. It was not disputed that his purpose in fostering the friendship was to gain access to the reclaimers with a view to abusing them sexually. He often visited the family home and brought presents for the children. He ran a boys' football team in which one of the reclaimers was involved. In short, both reclaimers spoke to abuse occurring in the family home, and in the caretaker's house which the first defender had occupied as a condition of his employment with the second defenders. The abuse began in 1979/1980 and continued until about 1985/1986. They both regularly accompanied the first defender to the sports

centre, during hours when it was open to the public and otherwise. This would be two or three times a week during school holidays and once a week during term time. They would help him set out equipment, setting up badminton nets and stands; fetching bags of footballs; and so on. The most serious abuse occurred in the caretaker's house. The first defender gave evidence admitting the abuse libelled in the criminal proceedings.

[3] The precise dates when the first defender was employed by the second defenders could not be ascertained, but HMRC employment records show that he commenced employment as Head Caretaker in the tax year 1983/84 until July 1987. A job description for the Head Caretaker role from 16 October 1987, noted seven duties: supervision and direction of staff under his control; setting out/dismantling equipment; controlling stock; general security of the building; routine maintenance of equipment, plant and machinery; enforcing adherence by users of the sports centre to its rules; and other duties as defined by his manager. Under the heading "Conditions of Service", the following is noted:

> "(1) The post is a residential one and the postholder is required to live in the accommodation provided …
> (2) The Head Caretaker is required to deal with emergencies outwith normal opening hours of the Centre."

The Head Caretaker's standard working hours were 8am until 5pm. However, it was noted that hours may vary and "include evening and weekend duties".

Lord Ordinary's decision

[4] The Lord Ordinary was satisfied that abuse occurred in the family home and the caretaker's house. He did not make a specific and separate finding that abuse occurred in the sports centre, and said that he did not consider it necessary for the purposes of the litigation to make findings as to the exact nature and extent of the abuse. However, he went on to find that the first defender had "abused the reclaimers as specified in the claim". The

latter finding was the subject of a cross- appeal, on the basis that this finding went beyond the agreement of parties as to the scope of the proof. The parties agreed therefore that this finding should be substituted with the following:

> "Whilst no finding is made on the precise nature and extent of the abuse perpetrated upon the reclaimers by the first defender, it has been established (i) that the first defender sexually abused the reclaimers in their family home at an address in …, Perthshire and in the caretaker's house at Bell's Sports Centre; and, (ii) that, without prejudice to the ability of the Lord Ordinary to hear evidence regarding the precise nature, frequency and extent of the abuse at any further Proof on the question of causation, quantification and apportionment of damages, the abuse carried out in the caretaker's house was, in general terms, of a more serious nature than that carried out in the family home.".

Being satisfied that such a finding accorded with the conclusions of the Lord Ordinary as a whole, and justified on the evidence, we allowed the substitution.

[5] Parties presented the case to the Lord Ordinary under reference to the test specified in *Lister & Ors* v *Hesley Hall Ltd* [2002] 1 AC 215. This required the Lord Ordinary to address first whether the first defender was in a relationship of employment with the second defenders, or akin to such a relationship; and second, if so whether there was a sufficiently close connection between the nature of the employment and the abusive acts such as to render it fair, just and reasonable to attribute vicarious liability therefor to the second defenders?

[6] The Lord Ordinary considered that the first stage of the test was plainly satisfied. In considering the second stage, the issue was whether there was a sufficiently close connection between the abusive acts and what he, as an employee of the second defenders, was authorised to do. The Lord Ordinary had regard to the first defender's specific duties and responsibilities as Head Caretaker. Three of these were of particular relevance: the setting out/dismantling of sports equipment; his security duties, including carrying out security rounds; and the duty requiring him to enforce the rules. He rejected the submission that any

of these created or significantly enhanced the risk of harm to the reclaimers (*Maga* v *Archbishop of Birmingham* [2010] 1 WLR 1441, at para 53, following *Jacobi* v *Griffiths* (1999) 174 DLR 71, at para 79). They did not place the first defender within close proximity to the reclaimers. Referring to the language of Longmore LJ in *Maga*, he considered that the "progressive stages of intimacy" had already taken place by the time the first defender commenced his employment, the abuse having begun in 1979 by virtue of his relationship with the reclaimers' mother. Not even "but for" causation could be established. It was not clear that the first defender's employment would have placed him in close isolated contact with children. The circumstances were comparable to those in *Jacobi*, where the Canadian Supreme Court held there was no vicarious liability. The claimants in *Jacobi* were, in fact, on stronger ground. For example, there, the abuser was encouraged to form relationships with children at the club. The first defender's job description did not require this of him. He was not required to associate with users of the sports centre on a private basis. Similar to *Jacobi*, the abuse could only be perpetrated when he was able to "subvert the public nature of his duties". In terms of the reclaimers' attendance at the caretaker's house, this was not closely connected with anything that the first respondent was authorised to do.

[7] A distinguishing feature of the present case was that the abuse commenced prior to the first defender's employment. The circumstances of *BXB* v *Trustees of the Barry Congregation of Jehovah's Witnesses* [2023] 2 WLR 953, relied upon for the reclaimers, were very different.

Submissions

Reclaimers

[8] The law had recently been authoritatively restated in the UK Supreme Court judgment in *BXB* para 78.

(i) The test of "close connection" is "whether the wrongful conduct was so closely connected with acts that the tortfeasor was authorised to do that it can fairly and properly be regarded as done by the tortfeasor while acting in the course of the tortfeasor's employment or quasi-employment".

(ii) That test "requires a court to consider carefully on the facts the link between the wrongful conduct and the tortfeasor's activities".

(iii) That there is a causal ("but for") connection is insufficient.

(iv) Abuse by someone "employed or authorised to look after the child" will generally satisfy the test.

(v) Acting under a "personal vendetta" will generally not satisfy the test.

(vi) The same 2-stage test applies to sexual abuse cases, as it does in any other case – no further tailoring thereof is required.

(vii) The legal test is a product of the policy and there will generally be no need to examine that underlying policy. In "difficult cases", where the circumstances have not previously been authoritatively judicially decided one may finally check the justice of same, by considering whether that outcome is consistent with the underlying policy.

(viii) The "core idea" or policy underlying the test is that, since an employer benefits from the activities of a person who is integrated into its organisation, he should bear the cost of wrongs committed by that person when carrying out those activities.

[9] In addition,

(ix) Judges should identify, from the previously decided cases, the factors that point towards or away from vicarious liability; and

(x) It is helpful to focus on the "field of activities" entrusted to the employee i.e. "what was the nature of his job", a phrase which covers a wider range of conduct than acts done solely in furtherance of employment (*Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677 at paras 36 and 44).

[10] Drawing on other relevant authorities, it was submitted that the conferral on the abuser of authority over the victim is not the "touchstone" of vicarious liability, and whilst such a conferral will generally satisfy stage 2 of the test, it is not a prerequisite. The creation or significant enhancement of the risk that the abuse might occur, by virtue of the circumstances of the employment, was not sufficient of itself for vicarious liability, but could be an important factor. Opportunity to commit abuse which arises as a result of the employment is not enough, but a sufficient and necessary connection can exist where "the employee used or misused the position entrusted to him in a way which injured the third party". Further, a close connection can exist where the "progressive stages of intimacy" were only possible because of an abuser's employment status and authority.

[11] As to the facts of the case, the focus of the reclaimers' submissions was on the contractual obligation on the first defender to reside in the caretaker's house and the abuse perpetrated there. It was submitted that this abuse was of a significantly more serious nature and thus severable from the previous abuse in the family home. The Lord Ordinary ought to have found a close connection between the abuse and the first defender's occupation of the caretaker's house. He concentrated on three specific duties at the expense of ignoring the contractual duty to live in the house, which was imposed "for the better performance of his duties": he lived there so he could do his job better. This is the aspect of

his employment which connected his job to the abuse carried out in the house. The unchallenged evidence of the reclaimers was that abuse perpetrated in the family home was "low-level" and "opportunistic", whereas that in the caretaker's house was "much higher level" and "much more serious". The Lord Ordinary failed to narrate these aspects of the evidence and had thus failed to take proper advantage of seeing and hearing witnesses. The abuse in the family home fell to be treated simply as background (*BXB).* The fact that previous abuse occurred did not destroy the subsequent close connection between the separate and more extreme abuse and the capacity in which the first defender resided at the locus. That the abuse admittedly started within the familial setting does not obliterate or dilute the closeness of the connection between the subsequent and more serious abuse in the caretaker's house and the authorised acts associated with that position.

[12] Had the Lord Ordinary properly considered the evidence, he would have recognised that prior interactions in the sports centre were all part of the progressive and abusive process. His employment "gave him the status and opportunity to draw the [reclaimers] into his sexually abusive orbit by ostensibly respectable means connected with his employment" (*Maga*, para 48). The more serious abuse was an "objectively obvious progression" from the interactions within the sports centre (*BXB*, para 78). The Lord Ordinary failed to appreciate the relevance of this evidence of grooming when he was actually at work to the close connection test.

[13] The following factors were demonstrative of a close connection:

(i) The first defender abused his position as Head Caretaker to groom the reclaimers in the course of his duties.

(ii) His employment required him to live in the caretaker's house "for the better performance" of his duties, thus for the second defenders' benefit.

(iii) He was permanently present onsite.

(iv) He was a quasi-managerial member of staff having responsibility for other caretakers.

(v) It followed from (ii) that the abuse was perpetrated while in the course of an activity carried on for the second defenders' benefit.

(vi) The abuse was committed on the second defenders' premises (unlike in *BXB* and *Jacobi*).

(vii) There was much more than "but for" causation or the simple creation of opportunity or enhancement of risk.

(viii) The first defender abused his special position. The "progressive stages of intimacy" were only possible because of his status and obligations as Head Caretaker.

(ix) His abuse of the reclaimers in the caretaker's house was a wrongful and unauthorised mode of doing some act authorised by the second defenders, in that he acted in breach of his contractual obligation to live in the house.

(x) Residing in the caretaker's house was part of the first defender's role. Therefore, he had not subverted the public nature of his role when abusing the reclaimers there.

(xi) He failed in his ultimate duty to keep sports centre users safe.

[14] The only factors militating against a finding of vicarious liability were that the abuse started prior to employment, and that the reclaimers were not directly entrusted to the first defender's care by the second defenders. It would be consistent with underlying policy considerations for vicarious liability to be imposed.

Second defenders

[15] The Lord Ordinary was entitled to reach the conclusions he did on the second stage

of the test based on the evidence before him. His conclusions were plainly correct and the Supreme Court had since confirmed his approach in overturning the Court of Appeal's decision in *BXB*, which had been heavily relied upon by the reclaimers at first instance. The grounds failed to identify (i) a material error of law; (ii) that any critical finding of fact was without basis in the evidence; (iii) any demonstrable misunderstanding of relevant evidence; or (iv) a demonstrable failure to consider relevant evidence (*Woodhouse* v *Lochs and Glens (Transport) Ltd* 2020 SLT 1203, Lord President (Carloway), para [32]).

[16] The issue before the Lord Ordinary was whether the second stage, the close connection test, was satisfied. In *Bazley* v *Curry* (1999) 174 DLR 45 and *Lister* an approach based on a superficial connection to the employment was rejected; a mere connection in time or in place was insufficient. Placing the individual in proximity to the victim made it fair for the employer to bear the risk. In child abuse cases there was a focus on whether a relationship of power or dependency existed (*Bazley* at para 46). The factors that the Canadian Supreme Court relied on in *Jacobi* to exclude vicarious liability, including the absence of any requirement to be alone with children off club premises outside club hours or to entertain children at home after hours, echoed in the present case. There was a lesser connection here. The first defender's job did not place him in contact with the reclaimers. His contact with them was the result of his relationship with the family. The reclaimers' mother entrusted the first defender with their care. This was what created the "progressive stages of intimacy".

[17] The reasons given in *BXB* for determining that there was no vicarious liability applied with equal force to the present case. First, the first defender was not carrying out any activity on behalf of the second defenders when abusing the reclaimers in the caretaker's house. Second, the power he exercised over the reclaimers was by virtue of his

relationship with their mother; she had entrusted their care to him. Third, for the same reasons given in *BXB*, it was unrealistic to say that the first defender was "never off duty" or that he "never took off his metaphorical uniform". Fourth, as the Lord Ordinary recognised, not even "but for" causation was made out in this case. Fifth, the events were the result of the first defender befriending the reclaimers' mother and grooming them prior to commencing his employment.

Analysis and decision

[18] We do not take issue with any aspect of the submissions in law made for the reclaimers. We accept, of course, the contention that authority over the abused individual is not a "touchstone", of vicarious liability, and that a wrongdoer need not have stood *in loco parentis* in respect of his victims for liability to attach. The circumstances which present themselves are of such infinite variety that there can be no one test, nor one list of factors which will always be relevant. As Lord Nicholls noted in *Dubai Aluminium Co Ltd v Salaam*, [2003] 2 AC 336, para 26:

> "This lack of precision [in the test for vicarious liability] is inevitable, given the infinite range of circumstances where the issue arises. The crucial feature or features, either producing or negativing vicarious liability, vary widely from one case or type of case to the next. Essentially the court makes an evaluative judgment in each case, having regard to all the circumstances and, importantly, having regard also to the assistance provided by previous court decisions. In this field the latter form of assistance is particularly valuable."

[19] That a factor was present in one case where vicarious liability was established does not mean that the same factor must always be present; that a factor was absent in a case where liability was established does not mean that its presence in another may not be highly relevant to the establishing of liability.

[20] However, whether the abuser was in a relative position of authority over the abused, and had been placed so by his employer, may be an important element in assessing vicarious liability. Here the reclaimers were brought into the orbit of the first defender by his effectively being put in the position of babysitter, by their mother. For most of his interactions with the reclaimers he was in reality *in loco parentis;* the situation did not come about because of his employment, the nature of his duties; or his occupation of the caretaker's house. Looking at the evidence in this case in its entirety, we are unable to say that the Lord Ordinary reached the wrong decision. It is clear to us that this is a case where the evidence justified the conclusion that the second stage of the test had not been met. The Lord Ordinary was fully entitled to conclude that the conduct was not so closely connected with authorised acts that it could fairly and properly be regarded as done in the course of the employment. Virtually none of the factors identified in the reclaimers' summary of the law can be identified in the present case.

[21] The submissions for the reclaimers hinge on taking a partial and incomplete view of the facts of the case, and in particular the elements which facilitated or enabled the abuse. A critical element of the reclaimers' submissions was that the aspect of his employment which connected his job to the abuse carried out in the house was the contractual requirement obliging him to live in the house for the better performance of his duties. However, that requirement, as part of his contract of employment, and the occurrence there of abuse which may be considered more serious than that which had occurred previously within the home, cannot be assessed in isolation from the whole circumstances in which the first defender came to know the reclaimers; came to be trusted by them, and their mother; came to spend time with them, to have the care of them; and to be able to perpetrate serious abuse against them. The circumstances which made these elements possible all point away from a

conclusion that it would be fair, just and reasonable to attach vicarious liability to the abuse. In fact the circumstances all point to the fact that it was the relationship with the reclaimers' mother through which he came to know the reclaimers; came to be trusted by them, and their mother; came to spend time with them, to have the care of them; and to be able to perpetrate serious abuse against them. We accept that there was a degree of grooming of the reclaimers by the first defender when he was at his place of work, but the "progressive stages of intimacy", that is, the grooming of the reclaimers, had commenced and progressed substantially before the first defender was employed by the second defenders. The first defender did not obtain any authority over the reclaimers by virtue of his role as head caretaker, it all derived from his familiarity and ingratiation with the family. The risk of his sexually abusing the reclaimers was not created, nor significantly enhanced, by what he was authorised to do by the second defenders. Rather the behaviour at the caretaker's house was a progression from the lesser abuse perpetrated in the family home, and a regrettably familiar form of grooming of those who were already within his orbit and sphere of influence. Indeed, the reclaimers gave evidence that they had been groomed by the first defender since the beginning of their relationship with him (e.g. Appendix Bundle, p 28-29 and 81), something which was thus directly attributable to his relationship with their mother. He had no special responsibility towards child users of the sports centre, and any special responsibility he had towards the reclaimers, in particular when they accompanied him there, arose from his relationship with their mother and the fact that she entrusted the reclaimers' care to him when she was working. There was sufficient evidence available to suggest that the reclaimers had been entrusted to his care whenever they attended the caretaker's house or accompanied him around the sports centre. Both reclaimers gave

evidence to this effect (e.g. *ibid*, p 47, 54, 62, 70-71, 93 and 114). They were never at the house without their mother's knowledge.

[22] In the language used by Lord Burrows in *BXB* (para 78), the more serious sexual abuse was an "objectively obvious progression" from the grooming and less serious abuse which occurred within the family home. We reject the submission that the circumstances were in any way comparable to the evidence in *BXB* about the "flowering" of a friendship which Lord Burrows described as merely background: the circumstances are entirely different. *BXB* involved a single episode of rape on an adult by a friend who was a spiritual leader in the congregation of which they were both members. Unlike the present case, the individual in question had not had the care of his victim in his charge; the incident was a sudden and shocking attack by one friend on another. For these reasons the friendship was only relevant as background. There was no progression from lesser to more serious conduct, and no evidence of "grooming" of the kind which exists in the present case. In *BXB* the court specifically noted that what happened was not equivalent to the gradual grooming of a child for sexual gratification by a person in authority over that child (para 78).

[23] In these circumstances the reclaiming motions must fail.