

PERSONAL INJURY BRIEFING

Case summary update

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Dual vicarious liability & *St Williams* litigation

Most lawyers regarded dual vicarious liability as being theoretically impossible before *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2006] QB 510. However, in that case, the Court of Appeal held that the negligence of a “borrowed” employee rendered both his employer and another contractor simultaneously vicariously liable.

A two judge court, May and Rix LJ, reached this decision via what appears to be slightly different routes. May LJ thought that the test was essentially a matter of control. Rix LJ adopted what appears to be a broader and more flexible test. This he stated in the following terms: is the employee in question so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence? However, even on his analysis, vicarious liability could only derive from “control” of the employee’s duties as has been emphasised by the later case of *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2008] EWCA Civ 1257. In the *Biffa* case, the court drew a distinction between a defendant exercising supervision over a borrowed employee and exercising control over him. The former would not give rise to vicarious liability whereas the latter would.

The issue of dual vicarious liability has recently been considered by HHJ Hawkesworth QC in a judgment handed down in the *St William’s Group Litigation*. This Group Action, described as one of Britain’s biggest sex abuse compensation claims, involved 170 claimants alleging abuse between 1965 and 1992 at St William’s, an institution that was an approved school and then a community home. The 35 defendants fell into three broad categories: the first, the so-called Middlesbrough Defendants, consisted of a diocesan children’s society and a number of priests and bishops sued in a variety of representative capacities; the second consisted of various current members of a lay religious order, the De La Salle Order, who were sued in personal and representative capacities (“DLS Defendants”); the third consisted of one defendant, a former Brother and former headmaster of the school, who had been convicted of serious sexual offences against boys at St William’s.

The facts are very complicated but in summary, the De La Salle Order had originally started working at St William’s, which was then a reformatory school, in 1912 as a result of its agreement with the Bishop of Middlesbrough. Under that agreement, the Order agreed to assume direction of, and to staff, St William’s and until 1933 the Order, through its Provincial, had the power to appoint staff to work there. In 1933, St William’s became an approved school and until 1973 its management was in the hands of a committee of managers, who had statutory responsibilities for the school’s operation and to whom the headmaster reported. As part of their obligations, the managers became the staff employers. On its changeover to a community home in 1973, the liabilities of the managers at St William’s were statutorily transferred to a children’s society, MDRS, for which the Middlesbrough Defendants were responsible. This society became the organisation statutorily responsible for the home’s management, which was delegated to a board of managers. Several years later, CCWS, a new diocesan children’s society, stepped into the shoes of the MDRS. Both MDRS and CCWS were the employers of all staff, including Brothers, at St William’s. However throughout the period, the Brothers from the Order worked at St William’s and occupied its senior teaching positions, including that of headmaster, and the Order’s Provincial regularly visited.

One of the preliminary issues the Judge was required to decide was whether the DLS Defendants were responsible in law for any of the abusers’ acts or omissions. The claimants sought to argue that there was dual vicarious liability by both the Middlesbrough and DLS Defendants. Their argument was there was a special relationship (i.e. a form of “quasi-employment”) between the Provincial and a Brother by reason of the Order’s hierarchical nature, the vow of obedience taken by each Brother, and the fact that the Order received the Brother’s salary. They also argued that members of the Order, which is an unincorporated association, would be liable as co-principals for the abuse. On the other hand the Middlesbrough Defendants, who denied any responsibility for the actual operation of St William’s, contended that the DLS Defendants were solely liable for essentially the same reasons. Finally the DLS Defendants argued, relying upon the Scottish case of *M v Hendron* [2007] SLT 467, that the Order never operated St William’s and that the Order was not therefore vicariously liable for any abuse that took place.

In rejecting the arguments of the claimants and the Middlesbrough Defendants, the Judge re-affirmed the “control” test for vicarious liability. He held that the DLS Defendants’ lacked “any relevant right to control” the way in which the Brothers worked at St William’s. The fact that

the Order's Provincial exercised supervision was not, in his view, a sufficient basis for such liability.

The Judge also rejected any attempt to extend liability on the basis that the other Brothers were co-principals of the abuser. Given the Brothers' employment status and the control exercised, or capable of being exercised, over them by St William's managers in accordance with their statutory duties, it could neither be fair nor just to hold the Order vicariously responsible for the actions of Brothers that were neither authorised nor condoned.

Limitation following *A v Hoare*

The case of *A v Hoare* significantly changed the law on limitation in cases involving trespass to the person. The House of Lords ruled on sections 11, 14 and 33 of the Limitation Act 1980 ('the Act') and made it easier for claimants to sue for damages after limitation had expired. One of the key questions since *Hoare* has been the extent to which a 'more liberal' regime has been introduced and how the discretion will be exercised in practice.

In the case of *Hoare* a victim of a rapist was prevented from suing him because her claim was time barred. He had won the lottery whilst in prison. She appealed to the House of Lords which concluded that 'breach of duty' in s. 11 was wide enough to encompass deliberate acts of assault. The consequence of the decision is that a court may now exercise its discretion under s. 33 of the Act to disapply the limitation period if it is equitable to do so.

Prior to *Hoare*, the claimant's psychological state in consequence of sexual abuse was to be taken into account when considering the claimant's date of knowledge under s.14 of the Act (*KR v Bryn Alyn Community (Holdings) Ltd*). In *Hoare* it was decided that the question when the claimant could reasonably have been expected to institute proceedings, taking into account his psychological state in consequence of the injury, was to be considered under s. 33.

How is the s. 33 discretion to be exercised? Lord Brown gave practical guidance: (1) Whether the defendant can investigate allegations sufficiently for there to be a reasonable prospect of a fair trial will depend upon a number of factors, not least when the complaint was first made and with what effect (2) If a complaint has been made and recorded, and particularly if the accused has been convicted then the discretion is likely to be exercised in favour of the claimant (3) If a complaint comes out of the blue with no apparent support for it (other than perhaps that the alleged abuser has been accused or even convicted of similar abuse in the past), it may be more difficult and (4) A fair trial, which includes a fair opportunity for the defendant to investigate the allegations, is in many cases likely to be found impossible after a long delay.

What has happened post *Hoare*? Perhaps the most instructive decision has been that of the Court of Appeal in *AB and Others v Nugent Care Society*.

In *Bryn Alyn* the Court of Appeal set out the principles to be applied when considering s.33. In *AB* the Court of Appeal said these remain valid subject to two amendments in the light of *Hoare* which make life easier for claimants. First, it is no longer necessary to establish systemic negligence. Secondly, evidence of the claimant of inhibition as a result of the abuse is now relevant to the exercise of the discretion. This stresses the broader nature of the discretion and that it does not focus solely on whether there has been prejudice to the defendant.

The Court of Appeal also commented on Lord Brown's 'valuable' guidance on the exercise of the s.33 discretion. They did not think that Lord Brown disagreed that the two changes made it easier for claimants but that he was simply sounding a cautionary note which would be of particular relevance on the facts of some cases.

In addition to the above, the Court of Appeal stated that the exercise of the s.33 discretion was an 'exceptional indulgence' because, but for its exercise, the claim remained time barred. However they said that it was only exceptional for that reason. The discretion was wide and unfettered.

The guidance given in *Bryn Alyn* suggested that a judge should decide limitation by reference to the pleadings and written witness statements and the extent and content of discovery. In *AB* the Court of Appeal said that a judge may consider that it is not feasible to decide the issues in this way and that it is desirable that such oral evidence as is available is heard. When a judge is considering the cogency of the claimant's case the oral evidence may be extremely valuable as it may throw light on the prejudice suffered by the defendant and the extent to which the claimant was reasonably inhibited in commencing proceedings.

The Court of Appeal also clarified that the prejudice to the defendant of losing a limitation defence was not relevant. The relevant prejudice was that which affected the defendant's ability to defend.

In terms of practical guidance, the Court of Appeal said that effort should be made to ensure that the claimant did not have to give oral evidence at both a preliminary hearing and at trial. Either the same judge must deal with both hearings or he or she should decide the preliminary point and then either stop or continue straight on with trial.

Claimants will undoubtedly take heart from the fact that the Court of Appeal has confirmed that it is now easier to persuade a court to exercise its discretion under s.33. The Court said that the difficulties in establishing assault, vicarious liability, causation and quantum 'can be overstated'.

On the other hand, particularly helpful for defendants is the finding that the court must consider not just the claimant's evidence but what evidence would or might have been available to the defendant at an earlier stage.

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