

Granting power and trust to a non-employee may bring vicarious liability

Priests are not employees. So can the Church body that appointed them be held vicariously liable for torts they commit? In recent times, this has taken the form of sexual assault. Traditionally, vicarious liability has not attached to Defendants that are not employers. In the recent case (08.11.11) of JGE v The English Province of Our Lady of Charity and the Trustees of the Portsmouth Roman Catholic Diocesan Trust [2011] EWHC 2871 (QB) MacDuff J found that the Trustees could be held liable despite not employing a priest, who had sexually assaulted the Claimant. This decision has relevance for personal injury claims against tortfeasors that are not employees e.g. police officers.

There has some interesting case law in this area recently: MAGA v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church [2010] EWCA Civ 256, Viasystems (Tyneside) Ltd v Thermal Transfer Ltd and others [2005] EWCA Civ 1151 and, the Canadian Supreme Court decision of Bazley v Curry 174 DLR (4th) 45. But this is first time a Court has had to decide this issue.

Bazley was a case of a sexual assault by a priest. It focused on whether the “employer’s enterprise and empowerment of the employee materially increased the risk of sexual assault and hence the harm”. It highlighted employees’ “special opportunities for wrongdoing” and the “existence of a power and dependency relationship”. A common thread was deterrence of the employer who “has introduced the risk of the wrong” (Bazley) and “the employer is encouraged to control that risk” (Rix LJ in Viasystems). Interestingly, MacDuff J also referred to two authorities (Privy Council and South African) where a police officer was held to incur vicarious liability.

These authorities concerned limb 2 of the test for vicarious liability – whether the tort fell within the scope of the employment. The leading authority is Lister v Hesley Hall [2002] 1 AC 215. The question is “whether the (employee’s) torts were so closely

connected with his employment that it would be fair and just to hold the employer vicariously liable". This is known as the "close connection" test.

MacDuff J was asked solely whether the Trust satisfied limb 1 of the test – was the relationship between the Trust and the priest one to which vicarious liability can be attached. Traditionally, this has been a relationship of employment. However, the Courts have made allowance for independent contractors and self-employed tortfeasors where there are relationships characterised by control, organisation or supervision (e.g. Short v JW Henderson (1946) 62 TLR 427).

In this case the Trust submitted that it lacked the right to dismiss, there was little control or supervision, and no wages or formal contract. But his Lordship noted that the priest was appointed by the Trust in order to do its work. He was given their full authority to fulfil that role. He was sent into the community with "free rein". He was trained for that purpose. "He had immense power handed to him by the Defendants. It was they who appointed him to the position of trust which... he so abused".

Essentially, what MacDuff J decided is that, in light of the Bazley and MAGA decisions, the "close connection" test applies to limb 1 as well as limb 2 – i.e. was the sexual assault so closely connected with the relationship between the employer and employee it would be fair and just to impose liability. He said that the Trust had "set in motion" the activities of the priest in pursuance of a relationship into which the Trust had entered for their own benefit. They had introduced the risk by granting him power and trust.

Following this MacDuff has widened the scope for vicarious liability by saying "the extent to which there is control, supervision, advice and support will be of relevance but not determinative". What is of vital importance is the connection between the relationship and the tort. What might draw similarities where a body that does not employ a tortfeasor nonetheless grants them authority and empowers them to go into the community in a position of trust e.g. not just police officers, but also self-employed medical or mental health professionals.