

Armes v Nottinghamshire County Council

[2017] UKSC 60

Vicarious liability is (still) on the move...

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Introduction

1. The Supreme Court has today handed down judgment in *Armes -v- Nottinghamshire County Council* [2017] UKSC 60, an appeal dealing with 'non-fault' liability of a defendant (here, a local authority) for the intentional acts of a non-employee (here, a foster parent).
2. In a landmark decision, Lady Hale, Lord Reed, Lord Kerr and Lord Clarke (Lord Hughes dissenting) have decided that it is fair, just and reasonable to extend the doctrine of vicarious liability, on the part of a local authority, to cover the acts - even deliberate and intentional acts - of foster parents towards a foster child, even in the absence of any fault on the local authority's part.

The Case - Background

3. The acts in question were the sexual and physical abuse of the Claimant, a child in the care of the defendant council, by some of the foster parents with whom she had been placed by the council's social services department.
4. The sexual and physical abuse was plainly deliberate and intentional conduct, as opposed to a 'negligent' act committed by them. Further, there was no evidence available at the trial to suggest that the defendant had known about the abuse or the abusers' propensity to abuse, and therefore it could not be argued by the claimant that the defendant had failed to exercise reasonable care in placing the claimant with those particular foster parents at the material time. So this was not a case of negligence or fault-based liability; instead it was a case focused upon whether, and if so in what circumstances, 'non-fault' liability could attach to the local authority for the abuse committed by the foster parents.
5. At the original trial, the claimant was put to proof that she had been abused by the foster parents as alleged. Both she and the relevant foster parents gave evidence on that issue. The claimant succeeded in proving, on the balance of probabilities, that she had been abused and most of her allegations were accepted. However, the trial judge (Males J) refused, after a careful analysis of the relevant authorities, to impose non-fault liability on the local authority's part in relation to that abuse (*NA -v- Nottinghamshire County Council* [2014] EWHC 4005 (QB); [2015] 2 FLR 671) and so her claim failed.
6. Males J did, however, give the claimant permission to appeal to the Court of Appeal on the following grounds. These same grounds - amounting to allegations that the local authority could be liable 'without fault' to compensate the claimant - also formed the basis of her appeal to the Supreme Court, which was argued on 8th and 9th February 2017 and in which judgment has been handed down today (18th October 2017):

- i. That the local authority was liable, pursuant to the principle established in Woodland -v- Swimming Teachers' Association [2013] UKSC 66; [2014] AC 537, 'without fault', for the abuse of the claimant by the foster parents. The claimant was, in effect, pointing to the principle established in Woodland (that a party could be liable without fault for the *negligence* of an independent sub-contractor to whom it had delegated the performance of an obligation it would otherwise have had to perform itself), and arguing that that principle (a) should apply in the context of fostering, and (b) should be extended to *deliberate* (as opposed to merely negligent) acts of that sub-contractor (if, indeed, it was ever intended in the Woodland case to be restricted only to negligence).
- ii. Alternatively, that the local authority was 'vicariously liable' for the said abuse on the basis that, although the foster parents were not strictly 'employees' of it, their status was nonetheless sufficiently 'akin to employment' that it was fair, just and reasonable that vicarious liability should be imposed. Here, the Supreme Court was being asked to depart from previous authority: S -v- Walsall MBC [1985] 1 WLR 1150, in which the vicarious liability of the council for acts of foster parents had previously been considered and found not to apply.

Court of Appeal

7. In the Court of Appeal (NA -v- Nottinghamshire County Council [2015] EWCA Civ 1139; [2016] QB 739), the Claimant was unsuccessful on both arguments.

Supreme Court

8. Today, however, the Supreme Court has allowed the Claimant's appeal, on the basis that it is fair, just and reasonable to extend the doctrine of vicarious liability, on the part of a local authority, to the acts, even deliberate and intentional acts, committed by foster parents, towards a foster child, even in the absence of any fault on the local authority's part.

Woodland: 'Non-Delegable Duty'

9. As to 'Woodland' liability, the Supreme Court was not persuaded that the local authority's responsibility to children in care extended to the taking of reasonable care for the day-to-day safety of children placed in foster homes. It was felt that such a duty would be too broad and the responsibility which came with it too demanding (per Lord Reed at para.49). Thus, in the Court's view, to attach non-fault liability where there had plainly been a failure to take reasonable care (by an act of deliberate abuse by a foster parent) of the foster child, went beyond the duty which the local authority had in fact assumed in relation to that child (see paras.40-42) and it would not be fair, just and reasonable to apply the principle established in the Woodland case in the context of foster care.

Vicarious Liability

10. However, the Supreme Court (by a margin of 4:1, Lord Hughes dissenting), considered that it was fair, just and reasonable to extend the principle of vicarious liability to the relationship between the local authority and the foster parent, notwithstanding the absence of any formal employment relationship between the two.
11. Paragraphs 59-70 of the lead judgment of Lord Reed set out the Court's reasoning as to why such an extension of the principle of vicarious liability is justified in this context and anyone interested in this area of law would benefit from reading them. Paragraph 60 is, however, of particular importance:

"60. Although the picture presented is not without complexity, nevertheless when considered as a whole it points towards the conclusion that the foster parents provided care to the child as an integral part of the local authority's organisation of its child care services. If one stands back from the minutiae of daily life and considers the local authority's statutory responsibilities and the manner in which they were discharged, it is impossible to draw a sharp line between the activity of the local authority, who were responsible for the care of the child and the promotion of her welfare, and that of the foster parents, whom they recruited and trained, and with whom they placed the child, in order for her to receive care in the setting which they considered would best promote her welfare. In these circumstances, it can properly be said that the torts committed against the claimant were committed by the foster parents in the course of an activity carried on for the benefit of the local authority."

12. At paragraphs 71-73, Lord Reed pre-empts some of the concerns expressed by Lord Hughes in his dissenting judgment, holding that those concerns are insufficient to displace the majority view that vicarious liability can and should attach in a foster care context.

Application to other cases - Fostering under later legislation

13. The point is made by Lord Reed, at para.72 of the judgment, that the Court was dealing with the case of a claimant taken into local authority care under the Child Care Act 1980, as opposed to the Children Act 1989, and that it would therefore be premature to express a view about whether or not the principles established in this latest judgment (relating to the earlier Act) would apply equally in the context of a claim involving the same facts but where the child had been taken into local authority care under the provisions of the later Act.
14. Notwithstanding Lord Reed's hesitancy to express a concluded view on vicarious liability in *post*-1989 Act cases, it is suggested that it would be very difficult to see why the Supreme Court's judgment in this latest case would not apply to such cases.
15. We would suggest that nothing sufficiently significant changed (whether in terms of the relationship between the local authority and the foster parent, or indeed the relationship between the local authority and the child

in its care, or indeed in fostering in general) by the coming into force of the Children Act 1989, which would prevent the principle of vicarious liability - established in today's judgment - from applying equally to a *post*-1989 Act case.

Application to other cases - Abuse by biological parents/child's relatives

16. Their Lordships have, however, expressed the view (per Lord Reed at para.72) that a court would probably be very slow to find that intentional abuse by a *biological* parent or other family member (i.e. *not* an approved and trained 'foster parent' on the council's list, but a much less formal placement), into whose home the child had been placed - whether temporarily or permanently - despite being under a care order (under whichever Act) in favour of the local authority, could be sufficient to found an action in vicarious liability against the local authority for that abuse. It is clearly felt that this would amount to a further extension still, to the principles established by the Supreme Court in their judgment today, which would require specific argument and consideration if and when such a case arose.

Conclusion

17. One must not, in cases such as this, overlook the fact that an innocent victim of childhood sexual and physical abuse is involved, indeed is at the heart of the case, and is simply seeking redress for the alleged harm caused by that abuse. It is easy to get swept up in the legal argument and debate, and to forget that what gives rise to that debate are human experiences, and often very unpleasant ones.
18. In this case, the Claimant's main complaint was that, on the law as it then stood, a decision taken many years earlier in her childhood, not by her but by the local authority into whose care she had been placed (namely, the decision whether to place her in a local authority children's home, or into foster care) would make the difference between whether she had a non-fault route to compensation for the consequences of abuse she then suffered.
19. Had she suffered the same abuse as she in fact did, but instead at the hands of a local authority employee working in a local authority children's home into which she had been placed by the defendant, she would have been able to pursue the local authority for compensation on the basis it was vicariously liable, even without fault, for its employee's intentional abusive acts (see Lister -v- Hesley Hall [2001] UKHL 22; [2002] 1 AC 215).
20. Until today's judgment of the Supreme Court, however, she was prevented from any remedy from the local authority, simply because the relevant abuse had been carried out by foster parents into whose care the local authority had placed her and there was (until today's judgment) no comparable mechanism of non-fault liability.

21. As such, the Supreme Court's extension of the doctrine of vicarious liability to the deliberate acts of foster parents is a welcome one, ensuring parity between the victims of proven childhood abuse by foster parents and local authority employees, and providing, now in both instances, a non-fault route to securing compensation for the alleged consequences of such abuse.

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Philip Davy was called to the Bar in 2009.

He specialises in personal injury work, with a particular interest and expertise in abuse cases and industrial disease. He is instructed in all types of personal injury cases, including in costs disputes arising from them, on behalf of claimants and defendants.

His involvement with *Armes -v- Nottinghamshire County Council* dates back to November 2014, when he was instructed to represent the claimant at the 3 week trial before Males J, without a leader, against leading and junior counsel for the defendant with a combined 45 years' call. He has since acted in the Court of Appeal and Supreme Court with leading counsel, Chris Melton QC.

Philip is always willing to discuss any case within his area of practice, whether by phone or email, and is able to provide advice or paperwork at short notice.

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