

Revisiting the Close Connection Test for Vicarious Liability: Adult Sexual Abuse Cases

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In *The Trustees Of The Barry Congregation Of Jehovah's Witnesses v BXB* [2021] EWCA Civ 356, the court revisited the two-stage test for vicarious liability and considered the application of the tailored close connection test to cases involving adult victims of sexual abuse.

The judgment is available [here](#).

The Facts

In the mid-1980s the Claimant and her husband, Mr B, became members of the Barry Congregation of Jehovah's Witnesses. They formed a friendship with another couple, Mark and Mary Sewell. Mark Sewell was a ministerial servant and, from 1989, an elder in the Congregation.

Mark Sewell had alcoholic and aggressive tendencies. He began to make inappropriate advances on the Claimant and also adopted inappropriate practices publicly, welcoming female members of the Congregation by kissing them on the lips. Nothing was said by other elders about his inappropriate behaviour.

Out of concern, the Claimant and Mrs Sewell approached Mark Sewell's father, Tony Sewell - also an elder in the Barry Congregation. Tony Sewell asked the Claimant to provide Mark Sewell with extra support - a request to which the Claimant said she would not have acceded but for Tony Sewell's status as an elder.

On 30 April 1990 the couples gathered at Mr and Mrs Sewell's home. The Claimant approached Mark Sewell in private - to offer support as she was instructed to do - at which time Mark Sewell attacked and raped her.

Following the rape, the Claimant suffered with depression and post-traumatic stress disorder. She brought a claim against the Defendant, arguing that it was vicariously liable for the rape. Chamberlain J found for the Claimant. The Defendant appealed.

On Appeal

The Court of Appeal addressed issues at both stages of the test for vicarious liability.

Stage one - whether the relationship was akin to employment

It was said by the Defendant that the trial judge had misdirected himself, referring as he did to Lord Reed's judgment in *Cox v Ministry of Justice* [2016] UKSC 10 at [24] - an approach based on policy as opposed to considering the features of the 'employment' relationship and whether it was akin to employment. It was argued that the judge had not conducted a sufficient inquiry into the details of the relationship between Mark Sewell and the Defendant and had adopted an oversimplified approach to stage one of the test [54-56].

Nicola Davies LJ accepted that the judge had adopted Lord Reed's formulation in *Cox* but held that in doing so the judge had conducted "*a searching inquiry*" into the role of the elders within the Defendant's organisation [73-75]. His conclusion, she noted, accorded with the conclusions of Globe J in *A v Trustees of the Watchtower Bible and Tract Society* [2015] EWHC 1722 (QB), a decision in respect of ministerial servants of Jehovah's Witnesses, and was only stronger in relation to the elevated position of elders [76]. An elder was thus an integral part of the Defendant's 'business' and the judge was correct to conclude that the relationship between elders and the Jehovah's Witnesses was one that could be capable of giving rise to vicarious liability [81]. Males and Bean LJ agreed [91] [108].

Stage two – the tailored close connection test

The Defendant advanced a multitude of criticisms of the trial judge's approach – broadly, that the judge took into account irrelevant factors, such as the instructions given by Tony Sewell, and failed to take into account relevant factors, such as the acts which Mark Sewell was authorised to do [57-58].

Nicola Davies LJ held that the judge had been correct to describe the tailored close connection test as “*more open textured*” than simply whether the rape occurred when Mark Sewell was performing his religious duties. It required an analysis of all aspects of the relationship between the tort and the abuser's status. [83].

Nicola Davies LJ went on to find that, in respect of the application of the tailored close connection test, there was no distinction between abuse cases involving children and those involving adults:

“Contained within the tailored test in cases of sexual abuse is the concept of the conferral of authority upon the tortfeasor by the defendant. In my judgment, the tailored version of the test applies in cases in which adults are alleged to have been sexually abused as it does in such cases involving children because the rationale for the test is the same. The issue is the connection between the abuse and the relationship between the tortfeasor and the defendant. It is not the particular characteristics of the victim. On the facts of this claim, what is relevant for the purpose of the close connection test is the conferral of authority by the Jehovah's Witness organisation upon its elders, coupled with the opportunity for physical proximity as between an elder and publishers in the congregation.” [84] (emphasis added)

In this regard, Nicola Davies LJ found it “*critical*” that the judge had accepted the Claimant's evidence that, had it not been that Mark Sewell was an elder and she had received instructions from Tony Sewell, the friendship would have come to an end before the rape. She said:

“quite simply, had [the Claimant] felt able to end the friendship at an earlier time, Mark Sewell would not have been able to continue his close proximity to [her] and she would not have felt compelled to tolerate his increasingly inappropriate and unbearable behaviour because he was an elder”. [87]

This demonstrated the “*strong causative link*” required in this type of case (as per *Christian Brothers* at [86]). The Defendant had created or significantly increased the risk of the abuse by requiring the Claimant to support Mark Sewell and conferring authority upon him. Having referred to the trial judge's findings and conclusions Nicola Davies LJ held that he was correct to find the close connection test satisfied [87]-[89].

Males LJ took a more nuanced approach to stage 2. He made the following observations:

- The tailored test in child sexual abuse cases must be equally applicable to cases involving adult victims. However, the application of the test will need to account for differences between children and adults.
- Children will typically be more susceptible to grooming - “*the progressive stages of intimacy*” as noted in *Maga v Birmingham Roman Catholic Archdiocese Trustees* [2010] EWCA Civ 256 – and will generally lack the maturity and independence of adults.
- By contrast, an adult may generally be expected to recognise inappropriate behaviour and remove themselves from such a situation. Such cases are less likely to involve a relationship in which the tortfeasor exercises power over the victim and the victim is dependent on or subservient to the tortfeasor.
- However, whether such a relationship exists will be a question of fact. Even adults can be susceptible to relationships which involve a risk of abuse, particularly in the context of those spiritual beliefs and doctrines which promote a culture of unquestioned obedience to religious leaders [96].

Males LJ considered that the essential issue was thus whether the rape was an abuse of the authority held by Mark Sewell and conferred on him by virtue of his status as an elder. Males LJ found four factors to be relevant:

1. The Claimant was required to be obedient and submissive to the elders and not to question their conduct or instructions [99].

2. The elders of the Barry Congregation knew of and permitted sexually inappropriate behaviour on the part of Mark Sewell. His actions in kissing female members of the congregation on the lips were condoned; other elders acquiesced in Mark Sewell's abuse of his position [100].
3. Despite being aware of Mark Sewell's inappropriate behaviour and capacity for violence, Tony Sewell (himself a senior and highly respected elder) instructed the Claimant to provide extra support to Mark Sewell. Tony Sewell was aware that inappropriate sexual behaviour was an abuse of Mark Sewell's position as an elder; he still encouraged the Claimant to support Mark Sewell [103].
4. If it had not been for Tony Sewell's instruction and Mark Sewell's status as an elder, the Claimant would have ceased contact with Mark Sewell [104].

Although Males LJ went on to observe that the Claimant had made a choice to continue associating with Mark Sewell, and that the rape had not occurred during Mark Sewell's religious duties (rather, a social gathering), he considered that the four factors identified above satisfied the close connection test. To that extent, Males LJ was in agreement with Nicola Davies and Bean LJ.

The appeal was dismissed.

Comment

The tailored test for sexual abuse cases was adopted out of a desire to ensure child abuse victims were appropriately compensated. It could be said that the *Barry* case amounts to an expansion of the doctrine: it broadens the category of victims to whom the tailored test applies. However, such a view would be mistaken. As Nicola Davies LJ noted, stage two of the test is focused on the proximity between the tortfeasor's 'employment' and his conduct and the conferral of authority by the defendant; it is not concerned with the physical characteristics of the victim. The test - the doctrine - remains the same, but its application has now been recognised as broader than first thought.

However, practitioners should heed Males LJ's guidance on the differences between child and adult sexual abuse cases. Adults are generally expected to have a greater capacity to extricate themselves from a risk of harm and be less susceptible to an abuse of power. Successful claims by adult victims are therefore likely to be few and far between. In order to satisfy the tailored close connection test it is probable that an adult claimant will be required to advance evidence of their dependency on or subservience to the tortfeasor.

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