MXX v A Secondary School [2023] EWCA Civ 996

A review by Michelle Marnham and future pupil Jeremy Warner

Introduction

1. In the ever-increasing cases concerning grooming/abuse, the Court of Appeal's decision provides helpful guidance in the context of work experience employment and vicarious liability. Guidance is provided in respect of:

    a) The "relationship akin to employment test"
    b) The "sufficiently close connection" test

2. The Court of Appeal has concluded that the secondary school is *not* vicariously liable for tortious acts of an 18-year-old man on work experience, arriving at the same conclusion as the High Court for subtly different reasons. In effect, it provides important guidance on how the well-known, but often troublesome/nebulous, two-stage test arising from *The Catholic Child Welfare Society and others v Various Claimants*[1] is to be interpreted.

Factual background

3. The 13-year-old Claimant joined the secondary school in December 2013. Between 24 February 2014 and 28 February 2014, the 18-year-old tortfeasor ("PXM") undertook work experience at the school of which he was previously a student. By early March 2014, PXM and the Claimant were communicating on Facebook and messages continued until September 2014 (although the messages exchanged between March 2014 and July 2014 were deleted by both parties and their content remains unknown). In August 2014, PXM committed the torts of assault, battery and intentional infliction of injury against the Claimant. PXM subsequently pleaded guilty to sexual activity with a child, amongst other charges.

[1] *The Catholic Child Welfare Society and others (Appellants) v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others (Respondents)* [2012] UKSC 56

First instance decision

4. On 19 August 2022, HHJ Carmel Wall sitting as a Deputy High Court Judge dismissed the claim. HHJ Wall found that the Defendant was not vicariously liable for the torts committed by PXM. HHJ Wall correctly sketched out the two-stage vicarious liability test citing a number of authorities beginning with *The Catholic Child Welfare Society v Various Claimants* and *The Institute of the Brothers of the Christian Schools and Others* [2012] UKSC 56 Lord Philips at paragraph 47, setting out the test noted in paragraph 1.

5. As to stage one of the test, HHJ Wall found that there was not a relationship akin to employment [188]. The Judge found that PXM's work experience was effectively an altruistic gesture by the Defendant, and it was intended that PXM would learn from the Defendant and provide little utility to the school and its business activities. His role was deemed to be "very limited." The Judge found that the Defendant's requirements that PXM should understand and accept its policies a neutral factor, as was the fact that pupils were required to treat PXM with respect [195] – [196].

6. The High Court provided that as PXM was deemed to enjoy no independent responsibility for any aspect of the Defendant's undertaking, he did not ever, nor was it ever intended that he have pupils entrusted to his care to any extent. It followed that it would not be fair, just or reasonable that a work experience student of one week in the circumstances amounted to a relationship akin to employment. In paragraph 19 of the Court of Appeal judgment, LJ Davies analysed the following reasons germane as to why the High Court concluded that the relationship was ***not*** "akin to employment":
   i) The tort was not committed as a result of activity being undertaken by PXM for the Defendant;
   ii) The tort itself was committed well after the work experience ended;
   iii) The sexual grooming and assaults had no connection with the Defendant's activity;
   iv) PXM's activity within the school was not in any real sense part of the Defendant's business activity;
   v) PXM was undertaking the work experience to learn from the Defendant's staff who were supporting him in pursuance of his own studies;
   vi) The limited tasks performed were minor and ancillary to the Defendant's undertaking;
   vii) The Defendant did not create the risk of PXM committing the tort.

7. Despite holding that the first stage of the test was not established, the Judge also concluded that the second stage was not made out. At the core of the Judge's reasoning was that the entirety of the wrongdoing occurred many weeks after PCM's work experience ceased. The use of Facebook, and the subsequent sexual relationship was "unrelated" to the Defendant's school activities.

Grounds of Appeal

8. There were four grounds of appeal. The Claimant argued the Judge at first instance was wrong:
    a) To conclude that the entirety of the wrongdoing occurred many weeks after PXM's relationship with the Defendant had ceased;
    b) To find that the conduct and mental elements of the tort of intentional infliction of injury were not made out until after the end of PXM's placement at the school;
    c) To find that the relationship between the Defendant and PXM was not akin to employment;
    d) To find that PXM's torts were not sufficiently closely connected with the Defendant so as to give rise to vicarious liability.

Court of Appeal decision

9. The first two grounds were of course factual determinations, not strictly relevant to the vicarious liability doctrine. The Court of Appeal, however, agreed with the Claimant that HHJ Wall failed to consider relevant evidence and failed to set out the full Facebook exchange between PXM and Claimant. Specifically, the final sentence on the Facebook exchange on 18 August 2014 which revealed the state of PXM's mind in relation to their interactions at school, in that PXM had an "*ulterior motive*," namely an intention to exploit or manipulate the Claimant for the purpose of sexual abuse.

10. The Court of Appeal noted that HHJ Wall only considered the Facebook messages to be of limited relevance. Instead, the Court of Appeal found this was relevant evidence striking at the core of the Claimant's case as to the Claimant's and PXM's interactions during the work experience week. In relation to ground two, the Court of Appeal also considered that the conduct and mental elements of the tort of intentional infliction of injury were made out during PXM's placement at school, on the basis that PXM engaged in unjustified conduct while *in* school (and not just out of it). This was because PXM altered his schedule so as to spend time with the Claimant and suggested to the

Claimant that she attend a badminton session in order to spend time with him. By this point, PXM knew (according to additional messages on Facebook) that Claimant had a "crush" on him.

11. In respect of ground 3, in relation to whether the relationship between PXM and Defendant was akin to employment. LJ Davies proceeded to explore the authorities such as the recent *Barclays Bank*[2] case, *Christian Brothers*[3] and *Cox*[4], and identified the legal test set out in paragraph 1 of this article.

12. In respect of ground 3, the Claimant argued that all features of employment were present in the relationship between Defendant and PXM save for salary. It was argued PXM's position heavily mirrored the work of a junior PE teacher. Although the Court of Appeal found that the High Court correctly set out the law as to the two stages of vicarious liability, the Judge was wrong to find that PXM was performing "minor ancillary" tasks. In fact, the Court of Appeal found that the tasks carried out by PXM were of clear benefit to the Defendant as they released its staff thereby enabling them to spend time on other tasks with pupils. His work experience was also for the benefit of the pupils who learned sports skills, and the Court of Appeal found the High Court did not give sufficient weight to the fact that PXM had to accept the Defendant's safeguarding policy. PXM had to read and accept the Defendant's procedures and guidance which applied to its members of staff, the Defendant regulated PXM's time, supervised him and controlled what he did. Although the High Court had previously construed this as being a "neutral factor," the Court of Appeal found it in fact demonstrated how the Defendant was regulating its relationship with PXM and he was therefore treated "similarly" [69] to other employees of the Defendant.

13. The Court of Appeal went on to find that interpreting PXM's role as "shadowing or observing" does not fairly reflect what he did during the course of his work experience. It was concluded, therefore, that the Judge was wrong to find that the relationship between the Defendant and PXM was not akin to employment, and this stage of the vicarious liability test was in fact made out.

[2] *Barclays Bank plc (Appellant) v Various Claimants (Respondents)* [2020] UKSC 13
[3] *The Catholic Child Welfare Society v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56
[4] *Cox v Ministry of Justice* [2016] UKSC 10

14. In relation to ground 4, the Claimant argued the Judge was wrong to find that PXM's torts were not "sufficiently closely connected" with his relationship with the Defendant so as to give rise to vicarious liability.

15. The recent *BXB*[5] case clarified the "close connection test" as being "*whether the wrongful conduct was so closely connected with the 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.*"[6] The Claimant criticised the Judge and argued that PXM's role was sufficiently closely connected to the abuse that it satisfied the "close connection" test rather than merely providing an opportunity in the form of a meeting which led to a subsequent Facebook relationship. HHJ Wall found that all of the wrongdoing occurred many weeks after PXM's relationship with the Defendant had ceased. Given the Court of Appeal's finding in respect of ground 1, this was no longer applicable (given PXM's state of mind during the work experience week revealed in Facebook messages which were not taken into evidential account during trial at first instance).

16. In respect of ground four, LJ Davies agreed with the High Court Judge in the sense that PXM had a limited role at the school. "*He had no caring or pastoral responsibilities for the pupils, a factor which has had considerable weight in previous cases*" [87]. As the "*grooming was not inextricably woven*" [88] with the carrying out by PXM of his work during his week at the Defendant's school such that it would be fair and just to hold the Defendant vicariously liable for the acts of PXM.

17. The Court of Appeal therefore held that the Defendant was not vicariously liable for the torts of PXM as they did not satisfy the two-stage test for the imposition of vicarious liability. The Appeal was therefore dismissed.

[5] *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2023] UKSC 15

[6]See paragraph 58(iii) of *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2023] UKSC 15

Conclusion

18. The Court of Appeal's decision clarified that work experience can establish a relationship akin to employment for the purpose of vicarious liability, but the close connection test remains challenging to satisfy, requiring a strong link between the wrongful conduct and the nature of employment itself. In summary:

    a) Work experience is indeed capable of satisfying limb one of the vicarious liability test, particularly if it goes beyond mere "shadowing and observing"

    b) The close connection test remains difficult to satisfy and the work experience student's tortious conduct must be "inextricably woven" with the nature of employment itself;

    c) In cases involving grooming, more than physical grooming is required before the employer can be vicariously liable for an individual working with children. Misuse of a role of responsibility is also required.

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