Armes v Nottinghamshire County Council
[2017] UKSC 60, [2018] AC 355

Barclays Bank plc v Various Claimants
[2018] EWCA Civ 1670

Summary

Armes* v *Nottinghamshire CC

Natasha Armes was taken into foster care by the defendant local authority in February 1985, at the age of 7. Between March 1985 and March 1986 she was fostered by Mr and Mrs Allison, and was physically abused by Mrs Allison. She was then fostered between October 1987 and February 1988 by a Mr and Mrs Blakeley, and was sexually abused by Mr Blakeley. When Armes was in her 30s, and feeling that – in the words of the trial judge – 'Her unhappy childhood experiences have cast a long shadow over her life', she launched proceedings against the defendant local authority, alleging that: (1) The defendant was in breach of a non-delegable duty of care that it owed her when it placed her with foster parents; and (2) The defendant was vicariously liable for the torts committed by Mrs Allison and Mr Blakeley. Armes lost on both points at first instance and the Court of Appeal. The UK Supreme Court held that while the defendant local authority had not owed Armes a non-delegable duty of care, it *was* vicariously liable in respect of Allison and Blakeley's torts on the basis that there was a relationship 'akin to employment' between a local authority and a foster family into whose care the local authority has placed the child. Lord Hughes dissented on the last point.

Lord Reed gave the majority judgment (with the agreement of Lady Hale, and Lords Kerr and Clarke). On point (1), he endorsed the analysis of non-delegable duties of care as 'duties not merely to take personal care in performing a given function but to ensure that care is taken' (at [31]), and held that 'a non-delegable duty [can] be breached by a deliberate wrong' (at [51]), giving *Morris* v *C W Martin & Sons Ltd* [1966] 1 QB 716 as an example. He went on to observe that a duties of care that parents owe their children should not be held to be non-delegable as there are so many occasions when parents need to entrust their children to the care of others, and finding parents liable 'if their child were injured because of a lack of care on the part of the nanny or the baby-sitter, or if the child were abused by a friend or a grandparent...would be liable to interfere with ordinary aspects of family life which are often in the best interests of children themselves' (at [42]). Lord Reed thought a similar rationale indicated that whatever duties of care local authorities owe children in fostering them, those duties of care should not be non-delegable: 'If...local authorities which reasonably decided that it was in the best interests of children in care to allow them to stay with their families or friends were to be held strictly liable for any want of due care on the part of those persons, the law of tort would risk creating a conflict between the local authority's duty towards the children...and their interests in avoiding exposure to such liability' (at [45]).

On point (2), Lord Reed endorsed the approach adopted by Lord Phillips in *Various Claimants* v *Christian Brothers* [2013] 2 AC 1 to determining when a relationship between a defendant (D) and a tortfeasor (T) is one that is akin to employment. On that approach, the courts should look at five factors: (i) whether D is more likely to have the means to compensate the victim of T's tort than T does; (ii) whether T's tort was committed as a result of activity being undertaken by T on behalf of D; (iii) whether that activity was part of D's

business activity; (iv) D created the risk that T might commit the kind of tort that T committed; and (v) T was under D's control. Lord Reed downplayed the importance of factors (i) and (v) in determining whether there was a relationship 'akin to employment' between T and D (at [56]), but went on to observe that in *Armes* so far as factor (i) is concerned, 'Most foster parents have insufficient means to be able to meet a substantial award of damages, and are unlikely to be have...insurance against their own propensity to criminal behaviour. The local authorities which engage them can more easily compensate the victims of injuries which are often serious and long-lasting' (at [63]). In relation to factor (v), Lord Reed noted that 'The local authority controlled who the foster parents were, supervised their fostering, and controlled some aspects of day-to-day family life, such as holidays and medical treatment' (at [65]). But he again stressed that 'it is important not to exaggerate the extent to which control is necessary in order for the imposition of vicarious liability to be justified... It is not necessary for there to be micro-management, or any high degree of control, for vicarious liability to be imposed' (at [65]).

Turning to the other factors: (ii) and (iii) were present because 'the foster parents provided care to the child as an integral part of the local authority's child care services' (at [60]), and (iv) was present because placing a child 'with foster parents creates a relationship of authority and trust...[that] renders the [child] particularly vulnerable to abuse' (at [61]). Lord Hughes, dissenting, questioned whether factors (ii) and (iii) were present in *Armes*: 'foster carers do not do what the authority would otherwise do for itself; they do something different, by providing an upbringing as part of a family' (at [88]). Lord Hughes also worried that the majority's position would mean (a) that a local authority could be held vicariously liable in respect of a tort committed by a child's parent if the child was entrusted to the care of the parent by the local authority when it would 'be artificial in the extreme to say of such placements that the parent's care was given on behalf of the local authority, or that it was integrated into the caring systems of the authority' (at [87]); and (b) that a local authority could be held liable in respect of *negligent* acts by foster parents, and thereby encourage 'the litigation of family activity which it is undesirable should be ventilated in the courts' (at [90]). In response, Lord Reed held that on point (a), a relationship 'akin to employment' would not exist between a local authority and a parent whose child had been placed back in the parent's care by the local authority because the parent 'would not have been recruited, selected or trained by the local authority' (at [71]); and on point (b), a foster parent whose carelessness resulted in harm to the foster child would be unlikely to be held liable in negligence for that harm, with the result that the local authority could not be held vicariously liable in respect of the same harm (at [73]).

More broadly, Lord Reed expressed himself confident that the decision in *Armes* would not discourage local authorities from placing children in foster care, as the local authority would already be held vicariously liable in respect of torts committed by its employees in looking after children staying in local authority accommodation: at [68]. And even if *Armes* did result in a flood of litigation against local authorities, it was probably a good thing that the existence of 'a widespread problem of child abuse by foster parents' should be exposed by ex-foster children taking advantage of *Armes* to sue in respect of the abuse they suffered: at [69].

Barclays Bank plc* v *Various Claimants

The claimants in this case – all prospective employees of the defendant bank – were sexually abused by a now deceased doctor, Dr Gordon Bates, when they were sent by the defendant bank to Bates for him to give them a medical exam. The claimants argued that the defendant

bank was vicariously liable in respect of Bates' torts because there existed a relationship 'akin to employment' between Bates and the bank.

The Court of Appeal agreed with the first instance judge that such a relationship existed, despite the fact that it was acknowledged that Bates was an independent contractor who had been hired by the defendant bank to examine the claimants. Irwin LJ gave the only judgment and held that 'it seems clear to me...that there will...be cases of independent contractors where vicarious liability will be established' (at [45]). Irwin LJ disdained what he called a '"bright line" test' under which vicarious liability could never arise in the case of a tort committed by an independent contractor, on the basis that determining whether 'an individual is an employee or a self-employed independent contractor can be full of complexity and of evidential pitfalls' and that asking whether an independent contractor is in a relationship 'akin to employment' could not present 'a more challenging' task (at [61]).

Turning to the by now familiar five factors set out by Lord Phillips for determining whether there exists a relationship 'akin to employment' between a defendant and the tortfeasor, Irwin LJ held that the first factor (suability) – while present here – should be given 'little weight': 'No liability could be founded on this consideration alone' (at [49]). The second and third factors (integration into the defendant's business) were made out as Bates' work in medically examining the claimants was done for the benefit of the defendant bank (at [51]). Irwin LJ held that the fourth factor (risk creation) was present given that (i) the defendant bank 'specified the nature of the examinations (including expanded and deflated chest measurements), as well as specifying the time, place and examiner' and (ii) 'at least some of the examinations included inspection of...genitalia' (at [55]). Irwin LJ endorsed the first instance judge's finding that the fifth factor (control) was also present here, with the first instance judge observing that the defendant bank 'was directional in identifying the questions to be asked and the physical examinations to be carried out by the doctor for the purpose of completing the templated form' (at [27]).

Comments

(1) *Implications*. As the Joker in *The Dark Knight* (2008) has it: 'And. Here. We. Go.' Tony Weir observed (in his *Casebook on Tort*, 10th ed (2004), at 269) that vicarious liability seems tailor-made to ensure that 'companies must pay for people but not *vice versa*'. This is because companies cannot be employees, and most employers are companies. But if the bar on vicarious liability for an independent contractor's torts is overturned – as the decision in *Barclays Bank* v *Various Claimants* indicates that it has – then this is no longer true as lots of flesh and blood people hire companies to work for them as independent contractors. Whether in such a case the courts will now find that there exists a relationship 'akin to employment' is a difficult question. Ironically, the one Phillips factor that would save people from such a finding – the first factor (suability) – is the one that the courts seem least keen on as a ground for determining whether there is a relationship 'akin to employment'. And they cannot be saved either by the fact that, as originally framed, the second and third factors focussed on the tortfeasor's working for, and integration within, the defendant's *business* because, as Lord Reed made clear in *Armes*, 'words such as "business" do not confine vicarious liability to activities of a commercial nature' (at [58]). So where A hires B, a jobbing gardener, to tidy up her garden every fortnight, and in the process of doing so, B carelessly causes A's neighbour, C, to be injured, what is there to stop C arguing that A is vicariously liable in respect of B's tort on the basis that there is a relationship 'akin to employment' between A and B? It is a mark of how far the law on vicarious liability has come since the House of Lords' fateful decision in *Lister* v *Hesley Hall Ltd* [2002] 1 AC 215 that such questions can

even be asked. And it is some measure of the continuing chaos in this area of law that it is difficult to know what the answer is.

(2) *Loss of control*. It seems to me – the *Lister* decision apart – that one factor that is causing this area of law to spin unpredictably out of control is the downplaying of the 'control' requirement for finding that there exists a relationship 'akin to employment' between the defendant and a tortfeasor. Lord Reed explained in *Armes* that downplaying this requirement is justified on the basis that 'There are countless cases where vicarious liability has been imposed for torts committed by professional persons who carry out their work without close supervision' (at [65]). This seems to me to be a big mistake. *Those* countless cases are ones where a variety of other factors clearly indicated that despite the lack of control, the 'professional person' in question should be regarded as an employee. Those other factors are listed in McBride & Bagshaw, *Tort Law*, 6th ed (2018), at pp 835-37 and include such considerations as whether the professional person was expected to work for a certain number of hours, whether they could get someone else to do that work for them, whether the defendant supplied them with what they needed to do their work, and whether the defendant represented their sole source of income. It is because those factors were absent in the *Barclays Bank* case that it was obvious Dr Bates was an independent contractor. When those factors are present, the degree of control (or lack of it) that the defendant exercised over the tortfeasor will not prevent the courts' finding that the tortfeasor was an employee of the defendant's. But to use *that* fact as justification for saying that 'We can *also* find there was a relationship "akin to employment" when there was very little control exercised by the defendant over the tortfeasor' seems to me illogical given that *ex hypothesi* all the *other* factors that might lead us to find that there was an employment relationship between the defendant and the tortfeasor will *also* be missing. Downplaying the requirement of control leaves the courts looking for very little before they will find that there exists a relationship 'akin to employment'. And thus we get decisions like the *Barclays Bank* case, and a potentially huge inroad made into the formerly clear position that a tort committed by an independent contractor would not give rise to vicarious liability.

(3) *Oblivion*. This might all be fine except for the fact that the courts obviously have *no clue whatsoever* as to why vicarious liability exists. So there is no principled understanding of the appropriate scope of the law on vicarious liability that is driving their decisions. Their embarrassment at Lord Phillips' suggestion that vicarious liability might be justified by virtue of the defendant's 'deep pockets' is palpable. But is anyone able to come up with something better? In *Armes*, Lord Reed suggested that, 'The most influential idea in modern times has been that it is just that an enterprise which takes the benefit of activities carried on by a person integrated into its organisation should also bear the cost of harm wrongfully caused by that person in the course of those activities' (at [67]). This sounds attractive – but what is an enterprise? What does benefit mean? What does 'integrated' mean? Is it right to think that a local authority is an enterprise? That if A, as a favour, allows B to spend a week or so working in A's offices for the experience and cv points, then A is 'benefiting' from B's work? That Dr Bates was 'integrated' into the defendant bank's operation because they used him regularly – would he have been less integrated if they had a list of 20 doctors that they used on rotation to carry out medical exams? There are no good answers to these questions because at base 'The most influential idea in modern times' to explain vicarious liability doesn't have much going for it other than its rhetorical appeal. In my latest book, *The Humanity of Private Law* (2018), I suggest (at 248-49) that vicarious liability might be justified as a response to the situation where (i) T has committed a tort in relation to V; (ii) there exists a relationship between T and D such that T's tort may well have been committed

because D ordered T to commit it; but (iii) it is practically impossible for V to establish that (ii) is true and thereby establish that D is liable in respect of T's tort as an accessory. In such a case, I suggest that it might be 'fair and just' to hold D vicariously liable in relation to T's tort provided that D can – through insurance – protect himself against the costs of being held vicariously liable in respect of T's tort, and is able to reduce the number of instances where he is held vicariously liable in respect of torts committed by someone like T to an acceptable level through disciplinary and supervisory measures. But this explanation only applies in cases where (a) there exists a relationship of dependency or ascendancy between D and T so that it's reasonable to think that T would do what D ordered her to do; and (b) the tort committed by T is such that it is reasonable to think that T might have been ordered by D to commit that tort. So this explanation does not work for *Lister* or either of the cases under discussion here. There is simply no way that (b) is made out in any of those cases: it is ridiculous to think that the defendants in those cases could have ordered the assaults that were committed in those cases.

(4) *Crimes and misdemeanours*. So if it is not a principled rationale for vicarious liability that is driving developments in this area of law, what is it? The answer seems to be that it is the criminal element of the tortfeasor's conduct that is motivating the courts to find that vicarious liability is made out. They seem to have a strong aversion to turning away the victim of crime, and telling him or her – you simply can't sue for damages in this case. And this is particularly so where the crime in question is a sexual assault. If this is true, then the result is very odd: after *Lister*, cases of sexual and other assaults have been transformed from being the cases in which it is *hardest* to establish vicarious liability, and are now the cases that are the *easiest* to litigate when it comes to establishing vicarious liability. However, tort law does not distinguish between crimes and non-crimes. A tort is a tort, whether or not it also amounts to a crime. And in allowing the law on vicarious liability to be driven by an idea that victims of crime should be able to sue someone for what has happened to them, the courts are always have to keep an eye out for the fact that when they expand the law on vicarious liability to protect victims of *crime*, victims of *negligence* may well be able to take advantage of this expansion in the law and in ways that may not always be welcome. The UK Supreme Court tried to head off this possibility in *Armes* by holding that someone who was carelessly injured by a foster parent could not hold the local authority that placed them with the foster parent vicariously liable for that act of carelessness because the foster parent would not be held liable in negligence for carelessly injuring the claimant. This again seems odd. It looks like the law of negligence is being cut back or, at best, held back here in order to stop the expansion of vicarious liability effected in *Armes* from operating in an undesirable manner. But the law of negligence cannot be so easily restricted in other contexts. For example, a dentist is always going to be held liable in negligence for carelessly drilling into the wrong tooth. So if this happens to V and D arranged for V to visit the dentist as part and parcel of the way D runs its 'enterprise', the *Barclays Bank* case may well make the company vicariously liable to V in respect of the dentist's negligence. Is this a result that makes sense? Shouldn't the dentist pay for drilling into the wrong tooth, and D should be left well out of it? Not any more – the desire to hold D vicariously liable if the dentist takes sexual advantage of V while she is under the gas leads, by the inexorable logic of tort law, to D's also being held vicariously liable when the dentist carelessly drills into the wrong tooth.

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