FOSTERING, VICARIOUS LIABILTY, NON-DELEGABLE DUTIES, AND INTENTIONAL TORTS

Abuse in care is a serious problem. *NA v Nottinghamshire County Council* [2015] EWCA Civ 1139; [2016] Fam. Law 171 concerns the non-delegable duties owed by local authorities to children in care, and the issue of vicarious liability for abuse committed by foster carers. However, the importance of the case stretches significantly beyond this context. Whilst the correct decision to reject the claimant’s claim was reached, the reasons for the rejection of the non-delegable duty claim varied significantly between the judges. The case threatens to divert the law of non-delegable duties onto the wrong path by precluding such liability for intentional acts. In so far as non-delegable duties are concerned Black L.J.’s judgment should be preferred.

In *NA* the claimant was abused physically and sexually during foster care placements whilst in the care of the defendant local authority.

During the placements the relevant legal regime was the Children and Young Persons Act 1969 and the Child Care Act 1980, as well as the Boarding-Out of Children Regulations 1955. Regulation 1 of the latter, and the undertaking contained within the Schedule to the Regulations stated that the child was to “live in [the foster carer’s] dwelling as a member of their family.” The local authority did not have day-to-day control over the foster carers, nevertheless as the Regulations demonstrate, given the duties and powers of the local authority it was not entirely the same as ordinary family life.

Given the substantial changes to the legislative framework introduced by the Children Act 1989 Tomlinson L.J. emphasised that the decision deals only with events in the period 1985-1988 (at [3]). However, just as the Court of Appeal placed significant reliance on the decision of the Canadian Supreme Court in *KLB v British Columbia* [2003] 2 S.C.R. 403; 2003 SCC 51, despite the different legislative regimes between the two jurisdictions, many of the arguments in *NA* are likely to be applied by analogy by future courts to post-1989 cases. Great care should be taken in using such arguments in future cases; in addition to significant legal changes, there have been significant social changes to the nature of fostering and the relationship between foster carers and local authorities over this period (see P. Morgan, (2012) 20(2) T.L.J. 110).

The issue of vicarious liability for foster parents was last considered by the English courts in 1985, (*S v Walsall MBC* [1985] 1 W.L.R. 1150; [1985] 3 All E.R. 294), prior to the development of the modern law of vicarious liability. Vicarious liability is a doctrine “on the move” (*Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1 (“*CCWS*”), per Lord Phillips (at [19]), which renders A strictly liable for the torts of B, provided A stands in a relationship with B sufficient to trigger the doctrine, and provided that the tort is sufficiently closely connected with the relationship. It classically occurs in the context of employment, although there are a number of other categories of vicarious liability, such as principal and agent, and a new category of “akin to employment”. The parameters of the latter category are presently uncertain. *NA* determines that despite the expansion in the doctrine of vicarious liability, foster carers (under the previous statutory regime) do not stand in a sufficient relationship with the local authority to trigger the doctrine.

In *CCWS* Lord Phillips (at [35]) set out the policy reasons for vicarious liability, including: “(ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the employer”.Applying this Tomlinson L.J. rejected vicarious liability in this case since in his view the provision of a family life is not part of the activity of a local authority or the enterprise on which it is engaged. However, the model of boarding houses in institutional care settings (as in *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215), or the employment of “parent figures” (as in *Bazley v Curry* [1999] 2 S.C.R. 534; (1999) 174 D.L.R. (4th) 45) demonstrates that this is not as clear cut as Tomlinson L.J.suggests.

In addition Tomlinson L.J. stated that the local authority did not exercise sufficient control over the foster carers for vicarious liability to be present since their control was at the “higher or macro level” and not “micro-management” (at [15]). This is not the correct test for vicarious liability. As demonstrated by *JGE v Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938; [2013] Q.B. 722, which introduced the “akin to employment” category of vicarious liability, micro-management is not the level of control needed for an “akin to employment” relationship; the relationship between a Roman Catholic Priest and a Diocesan Bishop was sufficient to trigger the doctrine, even though the priest enjoyed considerable autonomy in his ministry.

Tomlinson L.J. further adopted the arguments of *KLB* which held that there was no vicarious liability for foster carers. The Supreme Court of Canada considered that foster carers give children “the experience of a family”, and this meant that they “operate[d] independently of day-to-day state control”. The Supreme Court of Canada also argued that liability would not result in heightened tort deterrence, and that it may deter the use of foster care in favour of less efficacious institutional settings. The Court of Appeal made no reference to the decision of the New Zealand Court of Appeal in *S v Attorney-General* [2003] 3 N.Z.L.R. 450 (CA), which came to the opposite conclusion, finding vicarious liability for foster carers on the ground of ‘agency’. *S* and *KLB* demonstrate the care that needs to be made with utilising ‘deterrence’ arguments since the courts came to the opposite conclusions on the social desirability of vicarious liability in this context.

Black L.J. correctly noted the centrality of control in establishing a relationship “akin to employment”. She considered that the provision of the experience of family life through fostering precluded the necessary level of control required to found vicarious liability. Care must be taken here, since the implication is that this preclusion is present in the nature of fostering itself, rather than fostering at the time of the torts in this case. One must look beyond the legal regulations governing the relationship, and also examine the facts on the ground. The facts of this case as brought out at first instance demonstrate a lack of control by the local authority, (Paras [45]-[47], [2014] EWHC 4005 (QB); [2015] P.T.S.R. 653); however, a lack of control is not necessarily central to the idea of fostering itself. It is submitted that the nature of fostering has significantly changed since the time of this case and that some modern forms of fostering may be sufficient to trigger vicarious liability (see Morgan, above). Burnett L.J. agreed with both Tomlinson L.J. and Black L.J. on the issue of vicarious liability (at [28]). Thus whilst the conclusion on vicarious liability was correct for the period in question great care should be made in using the arguments by analogy in future cases.

In this case one placement (where *NA* was sexually abused) occurred in the context of a conventional family setting. Another placement (where she was physically abused) occurred in the context of a “Family Group Foster Home” where she was one of a rapidly turning-over group of nine or ten young children simultaneously fostered by Mr and Mrs A. Tomlinson L.J. (at [6]) noted reservations as to the appropriateness of the analogy of such a placement with normal family life. The author shares these reservations, particularly given the turn-over in the latter group. This is since the nature of the activity and the risk varies between the two types of placements. However, since the case was not advanced on the basis that there was a difference between the two placements, the placements were analysed in the same way.

Non-delegable duties are different to vicarious liability. Whilst one is not vicariously liable for the torts of an independent contractor, an independent contractor may place one in breach of a non-delegable duty. Such duties may be either created by statute or exist at common law. At the minimum (they may also be strict liability duties) they are “not merely a duty to take care but a duty to provide that care is taken.” (*The Pass of Ballater* [1942] P. 112, at 117, [1942] 2 All E.R. 79, per Langton J.). Thus if a duty is non-delegable the person who owes this duty to another may be in breach of the duty, even if they have taken all due care, where they have entrusted its performance to another and that other is at fault. Common law non-delegable duties enjoy an re-invigorated life following the decision of the Supreme Court in *Woodland v Swimming Teachers Association* [2013] UKSC 66; [2014] A.C. 537, in which a local authority was found to be in breach of a such a duty where the negligence of an independent contractor conducting swimming lessons led to the claimant’s injury.

Whilst each of the three members of the Court of Appeal in *NA* came to the same result as the other members of the Court on the issue of non-delegable duty, the reasons given for the result were fundamentally different.

Tomlinson L.J. determined the issue on the basis that there was no relevant non-delegable duty. He considered that for a duty to be non-delegable it must relate to a function which the delegator has itself assumed a duty to perform (at [24]). He stated that fostering is not such a duty since a local authority cannot itself provide accommodation within a family unit. By entrusting fostering to others it has discharged its duty to provide accommodation and maintenance. This is a very odd construction; it may be implied into the duty to accommodate/maintain the child that care will be taken in so doing. He did not consider whether a simultaneous common law duty might co-exist.

Burnett L.J. considered that there was no relevant non-delegable duty, although he construed the scope of the duty on the local authority very differently: one of a duty to “care for the child – to promote its welfare and protect it from harm” (at [29]-[30]). He argued that if applying the policy reasons in *CCWS* does not lead to vicarious liability for an assault, the court should not impose liability via a non-delegable duty (at [34]). This is incorrectly to conflate the two doctrines. Vicarious liability and non-delegable duties are separate doctrines, (*Woodland*, per Lord Sumption, at [4]), and do not have the same policy rationales. This is why breach of a non-delegable duty (unlike vicarious liability) may be triggered by an independent contractor; and also by an employee acting outside the course or scope of their employment. Whilst they are both used in triangular three party situations the doctrines should be kept apart (T. Weir, An Introduction to Tort Law, (OUP, 2006), P112).

Burnett L.J. stated that the English non-delegable duties cases concern negligence, not assault (at [32]). He argued with reference to the Australian decision in *NSW v Lepore* [2003] HCA 4; (2003) 212 C.L.R. 511, that an assault would not generate a claim for breach of a non-delegable duty, since such duties do not apply to intentional wrongs (at [37]).

Black L.J. took a third approach to get to the same result. She considered that the scheme provides that the local authority has a duty to care for and protect the child. She then considered the speech of Lord Sumption in *Woodland* who identified five indicia for the existence of a non-delegable duty (at [23]). Whilst Lord Sumption’s fifth indicia was expressed in the language of reasonable care, not intentional torts, this was not unsurprising given the facts of *Woodland*, Black L.J. thus considered that it is not limited to such situations and that in *NA* all five indicia were present. She considered that whilst there may be vicarious liability for criminal acts, given that non-delegable duties are a different concept, and that they go further than vicarious liability, there was no problem in contemplating breach of such a duty in a situation where there would be no vicarious liability for an assault (at [59]). Tomlinson L.J. did not deal with the issue of intentionality (at [25]).

The approach of Black L.J. that an intentional wrong may place a defendant in breach of a non-delegable duty is correct, and should be favoured over the approach of Burnett L.J.. If *Morris v CW Martin & Sons Ltd* [1966] 1 Q.B. 716; [1965] 2 All E.R. 729 is construed as a non-delegable duty case (as by Clerk and Lindsell on Torts, (21st edn, 2014), [6-71], Stevens (below); implicitly: *Lepore*, at [127], *Woodland*, at [7]) then there is English authority that the commission of an intentional wrong may trigger a breach of a non-delegable duty. That intentional wrongs may also trigger such a breach is implied in *Lister*. Even if *Morris* is not so accepted (P. Morgan, [2011] L.M.C.L.Q. 172) it should still be the case that an intentional tort may trigger breach of such a duty. As stated by Stevens: “[l]iability for breach of a primary duty cannot be avoided by showing that the breach was gross. It is as if a seller of canned soup could escape liability for its defective quality if it could be shown that it had been deliberately poisoned by the manufacturer… Only if non-delegable duties are seen as a ‘disguised’ form of vicarious liability does it make sense to refuse the claim on the basis that the wrongdoing was intentional. This was the majority’s assumption [in Lepore].” (“Non-Delegable Duties and Vicarious Liability” in J. Neyers, E. Chamberlain, and S. Pitel (eds.), Emerging Issues in Tort Law, (2007), P361). It is submitted that nothing within the normative justifications for non-delegable duties restricts breaches of such duties only to negligent acts.

In considering whether a non-delegable duty exists, even if the *Woodland* indicia are met there is still a need to consider if the imposition of such a duty would be fair, just, and reasonable (*Woodland*, [at 25]). Black L.J. considered that such a duty in the context of foster care would be an unreasonable burden on the local authority and contrary to the interests of children in care (at [60]). She stated that “[i]t is a fundamental principle of social work practice that children are best placed in a family environment. If they cannot live with their parents, the majority of children are therefore likely to benefit most from a foster placement” (at [62]). Burnett L.J. agreed with Black L.J. that the imposition of such a duty would not be fair, just, and reasonable (at [38]).

Black L.J. advanced that the law of negligence ensures proper screening of foster carers, along with checks and balances. A non-delegable duty on the other hand is to impose a liability on the local authority where it is not at fault. This she advanced would promote defensive practices and divert scarce resources into the prevention of wrongs, and insurance. It also may encourage the use of local authority run homes, rather than fostering, since the local authority can exert greater control over the former. However, such resources arguments mean that where there is one-off liability (such as in *Woodland*) courts are more likely to award damages when the *Woodland* criteria are met, but are less likely to award damages in situations where there are potentially a large number of claimants (e.g. in the fostering abuse context). This leads to the counterintuitive position that the greater the problem, (and the greater the need for tort to shape and improve practice), the less likely there is to be a remedy in tort. In *S* the New Zealand Court of Appeal argued that liability would be socially desirable since litigation would provide an incentive to take greater precautions to protect children, that this would not adversely affect the state/foster carer relationship, and that if it prevented only a few cases of abuse there might be savings in social costs, since abuse victims are disproportionately represented in users of mental health services, in the criminal justice system, and often receive state benefits (at [71]-[72], [58]).

It is submitted that Black L.J.’s second argument, detailed below, not her first, is the core of why a non-delegable duty is not suitable in the child placement and foster care context. Under the statutory regime at the time local authorities could discharge their duty to provide accommodation by allowing a child to live with a parent or relative. If a non-delegable duty was present this would create local authority liability for the acts of the child’s parents or relatives. This is highly undesirable; it would create a form of state insurance for family acts, when a child has been returned to its family, unless it could be argued that the fair, just, and reasonable factor varies by type of placement. However, it is unconvincing to distinguish this from other forms of placements. Such liability could discourage local authorities from reuniting families (at [63]).

This potential for liability for family acts is why a non-delegable duty is not desirable in this context, and it demonstrates the superiority of a vicarious liability approach. Vicarious liability would not result in local authority liability for the acts of a child’s own family members. A non-delegable duty would also mean that if one evening foster carers unilaterally delegated their role to a friend, relative, or babysitter then the local authority would also be liable for the acts of that person. With vicarious liability this would not be the case, the local authority would be liable only for the person for whom they stand in a sufficient relationship with; it thus limits liability to the torts of those that the local authority can screen and control. Whilst vicarious liability was not present under the statutory regime in question in this case, it may be present under subsequent regimes.

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