



Ian Miller

## PERSONAL INJURY BRIEFING

In our latest edition of the 1 Chancery's Lane Personal Injury Briefing [Ella Davis](#) reviews a recent decision from the Court of Appeal relating to vicarious liability and non-delegable duties.

### [The Court of Appeal resists the temptation to let a hard case make bad law.](#)

The Court of Appeal in *NA v Nottingham County Council* [2015] EWCA Civ 1139 has held that a local authority was not vicariously liable for the abuse of a child by the foster carers with which it placed her, nor did it owe her a non-delegable duty to protect her from harm.

There was no question that the local authority had not exercised reasonable care in placing her with those foster carers or in supervising those placements. An allegation to that effect was the subject of an early successful application for summary judgment.

### Vicarious Liability

All three members of the Court of Appeal applied *Various Claimants v Catholic Child Welfare Society and Others* [2012] UKSC 56. This was a case in which the Supreme Court held that there was a two stage test for establishing vicarious liability. First the relationship between the Defendant and tortfeasor had to be sufficiently akin to one of employment for vicarious liability to be capable of arising. Second, there had to be a relevant connection linking that relationship and the tortious conduct. The Respondents in that case were represented by 1 Chancery Lane members, Lord Faulks QC and Alistair Hammerton.

The focus of the enquiry in *NA v Nottingham CC* was the issue of whether or not there was a relationship akin to employment between the local authority and the foster carers. It was accepted that if the relationship was capable of giving rise to

vicarious liability, there was a relevant connection between it and the abuse. The Court of Appeal found it to be of significance that, under the contemporary legislative framework, the whole point of fostering was to replicate normal family life and to this end foster carers were given a high degree of independence. In those circumstances the control test was not satisfied.

### Non-delegable Duty

While in broad agreement, each of the three Court of Appeal judges gave their own slightly different reasons for refusing to hold that there was a non-delegable duty and so it is worth looking a little more closely at their individual reasoning.

### Tomlinson LJ

Tomlinson LJ started by summarising the key passages of *Woodland v Swimming Teachers Association and Others* [2013] UKSC 66 including the five "paradigm indicia" of circumstances in which a non-delegable duty will arise.

These are:

(1) *The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes.*

(2) *There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual custody,*

*charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren.*

*(3) The claimant has no control over how the defendant chooses to perform those obligations, i.e. whether personally or through employees or through third parties.*

*(4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it.*

*(5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.*

Tomlinson LJ then summarised the judge, Males J's reasons as to why, even though all five were met, it would not be fair just and reasonable to impose a non-delegable duty.

He held that the judge had been wrong to find that the duty which had been delegated was a duty to take reasonable steps to protect the child from harm. The local authority did not attempt to divest itself of this duty, in fact performing it by taking care in the selection of foster carers and supervising the placements.

In order to be non-delegable, a duty must relate to a function the local authority has assumed a duty to perform. Fostering is a function the local authority cannot perform but necessarily entrusts to others.

By placing the Claimant in a foster home the local authority discharged rather than delegated its duty to provide accommodation and maintenance. There was therefore no non-delegable duty engaged and the appeal should be

dismissed (¶24).

He was also not persuaded that the judge had given inappropriate weight to the factors relied upon in support of the conclusion that it was not fair, just and reasonable to impose such a duty.

#### Burnett LJ

Burnett LJ held that the local authority's duty was as the judge found "to care for the child – to promote its welfare and to protect it from harm" but qualified by "reasonable practicability".

In his view it was significant that none of the previous English cases on non-delegable duties concerned assaults but were all negligence cases. He concluded that if proper application of the *Various Claimants* test had the result that there was no vicarious liability for an assault on a child in care, then the common law should not impose liability by way of a non-delegable duty not to assault.

Non-delegable duties were not developed by the common law for the purposes of expanding the underlying duty. What the Claimant sought to do was to impose a new form of strict liability on local authorities in light of the fact that foster parents are not always able to satisfy a claim. Burnett LJ held this was not a sufficient justification for extension of the law (¶37).

He also considered it significant that the statutory context tied the local authority's powers and duties to those of a parent or guardian. The fact that a parent does not have a non-delegable duty in respect of third party assaults supported the conclusion that a local authority should not either (¶42)

#### Black LJ

Black LJ held that the first four of the five indicia referred to by Lord Sumption in the *Woodland* case were present. She was not prepared to give a firm view on the fifth.

She did, however, indicate that she was less sure than Burnett LJ that the deliberate nature of the foster parent's conduct was significant. In her view the fact that Lord Sumption expressed

himself in terms of “reasonable care” was unsurprising since the conduct complained of in that case was negligence. Further, there can be vicarious liability for criminal acts and liability for non-delegable duty goes further than vicarious liability, arising only because there is no vicarious liability.

Like *Males J*, she held that those five features had to be considered in the context of Lord Sumption’s remarks at ¶25 of *Woodland* to the effect that a non-delegable duty should only be imputed “so far as it would be fair, just and reasonable”. Her route to finding that no such duty arose in this case was therefore to hold that to impose it would be unreasonably burdensome and in fact contrary to the interests of the many children in the local authority’s care (¶60)

### Analysis

Black LJ was careful to note that if the law of negligence ensured that local authority safeguards were rigorously maintained that was “a very good thing”. It was a theme common to all three judgments though that, sometimes, those safeguards could not protect children from harm. The law should not go so far as to impose liability on local authorities whenever a child in foster care is harmed. Indeed Black LJ noted that if this led to defensive practice it risked causing more harm than good.

It will be a relief to local authorities that the Court of Appeal has taken a robust line and refused to expand the law on vicarious liability and non-delegable duties any further.

However, while this decision has clarified the duties of local authorities to children in foster care (subject to any appeal), the fact that all three judges reached that result by different reasoning may make this decision difficult to apply in other cases where a non-delegable duty is asserted. Further authority on whose is the correct approach will

have to follow and it seems inevitable that there will be continued appellate litigation in this area.

Ella Davis

### About the Author

Ella Davis is currently undertaking her pupillage at 1 Chancery Lane and Ian Miller is her current Pupil Supervisor.

