

## FOSTERING UNCERTAINTY IN THE LAW OF TORT

The Supreme Court's decision in *Armes v Nottinghamshire County Council* [2017] UKSC 60; [2017] 3 W.L.R. 1000, [2018] 1 All E.R. 1 affirms that the law of England and Wales concerning vicarious liability is long on policy, and short on principle.

As the trial judge (Males J.) emphasised, Natasha Armes experienced a “very unhappy childhood” ([2014] EWHC 4005; [2015] P.T.S.R. 653, at [1], [212]). After she had been taken into care at the age of seven, the defendant local authority, exercising its powers under the Child Care Act 1980, placed her in foster care. That care included periods of habitation with two couples, the Allisons and the Blakelys. Almost a quarter of a century later, Ms Armes brought proceedings against the local authority with respect to physical, sexual and emotional abuse suffered in her family home and in the homes of her foster parents. Males J. found that she had been physically and emotionally abused by Mrs Allison and sexually abused by Mr Blakely ([2017] UKSC 60, at [2] (Lord Reed)). Nevertheless, although he held that the claims were not time barred, the judge found against the claimant on the basis that (1) she had failed to prove negligence on the part of the social workers involved, (2) the local authority did not owe a non-delegable duty to care for the claimant, and (3) the local authority was not vicariously liable for torts committed by foster parents against those placed in their care.

The Court of Appeal dismissed the claimant's appeal on the second and third points ([2016] EWCA Civ 1139; [2016] Q.B. 739, noted Morgan (2016) 132 LQR 399). Tomlinson L.J. (at [1]) described Ms Armes' treatment at the hands of Mrs Allison as “cruel” and that by Mr Blakely as “utterly despicable”. The Court was, nevertheless, unpersuaded that there was a sufficient basis in law to find the local authority liable for the foster parents' undeniably tortious conduct.

The Supreme Court upheld the Court of Appeal's judgment on the non-delegable duty issue but, by a majority, allowed the claimant's appeal on the issue of vicarious liability. With respect to the latter question, Lord Reed (with whom Lady Hale, Lord Kerr and Lord Clarke agreed) relied heavily upon the framework established by his own judgment in *Cox v Ministry of Justice* [2016] UKSC 10; [2016] AC 660. He sought to establish whether the typical features of an employment relationship which have been held to justify, in policy terms, the imposition of vicarious liability between employer and employee (*Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1, at [35] (Lord Phillips)) were sufficiently present in the relationship between local authority and foster parent, and concluded that they were. In particular, in his judgment, (1) “the relevant activity of the local authority was the care of children who had been committed to their care”; (2) the local authority was under a statutory duty to care for such children; (3) it recruited, trained and paid foster parents in the discharge of that duty (at [59]); (4) placing children in the care of foster parents creates a relationship of trust and confidence between the foster parents and the children, without the exercise of close control by the local authority, and “renders the children particularly vulnerable to abuse”, such that “a particular risk of abuse is inherent in that choice” (at [61]); (5) although the foster parents managed and controlled their own households, it would be wrong to regard them as being in the same position as ordinary parents, given that the local authority exercised statutory powers of approval, inspection and monitoring, with the ultimate sanction of removal of the child (at [62]); and (6) whereas most foster parents have insufficient means to meet a substantial award of damages and are unlikely to have, or have the means to secure, insurance against the consequences of their own wrongful conduct, the local authorities that engage them “can more easily compensate the victims of injuries which are often serious and long lasting” (at [63]). These factors pointed, in Lord Reed's view, to the imposition of vicarious liability (at [64]).

Lord Reed's overall direction of travel may fairly be summarised in the following extracts from his judgment:

“[T]he foster parents provided care to the child as an integral part of the local authority's organisation of its child care services. ... [I]t is impossible to draw a sharp line between the activity of the local authority, who were responsible for the care of the child and the promotion of her welfare, and that of the foster parents. ... [T]he torts committed against the claimant were committed by the foster parents in the course of an activity carried on for the benefit of the local authority.” (at [60])

“[I]f the public bodies responsible for decision-making in relation to children in care consider it advantageous to place them in foster care, notwithstanding the inherent risk that some children may be abused, it may be considered fair that they should compensate the unfortunate children for whom that risk materialises, particularly bearing in mind that the children are under the protection of the local authority and have no control over the decision regarding their placement. In that way, the burden of a risk borne in the general interest is shared, rather than being borne solely by the victims.” (at [61])

Both the majority, and Lord Hughes in dissent, recognise (at [30], [91]) the anomalous and exorbitant character of vicarious liability within the law of tort in that the defendant (here, the local authority) is treated as if it were a wrongdoer without having committed any wrong itself. The character of vicarious liability is such that the law should resort to it only exceptionally (see Lord Hughes, at [91]), and in a manner that is both predictable and justified as a matter of principle. The modern English law does not, however, conform to any of these standards. It is broad, and has expanded considerably in the course of this century. Moreover, instead of seeking out a clear, principled basis for imposing liability on those who have committed no wrong, judges have relied instead on a casserole of incommensurable policy reasons and general resort to notions of what is “fair” and “just” to support the doctrine. These features make its operation highly unpredictable, encouraging claimants' lawyers to push at the ill-defined, expanding boundaries of liability and leaving defendants and their representatives in a quandary whether to settle or fight against the judicial current.

In *Armes*, the defendant's social services team were taken to have performed all of their duties and exercised all of their powers and responsibilities with due care for the claimant's care and wellbeing, and to have acted at all times in what they perceived to be in the best interests of the claimant. Nonetheless, the defendant (and its council tax payers) were required to foot the bill by a decision that appears, in substantial part, to have been motivated by a desire that the burden of the claimant's misfortune be distributed more widely.

More particularly, five elements of Lord Reed's vicarious liability analysis in *Armes* appear open to criticism.

First, he appears to suggest (at [30], [51]) that vicarious liability is a residual category of liability, which is not engaged if the defendant is directly liable for the harm caused by a third party (i.e. the defendant has actually committed a tort against the claimant). This seems intuitively out of line with the historical relationship between vicarious liability and non-delegable duties in the case law, the latter having been relied on principally in cases falling beyond the prevailing limits of vicarious liability (*Wilson & Clyde Coal Co v English* [1938] AC 57; *Woodland v Essex CC* [2012] UKSC 66, [2014] 1 AC 537, [4] (Lord Sumption)). It is also hard to justify in principle: as Lord Reed rightly notes (at [50]), there are “two distinct legal doctrines with different incidents and different rationales”. Furthermore, it may be advantageous for a claimant to seek to establish

vicarious liability for one tort (e.g. deceit) rather than direct liability for another (negligence). The available defences may well be narrower, or the rules of remoteness more favourable.

Secondly, Lord Reed's conclusion (at [60]) that the foster parents were "an integral part of the local authority's organisation of its child care services" appears in conflict with one of his principal reasons for rejecting (in the present author's view, correctly) the claim based on a non-delegable duty to care for the claimant, that "the duty of the local authority is not to perform the function in the course of which the claimant was abused (namely, the provision of daily care), but rather to arrange for, and then monitor, its performance" (at [47]). The latter view reflects a much narrower view of the local authority's "enterprise" than the former. The training and monitoring of foster parents was, no doubt, an important part of the local authority's activities, but those educational and regulatory roles do not justify the conclusion that the foster parents' care of the children was an activity that the local authority undertook for its own benefit.

Lord Hughes neatly captures this point in his dissenting judgment in *Armes* (at [87]-[88]):

"What the local authority does, in all cases, whether involving family and friends or strangers, is to take responsibility for making decisions about where the children shall live, and then monitoring the progress with a view to changing the arrangements if they do not benefit the children. ...

It seems to me that this is much the more realistic way of looking at the functions of the local authority, and the relationship between it and foster parents, of whichever type. The detailed controls which the authority exercises, and which are apt at first sight to suggest analogy to employment, are in reality decisions about where the children shall live. ... But once the decision to place has been made, the care of the children is in practice committed to the foster parents."

Thirdly, Lord Reed's frequent references to the defendant local authority's statutory duties and powers as supporting the imposition of vicarious liability (see *Armes*, esp. at [59]-[62]; also *ibid.*, at [38]-[48] with respect to non-delegable duties) may be contrasted with the evolved position in the tort of negligence, which treats the public law framework as a generally neutral factor in determining the existence of common law duties of care (see, recently, Lord Reed's own judgment in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [31]-[42]). If the right starting point for analysis is that "public authorities are generally subject to the same liabilities in tort as private individuals and bodies" (*Robinson*, at [32] (Lord Reed)) and that statutory powers and duties do not operate to extend common law liabilities (*ibid.*, at [36]), the method of reasoning to support a finding of vicarious liability in *Armes* strikes a discordant note (cf. *Cox*, above, at [38]).

Fourthly, Lord Reed undoes his own good work in *Cox*, in which he rather elegantly shaped Lord Phillips' five policy factors in the *Various Claimants* case into a workable test centred upon three of those factors (*Cox*, at [22]-[24]) while at the same time marginalising the other two: control over the tortfeasor and relative resources (*ibid.*, at [20]-[21]). Although Lord Reed reiterates this test in *Armes* (at [58]), the two side-lined factors (control and resources) undoubtedly play a significant role in his reasoning (*Armes*, at [62]-[63]). Lord Reed's reliance upon the local authority's perceived "deeper pockets" is doubly unfortunate: it undermines his principled – and persuasive – rejection of its relevance in *Cox* (at [21]) and suggests a lack of awareness of the financial challenges facing local authorities in this age of austerity and growing social care burdens (see National Audit Office, *Financial sustainability of local authorities*, HC 834 (Session 2017-2019), 8 March 2018).

Finally, Lord Reed’s emphasis upon the creation of risk of abuse (*Armes*, at [61]) remains at odds with Lord Toulson’s flat rejection of retrospective risk analysis in the second stage of the vicarious liability equation (*Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677, [40]). On this point, it is *Mohamud* that is the more troubling of the two decisions. As Lord Phillips put it in *Various Claimants* (at [86]-[87]), the analysis of risk creation or enhancement resulting from the defendant’s engagement of the tortfeasor in his enterprise may establish a “strong causative link” between the defendant’s conduct and the commission of the tort, and that link *might* (the present author would go no further) justify the imposition of liability without wrongdoing. By abandoning that position, and adopting a much less precise, and diluted, causal requirement (*Mohamud*, esp. at [45], [47]), Lord Toulson threw away what may have been the best opportunity to place vicarious liability on a principled footing in the English common law. The decision in *Armes* reminds us that it is now no more than a blunt tool for giving effect to judicial instincts for social justice.

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