

Supreme Court hold Local Authority vicariously liable for abuse by foster parents

Armes v Nottinghamshire County Council [2017] UKSC 60

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BACKGROUND

The appellant was in the care of the respondent local authority from the ages of 7 to 18. The local authority placed her into foster care with: (i) Mr and Mrs A between March 1985 and March 1986; and (ii) Mr and Mrs B between October 1987 and February 1988. She was physically and emotionally abused by Mrs A and sexually abused by Mr B.

The case proceeded on the basis that the local authority were not negligent in the selection or supervision of the foster parents, but that they were nevertheless liable for the abuse perpetrated by her foster carers.

She claimed that the local authority were liable for the abuse, either on the basis that they were:

- (i) in breach of a non-delegable duty; or
- (ii) vicariously liable for the wrongdoing of the foster parents.

Her claim was dismissed by the High Court and the Court of Appeal.

JUDGMENT

The Supreme Court allowed the appeal by a majority of 4:1. It rejected the argument that the local authority were liable on the basis of a non-delegable duty. However, it found the local authority vicariously liable for the abuse committed by the foster parents.

Lord Reed gave the lead judgment (Lady Hale, Lord Kerr and Lord Clarke agreed). Lord Hughes gave a (very strong) dissenting judgment.

REASONS FOR THE JUDGMENT

Non-delegable duty of care

A local authority are not under a non-delegable duty to ensure that reasonable care is taken for the safety of children in care while they are in the care and control of foster parents. Such a proposition is too broad and fixes local authorities with too demanding a responsibility [49].

The Supreme Court was unanimous and gave the following reasons:

- The Child Care Act 1980 ("the 1980 Act") permits a local authority to arrange for children in care to spend time staying with their parents, grandparents, other relatives or friends. Imposing a strict liability on local authorities for the lack of care of those relatives or friends would risk creating a conflict between the local authority's duty (under section 18(1) of the 1980 Act) to give first consideration to the need to safeguard and promote the welfare of the child and their interests in avoiding exposure to such liability. It would also risk creating a form of state insurance in situations where the local authority place the child with the child's own parents [45].
- The 1980 Act required the local authority to "discharge" the duty to provide accommodation and maintenance for a child, including by placing the child with foster parents. This implies that, although the local authority has numerous duties towards the child, their duty is not to provide the child with day to day care. It is rather to arrange for and monitor the performance of that function by the foster parents [46-47].
- The Secretary of State makes regulations under section 22 of the 1980 Act imposing duties on local authorities in relation to the boarding out of children. The implication of section 22 is that the local authority's continuing responsibility for the child is discharged by boarding-out the child in accordance with those regulations. This includes by prior approval of the household and then subsequent inspection, supervision and removal. The statutory regime does not impose any responsibility for the day to day care of the child [48].

Vicarious liability

Applying the principles set out in *Cox v Ministry of Justice* [2016] UKSC 10 on the imposition of vicarious liability, the Supreme Court held that the local authority were vicariously liable for the acts of the foster parents in the present case for the following reasons:

- **Integration and business activity:** The local authority carried out the recruitment, selection and training of foster parents, paid their expenses and supervised the fostering. In those circumstances, the foster parents were not carrying on an independent business of their own. If you stand back, it is impossible to draw a sharp distinction between the activity of the local authority and that of the foster parents. Therefore, the abuse committed by the foster parents against the claimant was committed by the foster parents in the course of an activity carried on for the benefit of the local authority [59-60].

- **Creation of risk:** The placement of children with foster parents creates a relationship of authority and trust between the foster parents and children in circumstances where close control cannot be exercised by the local authority. This renders the children particularly vulnerable to abuse [61].
- **Control:** The local authority exercised a significant degree of control over the foster parents. It exercised powers of approval, inspection, supervision and removal. Although foster parents controlled the organisation and management of their household and dealt with most aspects of the daily care of the children without immediate supervision, it would be a mistake to regard them as being in much the same position as ordinary parents. The local authority exercised a significant degree of control over both what the foster parents did and how they did it in order to ensure that the children's needs were met [62]. Micro-management (or a high degree of control) is not necessary for the imposition of vicarious liability [65].
- **Ability to pay damages:** Most foster parents have insufficient means to meet a substantial award of damages, whilst local authorities can more easily compensate victims of abuse [63].
- There was no evidence to suggest that imposing vicarious liability would discourage local authorities from placing children in care with foster parents and encourage them instead to place them in residential homes at much greater cost. In any event, that argument is difficult to accept [68].

Lord Hughes gave a strong, detailed dissenting judgment on the issue of vicarious liability. He considered that the majority's approach would extend vicarious liability to family and friend placements under the current statutory regime. If vicarious liability applies to "ordinary" foster parents (on the basis that they are doing the local authority's business) then it must apply to family and friend placements with connected persons. It would consequently inhibit local authorities' practice of making such placements as insurers would insist on additional safeguards in relation to family placements. This would discourage those placements being made. Finally, he considered that it may result in undesirable litigation of family activity in the courts [87-90].

In response to these concerns, Lord Reed stated: (i) the approach adopted would not have resulted in the imposition of vicarious liability if the appellant had been placed with her own parents; (ii) this decision is concerned only with the legislation and practice that was in force at the relevant time; and (iii) the court's care not to impose unduly exacting standards in the context of family life applies equally to life in foster families.

IMPACT OF THE DECISION?

The Supreme Court's decision is a tale of two halves.

In one breath it appears to have called a halt to arguments in favor of extending the scope of non-delegable duties of care, following the decision of *Woodland v Essex County Council* [2013] UKSC 66.

On the other hand, the Court has continued to develop the principles laid down in *Christian Brothers* [2012] UKSC 56 and *Cox v Ministry of Justice* and has (arguably) extended the scope of vicarious liability further. Lord Hughes states that the extension of vicarious

liability needs careful justification. It is clear that the majority in *Armes* believed that there was sufficient justification to do just that.

The question that practitioners are likely to want answered in light of this decision is: where do we draw the line? In other words, it is clear that the principle of vicarious liability now extends beyond the normal employee-employer relationship. But how far does it extend? *Armes* shows us that the reach of vicarious liability now extends to the relationship between local authorities and foster carers in respect of children placed in their care. Moreover, the approach taken by the appellate courts in the recent trend of cases gives the impression that they are more willing than ever to extend the scope of vicarious liability in order to find the employer liable.

This will likely be good news to claimants who will want to proceed against a local authority rather than an individual 'wrongdoer' who might not be able to satisfy any eventual judgment. Whereas, defendant local authorities will be concerned that this is a further expansion of vicarious liability which could extend their liability and lead to further claims. In turn, it could also have a serious impact on how social care is delivered.

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