

Fostering : vicarious liability and non-delegable duties
Consent in claims for historic abuse

Fostering Consent

- **Fostering** : Supreme Court 8 & 9 February 2017: vicarious liability and non-delegable duties : *NA v Notts & Woodland v Essex*
- **Consent** : The abuse of trust : *JL v Bowen* : The Sexual Offences Act 2003

Fostering

- NA v Nottinghamshire CC [2014] EWHC 4005– Males J
 - Facts : era – late 1970s/1980s : physically and emotionally abusive mother and mother’s partner; taken into care – abused by two sets of foster parents
 - Basis of claim :
 - (1) failure to remove earlier
 - (2) LA vicariously liable for acts of foster parents
 - (3) LA had non-delegable duties

Fostering : vicarious liability

- Premise : not claiming breach in selection of foster parents nor breach in failure to supervise
- Judge finds Mrs.A did physically abuse C
- Judge finds that Mr.B did sexually abuse C - bop
- LA responsible in law for acts of foster parents
- Simplify route : relationship akin to employment

Vicarious liability : statutory framework

- Relationship between FP and LA defined by statute
- CYPA 1969 : section 24 : care order : same powers and duties as a parent
- CA 1980 : safeguard and promote welfare of child – option of boarding out (fostering)
- Boarding Out Regulations 1955 – schedule 1 undertaking by foster parent : **will care for and bring up as we would a child of our own**
- As Males J put it : “ the whole concept...was to give a child something regarded by society as precious..the experience of family life”

The statutory limitations -

- The regulations required the local authority to visit the foster home and gave it the duty to remove a child if it appeared that boarding-out was no longer in the child's best interest, while a supervising visitor was empowered to remove a child immediately if he or she considered that conditions in the home endangered the child's health, safety or morals. However, **the regulations did not give the local authority or its visiting social workers day-to-day control over the way in which the foster parents provided care for the child. That was a matter for the foster parents, consistently with the objective of giving the child a normal experience of family life.**

Vicarious liability – 2 stage test

- Lord Phillips :why fair, just and reasonable for employer to be liable
 - Means to compensate – insurance
 - Tort committed as result of activity carried out on behalf of employer
 - Activity part of employer's business
 - In employing individual to carry out activity, employer creates risk of tort
 - Employee under control of employer
- Identify same 5 features in establishing relationship “akin to employment”

Vicarious liability – *KLB v British Columbia*

- The independence of the foster family is essential to the government's goal of providing family care. If foster parents had to check with the state before making ordinary day-to-day decisions, they not only would be less effective as parents, but would be unable to deliver the spontaneous, loving responses and guidance that the children need. Foster families must be left to arrange their own family routine, in their own way. They must deal with day-to-day challenges and problems by working them out within the family, and by sharing responsibility for doing this, demonstrating to foster children that it is possible to resolve difficulties by working together. Moreover, foster children must know that their foster parents have this responsibility. Only in this way can foster children come to understand that authority figures can be loving and consistent and worthy of trust. Foster parents cannot function as loving and consistent authority figures unless they have some authority to exercise. Hence, while foster parents act in furtherance of a public purpose, they must operate independently of day-to-day state control if they are to meet the goals of foster care.

Vicarious liability – Males J.

- “the decisive point is that the defendant local authority not only does not have control over the foster parents, whether to direct what they do or how they do it, but that **it is essential to the whole concept of foster parenting that the local authority should not have that control**. The foster parents’ role is to provide family life, bringing up the child as a member of their own family. That is only possible if a foster parent enjoys independence from direction by the local authority and autonomy to determine how the child should be parented.”

Non-delegable duty

- What is a non-delegable duty? – duty to ensure the careful performance of work delegated to others.
- How it arises – see Lord Sumption in *Woodland*
 - C vulnerable
 - Pre-existing relationship between C and D
 - C has no control over how D performs obligations
 - D has delegated to TP an integral part of D's duty to C
 - TP has been negligent
- And it is fair just and reasonable

Non-delegable duty – fostering

- Accepted that C vulnerable
- Accepted that pre-existing relationship between C & LA
- Found that C had no control
- LA assumed a positive duty to care for C which it delegated to the foster parents
- Negligence in performance – D: not for deliberate act
- But not fair just reasonable – unreasonable financial burden, risk-averse-fostering, limit to control of family life, do away with parent/foster placement distinction

NA in Court of Appeal - 2015 EWCA Civ 1139

— 3 judgements

- Reviewed statutory framework
- **Vicarious liability** – Tomlinson LJ rejected LA having level of control over foster parent as loco parentis and central to LA 'enterprise' : LA control at macro not micro level : **"Micro management of the day to day family life of foster children, or of their foster parents in the manner in which they create the day to day family environment, would be inimical to that which fostering sets out to achieve...** The control retained by the local authority, over and above the proper selection of foster parents and adequate supervision of the placement which is here not in issue, is thus irrelevant to the risk of abuse occurring during the unregulated course of life in the foster home"

NA in Court of Appeal

- Non-delegable duty – more detailed analysis
 - LA did **not** delegate duty to take reasonable steps to protect child from harm
 - Fostering “ is not a function which is an integral part of the positive duty assumed by the LA because the LA cannot itself provide foster care, but can only arrange for it to be provided by others”
 - “By arranging the foster placement the local authority **discharged rather than delegated** its [statutory] duty to provide accommodation and maintenance for the child. True it is that the local authority entrusted to the foster parents the day to day delivery of accommodation, but accommodation within a family unit was not something which the local authority could itself provide and this cannot properly be regarded as a purported delegation of duty. It was inherent in the permitted choice of foster care that it must be provided by third parties. “
[para.24]

NA in Court of Appeal

- Burnett LJ :
 - No non-delegable duty not to assault C : practical effect = strict liability for deliberate harm done to child in its care by those looking after
 - Reliance only arises where vicarious liability has failed – too far
 - The Appellant seeks to disconnect the non-delegable duty from the law of negligence and impose a new form of strict liability. The justification for such a step appears to be that foster parents may not be in a position to satisfy a claim for damages and costs if sued directly. Whether that is right or wrong in general, in my judgment it provides too insubstantial a ground for a significant extension of the law in this area, which might have wide implications
 - No non-delegable duty not to assault

NA in Court of Appeal

- Black LJ :
 - Vicarious liability : foster parents have control not LA – day to day life in charge of foster parents
 - Troubled
 - In the present case, the relevant duty is one that is established by statute [as opposed to that in *Woodland*] Depending on precisely how it is viewed, it could possibly extend to a duty not to assault the child (reflecting the parent's duty not to assault the child), and on that analysis, that duty not to assault the child would be the duty entrusted to the foster parents by the local authority.
 - to impose a non delegable duty on a local authority would be unreasonably burdensome and, in fact, contrary to the interests of the many children for whom they have to care – defensive practice (reluctant to place)

NA in Court of Appeal

- Black LJ :
 - If LA strictly liable for harm by foster parents then no basis for not making LA liable for harm when placing child back with parent – “this would affect the willingness of of the local authority to take what would otherwise be seen as the manageable risk of allowing the child to live at home, thus reducing the chance of reuniting the child with his or her own family where that would, in fact, benefit the child.”
 - ‘Duties of a parent’ : Parent not strictly liable for harm caused by someone to whom care of child delegated ; why should LA’s duty be more onerous?

To supreme court – feb 2017

- Questions for Court:
 - Does the relationship between a local authority and foster parents fulfil the criteria for vicarious liability in fact and in law?
 - Are the criteria necessary to establish a non-delegable duty, as set out by Lord Sumption in *Woodland v Essex County Council*, met?
 - If a non-delegable duty is established is it breached by a deliberate, rather than a careless, act?
 - Is it fair, just and reasonable to impose a non-delegable duty in these circumstances?

NA – what will happen?

- Vicarious liability :
 - Discharged its function ? In practice does LA abdicate its ongoing responsibility to child in its care?
 - Not extent of control but role required to undertake
 - LA providing family life through provision of organised fostering in a way that child in care not otherwise have
 - Guidance and foster training – social work supervision of both foster parents and children
 - Inconsistency with institutional care and vicarious liability for acts of carers
 - JW : foster parents acting on behalf institutional parent

In the supreme court..

- Non-delegable duty :
 - Policy issues : encouraging fostering and specialist fostering: benefit and burden – the overarching responsibility to care for looked after children
 - Why distinguish foster children from other looked after children: same protection
 - Higher responsibility than birth parent ?
 - Vulnerability of child in care
 - Meets Lord Sumption criteria – extension of supervision – fair just and reasonable – see HHJ Goldsmark – JB v Leicestershire CC 6 June 2014

Consent – the context

- 1990s - Young person at school
- 16/17 – tuition from teacher in lead up to exams
- Teacher takes special interest in pupil aged 16
- Pupil looks up to teacher
- Aged 17 has sexual relationship with teacher – 6 months
- Teacher ends relationship
- Psychiatric reaction – self-harm impact on further study
- 15 years on brings claim
- Teacher : was consensual aged 17



Nigella in agony – but is she about to take him back?

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FREE

Slazenger Wimbledon Tennis Balls

SEE PAGE 94

TOKEN COLLECT. TERMS APPLY

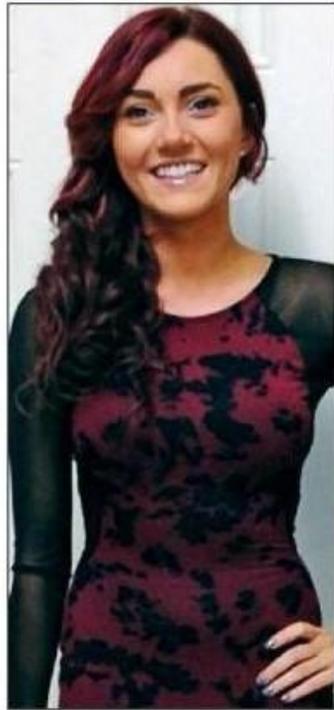


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PAGE TWO

KIDNAP TEACHER GROOMED ME AT 13

As maths master is jailed for 5½ years, another schoolgirl victim speaks out



Chloe Queen: Forrest asked her to stay for extra lessons

A TEENAGER told last night how shamed maths teacher Jeremy Forrest targeted her when she was just 13.

By Lucy Osborne, Tom Kelly and Claire Ellicott

Christmas and birthday cards, asked her to watch him perform with his band and made her stay after class for extra lessons.

'I thought he wanted to teach me more, not realising he possibly had other ideas,' she said. 'He would invade my personal space and make me feel uncomfortable. He would routinely muddle me.' Chloe, now 17, is one of a string of girls Forrest, 30, tried

to groom before he ran away to France with a 19-year-old last September. He was jailed for five and a half years yesterday at Lewes Crown Court and admitted five further counts of sex with a child after already having been
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30p
On Saturday

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Jailed for affair with his pupil



- Maths teacher sentenced to five years for abduction and child sex
- Girl's mother tells shocked court: 'My daughter is dead to me'
- Teachers warned over conduct after school missed warnings



New sums, please: UK debt rises



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Britain's new Glee schools

SPORT

Rugby Lions enter the arena



Crickets England face India in final



Sexual Offences Act 2003

2003 CHAPTER 42

PART 1

SEXUAL OFFENCES

Abuse of position of trust

16 Abuse of position of trust: sexual activity with a child

[^{F1}(1) A person aged 18 or over (A) commits an offence if—

- (a) he intentionally touches another person (B),
- (b) the touching is sexual,
- (c) A is in a position of trust in relation to B,
- (d) where subsection (2) applies, A knows or could reasonably be expected to know of the circumstances by virtue of which he is in a position of trust in relation to B, and
- (e) either—
 - (i) B is under 18 and A does not reasonably believe that B is 18 or over, or
 - (ii) B is under 13.

(2) This subsection applies where A—

- (a) is in a position of trust in relation to B by virtue of circumstances within section 21(2), (3), (4) or (5), and
- (b) is not in such a position of trust by virtue of other circumstances.

(3) Where in proceedings for an offence under this section it is proved that the other person was under 18, the defendant is to be taken not to have reasonably believed that that person was 18 or over unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.

(4) Where in proceedings for an offence under this section—

Sexual Offences Act 2003

- Sections 16-24 : Abuse of Position of Trust
- Section 16 : offence :abuse of position of trust: sexual activity with a child – child is person under 18 – does not reasonably believe to be under 18 – maximum 5 years – consent does not arise
- Section 21 : Positions of Trust :
 - Children in residential care
 - “ this subsection applies if A looks after persons under 18 who are receiving education at an educational institution and B is receiving and A is not receiving education at that institution

Consent – JL v Bowen & SA 27.05.15

manchester county court : HHJ Platts

- Facts –

- C brought up catholic – bullying & aggressive father; joins cubs aged 8; meets Father Laundry – scout chaplain
- C looks up to Laundry as father figure; Laundry invites C (13) and other scouts to house: music, smoking, drinking – encourages boys to moon for photos; C says no
- C (16) visits Laundry on his own at Presbytery : meals & tv – confided – camping one incident of sexual touching
- C nearly 17 – stays at Presbytery – Laundry masturbates C – anal digital penetration – every couple of months until goes to university
- C continues seeing Laundry – regular sexual contact – until 31 when Laundry arrested
- Laundry charged with 17 counts of indecent assault – 5 relate to C -pleads

Consent - 2

- Consent & convictions
 - 2 counts when 16 or under : Sexual Offences Act 1956 : no consent in law
 - 1 counts when 17; 1 when 18 ; 2 when over 21 – consent a defence
 - C relied on convictions in support of case that did not consent
 - Judge : convictions not conclusive – burden on D to show C did consent
- **What is consent** – Judge considers various jurisdictions – issue of fact
 - **Did the Claimant in fact freely consent to the assaults given the background of emotional manipulation or whether apparent consent is vitiated by manipulation**
 - **No statutory provision in civil law stating when consent can or cannot be given**
 - **“the age of the claimant when taken with all the other circumstances is clearly a relevant factor in determining whether he did consent and if so that consent was freely given” [reluctant consent ?]**

Consent- 3

- Considered concept in criminal appeal of “willing submission” – submitted to sexual intercourse rather than consented
- Judge finds that C had capacity to give consent when 16
- “The issue here is whether any consent was given freely or whether because of the background it could not properly be described as consent. The issue of whether mere submission can amount to consent is starkly raised.”
- Findings on facts – contact aged 16,17, 18 – over 3 years : “passive”

Consent - 4

- C's case : whole period to 31 non-consensual – “such consent as there was was the fruit of many years of grooming and friendship. That cannot amount to consent freely given. If consent as the product of grooming amounted to true consent then subject to the age of the victim, all sexual activity as a result of grooming would be lawful”
- D's case : consented throughout – was fully aware of what Launday was doing had sexual dimension – no coercion – had capacity to exercise choice – allowed it to continue to 31 – some visits initiated by C

Consent – 5

- Judge : not all or nothing
 - Does not follow that consent would have remained the same throughout
 - Relationship changed and developed over time
 - Relied on Professor Maden's view that by 16 ' a high degree of emotional dependency had been fostered'..'the emotional tie cannot easily be divorced from the issue of consent
 - Age 16 : no active participation by C –
 - " [C] felt that he could not object to the man he trusted and loved as a father figure...I am not persuaded that the claimant can truly be said to have been consenting freely [at age 16]"
 - Until university : 'the emotional tie and dependency remained' – consent after
 - "The claimant allowed it to happen, he submitted to what Father Launday was doing and was prepared to go along with it. That in my judgment, does not amount to consent"

Consent – 6

- Humane decision
- Practice points –
 - Fact sensitive – the significance of what went before
 - Role of psychiatrist : detail of account & relationship : appropriateness
 - Role of psychiatrist : view on nature of relationship
- Return to factual account :
 - Does abuse of position of trust negate consent ?
 - Can one go behind the claimant's view that she considered it consensual at the time?