Historical Sexual Abuse Claims: Is Vicarious Liability "On The Move" Again?

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Abstract

This article discusses the latest Supreme Court decisions on vicarious liability, Barclays Bank Plc v Various Claimants *and* WM Morrisons Supermarkets Plc v Various Claimants*, and their likely effect on the substantive outcomes in personal injury claims arising out of historical and more recent sexual abuse. It considers this by reference to some recent High Court cases on historical sexual abuse which pre-date the Supreme Court's decisions, as well as one High Court case which post-dates them.*

Introduction

This article considers the Supreme Court's recent decisions in *Barclays Bank Plc v Various Claimants*[1] and *WM Morrison Supermarkets Plc v Various Claimants*[2] and asks two questions by reference to some recent historical sexual abuse High Court judgments: first, whether the law on vicarious liability, in the field of sexual abuse, has moved on once again; and, secondly, whether, and if so to what extent, the Supreme Court's decisions are likely to affect the outcome in abuse cases.

Whilst all claims relying upon vicarious liability have their difficulties, claimants in historical sexual abuse claims have unique challenges to overcome. To succeed, a claimant usually must overcome three hurdles: first, to establish that the two limbs of the test for vicarious liability are satisfied in circumstances where the relationship between the institutional defendant and the primary wrongdoer is frequently atypical; secondly, to persuade the court to permit the claim to proceed out of time, as such claims are often brought many years after primary limitation has expired; and, thirdly, to show that the psychiatric injuries suffered, together with any other losses, were the causative result of the abuse suffered many years before at the hands of the primary wrongdoer. There is also sometimes a fourth hurdle which should not be forgotten: whether the claimant can establish that they were not consenting to the primary wrongdoer's conduct, such that it constitutes a trespass to the person. This article focuses on the first hurdle, which perhaps involves the greatest number of issues peculiar to sexual abuse claims.

The seminal two-stage test set out in *Various Claimants v Catholic Child Welfare Society*[3] requires the court to consider whether: (1) the relationship between the defendant and the abuser was so close that it was capable of giving rise to vicarious liability; and (2) the connection between that relationship and the abuse was close enough to impose liability on the defendant. We consider each in turn.

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[1] *Barclays Bank Plc v Various Claimants* [2020] UKSC 13; [2020] 2 W.L.R. 960.

[2] *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12; [2020] 2 W.L.R. 941.

[3] *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 A.C. 1.

First limb of vicarious liability: Qualifying relationships

The leading sexual abuse cases of the last 20 years have had to consider unique varieties of institutional actor, often operating within religious institutions. This is often no coincidence, given that sexual offenders seek to exploit these atypical institutional features in order to facilitate the grooming and abuse of victims. The traditional test for a qualifying relationship is one that is "akin to employment", which excludes cases involving independent contractors. Courts have found such qualifying relationships in cases involving priests[4] and lay religious appointees, such as lay brothers of the Institute of the Brothers of the Christian Schools[5] and ministerial servants of Jehovah's Witnesses,[6] as well as foster carers vis-à-vis local authorities.[7]

A recent helpful and comprehensive analysis of such atypical relationships can be found in *BXB v Trustees of the Watchtower Bible and Tract Society*,[8] where Chamberlain J considered the Jehovah's Witnesses' liability for one of their elders.

The claimant, a member of a Jehovah's Witnesses congregation and then aged 29, was raped by one of its elders after a morning's door-to-door evangelising together with their spouses. The defendant maintained that the rape occurred in the context of a friendship which had developed between the two of them and was unrelated to any formal activity being undertaken by the claimant or the elder. Chamberlain J rejected that argument, holding that the abuser was in a qualifying relationship with the defendant—Jehovah's Witnesses congregations act through their elders and the elder in question was carrying out activities as an integral part of the defendant's "business activities".[9] Accordingly, the commission of the rape was a risk created by the defendant when it assigned those duties to the elder.

Another feature of sexual abuse cases is that they often involve anomalous situations where the abuser is linked to the defendant by a much less formalised relationship but may, nevertheless, be closely integrated within the defendant's enterprise. A recent example is *DSN v Blackpool Football Club Ltd*.[10] The claimant was abused in 1987 by a scout for Blackpool FC, Frank Roper. Although not employed by Blackpool, and acting in a voluntary, unpaid capacity, Roper provided a steady stream of young football talent to the club from a feeder club which he coached, whilst also abusing the young boys, aged between about 11 and 15, in his charge. The claimant, himself, was abused whilst on a football tour to New Zealand, led by Roper.

Griffiths J found Roper's relationship with the football club sufficiently close to satisfy the first limb of the test and justify imposing vicarious liability.[11] This was principally because of the benefit which the club gained from Roper's scouting over many years. In particular, two players, brought to the club by Roper, had ultimately been sold on for record transfer fees, saving the club from insolvency.

Second limb of vicarious liability: Qualifying conduct/connection

For many years, the second limb required that a defendant's wrongful act had to be performed in "the course of employment", namely by either: (1) doing a wrongful act authorised by the employer; or (2) a wrongful and unauthorised mode of doing some act authorised by the employer. This test proved challenging for claimants who often struggled to satisfy it in cases concerning bad faith intentional torts, such as violent assaults and sexual abuse. This is primarily because conduct such as sexual abuse will inevitably be completely unauthorised by the employer, but also because, in many cases, the conduct often takes place outside of working hours and off the employer's premises.

[4] *Maga v Archbishop of Birmingham* [2010] EWCA Civ 256; [2010] 1 W.L.R. 1441.
[5] *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56.
[6] *A v Trustees of the Watchtower Bible and Tract Society* [2015] EWHC 1722 (QB).
[7] *Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355.
[8] *BXB v Trustees of the Watchtower Bible and Tract Society* [2020] EWHC 156 (QB); [2020] 4 W.L.R. 42.
[9] *BXB v Trustees of the Watchtower Bible and Tract Society* [2020] EWHC 156 (QB) at [157]–[164].
[10] *DSN v Blackpool Football Club Ltd* [2020] EWHC 595 (QB).
[11] *DSN v Blackpool Football Club Ltd* [2020] EWHC 595 (QB) at [159]–[162].

In *Lister v Hesley Hall Ltd*,[12] an historical sexual abuse case, the House of Lords adopted a new test intended to promote a more permissive approach so that such conduct more readily satisfied the second limb. This test required courts to ask whether there was a sufficiently "close connection" between the nature of the employment and the particular tort. A sufficiently close connection has since formed the essence of the test under the second limb.

A good example where the second limb was established is *BXB*, where the rape was committed whilst the elder was at home and Jehovah's work had ostensibly been completed. Chamberlain J applied a "more open-textured approach" which analysed all aspects of the relationship and the abuser's status.[13] He considered the elder's status to be crucial. It explained how the claimant and her husband had got to know the elder and why they had remained friends. It also enhanced the risk that the abuse could occur—the rape happened in circumstances closely connected to the religious activities being carried out.

Similarly, in *DSN*, Griffiths J found there to be a sufficiently close connection between the abuse of the claimant and Roper's work for the football club.[14] The abuse of a 13-year-old boy was committed during an out of season football tour to New Zealand, organised by the abuser, but endorsed by the football club. Although not officially a Blackpool FC tour, Griffiths J held it was a tour which was "part of Roper's operation in building the allegiance of promising young footballers" to the club and, therefore, closely connected with Roper's work for Blackpool FC. The parents only allowed the boys to go because "they saw it as part of Blackpool FC's recruitment operation".

Despite the permissive approach to the second limb being well-established for 20 years, some expressed concerns, following Lord Toulson's judgment in *Mohamud v WM Morrison Supermarkets Plc*,[15] that the second limb was becoming excessively permissive and seemingly limitless. Combined with attempts by some claimants to water down the test for the first limb, even following Lord Reed's clear judgment in *Cox v Ministry of Justice*,[16] the stage was set for the Supreme Court to reconsider both limbs in *Barclays Bank* and *WM Morrison Supermarkets*.

First limb of vicarious liability: Implications of *Barclays Bank*

In *Barclays Bank*, claims were brought by 126 claimants in respect of sexual assaults allegedly committed between 1968 and 1984 by the late Dr Gordon Bates. As part of Barclays' recruitment processes, prospective employees with job offers were required to submit themselves for a medical examination. These examinations were carried out by Dr Bates, during which the claimants alleged that he had sexually assaulted them.

Did Dr Bates' relationship with Barclays satisfy the first limb? The Supreme Court held that the test was not satisfied—he was an independent contractor "in business on his own account as a medical practitioner with a portfolio of patients and clients. One of those clients was the Bank".[17] In reaching that conclusion, Lady Hale made four key points:

- First, "[t]he question … is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant".[18] There was nothing in the most recent trilogy of Supreme Court cases on vicarious liability (*Catholic Child Welfare Society*, *Cox* and *Armes*) to suggest any erosion

[12] *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215.
[13] *BXB v Trustees of the Watchtower Bible and Tract Society* [2020] EWHC 156 (QB) at [167]–[174].
[14] *DSN v Blackpool Football Club Ltd* [2020] EWHC 595 (QB) at [175].
[15] *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677.
[16] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660.
[17] *Barclays Bank Plc v Various Claimants* [2020] UKSC 13 at [28].
[18] *Barclays Bank Plc v Various Claimants* [2020] UKSC 13 at [27].

of this classic distinction between employment and relationships akin or analogous to employment, as against the relationship with an independent contractor.[19]

- Secondly, Lady Hale referred to the five factors or "incidents", identified by Lord Phillips in *Catholic Child Welfare Society* which he considered would, if satisfied, usually make it fair, just and reasonable to impose vicarious liability on the defendant: (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (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; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; and (v) the employee will, to a greater or lesser degree, have been under the control of the employer.[20] Lady Hale held that in "doubtful cases" these incidents "may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability".[21] In particular, despite the non-commercial context of *Catholic Child Welfare Society*, these incidents "may be relevant in deciding whether workers who may be technically self-employed or agency workers are effectively part and parcel of the employer's business".
- However, thirdly, these five "incidents" were not the only criteria by which to judge the first limb of the test.[22] Lady Hale went further than Lord Reed in *Cox*, who had said that not all of these five incidents will be equally significant in each case. For Lady Hale, it was unnecessary for courts to consider them at all in cases where "it is clear that the tortfeasor is carrying on his own independent business".[23] In all cases, the key "will usually lie in understanding the details of the relationship".
- Lastly, Lady Hale considered briefly whether to align the first limb of the vicarious liability test with the statutory concept of "workers" in employment law, under the Employment Rights Act 1996 s.230(3).[24] She declined to do so, on the ground that the statutory concept of "worker" was "developed for a quite different set of reasons".

How does this affect the law as previously understood and applied in cases like *BXB* and *DSN*?

In our view, Lady Hale's judgment is unlikely to make a significant difference to the way sexual abuse claims are decided, primarily because *Barclays Bank* was, itself, a sexual abuse case. Lady Hale retains the status quo (the "akin to employment" test), even if she declined to adopt a more expansive approach which would have encompassed vicarious liability for independent contractors.

However, whilst Lady Hale considered Dr Bates to be a straightforward independent contractor, as we have seen, many of the atypical relationships that arise in the sexual abuse context are not so straightforward. The particular challenges often faced by sexual abuse claimants in establishing qualifying relationships mean that these claims are more likely to fall into Lady Hale's category of "doubtful cases", where reference to Lord Phillips' five "incidents" will often be helpful.

Lady Hale's decision not to align vicarious liability with the statutory concept of "workers" in employment law is especially welcome, at least for claimant lawyers, in sexual abuse claims because many of the relationships arising in these cases would be likely to fall outside established employment law relationships. Nevertheless, Lady Hale's comparison still provides a useful guide for future cases. In

[19] *Barclays Bank Plc v Various Claimants* [2020] UKSC 13 at [24].
[20] *Barclays Bank Plc v Various Claimants* [2020] UKSC 13 at [15], citing *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56 at [35].
[21] *Barclays Bank Plc v Various Claimants* [2020] UKSC 13 at [27].
[22] *Barclays Bank Plc v Various Claimants* [2020] UKSC 13 at [18].
[23] *Barclays Bank Plc v Various Claimants* [2020] UKSC 13 at [27].
[24] *Barclays Bank Plc v Various Claimants* [2020] UKSC 13 at [29].

particular, it may act as a helpful starting point, in each case, to consider whether the primary wrongdoer would constitute a worker for the purposes of employment law. If they would not, one would then need to consider why, for the different purposes of vicarious liability, the law should still consider the relationship sufficiently close to qualify under the first limb.

The recent case of *JXJ v Province of Great Britain of the Institute of Brothers of the Christian Schools ("the de la Salle Brothers")*[25] decided post-*Barclays Bank*, accords with our analysis. In the 1970s, the claimant attended an "approved" boarding school in Scotland for juvenile offenders and others considered to need care and protection. Legal responsibility for the school's management lay with a board of managers appointed by the Catholic Archbishop of Glasgow, pursuant to a statutory framework.[26] The headmaster, deputy headmaster and many of the teaching staff were members of the Institute of the Brothers of the Christian Schools (the same defendant as in *Catholic Child Welfare Society*).

Whilst at the school, the claimant was repeatedly sexually assaulted by James McKinstry, a lay member of staff who worked as a gardener and nightwatchman. The claimant brought proceedings against the Institute, not the school, claiming that it was vicariously liable for McKinstry's assaults. The substantive legal dispute concerned the first limb of the vicarious liability test which, it was agreed, was materially identical under both of the applicable laws, Scots law and the law of England and Wales.[27] Although McKinstry was in an employment relationship with the managers, who were themselves undoubtedly vicariously liable, the question was whether his relationship vis-à-vis the Institute was akin to employment.[28] Chamberlain J (the same judge as in *BXB*) ultimately concluded that it was not.[29]

He contrasted the qualifying relationship between the Institute and the brothers, as found in *Catholic Child Welfare Society*, with that between the Institute and McKinstry. The brothers had entered into a web of reciprocal obligations with the Institute, which pursued its objective of providing a Christian education to boys by requiring the brothers to enter into employment contracts with schools which shared the same objective. The brothers were an integral part of the work, business and organisation of both the Institute and the schools in which they were employed, such that it was appropriate to regard them as akin to partners in the Institute's business.[30] By contrast, lay staff had no reciprocal obligations with the Institute—McKinstry was employed by, and integral to the work of, the school but had no relevant relationship with the Institute.[31]

He also made two crucial findings that follow on from the restrictive approach in *Barclays Bank*:

- First, although it would be impossible for the Institute to pursue its objective without the assistance of lay staff, there was "no principle of law that a business or organisation is vicariously liable for to all those without whom it would be unable to operate".[32]
- Secondly, the Institute's considerable degree of control over the school's operation and organisation made no difference.[33] The facts did not extend to establishing a direct relationship akin to employment between the Institute and the lay staff, especially where legal responsibility for the school's operation and its staff remained with the managers. In short, "The law has not developed to a stage where a person who exercises *de facto* influence over the operation of a business is by virtue of that influence, to be held vicariously liable for an employee of the business with whom he has no direct relationship".

[25] *JXJ v Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914 (QB).
[26] *JXJ v Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914 (QB) at [21]–[26].
[27] *JXJ v Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914 (QB) at [120]–[122].
[28] *JXJ v Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914 (QB) at [136].
[29] *JXJ v Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914 (QB) at [145].
[30] *JXJ v Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914 (QB) at [137] and [140].
[31] *JXJ v Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914 (QB) at [138] and [141].
[32] *JXJ v Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914 (QB) at [142].
[33] *JXJ v Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914 (QB) at [118]–[119] and [143].

Finally, although there is little indication that this was really a "doubtful case", Chamberlain J used Lord Phillips' "five incidents" as a crosscheck and found that none of them provided any positive justification for imposing vicarious liability.[34]

Second limb of vicarious liability: Implications of *WM Morrison Supermarkets*

In *WM Morrison Supermarkets*, claims were brought by 9,263 employees or former employees of Morrisons in respect of the wrongful publication online of their personal information by Mr Andrew Skelton, another of Morrison's employees. Mr Skelton's wrongdoing was motivated by an "irrational grudge" against Morrisons after being subjected to disciplinary proceedings. The claimants sought damages for alleged distress, anxiety, upset and damage and claimed that Morrisons was: (1) primarily liable for breach of the statutory duty created by the Data Protection Act 1998 s.4(4), misuse of private information, and breach of confidence; and (2) vicariously liable for Mr Skelton's conduct under the same three causes of action.

Did Mr Skelton's wrongful conduct satisfy the second limb? The Supreme Court held that it did not—Mr Skelton "was not engaged in furthering his employer's business when he committed the wrongdoing in question", rather "he was pursuing a personal vendetta".[35] Lord Reed analysed, in detail, Lord Toulson's judgment in *Mohamud* and considered that its controversy was due to widespread misinterpretation. Lord Reed outlined what he considered to be its proper interpretation (or, alternatively one might conclude, perhaps his own more restrictive reinterpretation), emphasising the following six points.

- First, Lord Toulson had not intended to change the law.[36] His judgment was a summary, phrased "in the simplest terms", which had to be read with the previous cases of *Lister* and *Dubai Aluminium Co Ltd v Salaam*.[37] The correct approach to the second limb is to ask the following two questions.[38] First, what functions or "field of activities" were entrusted by the employer to the employee? For this, it is necessary to identify the acts the employee was authorised to do. Secondly, is there a sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable? The court generally has to decide whether the wrongful conduct was so closely connected with acts which the employee was authorised to do, that, for the purposes of the liability of his employer, it may fairly and properly be regarded as done by the employee whilst acting in the ordinary course of his employment.
- Secondly, Lord Toulson had not intended to suggest that a mere temporal or causal connection between the employment and the wrongdoing was sufficient—the close connection test is not merely a question of timing or causation.[39] Lord Toulson's references in *Mohamud* to "an unbroken sequence of events" and to "a seamless episode" were not directed towards the temporal or causal connection between the various events, but towards the capacity in which the primary wrongdoer was acting when those events took place—in other words, for Lord Toulson, this supported his conclusion in that case that the primary wrongdoer was acting throughout the entire episode in the course of his employment.[40]
- Thirdly, vicarious liability is not to be determined according to individual judges' sense of social justice but according to orthodox common law reasoning in line with decided cases.[41]

[34] *JXJ v Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914 (QB) at [144].
[35] *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12 at [47].
[36] *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12 at [17].
[37] *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 A.C. 366.
[38] *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12 at [25].
[39] *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12 at [26] and [31].
[40] *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12 at [28].
[41] *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12 at [26].

- Fourthly, it was a misreading of Lord Toulson's judgment to fixate on the words that "motive is irrelevant".[42] Whether the primary wrongdoer was acting, albeit wrongly, on his employer's business, or was acting for personal reasons on a frolic of his own, was plainly important. Rather, Lord Toulson's words were directed to a particular point mentioned by the first instance judge in *Mohamud* about the reasons why the primary wrongdoer in that case had become violent towards the claimant.[43] The reason why the primary wrongdoer in *WM Morrison Supermarkets* acted wrongfully was not irrelevant—on the contrary, whether he was acting on his employer's business or for purely personal reasons was, for Lord Reed, highly material.[44]
- Fifthly, the mere fact that the primary wrongdoer's employment gave him the opportunity to commit the wrongful act is insufficient, as is the fact that the wrongdoer's acts were closely related to his authorised field of activities.[45]
- Lastly, the key distinction was that drawn by Lord Nicholls in *Dubai Aluminium*[46] between whether the employee was engaged, however misguidedly, in furthering his employer's business, or whether the employee was engaged solely in pursuing his own interests on a "frolic of his own".[47] Only the former kind of conduct would satisfy the second limb.

How might Lord Reed's judgment affect future cases in this area? The way in which Lord Reed applies his analysis, taken in isolation, indicates a more restrictive approach to the second limb which may be unhelpful to survivors of sexual abuse.[48] The reasons why primary wrongdoers act as they do will, almost inevitably, be for purely personal reasons. Sexual conduct will rarely form part of the primary wrongdoer's functions or field of activities for which he is authorised and Lord Reed emphasised that neither a temporal nor causal connection will satisfy the close connection test on their own. Also unhelpful for claimants is his view that providing the opportunity to commit the wrongdoing will not, of itself, be sufficient.

However, claimants can find hope in Lord Reed's clear identification of what he refers to as the "more tailored version of the close connection test"[49] which should be applied to sexual abuse cases, which he explained as follows:[50]

> "As Lord Phillips noted in *Various Claimants v Catholic Child Welfare Society* [2013] 2 A.C. 1 at [83] and [85], the close connection test has been applied differently in cases concerned with the sexual abuse of children, which cannot be regarded as something done by the employee while acting in the ordinary course of his employment. Instead, the courts have emphasised the importance of criteria that are particularly relevant to that form of wrongdoing, such as the employer's conferral of authority on the employee over the victims, which he has abused."

This apparent carve-out for a different approach in sexual abuse cases is helpful given the particular difficulties faced by sexual abuse claimants in establishing a sufficiently close connection, mentioned above. In particular:

- First, and primarily, there is the difficulty directly addressed by Lord Reed of establishing a close connection where the primary wrongdoer's sexual abuse will inevitably be completely

[42] *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12 at [29].
[43] *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12 at [30].
[44] *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12 at [31].
[45] *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12 at [35].
[46] *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48 at [32].
[47] *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12 at [38] and [47].
[48] See *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12 at [31].
[49] *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12 at [36].
[50] *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12 at [23].

unauthorised. *BXB* helpfully illustrates how a claimant may overcome this difficulty, where the focus was very much on the authority bestowed upon the elder by the defendant.

- Secondly, in these cases the abuse itself often takes place outside of working hours and off the employer's premises, even if much of the grooming was during work hours and on work premises. In *DSN*, the abuse took place on the other side of the world and outside the football season, despite the grooming taking place on the club's premises.

That said, despite Lord Reed's express reference to the exceptional approach which should be taken in sexual abuse cases, future defendants are likely to make the most of Lord Reed's generally restrictive interpretation. We may well see increased pressure on claimants to explain carefully the operation of, and, more importantly, to justify the reasons for adopting, this different approach in sexual abuse cases.

Whatever the position going forward, claimant lawyers will be well advised to plead their case on vicarious liability carefully. Despite Lord Steyn's warning in *Lister*[51] against liability turning on the level of generality with which the primary wrongdoer's conduct is described, the tenor of Lord Reed's judgment suggests that this problem will continue to permeate future cases. This is because his approach would tend to suggest that the cases more likely to be successful are those where the primary wrongdoer's role is that of an all-encompassing institutional or moral authority, such as those possessing managerial status or plenary powers, duties and responsibilities. This is indicated by Lord Reed's approval of the result, if not the reasoning, in *Bellman v Northampton Recruitment Ltd*[52] in which the defendant was vicariously liable for an assault committed by an employee in a managerial role against another employee in the course of "asserting his authority over his subordinates".[53] In that light, the results in *BXB* and *DSN* are unlikely to be affected and remain instructive.

Conclusion

One can never truly be certain as to how future cases will develop in any area of law but this is especially true in the context of vicarious liability. Despite numerous attempts by the Supreme Court in recent years to settle the general principles in a way which promotes a consistency of application by first instance courts, trial judges and appellate courts continue to be vexed by the application of these principles to bad faith intentional torts.

Following *Barclays Bank* and *WM Morrison Supermarkets*, the courts' future approach to vicarious liability in sexual abuse claims remains to be seen. However, the instructive recent examples of *BXB,DSN* and *JXJ* demonstrate how the frequently recurring challenges for claimants in such cases might best be managed. The only thing that is certain is that the Supreme Court's latest pronouncements on vicarious liability will not be the final word.

[51] *Lister v Hesley Hall Ltd* [2001] UKHL 22 at 229B-D.
[52] *Bellman v Northampton Recruitment Ltd* [2018] EWCA Civ 2214; [2019] 1 All E.R. 1133.
[53] *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12 at [46].