



Neutral Citation Number: [2021] EWCA Civ 356

Case No: B3/2020/0347

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
MR JUSTICE CHAMBERLAIN
[2020] EWHC 156 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2021

Before:

LORD JUSTICE BEAN
LADY JUSTICE NICOLA DAVIES DBE
and
LORD JUSTICE MALES

Between:

**THE TRUSTEES OF THE BARRY CONGREGATION
OF JEHOVAH'S WITNESSES**

Appellant

- and -

BXB

Respondent

**Catherine Foster and Shane Brady (instructed by Watch Tower Bible and Tract Society of
Britain Legal Department) for the Appellant**

**James Counsell QC and Benjamin Bradley (instructed by Bolt Burdon Kemp) for the
Respondent**

Hearing date: 11 February 2021

Approved Judgment

Lady Justice Nicola Davies:

1. This is an appeal from a decision of Chamberlain J dated 30 January 2020. The judge found that the first and second defendants, Watch Tower Bible and Tract Society of Pennsylvania and the Trustees of the Barry Congregation of Jehovah’s Witnesses, were vicariously liable for the rape of the respondent, Mrs B, by one of their elders, Mark Sewell, on 30 April 1990. The judge also determined that it was equitable to extend time to allow the claims to proceed, pursuant to section 33 of the Limitation Act 1980, and that £62,000 should be awarded for psychiatric injuries sustained by Mrs B attributable to the rape. These determinations are not the subject of this appeal.
2. The first defendant is the worldwide governing body of the Jehovah’s Witnesses. It was unnecessary for the judge to consider the relationship between the first and second defendants as the first defendant accepted that it would satisfy any judgment against the second. This appeal is brought by the second defendant. The appellant contends that in finding that the first and second defendants were vicariously liable for Mark Sewell’s criminal act the judge failed to correctly apply the two-stage test for vicarious liability. The grounds of appeal are:
 - i) In his application of stage 1 of the test for vicarious liability the judge erred by his conclusion that the activities undertaken by Mark Sewell were an integral part of the “business” activities carried on by the defendants and that the commission of the rape was a risk created by the defendants assigning those activities to Mark Sewell;
 - ii) In his application of stage 2 of the test for vicarious liability, the judge erred by his conclusion that the rape was sufficiently closely connected to Mark Sewell’s position as an elder to justify the imposition of vicarious liability.
3. At the hearing of the appeal the appellant sought the permission of the court to add a new ground of appeal, namely that the judge had wrongly determined non-justiciable matters of religious dogma. The application sought to go behind findings of fact made by the judge.
4. In addressing the matter of the justiciability of religious issues, the judge correctly applied the law stated by Lord Neuberger, Lord Sumption and Lord Hodge, with whom Lord Mance and Lord Clarke agreed, in *Shergill v Khaira* [2015] AC 359 at [45]:

“This distinction between a religious belief or practice and its civil consequences underlies the way that the English and Scottish courts have always, until recently, approached issues arising out of disputes within a religious community or with a religious basis. In both jurisdictions the courts do not adjudicate on the truth of religious beliefs or on the validity of particular rites. But where a claimant asks the court to enforce private rights and obligations which depend on religious issues, the judge may have to determine such religious issues as are capable of objective ascertainment. The court addresses questions of religious belief and practice where its jurisdiction is invoked either to enforce the contractual rights of members of a community against other members or its governing body or to

ensure that property held on trust is used for the purposes of the trust. We consider each circumstance in turn.”

At [53] it was accepted that a court can treat a religious dispute as justiciable “where the determination of the dispute is necessary in order to decide a matter of disputed legal right.”

5. The approach taken by the judge was in accordance with the law. The appellant’s late application was misconceived and was refused.

The factual background

6. In 1984 Mrs B and her husband, Mr B, first attended the Kingdom Hall in Barry, South Wales, which was the meeting place of the Barry Congregation of Jehovah’s Witnesses. In 1986 Mrs B was baptised as a Jehovah’s Witness. Mrs B and her husband became friendly with another couple, Mark and Mary Sewell. Mark Sewell was a ministerial servant, a member of the congregation with special responsibilities. He subsequently became an elder. On 30 April 1990 Mark Sewell raped Mrs B in a room in his house. The fact of the rape is undisputed.
7. Mrs B did not report the rape immediately. In 1991 she discovered that Mark Sewell had been sexually abusing a girl aged under 14 (“CXC”), who was a member of the Barry Congregation. Following this Mrs B reported both matters to the elders of the congregation. They appointed investigators who interviewed Mrs B. A “judicial committee” consisting of elders from another congregation was convened. A hearing took place at which Mrs B was asked questions in the presence of Mark and Mary Sewell. Mark Sewell denied the allegations. The judicial committee found them not proven.
8. Mark Sewell remained a member of the congregation but was later disfellowshipped for conduct relating to his drinking of alcohol. Mrs B ceased her association with Jehovah’s Witnesses. Following a police investigation, a criminal trial took place at which Mrs B gave evidence. On 2 July 2014 Mark Sewell was convicted of raping Mrs B and of indecently assaulting CXC and another individual. He was sentenced to 14 years’ imprisonment.
9. Following the rape Mrs B suffered episodes of depression and post-traumatic stress disorder. At the civil trial a second claim was pursued in respect of the manner in which the investigation was conducted. By reason of the judge’s conclusion that the defendants were vicariously liable for the rape by Mark Sewell, and the fact that the investigation claim could only arise if it could be shown that the same constituted an intervening event which broke the chain of causation, which the defendants’ case did not suggest, the judge made no determinations upon the second claim.

Evidence at trial – Mrs B

10. Prior to her baptism, Mrs B became a “publisher” within the congregation. Mr and Mrs B raised their children as Jehovah’s Witnesses, which meant mixing predominantly with other families who were Jehovah’s Witnesses. Mr and Mrs B met the Sewells at the twice-weekly services at the Kingdom Hall. Mrs B stated that it was necessary for a publisher to demonstrate that he was a spiritually strong member of the congregation

in order to become a ministerial servant or elder, a role open only to men. Of Mark's role she stated:

“We felt proud to count Mark as one of our friends. It was because of his standing as a Ministerial Servant and then an Elder that our friendship became close as it did.”

11. In 1989 Mark became an elder, Mr B became a ministerial servant. Mrs B stated:

“...my husband had now become a Ministerial Servant and had ambitions in due course to become an Elder. Having Mark as a friend meant that Mark would have been in a position to guide and assist my husband in that regard. In addition, Mark seemed like a lovely, kind, genuine, helpful man. He could be very charming and funny.”

As to the role of elders, Mrs B described it as follows:

“The Elders are like shepherds, as it were.

Their directions are always followed by members of the congregation and they are very rarely criticised. There can be serious repercussions for those who disobey them. Anybody who disobeyed an Elders instruction would receive what was called a ‘shepherding call’. This would involve an elder coming to see the person concerned at their house or, in a more serious case, a judicial committee would be set up in the Kingdom Hall at which the person concerned would be given instructions on how to behave. If that person continued to disobey, they would be disfellowshipped.”

12. Mrs B said that Mark's duties as an elder included greeting members of the congregation when they arrived at Kingdom Hall. Mark often greeted her and other female members of the congregation by kissing them on the lips. He did this in the presence of other elders. This made Mrs B feel “extremely uncomfortable”. As no one commented upon it, Mrs B did not feel able to complain to the other elders. She raised the subject with Mark, as a result Mary Sewell told Mrs B that she had caused trouble between herself and Mark. Mary asked Mrs B to allow Mark to continue to kiss her in that way. Of that, Mrs B stated:

“I didn't want to make an issue out of it nor did I feel able to complain to anybody else. The Jehovah's Witness Organisation teaches members to love their brothers and sisters, and I therefore felt that complaining about a fellow member of the congregation would go against his teaching. As a Ministerial Servant and now an Elder, he was in a position of authority and had been awarded that title as a result of his being considered to be a trusted member of the congregation and capable of providing advice and guidance. It would have been very difficult to question his actions without facing repercussions. I did not know at the time that, if any ordinary member of the

congregation had behaved in this way, it would have been considered to be inappropriate.”

13. The Sewells’ marriage was volatile, they rowed. Mary would call Mrs and Mr B in the early hours of the morning complaining of Mark’s aggression to herself or the children. Mark began to drink heavily. Mark began to flirt with Mrs B, he would make sexual innuendos, hold her hand, give her kisses on the lips and compliments. Mrs B’s concern about Mark’s behaviour prompted her to suggest to Mary that they spoke to Mark’s father, Tony Sewell, who was also an elder. Mrs B and Mary met Tony Sewell at his home in 1989. Tony Sewell explained that Mark was suffering from depression, he needed love and support. He asked Mr and Mrs B to provide Mark with extra support. Mrs B stated:

“He made us feel that this was the right thing to do as good Jehovah’s Witnesses.

I was reluctant to spend more time with Mark because he made me feel uncomfortable. However, if an elder told me, as a publisher to do something, then it was my duty to do so. Tony had decided that this was the course of action to be taken and his request was really an instruction from an Elder. I was required by my faith and the congregation to carry out that instruction and to provide Mark with the extra support that he was deemed to require whatever I felt about it. Although there is no hierarchy of Elders, Tony was a highly respected Elder and had been an Elder for many years.

The meeting between Tony, Mary and myself ended with Tony saying a prayer for us to help Mark and calling upon Jehovah to help us.”

14. Mrs B said that she would not have acceded to the request had it not been made by an elder. She followed the advice of Mark’s father, she continued to support Mark and reported back to Tony about Mark’s behaviour.
15. Mark’s inappropriate behaviour towards Mrs B continued. On one occasion he asked her to run away with him. His behaviour became so unbearable that Mr and Mrs B attempted to cut off contact with Mark and Mary, notwithstanding the instructions of his father. When they did this, Mark came to their house at 2am, he was crying and stated that he could not handle not being friends with them. In her witness statement, Mrs B recorded:

“My husband and I found that we had got to the stage where we could not remove ourselves from the situation. Mark was an Elder in the congregation, and his father, Tony, had directed us to support Mark. We had no choice but to maintain the friendship. Looking back, I am sure that, had it not been for the fact that Mark was an Elder and I had received an instruction from another Elder, his father, our friendship with Mark and Mary would have come to an end well before what I describe below happened. Indeed, this situation was so difficult for us

that it was causing problems in my relationship with my husband.”

16. Mrs B’s evidence as to the circumstances of the rape and its immediate sequelae are set out at [42] to [46] of the judgment:

“42. ... On 30 April 1990, when Mrs B was 29 years old, she, Mr B, Mark and Mary were taking part in auxiliary pioneering in Cowbridge, South Wales. They all went to a local pub for lunch. Mark drank beer and wine. He argued with Mary and she threw a glass of whisky over him. Mark stormed off. Mr B went to look for him and found him outside with a card from a local solicitor’s office, saying that he wanted to divorce Mary. Mr B told him that would not be possible as divorce is only permitted within the Jehovah’s Witness community on specific grounds, which include adultery. Mark said that he would convince Mary that that ground was made out. Later that afternoon, Mr and Mrs B and Mark and Mary picked up their respective children and returned to Mark and Mary’s house. The children were upstairs playing. Mark went into a back room. Mrs B says:

‘Mark went into the back room. The children were on the third floor of the house playing. My husband, Mary and I sat in the front room talking about what we were going to do about Mark. As he had previously confided in me about his troubles and it was I who had been given that role, I decided that I should go to speak to Mark to try to convince him that he should go to the Elders about his depression.’

43. Mark was drunk and upset. A conversation ensued during which Mark pushed Mrs B to the floor, held her down, pushed up her skirt, ripped off her underwear and raped her. The penetration lasted for about 20 to 30 seconds, during which he ejaculated.

44. After they got home, Mrs B told Mr B what had happened. She says:

‘He reacted by saying “I knew it” and told me about what Mark had said in Cowbridge about wanting to give Mary a reason for them to divorce. I remember him saying to me that “half of me wants to go round and beat him... but the other half of me says I have to forgive my brother.”’

45. A few days later, there was a planned barbecue at the Sewells’ home. Mrs B confronted Mark about what had happened. Mark begged Mrs B for her forgiveness. Mrs B’s evidence was as follows:

‘Part of the teachings of Jehovah’s Witnesses is to forgive one’s brother if they are truly repentant. At the time, I

believed that Mark's pleas for forgiveness meant that he was truly repentant because he seemed so plausible and so genuine. I said to him that I wouldn't take the matter any further but that he shouldn't ever come near me again. He said that he would do whatever it takes, and we left it at that.

I felt that my only option was to forgive Mark. It was in part due to these teachings that I did not feel compelled to report Mark to the Body of Elders. Although I know that this is not rational, I was absolutely terrified that, by my actions, I felt that I had brought shame on Jehovah's name and the others would find out. I was very worried about how that would affect my family and also Mary. I also felt shame and guilt.

I also felt a continued pressure to continue to support Mark due to his position in the congregation as Elder as well as his father's earlier request. The position that both Mark and his father held within the congregation also made me feel that I was unlikely to be believed if I choose to report Mark to the Body of Elders.'

46. In May 1990, Mr and Mrs B and Mark and Mary went together on a family holiday to Portugal. The holiday had been booked before the rape occurred. Mrs B says:

'Obviously the last thing I wanted to do was to go on the trip with them, but my children were looking forward to it and I could not think of an adequate excuse to provide to Mary as to why we would not want to go and I had told Mark that I had forgiven him.

I didn't want to disappoint my children and the honour associated with spending time with an Elder's family made it difficult for me to avoid socialising with Mark and Mary and their family.

I was also aware of the continued instruction of Tony to support Mark and Mary, even though my fear of Mark increased. Given the position of an elder that both Tony and Mark held, I felt that I was unable to deny the request to continue to provide support to Mark and Mary although my husband and I were really struggling with this now.'

On the holiday, there was an incident in which Mark ripped off Mrs B's bikini top in the pool. This, she says, 'brought back the horror of what he had done to me'."

17. In 1991 CXC disclosed to Mrs B that Mark had been sexually abusing her. The following day, Mrs B and her husband spoke to Mark. Mrs B stated:

“We spoke to Mark the next day. He told us he could do what he liked because he was an elder and that he was not answerable to us. He said that CXC needed to be disciplined because she had been smoking and that whatever she might have said would be lies.”

18. It was following this that Mrs B made the decision to inform the elders about what Mark had done. Mrs B told CXC’s father, also an elder, what had happened to her. Following the reporting, the task of investigating her complaint was assigned to three elders from the Cardiff and Penarth Congregations. The investigation process took place, which Mrs B described as “extremely painful and humiliating” during which she was subject to explicit and, what she felt were, inappropriate questions from the elders. A judicial committee comprising the same three elders and a member of the Barry Congregation heard the complaint. At the hearing Mark Sewell denied all the allegations. He said he could not remember what had happened because he was drunk. The elders of the judicial committee subsequently visited Mrs B to tell her of the outcome. At [53] the judge recorded her account of the visit:

“I think they came and visited me at home. Incredible as it may sound, I think David Newman said to me that this was a classic case of “wife swapping”. The committee reached this decision because it was Mark’s word against mine. It was necessary for there to be two adult witnesses to corroborate an allegation. This test was not met because Mark had denied what happened and there was no one else there to see it. This was also the case with CXC. She was not considered to be a witness at all because she was a minor. Furthermore, I was instructed not to tell anyone else about the abuse and that I ought to move congregation so that I no longer had to see Mark. My perception was that the Elders had concluded that Mark’s assault had been my fault.”

The father of CXC

19. The father of CXC had been a Jehovah’s Witness since childhood. He was appointed a ministerial servant in his 20s, an elder when he was about 30, he gave evidence as to the role of elders. He described Mark Sewell as being “tactile with women, he would greet them by kissing them on the lips”. CXC regularly stayed at the Sewells’ home where she would participate in Jehovah’s Witnesses activities. Bible study would take place at the homes of approved members. Mark Sewell’s house was designated an “approved” venue by the Barry elders. He gave evidence of his daughter’s disclosure of Mark Sewell’s abuse and the investigation of her complaint.
20. Two elders gave evidence of the investigation of Mrs B’s complaint, which is not relevant to this appeal.

Andrew Schofield

21. The defendants called Mr Schofield, his evidence was directed to the organisational structure and teaching of Jehovah’s Witnesses. The judge’s summary of his evidence included the following:

“93. The organisational structure of Jehovah’s Witnesses is modelled on first century Christianity as described in Scripture. In line with the precedent set in Acts 15, the Governing Body provide Bible-based instruction to over 8.5 million Jehovah’s Witnesses in over 240 lands worldwide. There are around 90 branch offices worldwide and the activity of each is overseen by a Branch Committee. The Britain branch committee has offices in London. During the period relevant to this claim, the branch was divided into districts, overseen by a district overseer. Each district comprised approximately 12 circuits. A circuit comprised approximately 20 congregations and a circuit overseer (representing the branch office) visited each congregation for six days twice yearly.

94. Mr Schofield says:

‘There is no clergy laity class distinction or paid clergy in our Christian community. The Bible teaches that there are no class distinctions in the Christian congregation, we are not to show favouritism and all are equal in God’s sight (Galatians 3:28; James 2:9; Acts 10:34, 35). Jehovah’s Witnesses call and view each other as spiritual “brothers” and “sisters”. No human is a “leader” in the congregation – Matthew 23:8-10.’

95. Baptism is a public declaration of one’s dedication to God, whose name is Jehovah as revealed in the Bible. In order to be baptised, a person willingly undertakes a program of Bible study with one of Jehovah’s witnesses. Mr Schofield says:

‘Any obligation and individual feels once he is baptised as one of Jehovah’s Witnesses arises from his knowledge and understanding of the Bible and his personal devotion to God. Jehovah’s Witnesses are not under compulsion or obligation to any legal or natural person to engage in any particular religious activity. To the extent that Jehovah’s Witnesses engage in such activities, they do so voluntarily out of love for God and neighbour in accordance with their personal knowledge and understanding of the Bible.’

96. The Bible describes two groups of Christian men who have responsibilities to care for the congregation – ‘overseers’ and ‘ministerial servants’ (Philippians 1:1). Overseers are also known as ‘elders’. During the relevant period, ministerial servants were recommended for appointment by the local body of elders in consultation with the circuit overseer when he made one of his biannual visits. The circuit overseer would, however, have to seek the approval of the Britain branch before the appointment was confirmed. Ministerial servants assist the body of elders with routine organisational and physical tasks, including keeping the Kingdom Hall clean and tidy, arranging the platform and microphones, operating the sound system,

organising and making available to the congregation literature, serving as attendance at meetings in the Kingdom Hall, assisting in emptying contribution boxes and in counting and keeping the books relating to donations, managing territory records to help coordinate ministry and other tasks to which they may be assigned from time to time by the elders. Ministerial servants could also be assigned other more responsible tasks by the elders, including assisting an elder in leading a congregation book study group, handling certain talks at mid-week congregation meetings or delivering 45-minute Bible-based talks at public meetings usually held at the weekend.

97. A body of Elders made up of mature spiritual men is carefully selected and approved for appointment based on scriptural qualification set out in 1 Timothy 3:1–7 and Titus 1:5–9. An elder will have been baptised for many years and will previously have served as a ministerial servant. During the period relevant to this claim, they were recommended for appointment by the body of elders in consultation with the circuit overseer. As with ministerial servants, the appointment required the approval of the Britain branch. The primary role of elders is to guide and protect the congregation spiritually, including taking the lead in evangelising and presiding over congregational meetings.

98. As to the authority and status of elders, Mr Schofield says:

‘The teachings of Jehovah’s Witnesses do not require or even encourage individuals to follow instructions from an elder (or anyone else) that are not in harmony with Bible teachings and principles (Acts 5:29; Matthew 23:10).

The teachings and practices of Jehovah’s Witnesses have never required that one act as a confidant to a member of the opposite sex to him if they are not related or married, and specifically caution a woman from associating alone with any man to whom she is not related or married.’

He adds:

‘When it comes to the “shepherding” of a person of the opposite sex, elders have been specifically directed for many years to do so only in twos, never alone.’ (Emphasis in original.)

99. Mr Schofield refers at this point to two articles in *Watchtower*. The first, published on 15 November 1991 and entitled ‘An overseer must be self-controlled’, includes the following passage:

‘Elders must be keenly alert to exercise self-control when it comes to their dealings with those of the opposite sex. It is

inadvisable for an elder to make a shepherding call on a sister alone. The elder should be accompanied by another elder or a ministerial servant. Likely appreciating this problem, Paul counselled the elder Timothy: “Entreat... older women as mothers, younger women as sisters with all chasteness” (1 Timothy 5:1, 2). Some elders have been seen putting their hands on a sister as if with a fatherly gesture. But they could be deceiving themselves, for a romantic impulse instead of pure Christian brotherly affection could well be motivating such a gesture. – Compare 1 Corinthians 7:1.’

The second article, published on 15 September 1989 and entitled ‘Elders guard your trust’, says this:

‘Sexual immorality is another pitfall to avoid. The world’s moral decay can influence even an elder if he does not resist the temptations used by Satan in his efforts to break the integrity of God’s people. (Compare Matthew 4:1–11; 6:9, 13.)’

Mr Schofield says that, while ministerial servants and elders have a measure of spiritual responsibility and authority in the congregation, the Bible teaches that ‘more than usual [is] demanded of [them]’ (Luke 12:48, Hebrews 13:17, James 3:1).

100. The Bible teaches that some serious sins, such as sexual immorality (including rape and child sexual abuse), blasphemy, apostasy, idolatry and similar gross sins, require more than forgiveness from an offended individual (1 Corinthians 6:9, 10; Galatians 5:19-21). Because the spiritual and moral cleanness of the congregation is threatened, the Bible requires that such sins must be handled by the elders (1 Corinthians 5:6; James 5:14, 15). Individuals may approach the elders to confess their own sin or to report what they know regarding the wrongdoing of others (Leviticus 5:1; James 5:6). Where such a report is made, elders will be appointed to look into the matter. At this point Mr Schofield referred to a document outlining training for elders delivered in the period September 1998 to February 1999. It instructs elders in how to deal with allegations of child sexual abuse and says this:

‘When is it not advisable for the witness to confront the accused alone? What should the elders do? (When he is a party to the wrongdoing, as a victim, or is extremely timid. Children who are victims of molestation should not be required to confront the accused. In some cases two elders or an elder and the witness can confront the accused.)

101. Mr Schofield explained that in conducting the spiritual investigation of an allegation of serious sin, the elders apply the Bible’s rule of evidence which requires ‘the testimony of two

witnesses' (Deuteronomy 19:5; Matthew 18:16; 1 Timothy 5:19). This means that, in the absence of a confession, the allegation must be corroborated by a second witness for the congregation to take internal ecclesiastical judicial action. For these purposes, it is sufficient if the second witness attests to a separate allegation of a similar nature against the same accused person. If an accusation is evidenced in this way, the body of elders would assign a congregation judicial committee of at least three elders to handle the matter. Mr Schofield says:

‘The decision of the body of elders as to whether an accusation is Scripturally established does not in any way affect the absolute right of any person within or outside the congregation to report the matter to the appropriate statutory authorities, including the police. Elders are advised to make this clear to any person who comes to them with allegations of child abuse.

It is important to understand that these internal congregation Bible based procedures focus on the wrongdoer's relationship with God and the wrongdoer's congregation status as one of Jehovah's witnesses. They are not a substitute or replacement for the criminal investigation and prosecution processes. Jehovah's Witnesses do not shield child abuses from the consequences of their sins. On the contrary, Jehovah's Witnesses acknowledge and accept the authority of the state to investigate and prosecute any alleged crimes (Romans 13:1-4). In cases where the police investigate a crime that is also a Scriptural sin warranting congregation action, elders are usually directed to await the outcome of the criminal proceedings before concluding their spiritual investigation. This may include the wrongdoer not been given any congregation responsibilities until the criminal matter is resolved. This was the advice to elders at the material time.’

...

104. In cross-examination, Mr Schofield was asked in particular about the status and position of elders. He said that elders were appointed to shepherd the congregation. They could administer warnings if a member of the congregation was straying from the teachings of Jehovah. The role of elder was held in high regard both by the congregation and by those who held it. Elders should be examples to other members of the congregation.”

22. An article from *Watchtower* published on 15 September 1989 entitled “Be Obedient to those Taking the Lead” was shown to Mr Schofield. At [105] the judge recorded that the article included the following passages:

“1. Jehovah has provided overseers for his organisation in this ‘time of the end’ (Daniel 12:4). They take the lead in caring for

sheeplike ones, and their supervision is refreshing (Isaiah 32:1, two). Moreover, loving oversight by elders who treat God's flock with tenderness serves as a protection from Satan and this wicked system of things – Acts 20:28-30; 1 Peter 5:8; 1 John 5:19.

2. But how do you view the elders? In your heart, do you say: 'I will never go to another elder in this congregation if I have a problem, for I have no confidence in any of them'? If that is how you feel, could you be over emphasising their imperfections? ...

3. Since Christian undershepherds have been provided by the Great Shepherd, Jehovah God, how do you think he wants us to view them? Surely, God expects us to follow the Bible-based direction received through loving overseers under the supervision of the governing body of Jehovah's Witnesses. Then 'the Lord will be with the spirit we show,' We will enjoy peace, and we will be built up spiritually – 2 Timothy 4:22; compare Acts 9:31; 15:23-32.

4. Paul urged: 'remember those who are taking the lead among you, who have spoken the word of God to you, and as you contemplate how their conduct turns out imitate their faith' (Hebrews 13:7). Among the early Christians, the apostles primarily took the lead. Today, we can observe those making up the governing body of Jehovah's Witnesses, other anointed overseers, and men of the 'great crowd' who take the lead and manners (Revelation 7:9). Although we are not urged to imitate their voice quality, posture, or other human traits, we should be able to make our conduct turn out well by imitating their faith.

...

6. Overseers have been spirit-appointed to care for the spiritual needs of the congregation (Acts 20:28). They see to it that the kingdom message is preached in the territory of the local congregation. These scripturally qualified men also provide spiritual direction in a loving manner. They exhort, console, and bear witness to their spiritual brothers and sisters, to the end that these might go on walking worthily of God (1 Thessalonians 2:7, 8, 11, 12). Even when someone takes a full step before he is aware of it these men seek to readjust him 'in the spirit of mildness' – Galatians 6:1.

7. Our hearts are motivated to cooperate with such loving overseers. This is fitting, as Paul wrote: 'be obedient to those who are taking the lead among you and be submissive, for they are keeping watch over your souls as those who will render an account; that they may do this with joy and not with saying, for this would be damaging to you' (Hebrews 13:7). How are we to understand this counsel?

8. Paul urges us to obey those governing us spiritually. We are to 'be submissive,' to yield to these undershepherds...

9. Jehovah would be displeased if we failed to be obedient and submissive to Christian overseers. This would also prove burdensome to them and would harm us spiritually. If we were uncooperative, the elders might care for their duties with sighing, perhaps in a spirit of discouragement that could result in a loss of joy in our Christian activities. But our obedience and submissiveness promote godly conduct and strengthen our faith...

...

12. We will be helped to obey and honour those taking the lead if we remember that God himself has provided the elders (Ephesians 4:7-13)...

Why Appreciate Their Service?

13. In the world, there is a tendency to reject leadership. As one lecturer said: 'the rising education level has improved the talent pool such that followers have become so critical that they are almost impossible to lead.' But a spirit of independent thinking does not prevail in God's organisation, and we have sound reasons for confidence in the men taking the lead among us. For instance, only those meeting scriptural requirements are appointed as elders (one Timothy 3:1-7). They are trained to be kind, loving, and helpful, yet firm in upholding Jehovah's righteous standards. The elders adhere to scriptural truth, 'holding firmly to the faithful word, that they may be able to exhort by healthful teaching' (Titus 1:5-9). Of course, we should not magnify the human imperfections, for all of us are imperfect (1 Kings 8:46; Romans 5:12). Instead of feeling frustrated by their limitations and treating their counsel lightly, let us appreciate and accept the Bible-based direction of the elders as coming from God."

23. At [106] the judge stated that:

"Mr Schofield accepted that the Watchtower article was an accurate summary of the beliefs of Jehovah's Witnesses. He emphasised, however, that members of the congregation were not required to give unquestioned obedience to elders. The obligation to be 'submissive' applied only to those instructions which were in accordance with the scriptures. Members of the congregation were required to apply their own Bible-trained consciences before simply obeying the instruction or guidance of an elder. Submission, he said, was not the same as subjugation."

Vicarious liability – the law

Maga v Archbishop of Birmingham and Anr [2010] 1 WLR 1441 (“*Maga*”)

24. The claim was brought by the claimant against a Roman Catholic archdiocese alleging that he had been sexually abused as a child by a priest who lived and worked in the archdiocese. The claimant was not a Roman Catholic. He had met the priest, who had special responsibility for youth work, through church discos which were open to all young people, and had done jobs for the priest, including in the presbytery where the priest lived and where some of the alleged abuse had taken place. The Court of Appeal held that although the archdiocese had no direct responsibility for the claimant as a non-Catholic, a number of factors taken together established a sufficiently close connection between the priest’s employment as a priest at the church and the abuse which he had inflicted on the claimant, to render it fair and just to impose vicarious liability for the abuse on the archdiocese as the priest’s employer.
25. At [44] to [51] Lord Neuberger MR (as he then was) identified factors relevant to the issue of close connection. They included the fact that the priest held a special role of trust and responsibility and a degree of moral authority; the claimant’s youth and the priest’s special responsibility for youth work amongst Catholics and non-Catholics; the development of the priest’s relationship with the claimant through his youth work at the church, which led to the claimant’s work for the priest both on and off church premises and the priest’s opportunity to spend time alone with the claimant in the presbytery without supervision, all of which arose from his employment by the archdiocese as a priest.
26. At [84] Longmore LJ reviewed the developing association between the claimant and the priest as follows:

“What is said in this present case is that while the Church would accept responsibility for abuse of an altar boy and (probably) a member of the congregation, this case is different because the victim of Father Clonan’s abuse came into his ambit in a non-church manner, by admiring his sporty Triumph car, by taking part in disco evenings to which all were welcome, clearing up afterwards and then doing jobs in the Presbytery where Father Clonan lived with Father McTernan. But the progressive stages of intimacy were to my mind only possible because Father Clonan had the priestly status and authority which meant that no one would question his being alone with the claimant. It is this that provides the close connection between the abuse and what Father Clonan was authorised to do.”
27. Longmore LJ at [86] considered that there “undoubtedly existed a ‘power or dependency relationship’ with the claimant arising from his position as a priest.” At [88] he observed that the case was one of the priest inviting the claimant to the presbytery and there abusing him, which Longmore LJ stated “displays a strong connection with the Church by a priest whose power and ability to exercise intimacy was conferred by virtue of his ordination by the Church.”

Catholic Child Welfare Society and Others v Various Claimants and the Institute of Brothers of the Christian Schools and Others [2012] UKSC 56 (“*Christian Brothers*”)

28. The mission of the Institute, a lay Roman Catholic order and unincorporated association, was to provide Christian education to children. Another organisation managed a Roman Catholic boys’ residential school and employed the brothers of the Institute to teach at the school. It permitted the Institute to nominate a brother to act as headmaster and to appoint other brothers to teach at the school. Former pupils brought claims for damages against various representatives of the diocese and the Institute alleging serious sexual and physical abuse of boys by brother teachers. Lord Phillips PSC (with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Carnwath agreed) determined that the Institute was vicariously liable for the acts of abuse. At [21] Lord Phillips identified two stages which are required to be addressed in determining the test for vicarious liability, namely:

- i) The relationship between the tortfeasor and the parties said to be vicariously liable to determine whether it is one that is capable of giving rise to vicarious liability (stage 1);
- ii) The connection that links the relationship between those two parties and the act or omission of the tortfeasor (stage 2).

29. At [35] Lord Phillips identified policy reasons which were relevant to the imposition of vicarious liability as follows:

“The relationship that gives rise to vicarious liability is in the vast majority of cases that of employer and employee under a contract of employment. The employer will be vicariously liable when the employee commits a tort in the course of his employment. There is no difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied:

- 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;
- v) The employee will, to a greater or lesser degree, have been under the control of the employer.”

30. At [56] Lord Phillips considered elements of the relationship between the teaching brothers and the Institute and found that it had all the essential elements of the relationship between employer and employees. He identified and relied upon the hierarchical structure of the Institute; the fact that the teaching activity of the brothers and their contract of employment with a separate organisation were the result of the direction of the “provincial”; the teaching activity was in furtherance of the mission of the Institute; the manner in which the brothers were obliged to conduct themselves as teachers was dictated by the Institute’s rules.

31. At [59] he stated that:

“The business of the Institute was not to train teachers or to confer status on them. It was to provide Christian teaching for boys. All members of the Institute were united in that objective. The relationship between individual teacher brothers and the Institute was directed to achieving that objective.”

Lord Phillips found that the relationship between the teaching brothers and the Institute was sufficiently akin to that of employer and employees to satisfy stage 1 of the test of vicarious liability. At [61] he stated:

“There is a simpler analysis that leads to the conclusion that stage 1 was satisfied. Provided that a brother was acting for the common purpose of the brothers as an unincorporated association, the relationship between them would be sufficient to satisfy stage 1, just as in the case of the action of a member of a partnership.”

32. As to stage 2 of the test in the context of sexual abuse allegations, Lord Phillips addressed the issue at [83] to [87] as follows:

“83. Sexual abuse of children is now recognised as a widespread evil and the Criminal Records Bureau was established under Part V of the Police Act 1997 to reduce the risk of this by enabling screening of those seeking positions involving greater contact with young people and vulnerable adults. In *Lister* at para 48 Lord Clyde said that cases of sexual abuse by an employee should be approached in the same way as other cases in the context of vicarious liability. None the less the courts have been tailoring this area of the law by emphasising the importance of criteria that are particularly relevant to this form of wrong. In this way the courts have succeeded in developing the law of vicarious liability so as to ensure that a remedy for the harm caused by abuse is provided by those that should fairly bear that liability.

84. Where those who have abused children have been members of a particular church or religious order and have committed the abuse in the course of carrying out activities in that capacity claimants have had difficulty in establishing the conventional relationship of employer/employee. What has weighed with the

courts has been the fact that the relationship has facilitated the commission of the abuse by placing the abusers in a position where they enjoyed both physical proximity to their victims and the influence of authority over them both as teachers and as men of God.

85. The precise criteria for imposing vicarious liability for sexual abuse are still in the course of refinement by judicial decision. Sexual abuse of children may be facilitated in a number of different circumstances. ... This case ... is concerned with the liability of bodies that have, in pursuance of their own interests, caused their employees or persons in a relationship similar to that of employees, to have access to children in circumstances where abuse has been facilitated.

86. Starting with the Canadian authorities a common theme can be traced through most of the cases to which I have referred. Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.

87. These are the criteria that establish the necessary ‘close connection’ between relationship and abuse. I do not think that it is right to say that creation of risk is simply a policy consideration and not one of the criteria. Creation of risk is not enough, of itself, to give rise to vicarious liability for abuse but it is always likely to be an important element in the facts that give rise to such liability.”

E v English Province of Our Lady of Charity [2013] QB 722 (“E”)

33. The claimant alleged that she had been sexually abused by a priest appointed by the diocesan bishop, when she was a resident at a home operated by a Roman Catholic order of nuns. The defendants represented the trust which had stood in place of the diocesan bishop at the time. The Court of Appeal, in upholding the claim (Tomlinson LJ dissenting) held that a defendant might in law be vicariously liable for the torts of a tortfeasor who was not employed by him if the relationship between the defendant and the tortfeasor were so close in character to one of employer and employee that it was just and fair to hold the defendant vicariously liable. The priest was not the servant or employee of the bishop, but having regard to the degree of control which the bishop could exercise over the priest, the centrality of the priest’s activity to the objectives of the church and the extent to which the priest was integrated into the structure of the church, the relationship between the bishop and the priest was sufficiently akin to employment that it was just and fair that the trustees could be vicariously liable for his tortious actions.

34. Ward LJ stated at [62] that stage 1 of the test was established where the relationship between the tortfeasor and the defendant was “a relationship akin to employment”. At [72] Ward LJ identified signposts which may point to vicarious liability, which included:
- i) The extent to which the organisation exercised control over the tortfeasor. This would involve looking at the degree of managerial control which is exercised over the activity, which may depend upon how far a person is integrated into the organisation of the enterprise. Another way of looking at the control test is to examine the degree to which the “employee” is accountable to the employer.
 - ii) Control by the contractor (tortfeasor) of himself. This involves looking at how the tortfeasor arranges his work, his use of assets, his payment etc;
 - iii) The organisation test, how far the activity is a central part of the employer’s business from the point of view of the objectives of that business. The more relevant the activity is to the fundamental objectives of the business, the more appropriate it is to apply the risk to that business.
 - iv) The integration test, whether the activity is integrated into the organisational structure of the enterprise.
 - v) The entrepreneur test, is the person in business on his own account?

Cox v Ministry of Justice [2016] UKSC 10 (“Cox”)

35. The claimant was working as a catering manager in Swansea Prison and was injured when a bag of rice was dropped on her back by one of the prisoners working in the kitchen. She brought proceedings against the Ministry of Justice claiming damages for personal injury on the basis, *inter alia*, that it was vicariously liable for the negligence of the prisoner.
36. At [2] Lord Reed (with whom Lord Neuberger, Lady Hale, Lord Dyson and Lord Toulson agreed) stated that the scope of vicarious liability depended upon the answers to two questions:

“First, what sort of relationship has to exist between an individual and a defendant before the defendant can be made vicariously liable in tort for the conduct of that individual? Secondly, in what manner does the conduct of that individual have to be related to that relationship, in order for vicarious liability to be imposed on the defendant?”

The appeal in *Cox* was directed to the first question. The defendant was held to be vicariously liable for the negligence of the prisoner.

37. At [16] Lord Reed stated that it has “long been recognised that a relationship can give rise to vicarious liability even in the absence of a contract of employment.” As to the factors identified in [35] of *Christian Brothers*, Lord Reed considered that the first and fifth factors did not carry the significance of the remaining three. He found that the three factors are interrelated and concluded at [24] that Lord Phillips’ analysis wove

together the related ideas so as to develop a modern theory of vicarious liability. Lord Reed stated:

“The result of this approach is that a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question.”

38. At [29] Lord Reed did not confine the approach of Lord Phillips to special categories of cases which included the sexual abuse of children. Its intention was to provide a basis for identifying circumstances in which vicarious liability may be imposed outside relationships of employment. The approach focused upon the business activities carried on by the defendant and their attendant risks, relevant where “workers may be part of the workforce of an organisation without having a contract of employment with it”. At [30] Lord Reed stated:

“The defendant need not be carrying on activities of a commercial nature It need not therefore be a business or enterprise in any ordinary sense. Nor need the benefit which it derives from the tortfeasor’s activities take the form of a profit. It is sufficient that there is a defendant which is carrying on activities in the furtherance of its own interests. The individual for whose conduct it may be vicariously liable must carry on activities assigned to him by the defendant as an integral part of its operation and for its benefit. The defendant must, by assigning those activities to him, have created a risk of his committing the tort.”

39. At [31] Lord Reed concluded that what had weighed with the courts in *Christian Brothers* and *E* was that the abusers were placed by the organisations, as part of their mission, in a position in which they committed a tort whose commission was a risk inherent in the activities assigned to them.

Various Claimants v Barclays Bank Plc [2020] UKSC 13 (“*Barclays Bank*”)

40. The issue for the Supreme Court was whether a doctor, who carried out medical examinations on behalf of the bank at his home and who was alleged to have sexually assaulted claimants in the course of his examinations, was in a relationship with the bank which was sufficiently akin or analogous to employment so as to make it fair, just and reasonable to impose liability, or whether he was an independent contractor.
41. Lady Hale, with whom Lord Reed, Lord Hodge, Lord Kerr and Lord Lloyd-Jones agreed, considered stage 1 of the vicarious liability test. Having considered the authorities of *Christian Brothers* and *E* it was noted that policy reasons are not the same as defining the criteria of legal rules. At [18] Lady Hale quoted from [56] to [58] of

Christian Brothers in order to demonstrate that Lord Phillips was addressing the details of the relationship between the teaching brothers and the Institute and its closeness to employment rather than an analysis by reference to the five policy reasons set out in [35] of his judgment. At [22] Lady Hale stated that there was nothing in Lord Reed's judgment in *Cox* to "cast doubt on the classic distinction between work done for an employer as part of the business and work done by an independent contractor as part of the business of that contractor." She stated:

"It seems to me obvious that in *Cox* the result was bound to be the same whether it was expressed in terms of the test stated in para 24 of Lord Reed's judgment or in terms of the 'sufficiently akin to employment' test. Indeed, the case for vicarious liability for torts committed by prisoners in the course of their work within the prison seems to me *a fortiori* the case for vicarious liability for the work done by employees for their employers."

42. At [27] Lady Hale identified the question relevant to stage 1 as follows:

"The question therefore 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. In doubtful cases, the five 'incidents' identified by Lord Phillips may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability."

43. The court determined that the doctor was not employed by the bank. He did work for the bank, the bank made arrangements for the examination and sent him forms to complete. The doctor was not paid a retainer which might have obliged him to accept a certain number of referrals from the bank, he was paid a fee for each report. He was free to refuse an offered examination. The doctor would have carried his own medical liability insurance. He was in business on his own account as a medical practitioner with a portfolio of patients and clients, one of those clients was the bank. The bank was held not to be vicariously liable for any wrongdoing by the doctor, who was to be regarded as an independent contractor.

Various Claimants v Wm Morrison Supermarkets Plc [2020] UKSC 12 ("*Wm Morrison*")

44. Lord Reed (with which Lord Hodge, Lord Kerr, Lord Lloyd-Jones and Lady Hale agreed) focused upon stage 2 of the vicarious liability test, in particular the "close connection" approach. At [22] and [23] he referred to the judgment of Lord Nicholls in *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 in which he identified the "general principle" applicable to vicarious liability arising out of a relationship of employment, namely that the wrongful conduct must be so closely connected with acts the employee was authorised to do that, for the purpose of the liability of the employer to third parties, it may fairly and properly be regarded as being done by the employee while acting in the course of his employment. Lord Reed referred to the judgment of Lord Phillips in *Christian Brothers* at [83] and [85] (above) and at [23] stated that:

"... 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."

A v Trustees of the Watchtower Bible and Tract Society [2015] EWHC 1722 (QB) ("A")

45. Globe J upheld a claim by a woman, A, against Watch Tower Bible and Tract Society of Britain and two congregations of which she had been a member. As a child, A had been sexually assaulted by a ministerial servant in her congregation. Globe J held that the defendants were vicariously liable for the assaults and for the acts of the elders who had failed to take steps to protect her when they discovered that the individual had sexually assaulted another child in the congregation.
46. Globe J considered the structure and hierarchy of Jehovah's Witnesses and the role of elders and ministerial servants, referencing the strict code of moral conduct based on the scriptures by which Jehovah's Witnesses strive to live. At [63], having reviewed the evidence as to structure and governance of Jehovah's Witnesses and the evidence from "numerous elders", Globe J observed that:

"... being a Jehovah's Witness is a way of life for all members. It is not confined to the attendance at services. It affects every aspect of one's daily life. That is particularly so for those who become elders and ministerial servants. The strict code of moral conduct by which all members are expected to observe and apply to their day-to-day living is enforced by the existence of the judicial committee and its jurisdiction over all aspects of the life of a Jehovah's Witness."
47. At [65] he noted that: "The high level of control over all aspects of the life of a Jehovah's Witness is arguably a closer relationship than that to be found in an employer/employee relationship." As to whether a ministerial servant could be considered more like an independent contractor than an employee, at [70] Globe J stated: "He is a fundamental part of the whole enterprise dedicating himself to the good of Jehovah's Witnesses. His duties are solely to serve the interests of the organisation. He is constantly working for the good of the organisation of Jehovah's Witnesses and not for himself."
48. As to stage 2, Globe J found at [86] that the individual's access to the claimant's mother and through her to her children was as a direct result of his known and established position as a ministerial servant. At [90] he found that his progressive acts of intimacy were only possible because he had the actual or ostensible status of a ministerial servant that meant no one who saw him questioned him being alone with the claimant. That provided the close connection between the abuse and what the individual was authorised to do. The acts of abuse were inextricably interwoven with the carrying out of his duties.

Vicarious liability – the judgment of Chamberlain J

Stage 1

49. At [157] the judge identified the question to be answered at the first stage as being:

“... whether the relationship between the Defendants and Mark Sewell, one of their elders, was capable of giving rise to vicarious liability. The key questions, to adopt the formulation of Lord Reed in *Cox*, are (i) whether Mark Sewell carried on activities as an integral part of the ‘business’ activities carried on by the Defendants and for its benefit and (ii) whether the commission of the rape was a risk created by the Defendants by assigning those activities to Mark Sewell. To my mind, the answer to both questions is ‘Yes’.”

50. The judge explained his reasoning at [158] to [164] as follows:

“158. To the first question, the answer is clear. Elders are the spiritual leaders of the congregation. To be appointed an elder a publisher must first have served as a ministerial servant and demonstrated that he is spiritually suitable to be an example to others. An elder may be removed if he fails to maintain the high standards expected of him, whether in performance of his duties as an elder or in his personal life. Elders are the principal conduit through which the teachings of the faith, as represented in *Watchtower* and other publications, are disseminated to congregations. Instructions from the worldwide organisation on matters such as the reporting of child abuse are addressed to them. Insofar as a congregation of Jehovah’s Witnesses acts as a body, it acts through its elders. An elder is as integral to the ‘business’ of a congregation of Jehovah’s Witnesses as a priest is to the ‘business’ of the Catholic Church.

159. All this is apparent from Mr Schofield’s evidence alone. However, it is consistent with the conclusion reached by Globe J in relation to ministerial servants. Although his conclusions rested on the evidence before him, the evidence before me was not materially different. I accept Mr Counsell’s submission that, if anything, the position in relation to elders is *a fortiori*.

160. The second question is whether the commission of the rape was a risk created by Barry Congregation by assigning those activities to Mark Sewell. I have concluded that the answer to this question is also ‘Yes’, for three reasons.

161. First, any organisation that confers on its leaders power and authority over others creates a risk that those leaders will abuse that power and authority. This is as true of a religious organisation as it is of a secular one. There is no doubt that the teachings of Jehovah’s Witnesses confer on elders (who are said

to be appointed through the intermediation of Jehovah) considerable power and authority over other publishers, who are enjoined to be obedient and submissive to them, at least when their guidance does not conflict with the Bible.

162. Second, where an organisation makes rules for all aspects of its adherents' lives, and sets its leaders up as moral and spiritual exemplars, it imbues those leaders with power and authority even outside the confines of their religious activities. The suggestion that publishers should reject instructions from elders that do not accord with Biblical teaching must be seen in light of the specific guidance that 'a spirit of independent thinking does not prevail in God's organisation, and we have sound reasons for confidence in the men taking the lead among us', that '[t]he elders adhere to scriptural truth' and that 'we should not magnify [elders'] human imperfections' (*Watchtower*, 15 September 1989, 'Be Obedient to those Taking the Lead', §13). An organisation that chooses to give advice of that kind creates a risk that its adherents will mistakenly follow the instructions they are given by elders, even if on a proper analysis they are contrary to the Biblical teaching.

163. Third, sexual abuse is almost always a form of abuse of power. Where (as here) the act of abuse involves physical violence, it will generally be enabled by the relatively greater physical power of the abuser compared to his victim. But acts of sexual abuse rarely happen out of the blue. Often, the perpetrator abuses his own power, or that of others, to engineer a situation in which the abuse can occur, i.e. to legitimate and enable what Longmore LJ in *Maga* called the 'progressive stages of intimacy'. Any organisation that confers on its leaders power over others creates the risk that they will abuse it in that way.

164. This means that the relationship between the Defendants and Mark Sewell was capable in principle of giving rise to vicarious liability for acts of sexual abuse perpetrated by him on members of the congregation. Whether the particular act of sexual abuse at issue here, his rape of Mrs B on 30 April 1990, was sufficiently connected to his status as elder is, of course, a different question."

Stage 2

51. At [165] the judge observed that the question at stage 2 overlaps to some extent with the second question at stage 1. He identified the focus as being on the relationship between the tort committed by Mark Sewell and his position as elder. The victim was an adult married woman who was aged 29 at the time of the rape. It was her decision to associate with Mark Sewell when they first met and her decision to continue to see him as his behaviour began to deteriorate. That, of itself, did not determine the issue. The judge recognised at [167] that the rape did not occur whilst Mark Sewell was performing any religious duty. However, he did not regard that as a necessary

ingredient of liability in cases of this kind. He described the test as being “more open-textured” and one which required an analysis of all aspects of the relationship between the tort and the abuser’s status. The judge identified five relevant aspects at [168] to [172] as follows:

“168. First, Mr and Mrs B met Mark and Mary Sewell when Mark was a ministerial servant. I accept that the two couples began to associate in part because Mr and Mrs B perceived them, because of Mark’s position, to be of high standing in the community of Jehovah’s Witnesses. By associating with them, Mr and Mrs B were practising ‘good association’. Mr B also had aspirations to become a ministerial servant, which he did at the same time Mark Sewell became an elder. So, Mark Sewell’s status as an elder was one factor in the couple’s developing friendship. This would plainly not be enough on its own to justify holding the Defendants vicariously liable for Mark Sewell’s torts, but it is a piece of relevant context.

169. Second, another reason why the two couples continued to socialise was because they got on well. In particular, Mrs B found Mark Sewell charming and funny and she and Mr B enjoyed his and Mary’s company. But there came a time, probably in late 1989, when Mark Sewell began to cross boundaries and act inappropriately both towards Mary and towards Mrs B. I accept Mrs B’s evidence that one important reason why she tolerated this was because Mark Sewell was an elder. This meant both that Mrs B assumed that he would be acting from pure motives and that there could be repercussions if she were to call out his inappropriate behaviour. Mark Sewell’s ability to get away with inappropriate behaviour is illustrated by the lack of comment when he greeted women members of the congregation by kissing them on the lips. His own perception of the significance of his status can be seen from Mrs B’s evidence, which I accept, of his reaction when confronted by her about his sexual abuse of CXC: ‘He told us he could do what he liked because he was an elder and that he was not answerable to us.’

170. Third, the instruction from Tony Sewell, a senior elder, to Mr and Mrs B to act as confidants to Mark made it difficult to break off the friendship even after Mark’s behaviour became seriously concerning. Although Tony Sewell did not specifically say that Mrs B should act as confidante to Mark alone, he implied that by giving the example of his wife (who had confided in a male elder rather than her husband). I reject Ms Foster’s submission that, in giving the instruction Tony Sewell was acting *qua* Mark’s father, rather than *qua* elder. Such a distinction would be unreal in these circumstances, given that, as FXC said and I accept, the teachings of Jehovah’s Witnesses, and the authority of the elders, extended to all aspects of a publisher’s

life, not just those concerned directly with evangelism and with religious services. It is relevant that Tony Sewell finished the meeting with a prayer, deliberately invoking Mrs B's religious obligation to do what he had instructed. In giving his implied instruction to Mrs B to act as confidante to Mark, Tony Sewell had not, therefore, cast off the mantle of an elder; on the contrary, he had deliberately assumed it. The significance of the instruction was not undermined by the fact that it might conflict with the rule that men should not be alone with women to whom they were not related, because, as FXC said and I accept, elders were given more leeway than others in this regard and, by virtue of their status, might be assumed by other members of the congregation to be acting from pure motives. Thus, I accept as true Mrs B's evidence that 'had it not been for the fact that Mark was an elder and I had received an instruction from another elder, his father, our friendship with Mark and Mary would have come to an end well before [the rape]'

171. Fourth, it is material that the rape occurred after Mr and Mrs B had been out pioneering – i.e. performing the central religious duty of Jehovah's Witnesses. That is why Mr and Mrs B and Mark and Mary Sewell were together on the day when the rape occurred. It is also relevant that, as FXC said and I accept, Mark Sewell's house was 'an "approved" venue by the Barry Elders'; and that Mrs B went to the back room of that house, where the rape took place, because she had 'decided to go to speak to Mark to convince him that he should go to the elders about his depression' – in other words to convince him to fulfil what she regarded as his duty as one of Jehovah's Witnesses and as an elder.

172. Fifth, on the basis of Mrs B's evidence about what Mark Sewell said to Mr B, which I accept, I find that Mark Sewell had formed the belief that there had to be an act of adultery in order to generate scriptural grounds for him to divorce Mary. The idea of relying on a rape to legitimate a divorce was, of course, a perversion of the beliefs and teachings of Jehovah's Witnesses, but on the evidence before me it appears to have played a part in Mark Sewell's thinking at the time of the rape. The fact that, in his mind, rape was equivalent to adultery suggests a mindset in which he was entitled to act as he desired and Mrs B would or should submit to him. Such a mindset is utterly contrary to the teachings of Jehovah's Witnesses, but the evidence establishes that his pathological beliefs about his own entitlement to exercise power over others were bound up with the position and status the Defendants had given him by appointing him as an elder."

52. Having identified the five relevant factors, the judge found at [173] that the following conclusions could be drawn:

“Taking these features of the relationship together, the following conclusions can be drawn:

(a) The fact that Mark Sewell held a position in the Congregation (initially, ministerial servant) was an important part of the reason why Mr and Mrs B started to associate with Mark and Mary Sewell.

(b) But for Mark Sewell’s and Tony Sewell’s position as elders, Mr and Mrs B would probably not have remained friends with Mark Sewell by the time of the rape. There was, therefore, the ‘strong causative link’ referred to by Lord Phillips in the Catholic Child Welfare Society case at [86].

(c) The Defendants created or significantly enhanced the risk that Mark Sewell would sexually abuse Mrs B by creating the conditions in which the two might be alone together through (i) Tony Sewell’s implied instruction that she continue to act as his confidante (an instruction which carried the authority conferred by the Defendants because of his position as an elder) and (ii) investing Mark Sewell with the authority of an elder, thereby making it less likely that Mrs B (or others) would question his motives and emboldening him to think that he could act as he wished with little fear of adverse consequences.

(d) The rape took place in circumstances closely connected to the carrying out by Mark Sewell and Mrs B of religious duties at a venue – Mark Sewell’s home – which was ‘approved’ by the elders of the Barry Congregation.

(e) One of the reasons for the rape was Mark Sewell’s belief that an act of adultery was necessary to provide scriptural grounds for him to divorce Mary. His mindset, in which he appears to have equiparated rape and adultery, was closely bound up with his position as an elder.”

53. He concluded that the rape was sufficiently closely connected to Mark Sewell’s and Tony Sewell’s position as elders to make it just and reasonable that the defendant should be held vicariously liable for it.

The appellant’s submissions

54. The appellant contends that the judge’s application of the stage 1 test replaced the principles underlying the concept of vicarious liability with policy reasons. The two questions identified by the judge at [157] in respect of stage 1 are adapted from the words of Lord Reed at [24] in *Cox* and are said to be based upon two of the five policy reasons identified by Lord Phillips in *Christian Brothers* at [35].
55. The judge is said to have made no, or at least no searching, inquiry into the actual as opposed to presumed relationship between Mark Sewell and the defendants in order to

determine its closeness to employment. No evidence was presented of any actual religious activity by Mark Sewell either as an elder or as a ministerial servant. The judge made no findings as to Mark Sewell's actual religious activities, instead the judge "merely adopted and relied upon the judgment of Mr Justice Globe" in *A* (above). The only factual determinations made by the judge regarding the alleged relationship between Mark Sewell and the Barry Congregation were that elders are the spiritual leaders of the congregation and are allegedly the principal conduit through which the teachings of the faith are disseminated to the congregations. The judge provided no justification for his conclusion at [158] that an elder is as integral to the business of a congregation of Jehovah's Witnesses as a priest is to the business of the Catholic Church.

56. The judge erred in oversimplifying the analysis of the "akin to employment" test. The judgments in *Christian Brothers* and *E* identify two elements that characterise employment: control and economic dependence. In respect of Mark Sewell, neither was present on the facts of this case. There was no evidence that the Barry Congregation exercised any control over Mark Sewell and no greater control than could be exercised over an independent contractor. As a volunteer, Mark Sewell had freedom to accept or decline any religious assignments and could freely relinquish the role of an elder at any time for any reason. The fact that he was subsequently disfellowshipped is irrelevant. The part-time volunteer activities of Mark Sewell are more akin to those of an independent contractor.

Stage 2

57. The judge's identification of the test at [165] omitted consideration of what Mark Sewell was authorised to do. As to the judge's conclusions at [165] to [174] of the judgment, he erred by focusing on the relationship between the respondent and Mark Sewell and not the defendants and Mark Sewell. The focus should have been on Mark Sewell's activities and their connection with the wrongdoing. It was no part of his spiritual duties to activate a friendship with the respondent. It was in the context of close friendship that the rape occurred.
58. As to the five aspects identified by the judge ([168] to [172]), the history of the friendship between Mrs B and Mark Sewell, his behaviour in kissing Mrs B on the lips and the evidence of no complaints being made, is said to be irrelevant to stage 2. Tony Sewell's alleged instruction to Mr and Mrs B to act as confidants to Mark Sewell is irrelevant as Tony Sewell is not the tortfeasor. As to the pioneering work done on 30 April, there was no causal connection between those activities and the rape. Any connection was severed by the intervening events, namely the pub lunch, the drinking, collecting children, and the inappropriate drunken behaviour of Mark Sewell, the time-lapse and geographical distance. The judge failed to identify any activity entrusted to Mark Sewell which could constitute evidence for the stage 2 test. As to Mark Sewell's motive ([172]), this warped personal motive had nothing to do with authorised activity. Mark Sewell was not purporting to act as an elder, he was pursuing a despicable frolic of his own.

The respondent's submissions

Stage 1

59. The issue in this appeal is whether the relationship between an elder and the Jehovah's Witnesses is capable of giving rise to vicarious liability.
60. The test was defined by Lord Phillips in *Christian Brothers* as whether "... the relationship of [the tortfeasor] and [the defendant] ... is one that is capable of giving rise to vicarious liability" [21]. In *E*, stage 1 of the test was said to be satisfied where it was established that the relationship between the tortfeasor and the defendant was "a relationship akin to employment". The Supreme Court decisions in *Barclays Bank* and *Wm Morrison* do not change the common law on vicarious liability. In each case the Supreme Court applied existing legal principles rather than develop the law.
61. The determination of whether the relationship between an elder and the Jehovah's Witness organisation is one that is capable of giving rise to vicarious liability ultimately turns upon the judge's findings of fact as to the extent to which the elder's role in the defendants' organisation sufficiently demonstrated that stage 1 is established.
62. In his judgment, the judge properly considered his findings of fact through the prism of the test set out by Lord Reed in *Cox* at [24] and made relevant factual findings at [158].
63. The judge's analysis accorded with the approach taken by the Supreme Court and the Court of Appeal in other cases. In *Christian Brothers* at [61] Lord Phillips considered it sufficient that "... a brother was acting for the common purpose of the brothers as an unincorporated association, the relationship between them would be sufficient to satisfy stage 1 ...". The respondent contends that the position is analogous to that in this claim. The judge was entitled to conclude that the relationship between elders and the Jehovah's Witnesses was one which could be capable of giving rise to vicarious liability, his findings at [157] to [164] evidenced this fact. Elders are integral to the organisation, the nature of the elders' role is directly controlled by the Jehovah's Witnesses organisation, they are conferred with power by the organisation and its inherent structure. The conclusions were correct.

Stage 2

64. The original formulation of the stage 2 test is set out by Lord Phillips in *Christian Brothers* at [21]. At [23] of *Wm Morrison* Lord Reed acknowledged that the close connection test has been applied differently in cases concerned with the sexual abuse of children. At [36] Lord Reed stated that a "more tailored version of the close connection test is applied" in sexual abuse cases. Lord Reed did not confine the tailored test to cases involving children.
65. In determining the issue the judge applied the tailored version of the stage 2 test. He made findings of fact which led to the legitimate conclusion that it was satisfied.
66. At trial the respondent needed to establish that Mark Sewell was able to rape the respondent because there was a link between the rape and his relationship with the defendants, that being his status as an elder.

67. The judge set out the legal principles correctly at [132] onwards. At [165] he reminded himself of the issue he needed to determine, namely:

“The question at stage two of the inquiry overlaps to some extent with the second question at stage one. It focuses, however, on the relationship between the tort committed by Mark Sewell and his position as elder.”

68. It follows that the judge’s determination turned on his interpretation of the evidence and findings of fact as to the extent to which there was a link between Mark Sewell’s position as an elder and the abuse sustained by the respondent.

Findings of fact

69. The judge’s findings at [173] are clear. The crucial finding is that “But for Mark Sewell’s and Tony Sewell’s position as elders, Mr and Mrs B would probably not have remained friends with Mark Sewell by the time of the rape.” It follows logically that absent his status as an elder, Mark Sewell would not have raped the respondent. The judge found there was a strong causative link between Mark Sewell’s status as an elder and the rape. The findings were careful, logical, in accordance with the law and founded upon the evidence which he had heard.

Discussion and conclusions

70. The test for vicarious liability was identified by Lord Phillips at [21] of *Christian Brothers*. Two questions are posed:
- i) whether the relationship between the tortfeasor and the party said to be vicariously liable is one that is capable of giving rise to liability;
 - ii) whether there is a sufficiently close connection between the relationship between the tortfeasor and the party said to be vicariously liable and the act or omission of the tortfeasor.
71. In *E* at [62] Ward LJ found that the stage 1 test was established where it was shown that the relationship as between the tortfeasor and the defendant was “a relationship akin to employment”. The Supreme Court decisions in *Barclays Bank* and *Wm Morrison* did not change the common law on vicarious liability. At [17] of *Wm Morrison* Lord Reed stated that previous Supreme Court authorities had “... not intended to effect a change in the law of vicarious liability; quite the contrary”. In each case the court applied existing legal principles.

Stage 1

72. Lord Phillips at [35] of *Christian Brothers* identified five policy reasons which were relevant to the imposition of vicarious liability but, critically at [56], he identified specific elements of the relationship between the teaching brothers and the Institute which reflected the relationship between an employer and employee. It is of note that they included the hierarchal structure of the Institute, the fact that the teaching activity was in furtherance of the mission of the Institute and that the manner in which the brothers were obliged to conduct themselves as teachers was dictated by the Institute’s rules. These and other factors were relevant to the court’s finding that this was a

relationship sufficiently akin to that of employer and employee to satisfy stage 1 of the test of vicarious liability.

73. It is clear from the evidence of Mr Schofield that the Jehovah's Witness organisation is central to the lives of its publishers, ministerial servants and elders. Its structure could fairly be described as hierarchical. It exercises control over its members, which goes beyond activities directly related to the dissemination of the Kingdom message. It discourages socialising outside the organisation. It permits only men to become ministerial servants or elders, identifying elders as overseers who were responsible for taking the lead in caring for the "sheep-like-ones". Instructive is the *Watchtower* article entitled "Be Obedient to those Taking the Lead" published on 15 September 1989. It is the overseers, i.e. the elders, who are to take the lead, providing "loving oversight" to the congregation under the supervision of the governing body of Jehovah's Witnesses. The elders are said to have been spirit-appointed to care for the spiritual needs of the congregation. They see to it that the Kingdom message is preached in the territory of the local congregation. The hearts of the congregation are said to be motivated to cooperate with such loving overseers. The congregation was informed that they would be helped to obey and honour those taking the lead if they remember that God himself has provided the elders. In the article it is stated that "... a spirit of independent thinking does not prevail in God's organisation, and we have sound reasons for confidence in the men taking the lead among us." The elders are said to be trained to be kind, loving and helpful, yet "firm" in upholding Jehovah's righteous standards.
74. In identifying two key questions, namely (i) whether Mark Sewell carried on activities as an integral part of the "business" activities carried on by the defendants and for their benefit and (ii) whether the commission of the rape was a risk created by the defendants by assigning those activities to Mark Sewell, the judge did adopt the formulation of Lord Reed at [24] of *Cox* but in so doing he was addressing the issue of whether the relationship between the tortfeasor and the party said to be vicariously liable is one that is capable of giving rise to liability.
75. The judge did carry out a searching inquiry as to the role of elders within the Jehovah's Witness organisation. The judge's findings at [158] are clear, cogent and reflect the evidence. The core findings made by the judge are that:
- i) elders are the spiritual leaders of the congregation;
 - ii) an elder may be removed if he fails to maintain the high standards expected of him, whether in performance of his duties as an elder or in his personal life;
 - iii) elders are the principal conduit through which the teachings of the faith are disseminated to congregations;
 - iv) in so far as a congregation of Jehovah's Witnesses acts as a body, it acts through its elders;
 - v) an elder is as integral to the business of a congregation of Jehovah's Witnesses as a priest is to the "business" of the Catholic Church.

76. At [159] the judge correctly observed that the findings were apparent from Mr Schofield's evidence and were consistent with the conclusion reached by Globe J in the case of A in relation to ministerial servants. As the judge noted, the evidence before him was not materially different from that before Globe J. If anything, the position in respect of elders was stronger. The appellant's contention that the judge did no more than accept the findings of Globe J in relation to ministerial servants misrepresents the analytical approach taken by the judge to the factual evidence before the court.
77. I accept that the judge's finding that an elder is as integral to the "business" of a congregation of Jehovah's Witnesses as a priest is to the "business" of the Catholic Church was based on the evidence before the court and was a reasonable conclusion to draw on the facts.
78. As to the second question, namely whether the commission of the rape was a risk created by the Barry Congregation in assigning the activities of an elder to Mark Sewell, the judge made the following findings:
- i) An organisation which confers on its leaders power and authority over others creates a risk those leaders will abuse that power and authority. This is true of a religious organisation as it is of a secular one. The teachings of Jehovah's Witnesses confer on elders considerable power and authority over other publishers who are enjoined to be obedient and submissive to them, at least when their guidance does not conflict with the Bible.
 - ii) The organisation makes rules for all aspects of its adherents' lives and sets its leaders up as moral and spiritual exemplars. In so doing it imbues those leaders with power and authority even outside the confines of their religious activities. Of note, the evidence of Mr Schofield that publishers should reject instructions from elders that do not accord with biblical teachings was said by the judge as having to be seen in the light of the specific guidance that "a spirit of independent thinking does not prevail in God's organisation, and we have sound reasons for confidence in the men taking lead among us". The judge quoted from *Watchtower* (15 September 1989) that "[t]he elders adhere to scriptural truth" and that "we should not magnify [elders'] human perfections" and stated that an organisation that chooses to give advice of that kind creates a risk that its adherents will mistakenly follow the instructions they are given by elders, even if, on a proper analysis, they are contrary to the biblical teaching, was founded on the evidence.
 - iii) Sexual abuse can be a form of abuse of power. Often, the perpetrator abuses his own power, or that of others, to engineer a situation in which the abuse can occur, i.e. to legitimate and enable what Longmore LJ in *Maga* called the "progressive stages of intimacy". An organisation which confers on its leaders power over others creates the risk that they will abuse it in that way.
79. The point taken by the appellant that there was no evidence of the actual religious activity of Mark Sewell is without merit. It was the defendants who chose to call Mr Schofield to give evidence to the court as to the organisation and structure of Jehovah's Witnesses, in particular the role of elders. If it was any part of the defendants' case that Mark Sewell had not had conferred upon him the authority and duties of an elder, that point could, and should, have been taken at trial. It was not. In the circumstances the

judge was entitled to conclude that the evidence of Mr Schofield, and what was contained in the *Watchtower* article, was relevant to the role of all elders, which included Mark Sewell.

80. The findings of fact made by the judge were based upon the evidence of Mr Schofield or were inferences which could reasonably be drawn from it and from articles in the *Watchtower* magazine. They were findings which the judge was entitled to make and represented a sound evidential basis for his finding at [164] that the relationship between the defendants and Mark Sewell was, in principle, capable of giving rise to vicarious liability for acts of sexual abuse perpetrated by him on members of the congregation.
81. In *Christian Brothers* at [61], in considering stage 1, Lord Phillips considered it sufficient that "... a brother was acting for the common purpose of the brothers as an unincorporated association, the relationship between them would be sufficient to satisfy stage 1 ...". I accept the contention of the respondent that the position in this appeal is analogous to that described by Lord Phillips. In performing their activities as elders in leading the congregation, the elders were the chief conduit of the guidance and teachings of Jehovah's Witnesses, they were not carrying on business on their own account. Elders were integral to the organisation, the nature of their role was directly controlled by it and by its structure. The judge was entitled to conclude that the relationship between elders and the Jehovah's Witnesses was one that could be capable of giving rise to vicarious liability.

Stage 2

82. The judge's identification at [165] of the relevant test as focusing on the relationship between the tort committed by Mark Sewell and his position as an elder of the organisation reflects the essence of the test identified by Lord Phillips in *Christian Brothers*, namely whether there is a sufficiently close connection between the relationship between the tortfeasor and the organisation and the act or omission of the tortfeasor.
83. The judge accepted that the rape did not occur when Mark Sewell was performing any religious duty. At [167] he observed that that is not a necessary ingredient of liability in cases of this kind, the test is more open textured and requires an analysis of all aspects of the relationship between the tort and the abuser's status. I agree. The judge's reference to the more open textured test reflects the observations of Lord Phillips in *Christian Brothers* at [84] in considering cases of sexual abuse. Lord Phillips stated that "what has weighed with the court has been the fact that the relationship has facilitated the commission of the abuse by placing the abusers in a position where they enjoyed both physical proximity to their victims and the influence of authority over them, both as teachers and as men of God." The fact that Mrs B was aged 29 does not undermine the relevance of this observation and its focus upon physical proximity and authority. At [45] of *Maga* Lord Neuberger relied, *inter alia*, upon the "special role" of the priest which involves trust and responsibility and the fact that the priest has "a degree of general moral authority" as factors which led him to conclude that the close connection test was met even though the priest was acting *qua* youth worker and not *qua* priest. In *Wm Morrison* at [23] Lord Reed identified the fact that the close connection test has been applied differently in cases concerned with the sexual abuse of children where 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."

84. Contained within the tailored test in cases of sexual abuse is the concept of the conferral of authority upon the tortfeasor by the defendant. In my judgment, the tailored version of the test applies in cases in which adults are alleged to have been sexually abused as it does in such cases involving children because the rationale for the test is the same. The issue is the connection between the abuse and the relationship between the tortfeasor and the defendant. It is not the particular characteristics of the victim. On the facts of this claim, what is relevant for the purpose of the close connection test is the conferral of authority by the Jehovah's Witness organisation upon its elders, coupled with the opportunity for physical proximity as between an elder and publishers in the congregation.
85. In analysing the relationship between the rape committed by Mark Sewell and his position as an elder, the judge identified five relevant aspects. His findings at [168] that Mark Sewell's status as an elder was one factor in the couple's developing relationship and that Mrs B tolerated Mark Sewell's inappropriate behaviour towards her because Mark Sewell was an elder, which meant that she assumed he would be acting from pure motives and that there could be repercussions if she were to call out his inappropriate behaviour, reflects undisputed evidence. Of particular note is the judge's identification of Mark Sewell's perception of the significance of his status as an elder, reflected in his response when confronted by Mrs B about his sexual abuse of CXC, namely that "he told us he could do what he liked because he was an elder and that he was not answerable to us".
86. The instruction from Tony Sewell, a senior elder, to Mr and Mrs B to act as confidants to Mark, which made it more difficult to break off the relationship even after Mark Sewell's behaviour became seriously concerning was relevant and found to be so by the judge. The judge's finding, that in giving the instruction Tony Sewell was acting *qua* elder rather than as Mark's father, was reasonable. Tony Sewell chose to close the meeting with Mrs B and Mary Sewell with a prayer. The judge's finding reflected the teachings of Jehovah's Witnesses, the authority of the elders which extend to all aspects of a publisher's life.
87. In my judgment, of the findings made by the judge, critical was his acceptance of Mrs B's evidence that "had it not been for the fact that Mark was an elder and I had received an instruction from another elder, his father, our friendship with Mark and Mary would have come to an end well before [the rape]". Quite simply, had Mrs B felt able to end the friendship at an earlier time, Mark Sewell would not have been able to continue his close proximity to Mrs B and she would not have felt compelled to tolerate his increasingly inappropriate and unbearable behaviour because he was an elder.
88. These findings of fact led the judge to conclude that:
 - "(a) The fact that Mark Sewell held a position in the Congregation (initially, ministerial servant) was an important part of the reason why Mr and Mrs B started to associate with Mark and Mary Sewell.

(b) But for Mark Sewell's and Tony Sewell's position as elders, Mr and Mrs B would probably not have remained friends with Mark Sewell by the time of the rape. There was, therefore, the 'strong causative link' referred to by Lord Phillips in the *Catholic Child Welfare Society* case at [86].

(c) The Defendants created or significantly enhanced the risk that Mark Sewell would sexually abuse Mrs B by creating the conditions in which the two might be alone together through (i) Tony Sewell's implied instruction that she continue to act as his confidante (an instruction which carried the authority conferred by the Defendants because of his position as an elder) and (ii) investing Mark Sewell with the authority of an elder, thereby making it less likely that Mrs B (or others) would question his motives and emboldening him to think that he could act as he wished with little fear of adverse consequences."

89. In my judgment, these three conclusions of the judge provide the basis for satisfying the test of close connection in respect of Mark Sewell's position as an elder, his role and authority within the organisation and the power which it engendered so as to make it just and reasonable for the defendants to be held vicariously liable for his act in raping Mrs B.
90. Accordingly, for the reasons given, and subject to the opinions of Bean LJ and Males LJ, I would dismiss this appeal.

Lord Justice Males:

91. Whether the Trustees of the Barry Congregation of Jehovah's Witnesses are vicariously responsible for the rape of Mrs B by Mark Sewell involves a two-stage test. The question at the first stage is whether the relationship between the Trustees and Mark Sewell as an elder is capable of giving rise to vicarious liability. I agree that it is, for the reasons given by the judge and by Nicola Davies LJ. At the second stage, I have found the issue more nuanced and therefore add this judgment to explain in my own words why, in the end, I have reached the firm conclusion that the appeal must be dismissed.
92. As the Supreme Court has confirmed in *Various Claimants v Wm Morrison Supermarkets Plc* [2020] UKSC 12, [2020] AC 989, the second stage is concerned with whether the wrongful conduct is so closely connected with the acts which the employee was authorised to do that, for the purposes of the liability of the employer to third parties, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment. That general test requires adaptation in cases of sexual abuse because sexual abuse cannot be regarded as something done while acting in the ordinary course of a person's employment. Lord Reed explained the position at [23] of his judgment in *Wm Morrison*:

"As Lord Phillips noted in *Catholic Child Welfare Society* [2013] 2 AC 1, paras 83 and 85, the close connection test has been applied differently in cases concerned with the sexual abuse of children. 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.”

93. At [36] Lord Reed referred to this as “a more tailored version of the close connection test”.
94. Often religious leaders will not be employees of the organisation to which they belong, but that is a factor which is relevant at stage one. Lord Reed's formulation of the stage two test must be understood as applicable in all cases where the relationship at stage one is such that vicarious liability for the wrongdoing of an individual is capable of arising.
95. Lord Reed described this more tailored version of the stage two test as applicable to cases concerned with the sexual abuse of children, no doubt because those have been the cases which have generally come before the courts. Such cases will generally involve a relationship of power or dependency which on its own often creates a considerable risk of wrongdoing, as explained in the Canadian case of *Bazley v Curry* 174 DLR (4th) 45 at [46], which has been influential in this jurisdiction. This was explained by Longmore LJ in *Maga v Archbishop of Birmingham* [2010] EWCA Civ 256, [2010] 1 WLR 1441:

“85. The majority of the House of Lords in *Lister's* case derived great assistance from the judgments in the Canadian cases of *Bazley v Curry* (1999) 174 DLR (4th) 45 and *Jacobi v Griffiths* (1999) 174 DLR (4th) 71, Lord Steyn even saying that, whenever the problem of vicarious liability for sex abuse is considered in future in the common law world, those judgments should be the starting point.

86. In *Bazley's* case 174 DLR (4th) 45 the court imposed liability on the operators of a residential care facility for emotionally troubled children. The employees had quasi-parental duties ranging from general supervision to more intimate duties such as bathing the children and putting them to bed. McLachlin J surveyed the law of vicarious liability and summarized her conclusions in the following way in para 46:-

‘In summary, the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm. The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability – fair and efficient compensation for wrong and deterrence. This requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercise of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency

relationship, which on its own often creates a considerable risk of wrongdoing.’

This exposition of the law is highly relevant to the position of Father Clonan in respect of whom there undoubtedly existed a ‘power or dependency relationship’ with the claimant arising from his position as a priest.”

96. In principle, however, the test must be equally applicable to cases involving the sexual abuse of adult victims, although its application will need to take account of the differences between children and adults. Children, for example, will typically be more susceptible to grooming (what Longmore LJ described in *Maga* at [86] as “the progressive stages of intimacy”) and will lack the maturity and independence of adults. An adult, on the other hand, may generally be expected to be able to recognise inappropriate behaviour and to decide to have nothing more to do with an individual whose behaviour is unacceptable. In such a case the relationship is less likely to be a relationship in which the tortfeasor exercises power over the victim and the victim is dependent on or subservient to the tortfeasor. Whether such a relationship exists, however, will be a question of fact in each case. Even an adult may be susceptible to relationships which involve a risk of abuse, particularly in the context of those spiritual beliefs and doctrines which promote a culture of unquestioned obedience to religious leaders.
97. On any view the violent rape of Mrs B by Mark Sewell was shocking and criminal. But the essential issue at stage two is whether it was an abuse of the authority over her conferred on him by virtue of his status as an elder. That will depend on two sub-issues, (1) whether his status as an elder did place him in a position of power or authority over Mrs B, and (2) whether the rape was an abuse of that position as distinct from being unconnected with his status as an elder.
98. In my judgment there are four key factors which need to be borne in mind when addressing this issue.
99. First, it is clear, on the judge’s findings that ordinary members of the congregation (“publishers” such as Mrs B) were required to be obedient and submissive to the elders, and not to question their conduct or instructions. Although in principle this teaching applied only to instructions which were in accordance with the scriptures, it was inevitable in practice that an ordinary member of the congregation’s view of what was required would be coloured by the conduct of the elders as a body. The teaching of the *Watchtower* magazine emphasised the spiritual leadership of the elders and encouraged publishers to imitate their faith. The prevailing ethos in the Barry Congregation at the material time was that a female publisher who complained about the conduct of an elder could expect an unsympathetic response and potential repercussions. Mrs B had known cases where those who questioned elders had been labelled as insane or apostates.
100. Second, it is apparent that the elders of the Barry Congregation knew of and permitted sexually inappropriate behaviour on the part of Mark Sewell. When performing his duties as an elder by welcoming members of the congregation at Kingdom Hall, he would kiss Mrs B and other female members on the lips. He did this in the presence of other elders, who therefore knew of and condoned this practice. No one commented on it. No one suggested that it was inappropriate. This was an abuse of his position as an

elder in which the other elders acquiesced. Indeed, when Mrs B raised the subject with Mark Sewell, his wife Mary Sewell asked Mrs B to allow him to continue kissing her in that way and, because she felt unable to question the conduct of an elder, she acquiesced. So whatever he may have thought beforehand, Mark Sewell knew from then on that Mrs B did not want him to kiss her on the lips, but he continued to do so. This was a form of sexual abuse, albeit far less serious than what was to follow, which was a clear abuse of his position as an elder.

101. Third, towards the end of 1989 Mrs B raised her concerns about Mark Sewell's behaviour with his father, Tony, who was also a senior and highly respected elder in the Barry Congregation. In doing so, she was following the teaching of the *Watchtower* magazine which encourages publishers to go to the elders with their problems. Although the judge does not spell out exactly what was said, the reasonable inference is that she told him about her discomfort as a result of the kissing and also about the sexual innuendos which Mark had now begun to make; and that Mary Sewell, who accompanied her, described Mark's aggressive behaviour towards her and their children and his heavy drinking. Tony Sewell's response was to request that Mr and Mrs B provide Mark with extra support and that this was the right thing for them to do as good Jehovah's Witnesses. The judge found that, in making this request Tony Sewell was acting as an elder and that Mrs B rightly understood his request as being, in effect, an instruction from an elder with which she had a religious obligation to comply. She did comply by carrying on supporting Mark, and reporting to Tony Sewell on his behaviour, which continued to be inappropriate. On one occasion, Mark asked Mrs B to run away with him. On another occasion, Tony Sewell brought Mary Sewell to Mr and Mrs B's house because it was not safe for her to return home. Thus Tony Sewell, in his capacity as an elder, was well aware not only of Mark's inappropriate sexual behaviour, but also of his capacity for violence. He was aware also that the inappropriate sexual behaviour was an abuse of Mark's position as an elder, and therefore that Mark was prepared to abuse his position in this way, but he nevertheless encouraged Mrs B (and in practice instructed her that it was her religious duty) not only to continue to associate with him but even to act as his confidante.
102. Fourth, if it had not been for Tony Sewell's instruction and Mark Sewell's status as an elder, Mr and Mrs B would have cut off contact with Mark. In fact they tried to do so, when his behaviour became unbearable, despite Tony Sewell's instructions. However, as Mrs B put it, because of the fact that Mark Sewell was an elder and his father, another elder, had instructed her to continue to support Mark, she and her husband felt that they had no choice but to maintain the friendship.
103. As the judge acknowledged, Mrs B was an adult married woman who was 29 years old and it was her decision to continue to associate with Mark Sewell despite his unacceptable behaviour. In fact she did have a choice whether to continue to associate with him, although it is fair to say that ending the friendship might have made it difficult for her and her husband to remain as members of the Barry Congregation and would therefore have carried a considerable spiritual cost. Moreover, the rape did not occur while Mark Sewell was performing any religious duty. It is true that, earlier in the day, the two couples had been "pioneering" (evangelising door-to-door), but since then much had happened (lunch at a local pub; an argument between Mark and Mary Sewell in which she threw a glass of whisky over him and he stormed off; the conversation between Mr B and Mark Sewell about divorcing Mary; collecting their respective

children and returning to the Sewells' house; and Mark, in a state of drunkenness, going into a back room by himself). It can therefore be said that the rape occurred when the two couples were choosing to be together on an essentially social occasion, albeit one which must have been awkward in view of what had occurred. There is, therefore, at least an argument that by the time of the rape Mark Sewell's status as an elder had somewhat faded into the background. Further, the rape itself did not involve, as the child grooming cases have, any kind of acquiescence by Mrs B because Mark Sewell was an elder. On the contrary, he forced himself on her violently.

104. Moreover, I would attach less weight than the judge did to some of the factors which he regarded as important. The fact that the friendship between the two couples had begun some years before when, and in part because, Mark Sewell was a ministerial servant seems to me to be no more than part of the background to their relationship. The relationship began and developed in large part because, at any rate until late 1989, the two couples got on well. As Mrs B put it, "Mark seemed like a lovely, kind, genuine, helpful man. He could be very charming and funny." In view of the intervening events I do not regard the pioneering earlier in the day as particularly significant. Nor is the fact that the Sewells' home had been in some way "approved" by the elders of the Barry Congregation. There was no evidence that it was because of this approval that the two couples decided to return to the Sewells' home rather than to Mr and Mrs B's.
105. Nevertheless, when the circumstances of the rape are seen in the context of the four factors to which I have referred, it is apparent in my judgment that the rape occurred because of Mark Sewell's status as an elder, without which the two couples would have ceased to associate and without which Mrs B would never have approached him in the back room where the rape occurred. She did so because, and only because, despite the sexually inappropriate behaviour which he had demonstrated, of which the other elders including in particular Tony Sewell were aware, she had been taught that an elder has a special status in the community of Jehovah's Witnesses and had been instructed that it was her religious duty towards Mark as an elder to act as a friend and confidante to him in his depression. As she put it in her evidence, "it was I who had been given that role". She was, in effect, put in a position where the risk of sexual abuse of some kind was apparent. There was, as described for example in *Bazley* and *Maga*, a relationship of power which created a considerable risk of wrongdoing. Moreover, the judge found that one of the reasons for the rape was Mark Sewell's perverted belief that an act of adultery was necessary in order to provide him with scriptural grounds for divorce, and that he also had a belief in his entitlement as an elder to exercise power over others and to act as he desired. He had already shown himself to the other elders to be a man with a propensity to abuse his position and, on this occasion, that is what he did.
106. In these circumstances I agree that the stage two test is satisfied. The rape was sufficiently closely connected with Mark Sewell's status as an elder that it may fairly and properly be regarded as an abuse of the authority over Mrs B conferred on him by that status, such that the defendants who had conferred that authority on him should be vicariously liable.

Lord Justice Bean:

107. This appeal is the latest episode in the attempts of religious organisations to escape vicarious liability in claims for damages for sexual offences committed by those whom

they have placed in positions of responsibility and moral authority. In *Maga v Archbishop of Birmingham* the abuser was a Roman Catholic priest acting as a youth worker. In *E v Our Lady of Charity* (a trial of a preliminary issue) the alleged abuser was a visiting Catholic priest at a children's home. In the *Christian Brothers* case the abusers were Christian Brothers teaching at a Catholic boarding school. In the case of *A* tried by Globe J the tortfeasor was a ministerial servant in the Jehovah's Witnesses; and in the present case Mark Sewell was an elder in the same organisation. It is true that the claimants in each of these cases were children, whereas BXB was an adult when Sewell raped her. But, as Males LJ observes, even an adult may be susceptible to relationships which involve a risk of abuse, particularly in the context of those spiritual beliefs and doctrines which promote a culture of unquestioned obedience to religious leaders.

108. Chamberlain J conducted what Nicola Davies LJ has rightly described as a searching enquiry as to the role of elders within the Jehovah's Witnesses' organisation. His clear and compelling findings of fact were plainly open to him in the light of the *Watchtower* article of 15 September 1989 and the evidence of Mr Schofield. On the basis of those facts he was right to find that the two-stage test laid down by Lord Phillips PSC in the *Christian Brothers* case was satisfied.
109. For these reasons, and those given by Nicola Davies and Males LJ, I too would dismiss this appeal.