A Grand Unified Theory for the "Close Connection Test" in Vicarious Liability Cases

In *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2023] UKSC 15, [2023] 2 W.L.R. 953, the Supreme Court has drawn together recent case law into a grand unified theory of the "close connection" test for vicarious liability that does not distinguish between sexual abuse cases and other cases.

The claimant was a Jehovah's Witness who was raped by an elder of the congregation, Mark Sewell. Before the rape, Sewell had a pattern of kissing the claimant against her wishes at religious services. Another elder discouraged the claimant from distancing herself from Sewell, as a matter of religious duty. On the day of the rape, the claimant had been door-to-door evangelising with Sewell. Later that day, the claimant went to the home of Sewell, where the rape occurred.

Both the trial judge (Chamberlain J) and the Court of Appeal (Davies, Males, and Bean LJs) found the Congregation vicariously liable. Both courts emphasised that even if the ordinary close connection test would not have been satisfied, a less strict "tailored" version of the test applied in cases of sexual abuse and this tailored test was satisfied (paragraphs 64 and 92, Court of Appeal).

The Supreme Court, by contrast, held (allowing the appeal) that there is no "tailored test"; that the same, strict close connection test should be applied in sexual abuse cases as in any other case; and that this strict test was not satisfied. The Court acknowledged the unique challenges presented by sexual abuse cases (paragraph 3) but denied the need for "special rules" or "tailoring" of the test (paragraph 58(v)).

Lord Burrows (giving the sole judgment) presents the Supreme Court's judgment as a mere restatement of well-established principles. In reality, however, the judgment is highly innovative.

First, the judgment relies heavily on Lord Reed's comments in *Cox v Ministry of Justice* [2016] UKSC 10, where he is said to have "indicated that the sexual abuse of children is not a special category of case and that the general approach to vicarious liability applies to such cases (para 29)" (paragraphs 44 and 58(v)). What Lord Reed actually said in *Cox*, however, was that "the general approach" adopted in *Various Claimants v Catholic Child Welfare Society* ("*Christian Brothers*") [2012] UKSC 56, [2013] 2 AC 1 "is not confined to some special category of cases, such as the sexual abuse of children". The two are quite different: to say that an approach from case X may apply in case Y, is not the same as saying that the approach in both types of cases should always be the same. Furthermore, from the preceding paragraphs in Lord Reed's judgment it is clear that he meant only that the "five factors" articulated by Lord Phillips in *Christian Brothers* could apply more broadly. Far from implying that the ordinary rules of vicarious liability apply to sexual abuse cases, *Cox* holds merely that one set of considerations articulated in one child sexual abuse case can apply outside of that context.

Second, the *Barry* judgment elevates this creative reading of *Cox* and gives it greater precedential weight than either *Christian Brothers* – where Lord Phillips 'tailored' the close connection test in child sexual abuse cases "by emphasising the importance of criteria that are particularly relevant to this form of wrong" (paragraph 83) – or *WM Morrison v Various Claimants* [2020] UKSC 12, [2020] 2 W.L.R. 941 – where Lord Reed confirmed 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" and that "a more tailored version" of the test applies in such cases (paragraphs 23 and 36). The Court of Appeal placed great weight on these statements in *Barry* (paragraphs 64 and 92-95), and academic commentators had largely assumed that after *Morrison* there was a developing "bifurcation in approach between sexual abuse and non-sexual abuse cases" (see Emily Gordon, "Mohamud Explained and Re-Understanding "Close Connection" In Vicarious Liability" (2020) 79(3) *C.L.J.* 401-404, 404). However, these precedents are passed over in the Supreme Court's *Barry* decision: the relevant passage from *Christian Brothers* is mentioned only once, and the relevant passages from *Morrison* not at all. Lord Burrows dealt with these precedents only obliquely, saying that "[a]lthough one can reasonably interpret some judicial comments as supporting special rules for sexual abuse, this was rejected by Lord Reed in *Cox*" (paragraph 58(v)).

The *Barry* judgment seeks to present the close connection test as a single master test which the lower courts can now apply uniformly in sexual abuse and standard vicarious liability cases alike. However, despite the obvious merits of having a single master test and eliminating a special category for sexual abuse cases, something important has been lost in *Barry.* The Court in *Morrison* had adopted a clear-cut distinction between (i) cases where an employee is, however misguidedly, trying to further his employer's interests, and (ii) cases where an employee is solely trying to further his own interests. This distinction alone would determine the satisfaction of the close connection test for all cases other than exceptional ones concerning sexual abuse (and employee fraud – see *Lloyd v Grace Smith* [1912] A.C. 716). It would provide a clear, simple rule, with a narrow set of exceptions. In *Barry*, however, the Supreme Court replaced the precise and relatively mechanistic but non-universal test adopted in *Morrison* with a broader and more open-textured close connection test that applies to all vicarious liability cases. While this new '*Barry* test' offers coherence and universality, it tacitly sacrifices simplicity and predictability for standard vicarious liability cases.

As well as creating greater uncertainty in the test for standard vicarious liability cases, the Supreme Court's application of the close connection test to the facts of the sexual abuse also creates uncertainty in at least three ways. First, the Court considered the rape was a "one-off attack", distinguishing it from "grooming" cases such as *A v Trustees of the Watchtower Bible and Tract Society* [2015] EWHC 1722 (QB). In *A*, the close connection test was satisfied because the sexual abuse occurred after a grooming period during religious activity at locations associated with the religious institution. In *Barry*, by contrast, the Court held that there was no analogous progression from Sewell's behaviour to the rape, despite his previous sexual abuse of a minor and his inappropriate advances towards the claimant and others. The Court in *Barry* considered that such events "owed more to their close friendship than to his role as an elder" and yet the kissing occurred with other members of the Congregation while he was acting in his role as an elder. Thus, on the facts of the case, it is difficult to see why the sexual abuse was considered a "one-off" for vicarious liability purposes.

Second, the *Barry* judgment held that the rape was not committed while the tortfeasor was carrying out activities on behalf of his employer, on the employer's premises. As with the "one-off" attack, the Supreme Court distinguished the facts in *Barry* from those in *A* where sexual abuse took place on a religious organisation's property or after bible study – holding that Sewell was not wearing a "metaphorical uniform" as an elder (paragraph 76) but rather was in the position of a close friend. However, the Court downplayed the importance of two factors: (i) the claimant had long regarded Sewell as having religious authority, including during the day while they had been evangelising, and (ii) the house where the rape took place was 'approved'

by the elders of the Congregation (paragraph 173 of Chamberlain J's judgment) and was in fact regularly a place of religious study (see paragraph 69 of Chamberlain J's judgment).

Third, it is not obvious, contrary to the Supreme Court's suggestion, that the claimant was at Sewell's house as a friend. Indeed, the claimant stated that the relationship existed only because she had been told by another elder to maintain it. The Court noted that "but for" Sewell's role as an elder the circumstances of the rape would not have occurred. While admittedly not sufficient alone to satisfy the close connection test, the Court gave this much less weight than in previous cases (see, for example, paragraph 86 of *Christian Brothers* where Lord Phillips opined that a "causative link" would be "an important element in the facts that give rise to … liability"). In *Barry*, the Court diminished the value of this link but did not fully explain why its reasoning differed from previous cases.

The rape took place at an approved religious place, following a day of religious activity, by a man with religious authority and a history of sexual advances in religious settings. Ironically, in attempting to consolidate the tests for vicarious liability into a simple "grand unified theory", the Supreme Court may not only have reduced the clarity of the *Morrison* test in standard vicarious liability cases but may also have increased uncertainty about the application of the 'close connection' test to cases involving sexual abuse.