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Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church

[2010] EWCA Civ 256; [2010] All ER (D) 141 (Mar)

Court of Appeal (Civil Division)

Lord Neuberger of Abbotsbury MR, Longmore LJ, Smith LJ

16 March 2010

Child sex abuse - vicarious liability for assault by priest - negligence - limitation.

The appellant (M) alleged that in 1976, when he was 12 or 13 years of age, he was sexually abused by a Roman Catholic priest. The priest (C) had been assigned to a church in Coventry close by where M lived. He focused mainly on working with local children and youths regardless of any religious beliefs they might or might not have, running activities such as a social club, discos, and football teams. C's relationship with M started after he noticed M admiring his sports car. A process of grooming began, which involved, amongst other things, inviting M to discos, as well as paying him for a variety of odd jobs, such as cleaning his car, ironing, and tidying C's accommodation in the presbytery. M claimed that he was abused on numerous occasions and in different places across a six to twelve month period, first in the presbytery attached to the church and later elsewhere.

M issued proceedings in 2006, prompted by reports in the media that the Archdiocese had recently paid damages to a man who claimed that he also had been sexually abused by C when a boy (see A v Archbishop of Birmingham [2005] EWHC 1361 (QB)).

Jack J, [2009] EWHC 780 (QB), found that M had in fact been subjected to abuse substantially as alleged. Further, that despite the thirty year delay, his claim was not time-barred because he was 'under a disability' throughout for the purpose of s. 28 (1) of the Limitation Act 1980. Nonetheless, he dismissed M's action for damages against the Archdiocese (the Church). His Lordship concluded (at [100]) that the Church was not vicariously liable because the priest's acts of abuse had no sufficiently 'close connection' to his employment to make imposing such liability fair and just, as required by Lister v Hesley Hall Ltd [2002] 1 AC 215. Neither M nor his parents were Roman Catholics or members of the congregation, C had done nothing to draw M into the religious activities of the Church, and the assaults formed no part of C's evangelical or other duties. His role as a priest had merely provided him with the opportunity to perpetrate abuse, which is insufficient to found liability. Accordingly, such abuse could not be regarded as having been done in the course of C's employment.

Jack J also rejected a claim in negligence against the Church based on alleged failures by C's immediate superior to investigate properly complaints of abuse made to him by M and by the parents of an altar boy two years earlier (at [104]).

M's appeal on vicarious liability was allowed and the defendant's cross-appeal on limitation and the finding of abuse was dismissed. There was no appeal as to damages which, in case he was wrong on liability, Jack J had assessed at £17,500 for general damages and £15,000 for loss of earnings.

The Court of Appeal held:

1. There was sufficient evidence to support the judge's findings that M had been sexually abused (at [35]), and that his claim was not time-barred (at [28]).

2. The trial judge had been wrong to hold that the Church was not vicariously liable for C's tortious abuse. There were a number of factors which, taken together, showed that there was a sufficiently close connection between C's employment as a priest and the abuse making it fair and just to impose liability on the Church as his employer (at [55]). Lister applied. Jacobi v Griffiths (1999) 174 DLR (4th) 71 and Bazley v Curry (1999) 174 DLR (4th) 45 considered.

3. Per Lord Neuberger MR, obiter, the Church was vicariously liable for the negligent failure of C's priestly superior to properly supervise C following receipt of complaints that C was an abuser (at [70]). The judge had also been wrong to hold that the Church owed no direct duty of care to M (at [74]).

Commentary

In A v Hoare [2008] UKHL 6 (at [54]) Baroness Hale suggested that 'until the 1970s people were reluctant to believe that child sexual abuse took place at all'. Nowadays it is the everyday stuff of media reports and, increasingly, of prosecution and civil litigation. Maga appears to be the first case in England to find the Roman Catholic Church tortiously liable for such abuse by one of its priests. In the earlier case of A v Archbishop of Birmingham (above), only damages were in dispute, liability having been admitted. The Church was caught in a pincer forged from a claimant-friendly reading of the limitation rules and an expanded conception of vicarious liability.

i. Limitation

Where, as is often the case, the allegations involve historic abuse, typically claimants face limitation difficulties. However, these have been reduced significantly as a result of the decision in A v Hoare, which now allows late claims for intentional harm to be decided under the flexible regime in sections 11 and 33 of the Limitation Act 1980. Before that, Stubbings v Webb [1993] AC 498 had said that such claims were subject to the fixed six year period set out in s. 2. The advantage to claimants of this new approach

is illustrated by Raggett v Society of Jesus [2009] EWHC 909 (noted by P. Case (2009) 25 JPN 22) where an allegation of sexual abuse perpetrated some 33 years earlier by a teacher priest in a Roman Catholic college was allowed to go for trial.

In Maga, where there was a similarly long delay, limitation was inevitably a major issue, taking up almost two thirds of the trial judgment (at [9] to [53]). It was resolved in the claimant's favour. M suffered brain damage at birth, had epilepsy, learning difficulties, an IQ thought to be around 70, and was unable to read or write. His intellectual difficulties meant he was unable to conduct the proceedings and hence was under a disability by reason of mental disorder so that, in accordance with s. 28 of the Limitation Act 1980, time did not run against him. On appeal, the Church vigorously attacked this finding of incompetence. However, the Court of Appeal, while accepting, like Jack J, that this was a 'borderline case', was not prepared to say that it was a conclusion that was not open to him on the evidence (at [28]). In these circumstances, it was unnecessary for the Appeal Court to consider whether the judge had also been right to conclude that the claim was not time-barred by virtue of sections 11 and 33.

ii. Vicarious liability and the 'close connection' test

Turning to the issue of substantive liability, it seems likely that if the appellant had consulted lawyers earlier, at least before the decision in Lister v Hesley Hall Ltd [2002] 1 AC 215, he might well have been advised against trying to fix the Church with institutional responsibility.

While Lord Steyn was no doubt right to say in Bernard v A-G for Jamaica [2004] UKPC 47 (at [23]) that the 'principle of vicarious liability is not infinitely extendable', it is also the case that Lister's 'close connection' test has significantly expanded its reach. Regrettably however, the test provides little clear guidance as to the type or degree of connection that is sufficient to warrant imposing liability on an employer.

Maga illustrates the difficulty of providing a convincing answer to what Mattis v Pollock [2003] EWCA Civ 887 (at [19]) with heavy irony called this 'deceptively simple' question. The victim here was not simply a random stranger picked up in an amusement arcade, though neither was he an altar boy abused in the sacristy after mass. And, unlike in Lister, there was no residential setting and no explicitly authorised, quasi-parenting role conferred by the employer on the abuser either. Longmore LJ said that while the Church could not be regarded as having undertaken responsibility to care for M (at [79]), he was firmly of the opinion that such an undertaking is only one way of helping to establish a close connection; it is not essential. In these circumstances, and given the absence of binding authority, his Lordship thought that it might be necessary to bear in mind the policy purposes underpinning vicarious liability, while noting (at [81]) the absence of 'universal agreement' about what those policies might be. He cited three possibilities - the provision of a solvent defendant, encouraging employer vigilance, and distributive justice.

Essentially, the Court of Appeal concluded that the trappings of authority, literal and metaphorical, bestowed by the Church on the priest established a sufficient connection between his ostensible duties, including his primary outreach work with local children, and their subversion. It rejected the argument, so influential with the judge, that vicarious liability was out of the question where the victim was not a member of the congregation and came into the orbit of abuse in a non-religious connection.

Lord Neuberger MR gave the leading judgment. He listed (at [45] to [50]) seven factors which in combination persuaded him that a sufficiently close connection was present so as to make imposing vicarious liability just:

1. a priest, particularly when dressed in clerical garb, holds a special role in society which enables and is intended to enable him to hold himself out as possessed of a general moral authority;

2. the duty to evangelise and befriend non-Catholics. However, both Longmore and Smith LJJ (at [91] and [94]) expressly rejected the idea that a non-evangelical church would necessarily escape responsibility thereby;

3. C's specifically assigned responsibility for youth work;

4. the fact that M was initially drawn into a relationship with C through the medium of Church-organised functions (the discos) run by one of its priest on Church premises;

5. C got M to clear up after discos, which led on to M doing other (paid) work for C and thereby enabled him by apparently respectable means to further draw his victim into an abusive relationship;

6. M working at the church presbytery where the priest lived, and where a number of the incidents of abuse occurred, was relevant to the issue of vicarious liability for the first three reasons given, namely moral authority, evangelisation, and youth work;

7. the opportunity to spend time alone with M arose from C's role as a priest employed by the Archdiocese, an opportunity that C had subverted for his own purposes. For Longmore LJ, it was this priestly status and authority which meant that no one would question his being alone with his victim (at [84]).

Taken together, these factors had created what McLachlin J in Bazley v Curry (at para 46), adopting an enterprise risk analysis, called 'special opportunities for wrongdoing'.

iii. Liability for Negligence

Lord Neuberger (at [70]) held that C's priestly superior had been 'inappropriately casual' (even when judged against the laxer standards operating in the mid-1970s) when he effectively ignored two separate complaints alleging that C was an abuser. It was common ground that the Archdiocese was vicariously liable for this negligence.

The judge had held that the Church itself owed no duty to M to act on the complaints, applying the Caparo test. He reasoned that where, as he found, there is no vicarious liability because there is no sufficiently close connection, 'then the victim should be outside any duty of care owed by the employer'. This was so since both kinds of enquiry are predicated on the notion of what is fair and just and thus 'should provide the same answer' (at [104]). Lord Neuberger thought this wrong in principle (at [74]). An employing organisation can be in breach of its own duty without being vicariously liable. His Lordship gave, as an example, a school which, though it would not ordinarily be vicariously liable for sexual assaults on a pupil by a gardener, would be directly liable if it ignored earlier complaints of such behaviour so facilitating later abuse.

It seems clear that the Birmingham Archdiocese failed across an extended period to pay proper attention to complaints and suspicions that one of its priests was, as Lord Neuberger put it (at [7]), 'an active and promiscuous sexual abuser of boys'. In 1992, after twenty years in post, C suddenly quit and fled the jurisdiction, seemingly because his predatory behaviour was finally about to be publically exposed. In light of what has emerged from recent reports into abuse within the Roman Catholic Church, this pattern of turning a blind eye or worse appears tragically typical.

iv. Miscellaneous matters

Compensation claims for abuse are usually brought against an institutional defendant rather than the abuser personally, who will generally be impecunious. In Maga, it was accepted by the Archdiocese that the priest, C, 'should be treated as its employee for the purposes of this case', though the defence was anxious to have it noted that this was not a 'general admission that a priest is, or is in the same position as, an employee' (at [36]). Some clergy, such as teachers in church schools, plainly are employees (see Raggett v Society of Jesus, above). Others may or may not be employees, depending on the church in question, the religion in question, their duties, whether there can be said to be an intention to create legal relations, as well as the purpose for which the question is being asked, which may be taxation (ordinarily, yes) or employment protection rights (possibly, see New Testament Church of God v Stewart [2008] ICR 282 and Percy v Board of National Mission of the Church of Scotland [2006] 2 AC 28).

Whether vicarious liability is restricted to employer-employee relationships properly so-called is unclear. It is suggested that it is not, and that no contract of any sort, let alone a contract of employment, is necessary. Rather the critical question should be whether the defendant, said to be the 'employer', had a sufficiently close relationship and degree of control over the tortfeasor to make it fair and just to impose responsibility on him (see Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd [2005] EWCA Civ 1151 and Hawley v Luminar Leisure Ltd [2006] EWCA Civ 18). The Canadian Supreme Court adopted a similar approach in John Doe v Bennett (2004) 236 DLR (4th) 577 when it fixed a Roman Catholic Episcopal Corporation with vicarious liability for sexual assaults on children by one of its priests arguing that their 'sufficiently close relationship' was 'akin to an employment relationship' (at para 27).

The question who should be treated as the defendant 'employer' did not arise for discussion in Maga, save for Jack J noting (at [1]) that, since the Archdiocesan Trustees had been named, it had been agreed that it was 'unnecessary' also to nominate the Archbishop of Birmingham. In other cases this may be more contentious. Thus, in Diocese of Southwark v Coker [1998] ICR 140, an unsuccessful claim for unfair dismissal brought by a minister of the Church of England, Mummery LJ said, obiter, that such a diocese may lack sufficient legal personality to be capable of being sued as an employer. In contrast, Lord Nicholls in Percy (above), referring to Coker's case, observed (at [28]) that while the fragmentation of functions within a church 'may make it difficult to pin the role of employer on any particular board or committee… this internal fragmentation ought not to stand in the way of otherwise well-founded claims'. The Roman Catholic Church is not a single entity but is composed of dioceses, presided over by a bishop or archbishop, and various communities or religious orders, such Jesuits. In John Doe v Bennett (above) the court declined to examine 'the important and difficult question' whether the Catholic Church itself, as distinct from one of its episcopal corporations established by legislation in Canada, could be sued. In Australia, similar problems about capacity and the appropriateness of making representative orders have arisen (see G Blake (2008) 10 Ecclesiastical Law Journal 373). In principle, the entity to which the abusing priest is attached and which exercises control over matters such as appointment and discipline should be sued, whether that is a diocese or a religious community.

v. Conclusion

Whether a wrong was done in the 'course of employment' is the key device that controls the extent of vicarious liability. Testing for this, by whatever means, has never been entirely straightforward however, as the mass of pre-Lister case law testifies. Ultimately, the 'close connection' test requires the courts to make a value judgment about when it is or is not fair to impose liability without fault. It seems clear the senior judiciary are now rightly convinced that in order to minimise the risk of vulnerable victims suffering abuse, institutions should increasingly face liability. Whether the recent apologies, however sincere, issued by the Catholic hierarchy in England and Wales (see, for example, The Guardian, 23 April 2010, 'Catholic bishops apologise for terrible crimes and cover-ups') will be sufficient to rescue the reputation of the Church or protect its funds must be doubted.

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