

Linda Overall

**Abuse in Foster Care and Potential Liability for Local
Authorities: Can liability be imposed through
vicarious liability or a non-delegable duty?**

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Victoria University of Wellington

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Abstract:

In NA v Nottinghamshire County Council [2015] EWCA Civ 1139 the claimant attempted to sue the Nottinghamshire local authority through vicarious liability or alternatively non-delegable duties for the abuse she suffered at the hands of foster parents in two separate homes that she was placed in. This paper analyses the NA decision which rejected local authority liability under either claim. The article attempts to delineate an understanding of both doctrines, which remain contested within the judicial and academic communities. Through this understanding, and analysis of case law attempting to set down methodology and form within both doctrines, the article will show that recent decisions in both areas have followed instrumentalist reasoning rather than being based on principle. In an age where claims of abuse within foster care are likely to become more prevalent these questions need to be analysed and considered carefully in order to preserve the integrity of both private law doctrines, as well as to provide reasonable and justifiable precedent for future claims and claimants. The author argues that the better theory is that liability should have been imposed on the local authority under the non-delegable duty claim which works both in principle and in policy.

Key words: Vicarious liability, Non-delegable duty, foster care, abuse.

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I Introduction

A rise in sexual abuse litigation has brought an increased significance to the doctrines of vicarious liability and non-delegable duties, and a renewed interest in what limits each doctrine.¹ The question begs importance as both doctrines seek to place liability on a defendant, who has not themselves committed the wrong affecting the claimant. Developments of both doctrines, particularly the doctrine of vicarious liability, have expanded to meet rising social concern creating a much used cliché of a doctrine which is “on the move.”² An area of increasing public prominence is the abuse of foster children by their foster carers. In the United Kingdom, there has been no final decision on similar facts since 1985.³ After the decision in *NA v Nottinghamshire Council* [2015] EWCA Civ 1139 (*NA*) it seems likely that a claimant who has been abused by their foster carer/s will be unsuccessful under either doctrine.

Claims with similar fact scenarios are likely to continue to appear in courts, as abuse within foster care is an issue in countries the world over. For example, roughly 70,000 children in England are in care, the majority in foster care.⁴ Foster children have been specifically removed from dysfunctional homes and placed into foster care to enable them increased well-being. Instead, the child is subjected to the same, if not worse abuse possible.

¹ Emma Nottingham “Vicarious liability for the acts of foster carers (2015) 31(2) P.N. 91 at 91.

² For example see: *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938 ; *The Catholic Child Welfare Society and others v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56. (*CCWS*)

³ R Scorer “Fostering a duty?” (2014) 164 NLJ 7597 12 at 13.

⁴ At 12.

Focusing on developments around vicarious liability and non-delegable duties, this paper will examine whether or not *NA* was correctly decided. All three judges within *NA* seem to follow a somewhat instrumentalist approach. Instead of analysing the facts according to the methods and forms of each doctrine to enable the doctrine to remain coherent and principled, they seem to be working towards what they believed the correct end decision should be, in accordance with policy considerations. Given that the factual scenario has not been considered in over thirty years, any decision should be based on facts analysed through methodology of both doctrines and considered carefully.

Taking the decision of *NA* as is, results in a perceived schism in results. Claimants in foster care are unlikely to be successful under either doctrine, whereas a claimant abused in an institutional home is likely to be successful, at least under the doctrine of vicarious liability. This provides yet another reason to take a closer look at the arguments within *NA* and whether or not they reach a justifiable conclusion which provides this coherent and principled precedent that can help guide future claimants.

While this paper will concentrate on the English context, the question is important in all common law countries with the results of both doctrines uncertain, and the rationale behind the doctrines dividing judges and academics alike.⁵ Given the contested nature surrounding the doctrines the answer first and foremost requires a consideration on the underpinning rationale of vicarious liability and non-delegable duties to delineate the boundaries of each doctrine. Proceeding on the basis that each doctrine are conceptually distinct,⁶ vicarious liability and non-delegable duties both seem to have been judicially developed close to, and in some cases, past their underpinning rationale.

⁵ Christian Witting “Liability for corporate wrongs” (2009) 28.1 *Univ Qld Law J* at 113-114.

⁶ David Neild “Vicarious Liability and the Employment Rationale” (2013) 44(3/4) *VUWLR* 707 at 712.

While analysing the fact scenario through the form of the modern theories of vicarious liability and non-delegable duties, the author will attempt to stay true to the doctrinal underpinnings of each doctrine in order to reach a coherent and principled result. Non-delegable duty is conceptually distinct from vicarious liability. Non-delegable duty is based around the concept of a vulnerable person and a positive assumption of (or imposition of) responsibility towards this person. Whereas vicarious liability is based around the concept of an employment relationship between the wrongdoer and the defendant.

It is argued that, both in policy and principle liability, of the local authority should be found under the doctrine of non-delegable duty as this reflects the positive duty that the local authority has assumed towards vulnerable children in care under Section 1 Child Care Act 1980 (UK) and the relevant legislative regime. Before turning to the question of the potential liability of a local authority under either doctrine, it is necessary to understand the rationale and framework of both vicarious liability and non-delegable duty.

II Vicarious Liability vs Non-Delegable Duty

A Vicarious Liability: Still in search of a rational underpinning?

Vicarious liability generally arises within an employment context, and is widely perceived as “problematic” as it is at odds with the concept of fault which lay at the heart of tort law.⁷ Instead, vicarious liability placed a no fault liability on a defendant.⁸ Firmly entrenched in tort law, a two-step “test” is followed to determine whether or not a claim will be successful.

⁷ Paula Giliker *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, Cambridge, 2010) at 18. – Jenny Steele *Tort Law: Texts, Cases and Materials* (3rd ed., Oxford University Press, United Kingdom, 2014) at 562.

⁸ JG Fleming *The Law of Torts* (9th ed, LBC Information Services, Sydney, 1998) at 367.

The first step analyses the relationship between the wrongdoer and the defendant and whether or not it is one of employment or sufficiently akin to employment.⁹ The second step ascertains whether the wrongdoer was acting within a sufficiently close connection of their employment.¹⁰

The modern direction of the doctrine has moved according to changes of social realities and the ever changing nature of what may or may not be considered as “employment.” This was illustrated in the recent case of *Ministry of Justice v Cox* [2016] UKSC 10 which held that the prison authority was liable for the negligent actions of a prisoner carrying out prison work which ultimately harmed the claimant.¹¹ Clearly, the modern theory of liability has advanced beyond a simple contractual employment relationship.¹² At a basic level, the elements comprising this new “akin to employment” test are whether the activities carried out by the wrongdoer are created by the defendant, are completed for the defendant's benefit, and are an integral part of the business activities.¹³

The recent developments extending the doctrine purely on policy justifications are undesirable.¹⁴ Policy justifications are important considerations towards a successful claim, however, they should not be solely relied upon. Recent developments seem to be relying too much on policy rather than form or methodology. Decisions within the bounds of the underlying rationale of vicarious liability, would create a sense of coherency and principle into the doctrine delineating which claims are excluded from the doctrine. Vicarious liability should not delve into the

⁹ CCWS above n 2.

¹⁰ Mark Lunney & Ken Oliphant *Tort Law: Text and Materials* (5th ed, Oxford University Press, Oxford, 2013) at 816.

¹¹ *Ministry of Justice v Cox* [2016] UKSC 10.

¹² Above n 12; *JGE* above n 2; CCWS above n 2. See: Jason W Neyers “A theory of vicarious liability” (2005) 43(2) *Alta LR* 287.

¹³ CCWS above n 2; *Cox* above n 12.

¹⁴ G.H.L Fridman “The Course of Employment’: Policy or Principle?” (2002) 6(1) *Newc LR* 61 at 66.

territory of only being able to give a “perhaps” or a “possibly” and relying solely on the judges interpretation of the policy in each case. Veering too far from the underpinning rationale has already led to a blurring of the line between vicarious liability and the personal liability that a non-delegable duty attaches to a defendant.¹⁵

Employment is the concept that underpins the rationale of vicarious liability.¹⁶ Policy justifications informing this rationale include, that the defendant employer has created the risk for their own benefit through an activity which is an integral part of the business, informing the two limbs of the test as well as the justification for imposing liability on a third party. Employment also enables the deterrence rationale to be imposed. Employers are usually in a position to fulfil deterrence aims as they place people in positions of risk and have the ability to ensure that any risk is minimized.¹⁷ Employment in modern society is changing, therefore a definition or an understanding of the concept is needed. Any expansion beyond employment would create unnecessary uncertainty in a doctrine which already runs in the opposite direction of ordinary tort law principles. The confusion created through societal changes and developments in the doctrine is best illustrated through the need to even analyse the relationship between foster parents and local authorities as one of employment or not.¹⁸ It is argued that where courts have expanded vicarious liability beyond the realms of employment, that these, and future

¹⁵ Neild above n 6.

¹⁶ At 707.

¹⁷ *K.L.B v British Columbia* [2003] 2 SCR 403 at [20].

¹⁸ Neil Foster “Vicarious Liability and Non-Delegable Duty in common law actions based on institutional child abuse” (Presentation to Kelso Lawyers, The Newcastle Club, Friday 20 March 2015) Available at: http://works.bepress.com/neil_foster/92/ at 17.

cases where this might be tempted, liability under the doctrine of non-delegable duties will be a more principled avenue to take.¹⁹

The analysis within this article will be analysed according to precedent methodology within the confines of the underlying rationale of employment, and that ultimately the judges in *NA* were correct to decline liability under this doctrine.

B Non-Delegable Duties: Tort Laws Misunderstood soul?

Similar to vicarious liability, the doctrine of non-delegable duties, has many critics. Glanville Williams called the concept of ‘non-delegable duty’ a fraud,²⁰ and Fleming noted the ‘apparent absence of any coherent theory to explain when, and why, a particular duty should be so classified; and it has been questioned whether the resulting uncertainty and complexity of the law is matched by any corresponding advantages.’²¹ Throughout various judicial statements and vast academic opinions of the topic there are wide ranging views on what makes the doctrine of non-delegable duty. The view taken in this paper is that, a finding of non-delegable duty accords with the fault principle of tort law and places a personal liability on the defendant.²²

As opposed to vicarious liability, the success of a non-delegable duty is determined by analysing the relationship between the defendant and the plaintiff.²³ Where a non-delegable duty is found, the liability of the relevant duty assumed by the defendant stays with them regardless of whether or not the function is delegated to another, and regardless of whether or not the wrong occurred at the hands of this third party.²⁴ As

¹⁹ Neild above n 6 at 710 ; Tan above n 9 at 43.

²⁰ Glanville Williams “Liability for Independent Contractors” (Nov., 1956) 14(2) C.L.R. 180 at 198.

²¹ Fleming above n 8 at 434.

²² Williams “Liability for Independent Contractors” above n 22; Giliker above n 7 at 116-117.

²³ Neild above n 6 at 711.

²⁴ Lunney & Oliphant above n 11 at 842-843.

with vicarious liability, a non-delegable duty will generally be found within the employment context. However, liability in a non-delegable duty claim will be imposed where there is an assumption (or imposition) of a duty that extends to procurement of the careful performance of work delegated to others, rather than simply focussing on a relationship of employment.²⁵ While there are non-delegable duties in relation to hazardous activities, this essay focusses on those within another spectrum of the doctrine, that of duty towards vulnerable persons.

1 The vicarious liability/non-delegable duty divide.

The two doctrines of vicarious liability and non-delegable duty are conceptually distinct and should be treated by the courts as such when approaching claims under both doctrines. Criticism of non-delegable duty primarily relates to the concept that non-delegable duties extends the doctrine of vicarious liability to cover situations that the latter does not extend, but to which, perhaps it should.²⁶ Lending to the confusion around non-delegable duties is the fact that there has not been an explicit statement, either judicial or academic, of what exactly the doctrine constitutes.²⁷ Remarks in ground-breaking cases demonstrate the view that non-delegable duties are imposed where vicarious liability cannot be extended. For example, in *Woodlands v Essex County Council* [2013] UKSC 66, Lord Philips remarked that the issue of non-delegable duties arose not through anything to do with vicarious liability, but in the sense that it only arises because there is none.²⁸ Within this case it was held that the local school authority was liable for the negligent actions of independent contractors gravely wounding a school child in their care. Blurring the lines between the two doctrines is problematic. Doctrines

²⁵Paula Giliker *Tort* (5th ed, Sweet & Maxwell, London, 2014) at 118; At 278.

²⁶ *Lister v Hesley Hall Ltd* [2001] UKHL 22.

²⁷ Christine Beuermann “Vicarious liability and conferred authority strict liability (United Kingdom) (2013) 20(3) *Torts Law Journal* 265 AT 265-266.

²⁸ *Woodlands* above n 27 at [4].

cannot apply simply because others do not. Liability is imposed because it is included within the methodology of the doctrine itself without regard to any other liability that is, or could be claimed.

In addition, there are cases that have been decided on vicarious liability grounds that could be better explained through a non-delegable duty claim.²⁹ In these cases the courts have focused more on the relationship between the defendant and the claimant, as opposed to the wrongdoer. Arguably this has contributed towards the erroneous view that the doctrine of non-delegable duty acts only to extend vicarious liability towards acts of independent contractors.³⁰ The important point to remember is that the two claims are separate. Liability under a non-delegable duty is not a backdoor avenue for the courts to extend liability to areas which would not be covered by vicarious liability. Vicarious liability is a doctrine imposing strict liability on a defendant for the acts of another because of an employment type relationship between the defendant and the wrongdoer. Non-delegable duties on the other hand imposes personal liability on the defendant due to an assumption or imposition of responsibility towards a vulnerable person/s the liability of which cannot be delegated to another, even though the function can. It should no longer be a barrier to the imposition of a non-delegable duty claim the fact that the doctrine of vicarious liability will be extended into uncharted territory. In addition, just because a claim for vicarious liability has failed, does not necessarily indicate that a claim for non-delegable duty should also be declined.

2 *Underlying concept of non-delegable duty.*

While *Woodlands* can create some confusion in regards to the vicarious liability/non-delegable duty split, the judgments within the case did

²⁹ Neild above n 6 at 710.

³⁰ *Lister* above n 29.

provide a set of useful criteria or tools to determine whether or not a non-delegable duty may have been owed in any circumstance.³¹ For the purposes of this paper, the relevant policy reason for imposing a non-delegable duty regards the protection of vulnerable persons, with children in foster care being extremely vulnerable.³² While the extent of this duty will undoubtedly differ in each circumstance, there is an underlying rationale that the defendant has either assumed a positive responsibility towards particularly vulnerable persons, or has had a duty imposed upon them justifiably in the circumstances, and the defendants, in their position and assumption have been entrusted with the performance of this duty. The justification in imposing this duty is further enhanced by the fact that in many cases the vulnerable person will not have any control over this function or how it is performed.³³ Non-delegable liability in this context, reflects the responsibility that the defendant has assumed, or has been imposed upon them, and the duty that reflects what the claimant would have expected the defendant to have assumed.

The paper will proceed to analyse the claim for non-delegable duty according to the fact that the defendant either assumed or was imposed with an assumption of responsibility towards a vulnerable member of society, using the expressed in *Woodlands* to guide the analysis.

III Vicarious Liability in the Foster Care context – an unprincipled and incoherent development of the doctrine?

A Vicarious Liability: Step one

³¹ Giliker above n 7 at 118.

³² John Murphy “The Liability Bases of Common Law Non-delegable Duties – a Reply to Christian Witting” (2007) 30(1) NSWLJ 86 at 94.

³³ *Gold v Essex County Council* [1942] 2 KB 293 at 301; *Cassidy v Ministry of Health* [1951] 2 KB 343 at 362-363.

The real barrier to a successful vicarious liability claim is whether or not the relationship between the local authority and foster carers can be considered one of, or analogous to, employment.

All judges within *NA* concluded that the local authority could not be held vicariously liable for the abuse suffered by the claimant within two separate foster homes between the years 1985 to 1988. The relevant legal regime surrounding this claim includes the Children and Young Persons Act 1969, the Child Care Act 1980 and the Boarding-Out of Children Regulations 1955. The last decision in an English court to consider a similar fact scenario was over thirty years ago in *S v Walsall County Council* [1985] 1 WLR 1150. This claim, based on the negligent actions of foster carers, was declined on the basis that the foster parents could not be held agents of the local authority. To equate agency with employment has been heavily criticized by judges and academics alike,³⁴ and as such it is more than high time to consider this question afresh.

The aim of this paper is to consider this question within the modern developments of the doctrine of vicarious liability, considering both the reasoning within *NA*, and judicial and academic arguments both for and against vicarious liability. Ultimately the conclusion in *NA* regarding vicarious liability is correct. However, the reasoning within the judgments are weak and do not justify fully the outcome. The development of the doctrine, and analysis of similar facts into these developments need to be considered in order to fully justify the end conclusion, and to provide coherent precedent for prospective claimants.

1 Recent developments of vicarious liability

³⁴ Neild above n 6 at 710.

Developments of vicarious liability are best illustrated in a recent United Kingdom Supreme Court decision. The judgment of *Ministry of Justice v Cox* [2016] UKSC 10 held that the relationship between a prisoner and the prison service was sufficiently analogous to the relationship of employment to found vicarious liability. *Cox* followed the criteria set in *The Catholic Child Welfare Society and others v Various Claimants (FC) and the Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56³⁵ and demonstrates how far the modern form of vicarious liability has shifted from the standard contractual employment relationship.³⁶ The methodology identifies a set of policy factors seeking to align criteria to impose liability where it would be fair just and reasonable to do so.³⁷ The important elements of the criteria includes that the employer is more likely to have the means to compensate the victim. The tort will have been committed as a result of activity being taken by the employee on behalf of the employer and is likely to be part of the business activity of the employer. The employer will have created the risk of the tort committed by employee and will have, to some degree, controlled the actions of the employee.³⁸

In *Cox* all five criterion were satisfied, holding that the activity of the wrongdoer was carried out in furtherance of the prison services aims. The fact those aims served the public interest, and were not commercially motivated, did not affect the imposition of liability.³⁹ The judgment emphasised the fact that the prisoners working in the kitchens are integrated into the operation of the prison, completing activities which are

³⁵ Above n 2.

³⁶ See; *JGE* above n 2; *CCWS* above n 2; Jason W Neyers “A theory of vicarious liability” (2005) 43(2) *Alta LR* 287. Uses the word contractual which may incorrectly invoke the reaction of classical employment contract.

³⁷ *Cox* above n 12 at [41].

³⁸ *CCWS* above n 2 at [35]

³⁹ *Cox* above n 12 at [32].

integral to carrying out the aims of the prison service. They are placed in a position where there is a risk of negligent wrongdoing within the field of activities they are carrying out which is recognized by the health and safety training that they receive, and they work under the direction of the prison staff.⁴⁰ It appears that the important aspect of the case was that the activity which caused the wrong, formed an integral part of the operation of the prison service, being of direct and immediate benefit to the prison service, irrespective of the payment of a wage.⁴¹ The court held that it is not always necessary to ask a broader question of whether the imposition of vicarious liability would be fair just and reasonable, the criteria set in *CCWS* intended to be an indication of this question. The decision seems to extend past, or at least brush very close to the line of what is considered as employment.

The case follows the policy justifications underlying the employment rationale including that the defendant has created the risk for its own benefit, and that the activity be integral to the functions of the business. The job that the prisoner was completing, kitchen work, is one that is generally equated with 'employment.' Perhaps the fact that the activity is one which would inherently be described as employment, went towards the successful result, even though describing the actual relationship dynamic as one of employment, was arguable. The decision, as well as that in *CCWS*, illustrate how dangerous simply following policy criteria can be. Indeed after the two decisions it is hard to say for certain any case which might be excluded from vicarious liability. This does not reflect the method of private law. While we are dealing with a public authority, the claim is brought under private law, and private law arguably follows form and certainty. While the end result in each decision seems just, this could be the same in any case before the courts. Inherently, it seems unlikely

⁴⁰ At [32].

⁴¹ At [34] - [37].

that many people would view prisoners as employees of the prison service. Some would view this as a mere technicality. However, there arguably is a difference between a priest representing an organisation of which they are a member, and that they have been sent on a mission to represent (CCWS), and that of a prisoner doing work within the prison service.

Following *CCWS* and *Cox*, it seems the current method of analysing a vicarious liability claim is mainly through policy analysis and justification.⁴² While this may be the case, judges should be cautious to not simply place value judgments on what may or may not be excluded from liability under the doctrine. The form and methodology of vicarious liability is what should base decisions of the doctrine in order to delineate cases which are excluded and those which are included. Following *NA*, *CCWS* and *Cox* it still cannot safely be said which case will be excluded from vicarious liability. The question of whether a local authority can be held vicariously liable for the actions of foster parents is largely uncharted water, particularly in England. When considering a relatively new factual scenario, and with a doctrine that is “on the move,” it is important for judges and academics to explore these areas closely, especially where policy dominates. Only then will certainty and coherency be placed into an ever changing doctrine.

2 *The arguments within NA*

Looking at some of the arguments raised by the judges in *NA* the strength or relevance of the points raised are dubious. For example, Tomlinson LJ held that the provision of family life, which was what foster carers were carrying out, is not the activity of a local authority.⁴³ His Honour held that vicarious liability must therefore be unsuccessful. This argument

⁴² *CCWS* above n 2 at [23].

⁴³ *NA v Nottinghamshire County Council* [2015] EWCA Civ 1139 at [15].

however, is weak, confusing and should by no means be used in future cases to justify the rejection of a claim of vicarious liability. The justification of this argument is difficult once an analogy between foster care and institutional homes is made. The services provided are largely similar, the difference being the environment they are undertaken. The judges within *NA* seemed to impliedly accept that a successful claim would have arisen in the institutional care context, and indeed the barriers of vicarious liability seem less of a barrier in the institutional care context after the decision of *CCWS*. With this in mind, the bold statement that local authorities cannot provide family life and therefore vicarious liability in this situation must be declined is sceptical. In addition there is a strong claim that foster care is more than simply the provision of family life which is represented through the training and supervision that foster parents undertake and receive.

A large part of the ultimate decision in *NA* also hinged on the independence of foster parents. Independence arguably indicates that the policy goal of deterrence will not be served if successful claim is found. While deterrence was not expressly discussed within *NA*, the focus on level of control of the local authority and the independence of the foster parents in their activities arguably implies that the deterrence aspect was at some level a driving force of the final conclusion.⁴⁴ Without day to day control over the activities of foster parents, the (implied) argument is that the policy of deterrence would not be satisfied with a successful claim.⁴⁵ However, this overlooks what Tomlinson LJ described and expressly acknowledged as the macro level control retained by the local authority, such as their training and supervision, rather than “micro” level control which defines the day to day control over the activities of the foster

⁴⁴ At [45].

⁴⁵ At [49].

parents.⁴⁶ It is arguable that while micro level control is limited, the macro level of control retained would enable the policy of deterrence to be effective were vicarious liability imposed. The “micro” control and independence argument espoused by Tomlinson and Black LJJ is perhaps not as solid an argument as made out. As recognized by Arbour J in *KLB* as the government becomes aware of risks to children in care, the government can, and does respond by imposing rules and restrictions on how the foster parents complete their activities.⁴⁷ In addition this control can be exercised without undermining the foster parents’ relationship with foster children, and without denying children in care the experience of “real family.” The macro level control that the local authority obtains will still enable the policy of deterrence to be ‘fulfilled’ if vicarious liability is successful, through steps undertaken in training or changes in supervision.⁴⁸

3 *A closer look at the question.*

Control over and independence of foster parents are extremely important considerations in every vicarious liability analysis, and are both part of the problem. The role of foster parents is to create a family environment for children in their care. This necessarily requires a degree of control and independence from the local authority.⁴⁹ The issue is not with the conclusion reached, but with the analysis. More analysis is need on each of these issues where employment and the nature of foster parenting itself is changing. Through better analysis coherent and principled results can occur and would be able to serve as respectable precedent in future cases.

⁴⁶ At [15].

⁴⁷ *KLB* above n 19 at [88] – [89].

⁴⁸ At [89].

⁴⁹ *NA v Nottinghamshire County Council* [2014] EWHC 4005 (QB) at [24] – [25] cited in *NA* above n 43 at [11].

Following the judgments in *CCWS* and *Cox*, the important criterion for a successful claim is that the activity be integral to the operation of the business, as well as various policy criteria including control over the wrongdoer and accountability of the wrongdoer to the defendant.⁵⁰ Looking away from the arguments of the judges especially within *NA*, the following will examine arguments for and against the conclusion decided.

There are vocal proponents within the academic and judicial community who support finding for vicarious liability. An example of this is the dissenting judgment in *K.L.B v British Columbia* [2003] 2 SCR 403 from Arbour J. While this case is a Canadian case, where the government assumes responsibility for children in care rather than local authorities, arguments can be made which are relevant to the English foster care context. Her Honour held that the government has sufficient power of control over the foster parents which differentiated this relationship from one of an independent contractor which supported a finding of vicarious liability.⁵¹ She held that a useful indicator of a relationship capable of imposing vicarious liability was whether "...the imposition of vicarious liability could in fact deter harm to children."⁵² Her Honour's approach mirrors that proposed by Phillip Morgan to combine doctrinal and contextual analysis enabling the imposition of vicarious liability to reflect social change.⁵³ Arbour J ultimately held that the government remained the legal guardian of foster children with sufficient powers and rights of control over the care of them, sufficient to justify the vicarious liability claim.⁵⁴ Support for this claim is understandable, especially as it seems unrealistic to describe foster parents as engaged in an enterprise separate

⁵⁰ *CCWS* above n 2 at [56]. ; *Cox* above n 12 at [32] – [42].

⁵¹ *KLB* above n 19 at [76].

⁵² At [81].

⁵³ Phillip Morgan "Ripe for Reconsideration: Foster carers, context and vicarious liability (United Kingdom)" (2012) 20(2) Torts Law Journal 110 at 112.

⁵⁴ *KLB* above n 19 at [76] – [90].

from the mission of government agencies that place children in their care.⁵⁵ Foster carers are responsible for the public service of caring for the children under the local authorities care. The fact that the foster carers carrying out a public service has been used as an argument to reject vicarious liability,⁵⁶ however, this argument is weak, especially in light of the successful claim in *Cox* where the prisoner was completing a public service by working towards their rehabilitation.⁵⁷

Inevitably, with the form of the doctrine as presented in *CCWS* and *Cox*, there will be sound arguments either for or against a vicarious liability claim which presents a problem in that there does not seem to be any claim which would not be successful under the doctrine. What once may have been common sense, has become confused as judges have attempted to develop the doctrine according to societal changes and perceived 'just' results. There is no longer a line where liability is limited. This confusion is illustrated in the decision of *NA*, and even in the need to write this paper at all. A claim that once could easily have been displaced now has to be thoroughly argued and reasoned to be justified. Arguably, support of the imposition of vicarious liability derives from the perspective that local authorities should be held liable for the acts of foster parents and that children in foster care should have the same protection as those in institutional homes.⁵⁸ However, these arguments stretch the policy justifications to their limits. Simply viewing a decision as 'justified' due to the desired end result has the ability to sweep a whole range of cases under the doctrine. In order to remain principled and coherent, the reach of vicarious liability should be restricted to the employment rationale underpinning the doctrine, regardless of the fact that the result may

⁵⁵ Morgan above n 52.

⁵⁶ *KLB* above n 19 at [23].

⁵⁷ *Cox* above n 12 at [44].

⁵⁸ Nottingham above n 1 at 63

conjure a divide that could be considered socially unjust.⁵⁹ While the judges in *NA* ultimately arrived at the correct conclusion, the analysis needed to be more developed, in order to be justified and to provide future guidance in similar cases.

The relationship between the local authority and foster parents inherently does not fit within the employment rationale of vicarious liability. As far as the modern understanding has shift away from the “master-servant” relationship to cover situations such as *CCWS* and *Cox*, one cannot say that it is common place to view foster parents as employees of the local authority. The rationale of employment will not prevent any coherent development of the doctrine of vicarious liability but merely places the doctrine within its proper principled location. Vicarious liability will still be able to according to developments in employment such as casual workers, and workers via employment agencies.⁶⁰ The underpinning rationale enabling any further development to remain coherent. Perhaps claims would be successful where the claim is related to ‘modern’ abuses under new legislation,⁶¹ however it seems for now that claimants will be unable to sue the local authority under vicarious liability for the abuse committed by foster parents, at least under the historical foster care legislation. One cannot properly describe the work of foster parents as “so much a part of the work, business or organization” of the local authority that it would seem just to hold the local authority vicariously liable for their actions.⁶² Keeping in mind that this does not absolve the local authority of all liability, where they have been guilty of negligence then personal liability will attach.⁶³

⁵⁹ At 94.

⁶⁰ Giliker above n 25 at 265.

⁶¹ Morgan “Ripe for Reconsideration” above n 52.

⁶² *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18 at 79] cited in P Giliker “Tort” above n 28 at 270.

⁶³ Giliker above n 25 at 266.

The author has struggled with setting up a strong argument as to why vicarious liability should not be imposed in this situation other than it simply does not seem as though it should, once you disregard the obvious desire to provide the claimant, with adequate compensation. A fault perhaps, of this new direction of vicarious liability which illustrates the need for courts to really clarify the boundaries of the doctrine. For now it is argued that if a fact scenario such as that in *NA* presents itself in court again then the claim will most likely fail (as it should). This decision will however require more argument and justification than perhaps was discussed within *NA* itself in order to provide both a reasonable result, as well as coherent precedent for future cases running along similar lines.

B Vicarious Liability: Step Two

Historically the test was seen not to cover intentional acts, especially those which clearly were not mandated by the employer, as employees are not employed to perform duties in an unlawful manner.⁶⁴ Initially vicarious liability only covered acts authorized by the employer.⁶⁵ Following precedent such as *CCWS*, it seems highly likely that if the first step is satisfied the employer will most likely satisfy the second step of the test in a foster care abuse situation, the deliberateness of the action no longer a bar to a successful claim.

The second step calls for consideration of what functions or field of activities have been entrusted to the wrongdoer. In this case it would be the caring of the child or fulfilling familial activities. An analysis of whether or not the acts of abuse were sufficiently connected with the wrongdoer's position in which he was employed would then need

⁶⁴ Lunney & Oliphant above n 11 at 816.

⁶⁵ *Lister* above n 29 at [15].

consideration.⁶⁶ The English case of *Lister v Helsey Hall*, which held that the employers of a warden who was living and caring for children in an institutional home, were vicariously liable for his intentional abuse of the children, provides positive precedent that in the foster care context the success within this step would not be controversial.

IV Abuse in foster care covered by Non-Delegable Duty doctrine?

The second claim in *NA* was that the local authority owed a non-delegable duty to the claimant. Through canvassing what exactly a non-delegable duty constitutes it is argued that imposing liability through this doctrine on the local authority is a better theory, both in policy and principle, as opposed to imposing vicarious liability or no liability at all. Liability through non-delegable duty acknowledges the relationship between the local authority and the child in care recognising, not an employment relationship but the assumption of a positive duty over the child, assumed or imposed upon, which should be recognised. It is argued that the local authority has assumed such a duty in this context, and as such, should have this personal liability imposed upon them if this is breached.

There has been debate about whether or not the doctrine of non-delegable duties covers intentional wrongdoing such as abuse.⁶⁷ The correct approach is that a non-delegable duty is able to be imposed upon an intentional act.⁶⁸ There is nothing within the justifications for non-delegable duties that restricts the doctrine purely to negligent acts.⁶⁹

⁶⁶ At [20].

⁶⁷ See the difference in approach between Burnett LJ and Black LJ in *NA*.

⁶⁸ *NA* above n 43 at [58] – [59].

⁶⁹ Morgan “Ripe for reconsideration” above n 52 at 403.

In a non-delegable duty claim the most important aspect is to locate the correction function/duty of the defendant. The approach of the judges within *NA*, all three rejecting the claim on three different duties, is not conducive to any principled and coherent application of the doctrine. Given that the relationship between the local authority and children in care is located within many different legislation and regulations, pinning the duty on one single provision is apt to promote uncertainty in the doctrine. A more conducive analysis of this question would be to conduct a contextualized approach to this question which would explain the duty that best represents the relationship between the local authority and the child in care.⁷⁰

A *The relevant duty*

Fostering in the English context occurs under a range of legislative and regulatory provisions. The relevant duty canvassed in this section will focus on the historical regime that related to the foster care of the claimant in *NA*. Under Section 21 of the Child Care Act 1980 (UK) there is language of the local authority “discharging” a duty rather than delegating the duty. However, the duty that is discharged relates only to providing accommodation and maintenance. It is important to acknowledge that the relationship between the local authority and children in care is by no means limited the accommodation and maintenance of the child.

Canvassing the legislation and regulations at issue in *NA*, children at risk fall into the care of the local authority under Section 1 Children and Young Persons Act 1969 (UK). Throughout the relevant legislation a positive, affirmative duty to care for the welfare of the children with the local authority assuming responsibilities similar to a parent can be derived. In

⁷⁰ Elizabeth Adjin-Tettey “Accountability of Public Authorities through Contextualized Determinations of Vicarious Liability and Non-Delegable Duties (2007) 57 U.N.B.L.J. 46 at 60-63.

addition, when navigating the legislation and regulations it is difficult to comprehend how this duty could simply be one that is reasonable, given the express assumption of responsibility of the local authority towards extremely vulnerable members of society.⁷¹ They are from dysfunctional broken homes and are thrust into a new “home” environment, sometimes several times over. The foster care regime recognizes this vulnerability in that the local authority retain control over the children for their time remaining under the system by checking on the family environment, whether the home is suitable for the child and whether or not the child is well in the new environment.⁷² Control is also exercised through the training that is provided for foster parents. An overarching duty would not be inconsistent with the legislative regime as it would be hard to see how a duty to care for the welfare of the children, the whole idea of the system itself, is inconsistent with the statutory scheme surrounding foster care.

An important aspect of a non-delegable duty is that the defendant does not actually have to be able to carry the function out.⁷³ Lord Justice Tomlinson focused his judgment on the fact that fostering is a function which a third party must inevitably complete and therefore could not be held to be a non-delegable duty on the local authority but a duty that is discharged.⁷⁴ This approach does not however, follow precedent or the policy underpinning non-delegable duties. For example, there have been successful claims under the doctrine in hospital cases. While the hospital board cannot themselves carry out the functions and duties specific to each patient, under the criteria set by Lord Sumption in *Woodlands*,⁷⁵ this has not limited pronouncing the success of a non-delegable duty claim in these

⁷¹ Section 1 Child Care Act 1980 (UK).

⁷² Morgan “Ripe for Reconsideration” above n 52 at 117-118.

⁷³ *Woodlands* above n 27 at [23]. See Tomlinson LJ in *NA* above n 45 at [24].

⁷⁴ *NA* above n 45 at [25].

⁷⁵ *Woodlands* above n 27 at [23].

situations.⁷⁶ As stated in obiter by Lord Greene MR in *Gold v Essex County Council* “the first task is to discover the extent of the obligation assumed by the person whom it is sought to make liable... Once this is discovered, it follows of necessity that the person accused of a breach of the obligation cannot escape liability because he has employed another person, whether a servant or an agent, to discharge it on his behalf...”⁷⁷ The simple fact that the day to day caring of the child could not have been completed by the local authority themselves does not detract from fact the local authority has assumed responsibility to ensure that the care and welfare of the child is achieved.

The duty that the local authority assumes, or the duty that should be imposed upon them in relation to the relevant legislative regime, would be to take all reasonable care towards the welfare and well-being of a child who is placed into their care under Section 1 of the Children and Young Persons Act 1969 (UK) or the relevant modern legislation under the Care Standards Act 2000 (UK), the Children Act 2004 (UK) and the Children and Younger Persons Act 2008 (UK). This duty includes making sure that no child is placed in further position of risk, whether it be environmental or humanly inflicted, and to take all reasonable care that the system which places children in unfamiliar homes is carried out to the safest and best intent. This recognises the local authorities responsibility to consider the need to safeguard and promoting the welfare of the child throughout their childhood.⁷⁸

B Woodlands criteria and analysis

With the correct duty and the framework of non-delegable duty in mind, the next step is to analyse the duty according to the criteria as set in

⁷⁶ NA above n 45 at [20].

⁷⁷ *Gold* above n 36 at 301 cited in *Woodlands* above n 26 at [14].

⁷⁸ Part III Child Care Act 1980 (UK).

Woodlands while acknowledging the warnings of Lady Hale, to be wary of unbridled and unprincipled growth simply to match what is perceived to be the merits of the particular case.⁷⁹ After the analysing the facts of the case with the criteria it must also be considered fair just and reasonable to impose this duty on the defendant.⁸⁰

The criteria set by Lord Sumption is to make sure that the “exception does not eat up the rule.”⁸¹ The following defining features recognized by Lord Sumption include a claimant who is vulnerable or dependent on the protection of the defendant against the risk of injury, that there is an antecedent relationship between the claimant and the defendant where it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm. The claimant will have no control over how the defendant performs their obligations including whether or to who the functions integral to the duty are delegated to. Lastly there will need to be a wrong that has occurred in the performance of the relevant function.⁸²

Unfortunately, the judgments within *NA* do not lend much analysis of the facts with the criteria mentioned. Other than that of Black J, the policy arguments concerning whether or not a non-delegable duty would be fair just and reasonable to impose on the defendant local authority, were focused upon and relied upon heavily. This approach sidesteps the criteria which is meant to inform the question of fair, just and reasonableness.⁸³ At trial it was held that all five criteria were satisfied, nevertheless liability was declined on policy grounds.⁸⁴

⁷⁹ *Woodlands* at above n 27 at [28].

⁸⁰ At [25].

⁸¹ At [22].

⁸² At [23].

⁸³ *Lunney & Oliphant* above n 11 at 843.

⁸⁴ *NA* above n 45 at [197].

Arguably, the relationship between children who are placed in local authorities care under Section 1 Children and Young Persons Act 1969 (UK) can inevitably satisfy all five criteria set in *Woodlands*. The claimant is clearly an extremely vulnerable child with a very troubled childhood. Her placement in the local authorities care under Section 1 of the Children and Young Persons Act 1969 (UK) demonstrates that she was dependent on the local authority for protection against injury. Looking at this section it is possible to impute the local authority has assumed a positive duty or care over the claimant. There is immense control over the claimant, according to the relevant legislation the local authority assume a position similar to a parent but not in loco parentis. The children also have limited control over how they are positioned, under the Child Care Act 1980 (UK)⁸⁵ the local authority as the power to determine where the child will live, and policy decisions dictate that foster care is the preferred option for children in care. The control over such an important element in children's lives is considerable. The loss of day to day control of the local authority does not necessarily mean that a claim for non-delegable duties will be unsuccessful, in most instances the duty will be imposed regardless of the lack of control.

Liability therefore depends on whether or not it would be fair, just and reasonable to impose a non-delegable duty in this scenario which by itself does not seem to be a great test. Ultimately the court has discretion to decide each case, following their value judgments too closely however will not create coherent judgments to lend as precedent to future cases. The satisfaction of the five criteria lends support that the imposition of liability will be reasonable. As with every scenario there are many policy factors which support declining liability. The judges within *NA* were

⁸⁵ Section 24 Child Care Act 1980 (UK).

concerned that liability would promote defensive practices on the part of the local authority.⁸⁶ In particular there was concern that liability would promote placing children in local authority run homes rather than the preferred method of placing them in foster care.⁸⁷ This reasoning seems rather instrumental, looking towards an end result which does not seem desirable, rather than following method and coming to a rational conclusion.⁸⁸ While judges do have to take into account policy factors, they should only be driven so far by these factors. Where principle tends to support one conclusion arguably weight should be extended to favour that conclusion. Where the end result is not ‘ideal’ in a policy sense, then Parliament will have the opportunity to change that. There is no reason why form and principle of a doctrine should become incoherent or ignored based on a sitting judge’s value judgment of reasonableness or otherwise.

An issue also arguably arises with respect to the fact that within the statutory regime, the local authority could delegate the care of the child to a parent or a relative. Therefore a non-delegable duty would impose liability on the local authority for the acts of the child’s parents or relatives which is, as the judges pronounced, highly undesirable. Varying the type of liability by placement is unconvincing and in turn could discourage local authorities from reuniting families, which ultimately is more desirable than placing them within foster care.⁸⁹

C Summary of the non-delegable duty claim

Initially the authors proposed duty differentiated between the different types of placements and sought to impose non-delegable liability in

⁸⁶ NA above n 45 at [60].

⁸⁷ At [62] – [63].

⁸⁸ Phillip Morgan “Fostering, vicarious liability, non-delegable duties, and intentional torts” (2016) 132(Jul) L.Q.R. 399 at 402.

⁸⁹ At 403.

relation to children placed in care of supervisors who are not considered “family.” The duty was reconstructed after analysing the position further. No limit is necessary as any imposition of liability simply acknowledges the relationship between the local authority and the child in care. This relationship is in place even where the child is placed back within the care of parents and relatives.⁹⁰ While it seems undesirable for the local authority to have liability for the actions of relatives and parents, the child is still within the assumption of responsibility of the local authority.⁹¹ The same system in operation is that with children in local homes and foster care. Checks are in place and the authority maintains contact with the families ensuring the welfare of the children. When the child, in the care of relatives or parents are ultimately deemed safe, then the relationship between the local authority and the child would cease. Thus, the liability of the local authority for acts carried out by relatives and foster parents would not be for the duration of the child’s life within their homes. Liability where the assumption is still undertaken will not be unreasonable or unjust but simply represent the positive duty the local authority has assumed through the legislative regime. This same argument also rids of the argument about the local authority possibly being held liable for the actions of a babysitter.⁹² A child in care is extremely vulnerable. While the child is under the legislative protection of the local authority, training and supervision under the authority of the local authority is in place. The responsibility that the local authority has assumed towards society’s vulnerable children is still carried out and there is no reason why, in scenarios such as those proposed, should negate liability. A non-delegable duty represents the relationship between the claimant and the defendant, in the foster care scenario this relationship is strong. It would ultimately

⁹⁰ Section 21 Children and Young Persons Act 1969 (UK).

⁹¹ Section 1 Child Care Act 1980 (UK).

⁹² P Morgan above n 52 at 403.

be unreasonable for liability to not be imposed. Therefore a claim in the fact scenario presented in *NA* should be successful.

V Conclusion

The doctrines of vicarious liability and non-delegable duty are highly complex, due especially to the debates around their underpinning as well as their developments according to modern societal changes. Through analysing these debates, the two doctrines can be placed within their underpinning framework, which allows further development to remain coherent and principled.

In an age where many cases of abuse within foster care are likely to be put forward into the courts, especially historical abuse claims, questions and analysis of both doctrine are important. The judgments within *NA* unfortunately failed to undertake proper analysis of the methodology and developments of each doctrine. With a factual scenario that has not been heard in a court in over thirty years, it is appropriate and necessary to take account of the underpinning rationale and principles of both doctrines and how they have been developed over the years. Such analysis would ensure that the court, when approached with this scenario again, did so with proper understanding in the operation of, and the proper scope of each doctrine. The judges were correct in concluding that the local authority could not be held vicariously liable for the actions of foster carers because the relationship between the local authority and foster carers cannot be said to be one of employment or akin to employment. But as non-delegable is separate and distinct from vicarious liability, there is no barrier in applying the doctrine outside an employment context.

When properly analysed, a non-delegable duty ought to have applied to the local authority in light of how previous courts have developed and

defined the scope of the doctrine. In this factual scenario, the claimant is extremely vulnerable, and in light of the legislative regime, the local authority has assumed a positive duty over the claimant. While there are policy reasons which would speak against imposing a duty, such arguments look over the fact that the local authority has assumed responsibility over these children, at least for the period of time that they are within the relevant legislative regime. Although policy has a factor in whether or not a claim is successful in both doctrines, ultimately, the local authority had assumed a clear relationship of responsibility towards an identifiable class of individuals (in this case, the claimant), under the relevant legislative regime. The claimant was extremely vulnerable with no control over her situation. When children are in care there is an expectation from the community, and from the children themselves that they will be protected. Where this does not occur, even when the function of the duty has been delegated to another, liability ought to be imposed on the local authority who assumed the care of the children under the foster care legislative regime.

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