Neutral Citation Number: [2024] EWCA Civ 841

Case No: CA-2023-001744

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
The Hon Mrs Justice Lambert DBE
F46YM683

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 July 2024

Before :

LADY CARR OF WALTON-ON-THE-HILL,
THE LADY CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE BEAN
and
LORD JUSTICE BAKER

- -

Between :

DJ	**Claimant/ Appellant**
- and –	
BARNSLEY METROPOLITAN BOROUGH COUNCIL	**Defendant/ Respondent**
- and –	
SG (for and on behalf of the estate of AG)	**Part 20 Defendant/ Respondent**

- -

Justin Levinson and Thomas Beamont (instructed by **Jordans Solicitors**) for the **Claimant / Appellant**
Steven Ford KC (instructed by **Browne Jacobson**) for the **Defendant / Respondent**
The Part 20 Defendant / Respondent was not represented at the hearing

Hearing date : 19 June 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 23 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LADY CARR OF WALTON-ON-THE-HILL, THE LADY CHIEF JUSTICE, LORD JUSTICE BEAN AND LORD JUSTICE BAKER :

1. The question arising on this appeal is whether a local authority can be vicariously liable for torts committed against a child by a foster carer who is also a relative of the child. In *Armes v Nottinghamshire County Council* [2017] UKSC 60, [2018] AC 355, the Supreme Court held that a local authority can be vicariously liable for torts committed against a child by a foster carer who is not related to the child but left open the question whether vicarious liability can arise where they are related.

2. The facts of the present case occurred four decades ago. They are set out in greater detail below but can be summarised briefly as follows. In 1980, after the claimant, DJ, then aged ten, had been abandoned by his parents, the defendant local authority ("the local authority") arranged for him to go to live with his maternal aunt and uncle, Mr and Mrs G, whom he had not previously met. Over the next few months, the local authority carried out a foster assessment of the Gs and in August 1980, after they had been approved as foster carers, DJ was "received into care" by the local authority. In 1983, the local authority "assumed parental rights" for DJ under the legislation then in force. DJ continued to live with the Gs until his early twenties.

3. Many years later, in 2018, DJ alleged that he had been sexually assaulted by Mr G as a child and brought a claim for compensation against the local authority asserting that they were vicariously liable. The question whether a local authority could be vicariously liable in these circumstances was heard as a preliminary issue by Mr Recorder Myerson QC ("the recorder") who ruled against DJ. His decision was upheld by Lambert J ("the judge") on appeal. This is therefore a second appeal from the recorder's decision.

The law – (1) relevant statutory provisions

4. The events described above took place before the passing of the landmark Children Act 1989 which (as subsequently amended) contains the current statutory provisions governing the support for children and families by local authorities in England (Part III) and care and supervision orders (Part IV). Prior to the 1989 Act, the law was found in piecemeal provisions which had been introduced in and/or amended by various statutes over the previous forty years. At the time that DJ went to live with the Gs in 1980, the principal statute was the Children Act 1948, supplemented and amended by provisions in the Children and Young Persons Act 1963, the Children and Young Persons Act 1969 and the Children Act 1975. Many of those provisions were subsequently consolidated in the Child Care Act 1980. That came into force on 1 April 1981 and was thus the governing legislation at the time of the local authority's "assumption of parental rights" in respect of the claimant in 1983.

5. When reading the relevant provisions set out below, it should be remembered that prior to the 1989 Act the term "care" was used more broadly in the context of local authorities than it is now. It was used to describe all children being cared for or accommodated by local authorities, some of whom were subject to care orders made by a court (under a range of statutory provisions) but many others who were not. Under the current law, a child is only "in care" if subject to a court order under Part IV of the 1989 Act. There are many other children who are not subject to court orders but are being "provided with accommodation" by a local authority, mainly under s.20 of the 1989 Act. The

umbrella term used in that Act to describe both categories of children – those in care and those being accommodated – is "looked after children".

6. Under the current law, the principal legal difference between a child who is in care under a care order and a child who is being accommodated by the local authority is that the local authority has parental responsibility for the former but not for the latter. At the time of the events with which this case is concerned, the concept of parental responsibility was not part of our law. It was introduced by the 1989 Act as "the conceptual building block" to emphasise "the practical reality that bringing up children is a serious responsibility, rather than a matter of legal rights" (*"The Children Bill: The Aim"* Professor Brenda Hoggett QC, as she then was, Family Law (1989) Vol 9 p217). The previous law used a variety of expressions, in particular "powers and duties" in respect of a child, which were vested in a local authority on the making of a care order, and "parental rights" which could be "assumed" by a local authority by the passing of a resolution.

7. Turning to the statutory provisions relevant to the present case, s.1 of the Children Act 1948 provided (so far as relevant):

> "1. Duty of local authority to provide for orphans, deserted children, etc
>
> (1) Where it appears to a local authority with respect to a child in their area appearing to them to be under the age of seventeen -
>
> (a) that he has neither parent nor guardian or has been and remains abandoned by his parents or guardian or is lost; or
>
> (b) that his parents or guardian are, for the time being or permanently, prevented by reason of mental or bodily disease or infirmity or other incapacity or any other circumstances from providing for his accommodation, maintenance and upbringing; and
>
> (c) in either case, that the intervention of the local authority under this section is necessary in the interests of the welfare of the child,
>
> it shall be the duty of the local authority to receive the child into their care under this section.
>
> (2) Where a local authority have received a child into their care under this section, it shall, subject to the provisions of this Part of this Act, be their duty to keep the child in their care so long as the welfare of the child appears to them to require it and the child has not attained the age of eighteen.
>
> (3) Nothing in this section shall authorise a local authority to keep a child in their care under this section if any parent or

> guardian desires to take over the care of the child, and the local authority shall, in all cases where it appears to them consistent with the welfare of the child so to do, endeavour to secure that the care of the child is taken over either -
>
> (a) by a parent or guardian of his, or
>
> (b) by a relative or friend of his, being, where possible, a person of the same religious persuasion as the child or who gives an undertaking that the child will be brought up in that religious persuasion."

These provisions were re-enacted in s.2 of the Child Care Act 1980.

8. S.13(1) of the Children Act 1948, headed "Provision of accommodation and maintenance of children in care" was substituted by s.49 of the Children and Young Persons Act 1969 so as to provide as follows:

> "(1) A local authority shall discharge their duty to provide accommodation and maintenance for a child in their care in such one of the following ways as they think fit, namely.—
>
> (a) by boarding him out on such terms as to payment by the authority and otherwise as the authority may, subject to the provisions of this Act and regulations thereunder, determine; or
>
> (b) by maintaining him in a community home or in any such home as is referred to in section 64 of the Children and Young Persons Act 1969; or
>
> (c) by maintaining him in a voluntary home (other than a community home) the managers of which are willing to receive him;
>
> or by making such other arrangements as seem appropriate to the local authority.
>
> (2) Without prejudice to the generality of subsection (1) of this section, a local authority may allow a child in their care, either for a fixed period or until the local authority otherwise determine, to be under the charge and control of a parent, guardian, relative or friend."

These provisions were re-enacted in s.21 of the Child Care Act 1980. S.14 of the 1948 Act provided for the making of regulations to make provision for the welfare of children boarded out by local authorities under s.13(1). At all material times, the relevant regulations were the Boarding-out of Children Regulations 1955 which, under regulation 1, applied inter alia to the "boarding of a child … by a local authority in whose care a child is … with foster parents to live in their dwelling". The regulations make provision for regular visits, medical examinations, reviews and the keeping of records.

9. S.1(1) of the Children and Young Persons Act 1963 provided (so far as relevant):

> "It shall be the duty of every local authority to make available such advice, guidance and assistance as may promote the welfare of children by diminishing the need to receive children into or keep them in care under the Children Act 1948 … or to bring children before a juvenile court; and any provisions made by a local authority under this subsection may, if the local authority think fit, include provision for giving assistance in kind or, in exceptional circumstances, in cash."

10. S.3 of the Child Care Act 1980 (re-enacting s.2 of the Children Act 1948 as substituted by s.57 of the Children Act 1975) ("s.3") was headed "Assumption by local authority of parental rights and duties". Subsection (1) provided:

> "(1) Subject to the provisions of this Part of this Act, if it appears to a local authority in relation to any child who is in their care under section 2 of this Act—
>
> (a) that his parents are dead and he has no guardian or custodian; or
>
> (b) that a parent of his—
>
> (i) has abandoned him, or
>
> (ii) suffers from some permanent disability rendering him incapable of caring for the child, or
>
> (iii) while not falling within sub-paragraph (ii) of this paragraph, suffers from a mental disorder (within the meaning of the Mental Health Act 1959), which renders him unfit to have the care of the child, or
>
> (iv) is of such habits or mode of life as to be unfit to have the care of the child, or
>
> (v) has so consistently failed without reasonable cause to discharge the obligations of a parent as to be unfit to have the care of the child; or
>
> (c) that a resolution under paragraph (b) of this subsection is in force in relation to one parent of the child who is, or is likely to become, a member of the household comprising the child and his other parent; or
>
> (d) that throughout the three years preceding the passing of the resolution the child has been in the care of a local authority under section 2 of this Act, or partly in the care of a local authority and partly in the care of a voluntary organisation,

> the local authority may resolve that there shall vest in them the parental rights and duties with respect to that child, and, if the rights and duties were vested in the parent on whose account the resolution was passed jointly with another person, they shall also be vested in the local authority jointly with that other person."

Subsections (2) to (6) contained provisions requiring the local authority to serve notice of the resolution on the child's parents, entitling a parent to object to the resolution by serving a counter notice, and the local authority thereupon to complain to the juvenile court to determine whether the resolution should continue or lapse.

The law – (2) Vicarious liability

11. Until the end of the last century, the law on vicarious liability was settled and straightforward. The general principle, as described by Tony Weir (*A Casebook on Tort* 3rd edition 1974 page 208-9) was that:

> "the employer of a person must pay for the damage tortiously caused by that person acting in the course and scope of his employment…. Before true vicarious liability attaches, the plaintiff must establish two relationships, between the actor and the defendant, and between the act and the defendant's activity. The actor must be the defendant's employee and he must have been acting in that capacity."

12. Since 2001, however, the law on vicarious liability has been "on the move". So said Lord Phillips of Worth Matravers in *Various Claimants v Catholic Child Welfare Society and others* ("*Christion Brothers*") [2012] UKSC 56, [2013] 2 AC 1, at paragraph 19), one of a series of decisions of the House of Lords and Supreme Court which also included *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215, *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 669 ("*Cox*"), *Armes v Nottinghamshire County Council ("Armes")* [2017] UKSC 60, [2018] AC 355, *Various Claimants v Barclays Bank plc* [2020] UKSC 13, [2020] AC 973, and *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* ("*BXB*") [2023] UKSC 15, [2023] 2 WLR 953. It should be noted that the Supreme Court's decision in *BXB* was handed down after the judgment of the recorder in the present case but was available to and cited by Lambert J on appeal.

13. The development of the law over the past 23 years is described comprehensively by Lord Burrows JSC in *BXB* at paragraphs 30 to 57, and the modern law summarised in the same judgment at paragraph 58. For the purposes of this appeal, the relevant principles in that paragraph can be summarised as follows.

14. First, "there are two stages to consider in determining vicarious liability. Stage 1 is concerned with the relationship between the defendant and the tortfeasor. Stage 2 is concerned with the link between the commission of the tort and that relationship. Both stages must be addressed and satisfied if vicarious liability is to be established."

15. Secondly, the test at stage 1 is "whether the relationship between the defendant and the tortfeasor was one of employment or akin to employment". The test at stage 2 (with which this appeal is not concerned) is "whether the wrongful conduct was so closely

connected with acts that the tortfeasor was authorised to do that it can fairly and properly be regarded as done by the tortfeasor while acting in the course of the tortfeasor's employment or quasi-employment."

16. Thirdly, "in applying the "akin to employment" aspect of this test, a court needs to consider carefully features of the relationship that are similar to, or different from, a contract of employment. Depending on the facts, relevant features to consider may include: whether the work is being paid for in money or in kind, how integral to the organisation is the work carried out by the tortfeasor, the extent of the defendant's control over the tortfeasor in carrying out the work, whether the work is being carried out for the defendant's benefit or in furtherance of the aims of the organisation, what the situation is with regard to appointment and termination, and whether there is a hierarchy of seniority into which the relevant role fits."

17. Fourthly, whilst in the vast majority of cases these tests can be applied without considering the underlying policy justification for vicarious liability, it is also the case that, "in difficult cases … having applied the tests to reach a provisional outcome on vicarious liability, it can be a useful final check on the justice of the outcome to stand back and consider whether that outcome is consistent with the underlying policy".

18. Fifthly, in those cases where it is appropriate to check whether the justice of the outcome is consistent with underlying policy, the court can have regard to the five policy reasons (or "incidents") identified by Lord Phillips in *Christian Brothers* that "usually make it fair, just and reasonable to impose vicarious liability on the employer". The five reasons are: "(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."

19. In *Cox*, Lord Reed made clear that, of those five, numbers (i) and (v) are of limited importance and the other three are inter-related and together give an underlying rationale for vicarious liability in situations beyond a relationship of employment. At paragraph 24 of his judgment in *Cox*¸ he expressed the rationale in these terms:

> "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."

Lord Burrows in *BXB* expressed it in these terms (at paragraph 58(iv)):

> "At root the core idea (as reflected in the judgments of Lord Reed in *Cox* and *Armes* …) appears to be that the employer or quasi-employer, who is taking the benefit of the activities carried on by a person integrated into its organisation, should bear the cost (or, one might say, should bear the risk) of the wrong committed by that person in the course of those activities."

20. In the context of the present appeal, it is also relevant to note a further observation made by Lord Reed in *Cox* (at paragraph 35):

> "it is not essential to the imposition of vicarious liability that the defendant should seek to make a profit. Nor does vicarious liability depend upon an alignment of the objectives of the defendant and of the individual who committed the act or omission in question."

Since the judge's decision in the present case, this last observation by Lord Reed has been cited and applied by this Court in *MXX v A Secondary School* [2023] EWCA Civ 996 (per Nicola Davies LJ at paragraph 57) in which it was held that the relationship between a school and an individual undertaking a work experience placement was akin to employment (although the second stage for the imposition of vicarious liability was held not to be satisfied).

21. Like the present appeal, *Armes* concerned a claim arising out of torts alleged to have been committed while the child was in foster care in the 1980s under the statutory and regulatory regime in force before the passing of the landmark Children Act 1989. The Supreme Court held (by a majority) that a local authority was vicariously liable for torts comprising sexual abuse of a child committed by a foster carer who was not related to the child and had been recruited and trained by the local authority who had placed the child with them under a care order.

22. In concluding that the stage 1 test was satisfied, Lord Reed JSC said (at paragraphs 59 and 60):

> "59. Applying the approach adopted in *Cox* to the circumstances of the present case, and considering first the relationship between the activity of the foster parents and that of the local authority, the relevant activity of the local authority was the care of children who had been committed to their care. They were under a statutory duty to care for such children. In order to discharge that duty, in so far as it involved the provision of accommodation, maintenance and daily care, they recruited, selected and trained persons who were willing to accommodate, maintain and look after the children in their homes as foster parents, and inspected their homes before any placement was made. They paid allowances to the foster parents in order to defray their expenses, and provided the foster parents with such equipment as might be necessary. They also provided in-service training. The foster parents were expected to carry out their fostering in co-operation with local authority social workers, with whom they had at least monthly meetings. The local

> authority involved the foster parents in their decision-making concerning the children, and required them to co-operate with arrangements for contact with the children's families. In the light of these circumstances, the foster parents with which the present case is concerned cannot be regarded as carrying on an independent business of their own: such a characterisation would fail to reflect many important aspects of the arrangements.
>
> 60. Although the picture presented is not without complexity, nevertheless when considered as a whole it points towards the conclusion that the foster parents provided care to the child as an integral part of the local authority's organisation of its child care services. If one stands back from the minutiae of daily life and considers the local authority's statutory responsibilities and the manner in which they were discharged, it is impossible to draw a sharp line between the activity of the local authority, who were responsible for the care of the child and the promotion of her welfare, and that of the foster parents, whom they recruited and trained, and with whom they placed the child, in order for her to receive care in the setting which they considered would best promote her welfare. In these circumstances, it can properly be said that the torts committed against the claimant were committed by the foster parents in the course of an activity carried on for the benefit of the local authority."

23. On the issue of risk creation, Lord Reed observed (at paragraph 61):

> "the local authority's placement of children in their care with foster parents creates a relationship of authority and trust between the foster parents and the children, in circumstances where close control cannot be exercised by the local authority, and so renders the children particularly vulnerable to abuse. Although it is generally considered to be in the best interests of children in care that they should be placed in foster care, since most children benefit greatly from the experience of family life, it is relevant to the imposition of vicarious liability that a particular risk of abuse is inherent in that choice. That is because, if the public bodies responsible for decision-making in relation to children in care consider it advantageous to place them in foster care, notwithstanding the inherent risk that some children may be abused, it may be considered fair that they should compensate the unfortunate children for whom that risk materialises, particularly bearing in mind that the children are under the protection of the local authority and have no control over the decision regarding their placement. In that way, the burden of a risk borne in the general interest is shared, rather than being borne solely by the victims."

24. As to the issue of control, Lord Reed concluded (at paragraph 62):

> "…although the foster parents controlled the organisation and management of their household to the extent permitted by the relevant law and practice, and dealt with most aspects of the daily care of the children without immediate supervision, it would be mistaken to regard them as being in much the same position as ordinary parents. The local authority exercised powers of approval, inspection, supervision and removal without any parallel in ordinary family life. By virtue of those powers, the local authority exercised a significant degree of control over both what the foster parents did and how they did it, in order to ensure that the children's needs were met."

25. In a dissenting judgment, Lord Hughes described how, both under the statutory regime in force at the relevant time and subsequently under the Children Act 1989, the local authority was under a duty to place a child with a parent or with a friend or relative, provided such a placement was consistent with the child's welfare. This led him to the following conclusion:

> "87. It seems to me to follow that if vicarious liability applies to "ordinary" foster parents, on the basis that they are doing the local authority's business, then it must apply also to family and friends placements with connected persons. What of placements with parents? These too may be in the interests of the children, and even after a care order has been made. If they are, it is desirable that they are encouraged, as at present consideration of them is encouraged. It would, however, be artificial in the extreme to say of such placements that the parent's care was given on behalf of the local authority, or that it was integrated into the caring systems of the authority. Nor would it be fair, just or reasonable, if there were to be behaviour by the parent which amounted to a tort, to impose vicarious liability for that behaviour on the local authority which exercised all due care in making the placement and did so in pursuit of what are recognised to be sound principles of child care. It might in theory be possible to distinguish parents on the basis that they do not have to be approved foster parents and are thus not part of the local authority's "enterprise", but it is not easy to see how they differ in practice from grandparents or from aunts and uncles or close friends who fulfil the same role but have to be approved as foster parents, on limited terms, in order to do so. The reality is that any member of the extended family, or close friend, who undertakes the care of children in need, is doing so in the interests of the family, not as part of a local authority enterprise. What the local authority does, in all cases, whether involving family and friends or strangers, is to take responsibility for making decisions about where the children shall live, and then monitoring the progress with a view to changing the arrangements if they do not benefit the children.

> 88. It seems to me that this is much the more realistic way of looking at the functions of the local authority, and the relationship between it and foster parents, of whichever type. The detailed controls which the authority exercises, and which are apt at first sight to suggest analogy to employment, are in reality decisions about where the children shall live. These are onerous decisions about young lives, and are properly surrounded by detailed regulations. But once the decision to place has been made, the care of the children is in practice committed to the foster parents. The daily lives of the children are not thereafter managed by the authority, as they are if they are accommodated in a Children's Home. Subject to specific rules (such as a bar on corporal punishment), the practice of the foster parents in relation to their own and the fostered children is for them. The foster carers do not do what the authority would otherwise do for itself; they do something different, by providing an upbringing as part of a family. The children live in a family; a family life is not consistent with the kind of organisation which the enterprise test of vicarious liability contemplates. The children are in reality committed to independent carers, as they also are, although in a different manner, if the authority places the children in a specialist home run by a different authority or by a charity, as may often happen where children have special needs. The authority retains the right, and the responsibility, in all cases including that of children placed in a specialist children's home, to remove the child if the placement is no longer the best for his welfare. In order to exercise that power, the authority monitors progress by way of visits, it expects reports, and it provides a social worker for the child. Meanwhile, the authority retains the right, in the case of children in care at least, to make major medical decisions if the need arises. But none of that really means, in practice, that the authority is bringing the child up, as it is if the accommodation is one of its own children's homes."

26. Lord Reed addressed these points on behalf of the majority at paragraphs 71 and 72:

> "71. …. It is important to emphasise that the decision that vicarious liability should be imposed in the present case is based on a close analysis of the legislation and practice which were in force at the relevant time, and a balancing of the relevant factors arising from that analysis, some of which point away from vicarious liability, but the preponderance of which support its imposition. Applying the same approach, vicarious liability would not have been imposed if the abuse had been perpetrated by the child's parents, if the child had been placed with them, since the parents would not have stood in a relationship with the local authority of the kind described in *Cox*: even if their care of the child might be described as having been approved by the local authority, and was subject to monitoring and might be

> terminated, nevertheless they would not have been recruited, selected or trained by the local authority so as to enable it to discharge its child care functions. They would have been carrying on an activity (raising their own child) which was much more clearly distinguishable from, and independent of, the child care services carried on by the local authority than the care of unrelated children by foster parents recruited for that purpose.
>
> 72. It would not be appropriate in this appeal to address the situation under the law and practice of the present day, on which the court has not been addressed, and which would also require a detailed analysis. It is sufficient to say that, for the reasons explained by Lord Hughes, the court would not be likely to be readily persuaded that the imposition on a local authority of vicarious liability for torts committed by parents, or perhaps other family members, was justified."

Factual background

27. The following summary of the known history in the present case is taken from the report of an independent social worker, Paul Doherty, who was jointly instructed by the parties to prepare a report setting out "factual evidence on foster placements at the material time". In preparing his report, Mr Doherty was given access to the social services records relating to DJ as a child from 1975 to 1986. The records had been placed on microfiche in 1993 and were in parts illegible. The salient points from the background are as follows.

28. DJ was born in 1970. In 1974, he and his siblings were referred to the local authority, Barnsley Metropolitan Borough Council ("the local authority") because of concerns that they were being neglected by their parents. In August 1975, his parents' marriage broke down, the family was evicted from its accommodation, and DJ and his siblings were received into care under s.1 of the Children Act 1948 and "boarded out" with foster carers under the Boarding-Out of Children Regulations 1955. After a month, the children returned to their mother, but by February 1976 DJ was living with his father.

29. By 1979, DJ and his father were living what was described as an "itinerant lifestyle" between different friends and relations. At about the same time, DJ's mother moved to live in Scotland. Social services became involved again. In the course of her inquiries, the social worker was told about a maternal aunt and her husband, Mr and Mrs G, who had only met DJ recently but expressed an interest in looking after him. The social worker recorded that, following a discussion with other relatives, "I understand that they [the Gs] have taken an interest in DJ in recent months and were prepared to take him in for the time being and even, if necessary, to foster him." She met the Gs and advised them that they "would have to think very carefully about applying to be [DJ's] foster parents as these were very early days and many factors needed consideration." DJ spent Christmas with his paternal grandparents and then a week or so with other relatives, during which time he was introduced to Mr and Mrs G.

30. On 4 January 1980, DJ moved to live with Mr and Mrs G. In his report, Mr Doherty said that some passages of the microfiche records for this period were blurred and unreadable. One note dated "January 1980" recorded:

> "Form 33/CYP 1: financial and material assistance under s.1 CYP 1963. DJ abandoned by family is currently staying with maternal aunt, Mr and Ms G …. It is improbable [sic] that a fostering application may be made by the Gs. Current need for clothing grant (£3) for DJ whose recent itinerant life has left him few clothes and possessions."

A further note dated 4 January 1980 read:

> "Form: financial and material assistance under s.1 CYP 1963: social worker 'DJ is now being placed 01.04.1980 with maternal uncle and aunt Mr and Mrs G, as his mother remarried, now living in Scotland, father's whereabouts currently unknown. This placement may develop into long term fostering although current need is for weekly boarding out allowance to be paid until situation is further clarified."

Another note recorded that on 7 January a social worker paid a home visit and "found that DJ was well settled and there were no problems". The note continued:

> "the arrangement is that the Gs will be paid temporary boarding out allowances for a month and that … the fostering officer will visit within the next three weeks".

31. The records for this period include a letter dated 6 February 1980 from the social worker to the father's GP in which she said that "the most recent family development has been the reception into care of [his] nine-year-old son DJ who is staying with relatives." On 11 February, the social worker visited DJ at the Gs' home and was shown a letter from his mother. The social worker recorded:

> "it seemed to offer no indication or an expectation that he might join the rest of his family in Scotland. Therefore it seemed that this placement may well turn into a long term fostering situation."

32. On a home visit in April 1980, the social worker suggested to Mrs G that:

> "we would be looking at a formal registration of both herself and her husband as foster parents by our department."

It was recorded that the claimant was getting on well with the Gs' own son who was a few years older. Although no copy of an application form was noted in the records, it seems that Mr and Mrs G then applied to become DJ's foster carers and a fostering assessment was carried out by a social worker. On 3 June 1980, during a visit to the social worker, Mrs G is recorded as saying that:

> "whilst she and her husband were being vetted as foster parents they were finding it difficult to care for DJ in terms of finance….They had not got the family allowance book from DJ's father whose whereabouts were not known."

The record continued:

> "interim payment to be made pending the fostering officer's processing of their application."

33. In the course of the fostering assessment, a police check revealed that Mr G had been convicted in 1966 of three offences of unlawful sexual intercourse. As a result, he was interviewed by the social worker and asked why he had not disclosed the offences on his application form. He is recorded as having replied that the offences were committed while he was a teenager, that the girls in question were his girlfriends at the time and that "the incidents had occurred such a long time ago he thought they were no longer relevant so far as his fostering application was concerned". The interviewing social worker recorded the following comment:

> "I basically believe that Mr G is an honest man who did not realise that by omitting these offences from his application form he was doing anything wrong. The Gs' application is to act as de facto foster parents … Although I do not feel that these offences stand in the way of his fostering his nephew it may be that they would not be considered appropriate to be approved for any other than specifically their 10-year-old nephew."

34. The records stored on microfiche include a copy of the fostering assessment, completed on a standard form – "Form F" – produced by the British Association of Adoption and Fostering. Mr and Mrs G were named as the "applicant foster carers". The assessment included details of their personal circumstances, backgrounds, characters and interests. It referred to Mr G's previous convictions. Under the heading "motivation and present understanding of fostering tasks", it stated:

> "the Gs, if approved, are fully aware of their role as de facto foster parents and would be well able to discharge their responsibilities in providing a good and secure home for their nephew."

35. Following the assessment, Mr and Mrs G were approved as foster carers. Entries in the file recorded that on 1 August 1980, DJ was received into care under s.1 of the Children Act 1948.

36. Thereafter, the records include reports of regular visits by a social worker to what was described as DJ's foster home with Mr and Mrs G. There were regular review meetings and occasional contact visits with other relatives arranged by the social worker. A review form dated August 1982 included a note: "will consider section 3 next year after the three year in care condition if it is considered appropriate."

37. In January 1983, DJ's mother telephoned him and asked he wanted to go to live with her in Scotland. At a review meeting in February 1983, DJ was described as being "stunned" and "understandably confused and upset at the sudden interest". The reviewing officer commented that "decision needs to be taken for APR Child Care Act 1980 section 3(1)(b)(iv)" and that "DJ's needs are being totally met in this substitute family". In a meeting with the social worker the following month, DJ said he had thought about returning to his mother but was happy that his home was now with the Gs.

38. By September 1983, all four of DJ's sisters were living with their mother in Scotland, the last remaining sister having moved there suddenly during the summer. A note on the records stated: "in view of [her] sudden departure, it is important to offer DJ as great a base of stability as possible, a further reason for having to apply for the APR". In November 1983, the social services department filed a report with the local authority's social services committee recommending that parental rights be vested in the local authority pursuant to s.3(1)(b)(iv) of the Child Care Act 1980 (which had by that stage replaced the Children Act 1948) on the grounds that DJ's parents were "of such habits or mode of life as to be unfit to have the care of the child". The purpose of the recommendation was stated as being "to secure a stable environment and consistent lifestyle for DJ who virtually has no effective parent".

39. On 22 November, the social services committee passed a resolution assuming parental rights in respect of DJ pursuant to s.3. The whereabouts of DJ's father were unknown, but a letter was sent to his mother informing her of the resolution and of her right to object pursuant to s.3(3) of the 1980 Act. His mother replied objecting to being described as unfit to have care of her son, whilst not opposing his continued placement with the Gs. The resolution of 22 November 1983 was subsequently rescinded and, on 10 January 1984, a further resolution was passed vesting parental rights in DJ in the local authority pursuant to s.3(1)(b)(iv) and (v) in respect of his father and s.3(1)(b)(v) and (d) in respect of his mother.

40. The regular social work visits and reviews continued until DJ's 18th birthday in 1988 when the s.3 resolution expired. He continued to live with Mr and Mrs G until 1991.

The Claim

41. On 25 November 2019, DJ filed a claim for damages against the local authority. In his Particulars of Claim, it was asserted:

> "3. In placing the Claimant with Mr and Mrs G and supervising, monitoring, supporting and maintaining that placement, the Defendant employed or used Mr and Mrs G as foster carers for the Claimant. On a date which is at presently unclear pending full disclosure, the Defendant assessed and approved Mr and Mrs G as foster carers. Notwithstanding that Mrs G was the Claimant's maternal aunt, the Defendant and all parties correctly regarded the placement as no different to any other foster placement for a looked after child in terms of the rights and obligations of the Defendant and Mr and Mrs G and the service provided by all of them to the Claimant.
>
> 4. The Defendant was entrusted with and responsible for the care, safety and welfare of the Claimant during his time in the Defendant's care and whilst placed with Mr and Mrs G.
>
> 5. Between about 1980 and about 1986, the Claimant was sexually abused and assaulted by Mr G approximately every other week ….

> 6. The sexual abuse and assaults referred to in paragraph 5 above arose in circumstances where the Defendant entrusted the safekeeping and care of the Claimant to Mr and Mrs G, delegated those tasks to Mr and Mrs G and undertook its care and safekeeping of the Claimant through the services of Mr and Mrs G. Further or alternatively, the abuse and assaults were committed in the course of Mr G's employment by and/or service for the Defendant and/or were closely connected therewith.
>
> 7. In the premises, the Defendant is vicariously liable for the sexual abuse and assaults referred to in paragraph 5 above and for the injury and damage, which the Claimant suffered as a result of Mr G's deliberate acts."

42. By its Defence dated 10 May 2020, the local authority contended that the claim was statute barred under s.11 of the Limitation Act 1980. The Defence continued, without prejudice to the limitation defence:

> "4. Save that it is admitted that Mrs G was the claimant's maternal aunt, and that it is admitted and averred that the defendant assessed and approved [Mr] and Mrs G to act as de facto foster carers for the claimant in August 1980, paragraphs 3 and 4 of the particulars of claim are denied. It is denied that the defendant is vicariously liable for Mr and Mrs G.
>
> 5. Paragraph 5 of the particulars of claim is not admitted and the claimant is required to prove the abuse alleged.
>
> 6. Paragraphs 6 and 7 of the particulars of claim are denied …."

43. The local authority subsequently brought a Part 20 claim against Mr G seeking an indemnity or contribution. Mr G has denied the allegations of sexual abuse.

44. On 1 December 2020, it was ordered that there be a preliminary hearing on the issue of vicarious liability. By a judgment dated 27 July 2021, that issue was determined by Mr Recorder Myerson QC sitting in the Sheffield County Court in favour of the local authority. By an order dated 13 August 2021, the claim was dismissed. On 23 February 2022, DJ was granted permission to appeal. On 14 February 2023, the appeal was heard by Lambert J and on 8 July 2023 she handed down judgment dismissing the appeal. On 7 September 2023, a notice of appeal to this Court was filed. Permission to appeal was granted by Dingemans LJ on 21 November 2023.

The judgments of the recorder and the judge

45. At first instance, the recorder found that the evidence showed "that the Gs would not have fostered [DJ] had he not been a relative", that the relationship between the local authority and the Gs was "based on a mutual exchange of views, rather than direction and compliance", and that the fact that DJ chose to remain living with the Gs after his 18th birthday rather than live independently with local authority support was evidence that he regarded them as his family . Having considered the judgments in *Armes*, he

concluded that this was a "difficult case" and that it was therefore necessary to analyse the five "incidents" identified by Lord Phillips in the *Christian Brothers* case to decide whether the Gs fell within the category of foster carers for whom it was justified to impose vicarious liability on the local authority. He found that four of the five were, at least to some extent, in DJ's favour. But the most important "incident" was whether the activity was undertaken on the local authority's behalf. It was the most important because "that was the basis for the agreement in *Armes* that Lord Hughes' views required accommodation by the majority" and was the one "that talks most directly to the question of what the Gs were doing". The recorder held:

> "on the balance of probabilities I conclude that the Gs were bringing up a relative. That is not akin to a contract of employment. It is closer to being the opposite of it. The weight I give to the other incidents is weak, because business activity, risk, control and means are more or less written into every fostering situation, including the situation exempted from vicarious liability by the Supreme Court in *Armes* where parents are also foster parents."

46. On appeal, the judge found there were factors pointing in the direction of a relationship between the local authority and the Gs that was akin to employment. These included:

(1) the local authority was under a statutory duty to provide care for DJ following his abandonment by his parents which they discharged by placing him with the Gs;

(2) the Gs were required to apply for the role of foster parents and there was "some form of risk assessment" in which they were "interviewed" for the role;

(3) following their appointment, the Gs were monitored and supervised;

(4) there were regular reviews of DJ's welfare, health, conduct, appearance and progress;

(5) there must have been "some agreement between the Gs and the local authority – at least concerning the circumstances and incidence of contact with DJ's mother and father – and that when that agreement was not observed, this fact was brought to the attention of the Gs".

47. On the other hand, she found that there were also factors pointing the other way, in particular the fact that the Gs were not recruited, selected or trained for the role because they were "taking on the role of providing a home for their nephew". She therefore agreed with the recorder that it was necessary to consider whether the policy reasons underpinning the imposition of vicarious liability were satisfied. In particular, she held it was necessary to consider "whether the Gs' care for [DJ] was integral to the business of the [local authority] or whether it was sufficiently distinct from the activity of the [local authority] to avoid the imposition of vicarious liability."

48. The judge continued:

> "40. I, like the Recorder, am persuaded that there was a sufficiently sharp line between what the Gs were doing and the

> activity and business of the defendant. My reasoning is slightly different from his. I do not find that there was an unusually consensual relationship or "consultative process" between the defendant and the Gs and I accept that foster parents will, in general, be expected to work with the local authority and to cooperate with the social workers. Nor, do I place much weight upon the conclusion (if it were correct) that the claimant settled well into the family and remained with the Gs after his 18th birthday when he could have been supported financially independent of the G family. I accept the claimant's point here that many fostered children will regard the foster family as a substitute family and that many foster children will get on well with their foster family.
>
> 41. It is the circumstances in which the G family came to be involved in fostering the claimant that I find to be the most revealing evidence that the Gs were carrying on their own activity distinct from the statutory obligations of the local authority …. Although there is no direct evidence on the point, I accept the clearest of inferences that the Gs would not have considered fostering, or taking the claimant into their family, had he not been their nephew. All of these features suggest to me, and strongly so, that the G family were intending to and, in fact did, raise their own nephew because he was their nephew and that their purpose was to raise him as part of the family of which he was a member and in the interests of the family, including the claimant.
>
> 42. The claimant is critical of the Recorder for having taken into account what is described as the "motive" of the Gs in fostering the claimant. Mr Levinson urges me to focus only on the task which the Gs were undertaking, disregarding the reason why the Gs were undertaking that task. But, in considering whether the Gs (or any foster carers) are involved in an activity, or task, or project which is separate from that of the local authority it may be necessary to consider why they took on the activity, task or project. It would be wholly artificial to consider what the Gs were doing (which was self-evidently raising their nephew) from why they were doing that task: because he was their nephew. The fact that he was the G's nephew is integral to the activity which the Gs are undertaking. I therefore do not accept the criticism of the Recorder."

49. The judge also rejected the submission that the fact that the Gs and DJ were strangers before the placement militated against the finding that the Gs were "taking on the distinct task of raising their nephew". She found other evidence which supported that finding, including what she described as the "risk assessment" following the discovery of Mr G's previous convictions and the fact that "the social workers did not believe that Mr G's criminal activity posed a risk in part because the Gs were raising their own nephew". For the judge, however, the "most compelling aspect" of the evidence which

led to her conclusion that the Gs were not engaged in activity on behalf of the local authority was the circumstances in which DJ was taken in by the family. She concluded:

> "Although I may not accept all of his findings, none of those findings fatally undermine his conclusion that the Gs were engaged in an activity which was more aligned to that of parents raising their own child and that the activity was sufficiently distinct from that the local authority exercising its statutory duty."

The appeal

50. The single ground of appeal is that the recorder and the judge were wrong to conclude that the relationship between the local authority and Mr G was not one capable of giving rise to vicarious liability. On behalf of the claimant, Mr Levinson submitted that the judge's principal errors were that:

(1) she wrongly stated that Mr and Mrs G were not recruited and selected by the local authority – the evidence showed that they were required to apply to be DJ's foster carers and underwent a full fostering assessment;

(2) she attached excessive weight the fact that the Gs received no special training before being approved as foster carers – in this case, the local authority concluded that no such training was required;

(3) her finding that "the Gs were carrying on their own activity distinct from the statutory obligations of the local authority" was wrong because it overlooked the fact that the decision as to whether DJ remained with the Gs was made by the local authority, not the family;

(4) like the recorder, she wrongly gave determinative weight to the Gs' apparent motives for entering into the relationship with the local authority (about which there was in any event no evidence), and

(5) in saying that "the fact that he was the Gs' nephew is integral to the activity which the Gs are undertaking", she wrongly focused on the relationship between DJ and the Gs instead of the relationship between the Gs and the local authority, which was the important relationship for determining whether the circumstances gave rise to vicarious liability.

51. Mr Levinson submitted that these errors led the judge to distinguish the present case from *Armes* when there was in fact no material difference. The relevant features of a relationship "akin to employment" identified in *BXB* were all present. The work of Mr and Mrs G was "integral to the organisation" of the local authority in the same way as it was in *Armes*. The situation with regard to appointment and termination and local authority's control over the Gs' work were effectively the same as in *Armes*. Unlike the actions of parents caring for their own child, the Gs' activity in caring for DJ was neither distinguishable from nor independent of the child care services carried on by the local authority.

52. For the local authority, Mr Ford KC submitted that the recorder and the judge had been right to conclude that, as he put it, this was a "doubtful" case on the issue of "akin to employment", that they had therefore been right to have regard to the underlying policy considerations, and that the judge had been right to conclude that the Gs' care of DJ was not an integral part of the local authority's business because of the circumstances in which the arrangement came about. The case was distinguishable from *Armes* because, in contrast to that case where the foster carers had been unrelated to the claimant, here the Gs had acted principally in the interests of the family. The judge had been right to say that it would be artificial to disregard their motive for taking him in.

53. Mr Ford told the court that, on the local authority's reading of the evidence, the local authority had little if anything to do with the initial arrangement that DJ should be looked after by the Gs. Even if it was right that they played a part in facilitating the move, this was a long way from the situation where a local authority takes a child into care, looks at a pool of available carers and chooses one couple from that pool to look after the child. Mr Ford accepted that motive was not relevant. What mattered was what the tortfeasor was actually doing and in this case Mr G was looking after his nephew. In those circumstances, the Gs' relationship with the local authority was not akin to employment.

Discussion

54. In assessing whether the local authority's relationship with the Gs was akin to employment, we conclude that the nine-year period of DJ's residence with the Gs from his arrival in 1980 to his 18th birthday in 1988 fell into three phases.

55. The first phase covered the initial seven months after DJ started living with the Gs. We must be cautious about drawing too firm a conclusion about what happened over Christmas 1979 and during the first few months of 1980. The social work records stored on microfiche are incomplete and in places illegible. The summary in Mr Doherty's report leads us to conclude, however, that the initial placement of the claimant with the Gs in January 1980 was a temporary, informal family placement initially suggested by other family members but approved and facilitated by the local authority. In helping to arrange this placement, the local authority were complying with their duty under s.1 of the Children and Young Persons Act 1963 to "make available such advice, guidance and assistance as may promote the welfare of children by diminishing the need to receive children into … care". The social services records contain references to the local authority providing "financial and material assistance under s.1 CYP 1963".

56. At that stage, DJ was not "in care" and the local authority had no statutory responsibility for him or rights in respect of him. The local authority had no clear plan about receiving him into care, but it was plainly an option under consideration from the outset. One entry in the social service records dated 4 January 1980 stated: "This placement may develop into long term fostering although current need is for weekly boarding out allowance to be paid until situation is further clarified." Another note written three days later recorded: "the arrangement is that the Gs will be paid temporary boarding out allowances for a month and that … the fostering officer will visit within the next three weeks". A further note dated 11 February 1980 included the observation that "this placement may well turn into a long term fostering situation."

57. By April 1980, the local authority's plan had become clear. In that month, a social worker suggested to Mrs G that "we would be looking at a formal registration of the Gs as foster parents by our department." A fostering assessment was carried out and Mr and Mrs G were approved as foster carers. On 1 August 1980, DJ was received into care under s.1 of the Children Act 1948. This marked the start of the second phase of DJ's residence with the Gs. From that point, he was "in care" and "boarded out" with the Gs. The local authority paid boarding out allowances under the power provided by s.13(1) of the 1948 Act.

58. For the next three years, however, although DJ was in care, parental rights remained with his parents. It seems that the local authority only decided to assume parental rights after the disruption caused by DJ's mother's unexpected suggestion that he might move to live with her in Scotland. On 22 November 1983, the local authority passed the assumption of parental rights resolution under the power in s.3 to assume parental rights in respect of any child in their care. This marked the start of the third phase of DJ's residence with the Gs which continued until he attained his majority.

59. During the first phase, DJ was not in the care of the local authority. The social services had facilitated his move to live with the Gs in January 1980. But (unlike the authority in *Armes*) the local authority was not at that stage under a statutory duty to care for him and (unlike the carers in *Armes*) the Gs were not looking after him as foster parents. The local authority was not at that point under the obligations imposed under the 1948 Act and the 1955 Regulations. The payments made to the Gs were under the provisions of s.1 of the 1963 Act in respect of children who were not in care. On balance, we conclude that, in the first phase, the Gs' care for DJ was not integral to the local authority's business and the relationship between the local authority and the Gs was not akin to employment.

60. In the second and third phases, however, the position was different. From 1 August 1980, DJ was in the care of the local authority. From that point, it, like the authority in *Armes*, was under a statutory duty to care for DJ. The care of children like DJ who had been received into its care was the local authority's "relevant activity". And from that point, the Gs were looking after DJ as foster carers. At the local authority's suggestion, they had applied to be his foster carers, undergone a full assessment, and been approved as foster carers. We disagree with the judge's analysis that they were not recruited and selected as foster carers. It is true that they were not recruited and selected to be foster carers for any child placed with them but only for DJ. But they were recruited and selected as DJ's foster carers to enable the local authority to discharge its statutory duty towards a child received into its care. It was open to the local authority to conclude that the Gs were not suitable to be foster carers. The exercise undertaken by the local authority was one of assessment and selection as foster carers, rather than a ratification of the pre-existing arrangement.

61. It is also correct that, Mr and Mrs G did not receive any specific training to become DJ's foster carers. In our view, this factor carries no material weight in the analysis in this case. The local authority seemingly took the view that in the circumstances they did not require any specific training, concluding that the Gs "would be well able to discharge their responsibilities in providing a good and secure home for their nephew". After DJ was received into care, he was visited regularly at the Gs' home by his social worker, and the Gs' care was monitored and supervised. There were regular reviews of

DJ health, welfare and progress. The local authority gave directions about his contact with his parents and other members of his family.

62. In our view, after 1 August 1980, the preponderance of factors points clearly to the relationship between the local authority and the Gs being akin to employment. In those circumstances, we do not consider this to be one of those cases where it is necessary to check whether the justice of the outcome is consistent with underlying policy. But, standing back and assessing whether our proposed outcome is indeed consistent with that policy, we conclude that all five "incidents" identified by Lord Phillips in the *Christian Brothers* case are satisfied. Both the recorder and the judge found that all were satisfied save for the second (whether the tort was committed as a result of activity being taken by the employee on behalf of the employer). They concluded, for slightly different reasons, that there was, in the judge's words, "a sufficiently sharp line between what the Gs were doing and the activity and business of the defendant".

63. We disagree. The judge may have been right to conclude that the fact that DJ was their nephew was "integral" to what the Gs were doing and that they would not have considered fostering had he not been their nephew. It does not follow, however, that their care of DJ was distinct from the local authority's activities. On the contrary, once he was received into care and the Gs had been approved as his foster carers, their care of DJ was integral to the local authority's business of discharging its statutory duties towards him.

64. We accept Mr Levinson's submission that the judge was wrong to ascribe importance to the Gs' motive in caring for their nephew. As Lord Reed observed in *Cox*, the imposition of vicarious liability does not depend upon an alignment of the objectives of the defendant and of the individual who committed the act or omission in question. In fact, the objectives of the parties to a contract of employment, or in a relationship akin to employment, will rarely if ever be totally aligned and in many cases may be completely different. A person may decide to become a foster carer for a number of reasons – a general interest in children, or perhaps, after one's own children have left home, a wish to deploy the skills one has acquired as a parent, or a sense of social concern or altruism, or a desire to supplement income, or, where the child is a relative, a sense of family obligation. Many foster carers will have a number of reasons for taking on the role, and where they are fostering as a couple each of them may have different reasons. There may be cases where a carer may foster related and unrelated children placed by the local authority, sometimes at the same time. None of this affects the relationship between the foster carer and the local authority. Motive is not relevant to determining whether the relationship between the local authority and the foster carer is "akin to employment".

65. The recorder and the judge both focused on the relationship between DJ and the Gs to a considerable extent. But the central relationships for the purpose of determining whether there was vicarious liability in this case were the two other relationships – between the local authority and DJ and between the local authority and the Gs. Once the local authority had taken DJ into care, their relationship with him was one in which they were under statutory duties including the statutory duty to provide accommodation. They discharged that duty through their relationship with the Gs whom they approved as foster carers and with whom the claimant was then boarded out.

66. We therefore disagree with the judge that the circumstances in which the Gs came to be involved with DJ was indicative that they were carrying on their own activity distinct from the statutory obligations of the local authority. We also disagree with the judge's view that the social worker's assessment of risk arising out of Mr G's previous convictions for sexual offences was further evidence which pointed away from a finding of a relationship giving rise to vicarious liability. The social worker seems to have assumed that Mr G posed less risk to his wife's nephew than to another child and that he could be approved as a foster carer for DJ although not for any other child. This assessment of risk based on the relationship between the Gs and DJ made in the course of the fostering assessment prior to the approval of Gs as foster carers, has no bearing on the relationship between the Gs and the local authority after they had been approved as foster carers and DJ had been received into care.

67. We therefore conclude that, at all material times after 1 August 1980, the relationship between the local authority and Mr and Mrs G was akin to employment.

68. For these reasons, we allow the appeal and set aside the order dismissing the claim.

69. For the avoidance of doubt, we have reached our decision on the specific facts of this case. We are not laying down a general rule that a local authority will always be vicariously liable for torts committed by foster carers who are related to the child. Furthermore, in allowing this appeal, we do not intend to give any indication about the circumstances in which vicarious liability might arise under the present legislation and regulatory regime. We heard no submissions on that topic. As stated above, this area of the law was fundamentally reformed by the Children Act 1989 and since then statutory and regulatory provisions governing local authority children's services, including fostering, have been amended again on a number of occasions. We therefore echo the observation of Lord Reed in *Armes* (at paragraph 72) that "it would not be appropriate in this appeal to address the situation under the law and practice of the present day, on which the court has not been addressed, and which would also require a detailed analysis".