



Neutral Citation Number: [2023] EWHC 1815 (KB)

Case No: F46YM683

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18th July 2023

Before :

Mrs Justice Lambert DBE

Between :

DJ
- and -
BARNSELY METROPOLITAN BOROUGH
COUNCIL

Appellant

Respondent

-and-

AG

Part 20 Defendant

Justin Levinson (instructed by Jordans Solicitors) for the **Appellant/Claimant**
Steven Ford KC (instructed by Browne Jacobson) for the **Respondent/Defendant**

Hearing Dates: 14 March 2023 and 20 May 2023

Approved Judgment

This judgment was handed down remotely at 10am on Tuesday 18th July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Lambert DBE:

Introduction

1. This is an appeal against the Order of Mr Recorder Myerson KC of 13 August 2021 dismissing the Claimant’s action for damages for personal injury arising from the sexual abuse perpetrated by Mr G, the Part 20 Defendant. Mr and Mrs G were the Claimant’s uncle and aunt, Mrs G being the Claimant’s mother’s sister. Following the disintegration of the Claimant’s parent’s marriage, the Claimant was placed by the Defendant in voluntary care with the G family in early January 1980. The Claimant was then aged 9. The G family applied to become, and later became, the Claimant’s foster parents and the Claimant remained with the G family until his late teens. During this period he alleges that he was sexually assaulted by Mr G.
2. The Claimant alleges that the Defendant is vicariously liable for the tortious actions of Mr G. The proceedings were issued on 12 May 2020. The Particulars of Claim assert that, by his placement with the G family and by the Defendant’s supervision, monitoring, support and maintenance of the placement, the Defendant “*employed or used the G family as foster carers and ... the tasks of safekeeping and care were effectively delegated to the G family.*” Although Mrs G was the Claimant’s maternal aunt, the claim alleges that nonetheless the parties all “*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.*”
3. The action came before the Recorder for a trial of the preliminary issue of whether the Defendant was vicariously liable for the tortious acts of Mr G. It was common ground that, in general, the relationship between a local authority and an “ordinary,” or unrelated, foster carer is sufficiently closely akin to the relationship between employer and employee to justify the imposition of vicarious liability on the local authority for tortious acts by the foster carer which are closely connected with that relationship (see *Armes v Nottingham County Council* [2017] UKSC 60). The Defendant’s case was that the Gs however, as maternal relatives of the Claimant, did not stand in a similar relationship with the Defendant as other non-related foster carers. Rather, the relationship between the G family and the local authority was analogous to that of parents in whose care a cared-for child had been placed by a local authority. In these circumstances, the G family was therefore carrying on an activity “*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.*” See [71] *Armes*.
4. The Recorder found that the relationship between the Defendant and the Gs (and Mr G in particular) was not akin to one of employer and employee and that, consequently, the Defendant was not vicariously liable for the alleged tortious abuse of the Claimant by Mr G. The action was struck out.
5. The Claimant appeals that Order with the leave of the single judge. The parties are represented before me, as they were before the Recorder, by Mr Justin Levinson for the Claimant and Mr Steven Ford KC for the Defendant. The preparation of this judgment was paused pending the outcome of the appeal to the Supreme Court in *Trustees of the Barry Congregation of Jehovah’s Witnesses v BXB* [2023] UKSC 15 and consequential

further submissions by the parties in this case. I am grateful to both Counsel and those assisting them for their help.

6. I maintain the Order made by the Recorder on 27 July 2021 anonymising the Claimant (as an alleged victim of sexual abuse) pursuant to the Sexual Offences (Amendment) Act 1992. I also continue his Order anonymising the Part 20 Defendant so as to protect the Claimant from, as the Recorder put it, jigsaw identification.

The Judgment Below

7. The evidence before the Recorder was, for the purpose of the preliminary issue, agreed. The evidence comprised a witness statement by the Claimant and an expert report from a jointly instructed social worker, Paul Doherty. No oral evidence was called. Annexed to Mr Doherty's report was a chronology of social worker involvement with the G family and the Claimant made up from such parts of the social worker records as were legible from the existing microfiche copies. The report also appended extracts of relevant legislation and regulations. The parties had not prepared a statement, or list, of agreed facts for the purpose of the preliminary hearing. The Recorder was invited to review all of the material for himself and identify the key aspects of the evidence for himself, taking into account Counsel's submissions.
8. The Recorder set out relevant legislation, noting that much of the legislation and the regulations in force at the beginning of the Claimant's involvement with the local authority were replicated in later legislation, notably by the Child Care Act 1980. He set out section 1(3) Children Act 1948 (replicated by s 2(3) Child Care Act 1980) which required a local authority to permit the care of the child to be taken over by a parent, relative or friend where consistent with the child's welfare. He noted that by section 13 of the Children's Act 1948 Act a local authority should discharge its duty to provide accommodation and maintenance for a child in its care by "*boarding him out on such terms as to payment by the authority and otherwise as the authority may... determine.*" He set out part of section 18 Child Care Act 1980 requiring that: "*in reaching any decision relating to a child in their care, a local authority shall give first consideration to the need to safeguard and promote the welfare of the child throughout his childhood and shall so far as it is practicable ascertain the wishes and feelings of the child regarding the decision and....*"
9. The Recorder noted that regulations made detailed provisions for medical examinations, written reports, visits, case records and so forth. He observed that although the local authority did not exercise day-to-day control over the manner in which the foster parents cared for the Claimant, it nevertheless had powers and duties of approval, inspection, supervision and removal "*without parallel in ordinary family life.*"
10. The Recorder directed himself on the legal principles by citing extensively from the judgment of Cavanagh J in *SKX v Manchester City Council* [2021] EWHC 782. That case considered the relationship between a tortfeasor, who was an employee of a children's home, and the local authority which had sent the claimant to the children's home. He cited Cavanagh J's review of the Supreme Court authorities of *The Catholic Child Welfare Society and others v Various Claimants and The Institute of the Brothers of the Christian School and others* [2012] UKSC 56; *Cox v Ministry of Justice* [2016] UKSC 10 and *Barclays Bank plc v Various Claimants* [2021] UKSC 13. He referred to

Lady Hale’s approval (in *Barclays Bank*) of the reasoning of the Singapore Court of Appeal in *Ng Huat Sen v Mohammed* [2017] SGCA 58 that vicarious liability would apply to relationships which “*when whittled down to their essence, possess the same fundamental qualities as an employer/employee relationship.*”

11. He reminded himself of paragraph 71 of *Armes* in which Lord Reed, in response to the dissenting speech of Lord Hughes, stated that if the local authority had placed a “cared for” child with its parent, then 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.” He commented that “*in my judgement the Supreme Court agreed that the question of the primary task of the foster parent is relevant. Parents paradigmatically are the example of those raising their own children. The task for them is - per Lord Reed – independent of the local authority’s statutory obligations. In my judgement that is the basis of distinguishing parents from the local authority, and therefore of finding that it would be unjust to impose vicarious liability on the local authority for the acts of the parents.*”
12. He concluded that the case before him was “*a difficult case*” in which it was necessary to consider the five incidents described by Lord Phillips in *Christian Brothers*. The Recorder set out his conclusions in respect of each of the five incidents. He had little difficulty in resolving the question of the existence of incident 1 (means to compensate) and the third (whether the activity being undertaken by Mr G was part of the defendant’s business activity). Both were resolved in the affirmative. He concluded that the Defendant would have deeper pockets to compensate the Claimant and that Mr G was undertaking an activity which was part of the defendant’s business activity because the defendant was obliged to assume the care of the claimant, took the claimant into care, boarded him out pursuant to the regulations, allowed the Gs to foster him pursuant to the Act and assumed parental rights.
13. He considered the existence of the other incidents less easy to resolve. There was, he found, very considerable overlap between them. He found that incident 2 (whether the tort was committed as a result of activity being taken by Mr G on the Defendant’s behalf) was similar to the fourth incident (the creation of the risk by engaging Mr G to foster the claimant) and that the fifth incident (control) was likely to be resolved in a similar way to the second incident “*because control is now about telling the foster parent what to do not how to do it*”.
14. His analysis focussed upon incident 2. He found that there were “*pointers both ways*” in answer to the question of whether Mr G was carrying on an activity on the Defendant’s behalf. On balance however, he concluded that Mr G was not carrying on an activity on behalf of the Defendant.
15. The main reasons for this conclusion were that:
 - i) the Gs became foster parents for two reasons. First because the placement with them was consistent with the statutory duty to place the Claimant in his best interests. Second, because the Gs volunteered for the role and, he found, the Gs would not have fostered the Claimant had he not been a relative. In support of this conclusion he referred to the entry in the social worker records for the 28 December 1979: “*the Gs have taken an interest in (the Claimant) in recent*

months and were prepared to take him in for the time being and even if necessary to foster him.. the Gs would have to think very carefully about applying to be (the Claimant's) foster parents as these were very early days."

- ii) The Claimant appeared to settle well with the Gs. He was noted to be thriving physically and the social worker notes were consistent with the Gs being the Claimant's substitute family and his needs being fully met.
 - iii) Based upon his reading of the social worker records, he found that the relationship between the Defendant and the G family was based a "*mutual exchange of views, rather than direction and compliance.*" Later in his judgment he referred to the evidence demonstrating the existence of a consultative process between the Defendant and the Gs in which decisions were made via discussion and consensus. He referred to the fact that the Gs listened to the Defendant and took the initiative in reporting concerns to the Defendant even when it was in the interests of the Claimant's mother that such concerns were minimised or not reported. He concluded by saying that: "*that is far more consistent with a family situation than with a commercial one.*"
 - iv) The Claimant remained with the Gs after his 18th birthday even though he could at that stage have lived independently with the assistance of funding from the local authority. The Recorder's impression was that the Claimant regarded the G family as his family.
16. The Recorder was reminded by Mr Levinson that, before 1979, the G family had not met the Claimant and that the Claimant had said that he had not even known of the existence of the G family before 1979. Mr Levinson argued that although the Claimant may therefore have been a relative of the G family, he was not part of the G's family and should therefore be categorised as "ordinary" foster parents. The Recorder rejected this submission on the basis that it was applying too much tension to the phrase "*other family members*" used by Lord Reed at [72]. He also took into account that the statutory language (presumably referring to s 2(3) Child Care Act 1980) referred to relatives, rather than family. He said that the Gs and the Claimant "*shared, whether the claimant knew it or not, significant family history and knowledge of the claimant's parents. A child would not, for example, be fostered by strangers if he went on his own grandparents whilst a baby*". He concluded the point by saying at [49] "*the fact that the Gs fostered the claimant, in circumstances in which he shared a bedroom with their son, his cousin and did so without any previous fostering experience or commitment is a proper basis for concluding that the nature of the relationship was a family one.*"
17. The Recorder concluded that this was not a "*stranger, commercially based, fostering placement.*" The records of interactions between the Claimant, social workers and the Gs show that the Gs were bringing up a relative. This was not akin to a contract of employment. It was, he recorded, closer to being the opposite of it. On this basis the G's activity in fostering the Claimant was not taken on the Defendant's behalf.

The Grounds of Appeal

18. There are four grounds of appeal. The first is that having identified the distinction drawn between foster carers raising their own child and those who were not doing so, the Recorder then failed to apply the distinction correctly. The Recorder was wrong to

conclude that the Supreme Court in *Armes* were making a distinction between foster carers who were relatives and those who were not. The distinction which was being drawn was between those foster carers who were engaged in the task of a parent – bringing up their own child, or a child which they treated as their own – and those who were not doing so. It is not the title of the person who is undertaking the foster care role, the question is whether the role is one that they would anyway be undertaking. Had the Supreme Court intended that local authorities would not be vicariously liable for the tortious acts of relatives (as well as parents) then Lord Reed would have made this clear. In this context, the Claimant therefore submits that the evidence before the Recorder did not support the conclusion that the Gs were raising their own child. The Claimant was not their child and the evidence was that they did not regard him as such.

19. The second ground of appeal is that the Recorder was wrong to find that the process by which the G family came to be assessed by the Defendant was different from the assessment which would be undertaken by local authorities for non-family foster parents. The Claimant argues that this conclusion was one which was not open to him on the evidence. On the contrary the agreed expert evidence was that the process by which relatives were assessed for the purpose of becoming foster carers was identical to that of “professional foster carers.”
20. Third, the Claimant argues that the Recorder’s approach and evaluation of the five incidents was inconsistent and based upon factual conclusions which were mistaken or misplaced. He should have found that the fostering activity undertaken by the Gs was undertaken on behalf of the Defendant for the reasons given by Lord Reed in *Armes* at [60].
21. Finally, the Claimant submits that the Recorder impermissibly focussed upon the motive of the G family in reaching his conclusion. The Recorder found that the G family would not have volunteered to foster the Claimant had he not been family. This, says the Claimant, is irrelevant, as is the motive for the Defendant in placing the Claimant in the care of the Gs. The real question, and the only question, which the Recorder should have focussed upon was the task which the Defendant entrusted the G family to undertake; the answer to that question is, says, the Claimant quite simple. It is: “the care of a child who was the responsibility of the Defendant, not the Gs.” The focus should be upon what the Gs were doing, not why they were doing it.

Respondent’s Submissions

22. The Respondent submits that the Claimant has misunderstood the distinction which is drawn by Lord Reed in *Armes*. The Court was not there dealing with the distinction between those who were and those who were not raising their own child but between parents raising their own child and carers looking after unrelated children. The Recorder had been correct in his conclusions for the reasons which he gave. He focussed upon the “task” being undertaken by the foster carers and was correct to find that the project upon which they were engaged was more closely aligned to that of a parent than that of an “ordinary” foster carer. The Recorder was entitled to take into account the motive of the Gs in fostering the Claimant which was a relevant factor to take into account in concluding that the task which they were engaged in was independent of that the local authority.

Legal Framework

22. It is common ground that 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 tortious act and that relationship. For purposes of the preliminary issue trial in this case, only stage 1 was in focus.
23. From the analysis of the contemporary legal approach to Stage 1 set out by Lord Burrows in *BXB*, I take the following points:
- i) the test which the Court must apply when considering stage 1 is whether the relationship between the defendant and the tortfeasor was one of employment or “akin to employment.”
 - ii) In applying the “akin to employment” aspect of the test, the Court should consider those features of the relationship which are similar to, or different from, a contract of employment. Relevant features to consider may include: whether the work is being paid for in money or in kind; how integral to the organisation was the work carried on 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.
 - iii) It must be borne in mind that the “akin to employment” expansion does not undermine the traditional position that there is no vicarious liability where the tortfeasor is a true independent contractor in relation to the defendant.
 - iv) The tests above are a product of the policy behind vicarious liability which will render it unnecessary to invoke the underlying policy rationale for the imposition of vicarious liability. There should be no need to turn back continually to examine the underlying policy.
 - v) However, in difficult cases having applied the tests to reach a provisional outcome, it can be a useful check on the justice of the outcome to stand back and consider whether that outcome is consistent with the underlying policy. The core idea underlying the imposition of vicarious liability is that: “*the employer or quasi employer who is taking the benefit of the activities carried on by a person integrated into the organisation should shoulder the risk of the wrong committed by that person in the course of those activities*”.
 - vi) There is no need to tailor the approach to deal with cases alleging sexual abuse as the “*necessary tailoring is already reflected in an embraced by the modern tests.*”

The Issue in this Appeal

24. In *Armes*, the Supreme Court found the local authority to be vicariously liable for the torts of the foster parents (who were unrelated to the Claimant). Lord Reed found the relationship between the local authority and the tortfeasors to be analogous to that of employer/employee in that it bore a number of the hallmarks of such a relationship. He found that the balance of the various policy factors justified the imposition of vicarious

liability. At [60] Lord Reed said: “*the picture painted 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 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 .. 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.*”

25. In his dissenting speech, Lord Hughes considered the imposition of vicarious liability within the context of the “*legal and practical shape*” of fostering. His objection to the imposition of vicarious liability for tortious acts by foster parents stemmed in part from the statutory duty imposed on local authorities to give priority if possible to accommodation with “connected persons”, that is, relatives and friends of the cared for child, including the child’s parents. At [87] Lord Hughes remarked that if vicarious liability applied to “ordinary” foster parents on the basis that they are doing the local authority’s business then it must also apply to placements with connected persons such as parents, relatives and friends. He found that it would 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 and 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...*” He went on to observe that any member of the extended family or any 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.*”
26. Lord Reed addressed the dissenting argument by stating at [71] and [72] that applying the principles which he had identified in the judgment, vicarious liability would not have been imposed if the abuse had been perpetrated by the child’s parents. He said that the “*parents would not have stood in a relationship with the local authority of the kind described in Cox...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.*” He continued at [72] “*..., 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 by other family members, was justified.*”
27. Although there are a number of grounds of appeal, this case really resolves into a single issue which focusses on the principle underpinning Lord Reed’s observation that the local authority would not be vicariously liable for the torts of parents of “cared-for” children in whose care the child had been placed.
28. When the submissions of the parties are drilled down, both sought to persuade the Recorder that the question of vicarious liability could be answered by reference simply to the relationship between the Claimant and the G family. Mr Levinson submitted that, because the Claimant was not a child of the Gs, therefore vicarious liability would attach for Mr G’s tortious conduct; Mr Ford that, because the Gs were related to the

Claimant and were therefore connected persons, so the Defendant could not be vicariously liable for the sexual abuse of Mr G.

29. It may be inviting to consider Lord Reed's observations in paragraph 72 and, in particular, his reference to the reasoning of Lord Hughes as support for the defence position that all categories of connected person (parent, relative or friend) would be undertaking an activity clearly distinguishable from that of the local authority on the basis that all were undertaking an activity which was described by Lord Hughes to be "*in the interests of the family.*" However, when expressing his doubts concerning the imposition of vicarious liability at [72] Lord Reed refers only to "*parents or, perhaps, other family members.*" He makes no reference to friends, even though friends may be connected persons under the legislation.
30. There is however a wider point here and one which the Recorder appeared to recognise when he referred to his rejection of, what he called, the parties' "maximalist" positions. Paragraphs [71] and [72] of *Armes*, when read together do not define categories of foster carers for the purpose of understanding whether the local authority will or will not be vicariously liable for their tortious acts (or omissions). Lord Reed is not prescriptive, even in respect of parents, saying only that the court would not be "likely" to be "readily persuaded" to impose vicarious liability for tortious conduct.
31. The question is whether there is a sufficiently sharp line between the activity of the foster carers and the local authority such that vicarious liability is not justified. There may be very little room for doubt in the case of "ordinary" foster parents. There may be a very large measure of doubt in the case of foster parents who are parents. But whether there is such a demarcation will lie in understanding, as best one can, the "*details of the relationship,*" as described by Lady Hale in *Barclays Bank* at [27] to see whether, when whittled down, the relationship is one akin to employment. I do not therefore find that the question of the imposition of vicarious liability (or not) in this context can be resolved by reference simply to the relationship between the Claimant and the G family.

Analysis

32. The Recorder did not set out the facts relevant to the question in hand although they were interspersed in his judgment. For convenience I set out the salient facts which emerge from the social services records below.
 - i) The Claimant and his siblings had been referred to the Defendant as early as 1974 owing to concern over parental neglect. The Claimant and his sister were fostered for short periods during the middle 1970s when their mother was in hospital and when the family were evicted from the council house in which they lived. In the middle 1970s, the Claimant's father was granted custody of both the Claimant and his sister.
 - ii) In late 1979 the Claimant's mother left Barnsley to live in Scotland leaving the children in the care of their father. The father and children were living an itinerant lifestyle moving between different friends and relatives. Social worker involvement was particularly intense in December 1979. The Claimant spent Christmas with his paternal grandparents before moving in with a set of maternal relatives (not the G family). On 28 December 1979, the social worker visited

the Gs and recorded that Mrs G was the Claimant's maternal aunt and that, following a discussion with the other relatives, "*I understand that they 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.*" There followed what was described as a preliminary discussion with the Gs concerning the circumstances in which the Claimant had been taken to live with other relatives. The Gs were advised that they "*would have to think very carefully about applying to be [the Claimant's] foster parents as these were very early days and many factors needed consideration..*" It was agreed that the Gs would meet with the Claimant over the following week and if all went well, he would come to them for the beginning of the new term. This decision was discussed with senior staff.

- iii) On 4 January 1980, the Gs met with the Claimant at the other relative's home. It appears as though, shortly afterwards, he came to live with them. Further home visits were made by the social workers on 7 January 1980 and 10 January 1980.
- iv) On 11 February the social worker recorded his opinion that the placement may well turn into a long term fostering situation. At a further review in April 1980, the social worker suggested to the Gs that they would be looking at a formal registration as foster parents by the local authority. Various written applications were submitted. The Gs visited the local authority offices in June 1980 complaining that whilst the vetting process was being undertaken, they were struggling financially to care for the Claimant.
- v) In July 1980, Mr G was interviewed by the social worker as part of the fostering assessment. It appears as though there were quite detailed interviews of both Mr and Mrs G. Mr G was asked about his failure to declare on his application form that he had been charged with three offences of unlawful sexual intercourse. His explanation was that the incidents had occurred in 1966 which was so long ago that he had not considered them to be relevant to the application. He said that he had not committed any offences since 1966. The social worker noted that "*I basically believe that Mr G is an honest man who did not realise that by omitting these offences from his application form that he was doing anything wrong.*" The conclusion of the social worker was that he did not consider that the offences stood in the way of Mr G fostering his nephew, although those same facts may have prevented him being approved to foster other children.
- vi) On 1 August 1980, the Claimant was received into the care of the local authority. The Defendant registered the Claimant at the local school. Regular monitoring by the social workers of the Claimant's mental state, his appearance, his maturity and his schooling continued. The social worker notes record that the Claimant was shown photographs of the Claimant's mother's family in Scotland and that "shared family links" were helping the Claimant to settle with the G family.
- vii) In April 1981, on a visit to Scotland, the G family and the Claimant met up with the Claimant's mother and his sister at the zoo in Edinburgh. The fact of the meeting as reported by the G family to the social worker who described the meeting as being "in direct contradiction" to what the social worker had agreed

with the family. Regular monitoring of school performance, his emotional development, his contact with mother and sibling.

- viii) In September 1982, the records refer to the Claimant visiting his paternal grandfather in company with his sister.
 - ix) In November 1983, parental rights and duties were vested in the Local Authority. In January 1984 the assumption of parental rights was ratified by the Social Services Committee of the Defendant.
 - x) In 1984, the Claimant was described as presenting an integral part of the family. There was, at this time, much dialogue between the Gs and the Defendant concerning financial allowances and there were many complaints by the Gs that the boarding out payments were too low, particularly given that Mr G was affected by the miners' strike.
 - xi) Monitoring continued and in March 1987, the social worker then involved in the case noted that the Claimant wished to stay with the Gs, even though he could have made contact with his biological parents.
 - xii) The case was closed in July 1988 and it was noted that the Claimant wished to stay with the Gs even though he could have made contact with his parents. The case was closed July 1988 with the note that due to pressure of other work, it was impossible to offer ongoing voluntary support.
33. From the Claimant's witness statement, there is little more to add other than it appears to be accepted that before Christmas 1979, the Claimant had never met the G family. In fact, he states that he did not know of their existence.
34. The Recorder plunged straight into his consideration of the five policy incidents without dealing with the existence or otherwise of features typical of a relationship of employment. It may be that he accepted that a number of such features were present but that in this case their presence were unlikely to be determinative. If this was his thinking, then I agree with it.
35. The Defendant was under a statutory duty to provide care for the Claimant following his abandonment by his mother and then his father. That statutory duty was discharged by the Defendant by the Claimant being placed with the G family. The Gs were required to apply for the role of foster parents and there was some form of risk assessment in which Mr and Mrs G were both "interviewed" for the role. Following their appointment, they were monitored and supervised. There were regular reviews of the Claimant's welfare, health, conduct, appearance and progress. It must have been some form of agreement between the Gs and the Defendant – at least concerning the circumstances and incidence of contact with the Claimant's mother and father and that when that agreement was not observed, this fact was brought to the attention of the Gs.
36. The presence of these factors point in the direction of a relationship which is akin to one of employment. Many of those factors are however likely to be present in most cases in which there is a fostering relationship. As Lord Reed said in *Armes* at [71] even in cases in which the parents are foster parents, many of those features will be present, including the monitoring and supervision by the local authority.

37. In this case however, certain features which would typically be present in a relationship between ordinary foster carers and a local authority were not present. The Gs were not recruited for the role of foster carers or selected by the local authority. They came forward to take on the role of caring for the Claimant when his family disintegrated. The Claimant had been cared for by his grandparents over Christmas. He was then cared for by another set of maternal relatives, but this had proved unworkable because of the living arrangements. This was the point at which the Gs took the Claimant into their home with a view to fostering him in the long term. It can't be said in the case of the Gs that they were "recruited or selected" for their role.
38. Nor, it seems were the Gs trained for the role of foster parents. The records state (in January 1980) that the Gs would be well able to discharge their responsibilities in providing a good and secure home for their nephew and their expectations of the Claimant's background were not relevant as they were caring for their own nephew. Although such records as remain are not explicit, the implication is that the Gs were not in need of information concerning the Claimant's background nor in need to training for any particular aspect of his care as they were taking on the role of providing a home for their nephew.
39. Although therefore there were factors pointing in the direction of an employment relationship, equally there were pointers away – particularly in the context of a fostering arrangement. I agree with the Recorder therefore that this was one of those cases in which it is necessary to consider the balance of the policy reasons underpinning the imposition of vicarious liability were satisfied. In other words, it was necessary to consider the incidents referred to in *Christian Brothers*, in particular, whether the G's care for the Claimant was integral to the business of the Defendant or whether it was sufficiently distinct from the activity of the Defendant to avoid the imposition of vicarious liability.
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. Mr and Mrs G took the Claimant in when other parts of his family were unable or unwilling to do so: his parents because the marriage had failed and neither parent was equipped or willing to care for him; his grandparents (with whom the Claimant spent Christmas) and his other blood relations (aunt and uncle) because their home was insufficient to accommodate a soon to be adolescent boy. 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.
43. The fact that the Claimant had not met with the G family, nor known of the family’s existence, before 1979 does not seem to me to be directly relevant to the activity in which the G family were engaged with the Claimant from December 1979 onwards. The point has led to some linguistic arguments arising from [71] and [72] of *Armes* and the meaning of the words relative and family, but I have already set out that I do not consider those relationships to be determinative. That the Claimant and the Gs were strangers (as Mr Levinson put it) before 1979 does not militate against the finding that the Gs were taking on the distinct task of raising their nephew. Not because (as the Recorder found) of the existence of any particular shared family history but because the characterisation of the activity in 1979 does not depend upon what came before. A family may take in a relative when circumstances require it even though there may have been no previous contact.
44. There is other evidence which supports the view that the G family were engaged in the distinct activity of raising their nephew. I refer here to the risk assessment which was undertaken following Mr G’s failure to declare his previous criminal activity. 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. I take into account that the Gs used family photographs to remind the Claimant that he was with his family and to demonstrate family links in order to settle him. I also take into account that the Gs appear from the records to be encouraging of the Claimant maintaining contact with his wider family (parents, grandparents and sibling). These points support the finding that the G family were engaged in the task of raising their nephew. However, the most compelling aspect of the evidence which leads to my conclusion that the G family were not engaged in activity undertaken on behalf of the Defendant is the circumstances in which he came to be taken in by the family.
45. The Recorder considered carefully the other incidents referred to in *Christian Brothers*. He found that the Defendant was likely to have the better resources to meet a claim for damages. He found that the fostering arrangement between the Defendant and the Gs was part of the local authority’s “business activity” because the local authority were under a statutory obligation to board the Claimant out and that they did so by his placement with the G family. I do not disagree with either of those conclusions. Nor would I disagree with the conclusion that the Defendant created the risk by engaging the Gs as foster parents for the reasons expressed in *Armes* at [61]. The Recorder

carefully balanced his conclusions on those incidents with what he found to be, in the fostering context, the critical incident and the one upon which the Recorder focussed in his comprehensive judgment. 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.

46. It follows that I agree with his conclusion that the Defendant is not vicariously liable for the sexual abuse perpetrated by Mr G. For these reasons, I dismiss this appeal.