Neutral Citation Number: [2023] EWCA Civ 996

Case No: CA-2022-001876

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE KING'S BENCH DIVISION
HER HONOUR JUDGE CARMEL WALL (SITTING AS A DEPUTY HIGH COURT JUDGE)
QB-2020-002489

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 August 2023

Before :

LORD JUSTICE LEWISON
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE NICOLA DAVIES

- -

Between :

MXX	**Appellant**
- and -	
A Secondary School	**Respondent**

- -
- -

Justin Levinson (instructed by **Bolt Burdon Kemp**) for the **Appellant**
Adam Weitzman KC (instructed by **DWF LLP**) for the **Respondent**

Hearing date: 29 June 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 25 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Nicola Davies :

1. At the core of this appeal is the issue of vicarious liability, arising from the tortfeasor's wrongdoing in respect of a pupil at the defendant school. The tortious acts occurred subsequent to a week during which the tortfeasor took part in a work experience placement ("WEP") at the school. Findings of fact made at trial are challenged. In issue are how the "relationship akin to employment" test and the "sufficiently close connection" test operate in the context of a WEP.

The background

2. The defendant (respondent) is a co-educational secondary school providing education for children aged 11 to 16. In December 2013 the claimant (appellant), then aged 13, joined the school. Between 24 and 28 February 2014 the tortfeasor ("PXM"), one of the defendant's former pupils, undertook a WEP at the school. He was aged 18 and attending college hoping to qualify as a physical education ("PE") teacher. By early March 2014 PXM and the claimant were communicating on Facebook and exchanges continued until September 2014. In August 2014 PXM committed the torts of assault and battery against the claimant. In September 2014 he was arrested and on 2 November 2015 PXM pleaded guilty to sexual activity with a child by penetrating the claimant's mouth with his penis (count 2), penetrating the claimant's vagina with his fingers (count 3) and two counts of causing a child (the claimant) to watch a sexual act by looking at an image of a person engaging in sexual activity.

The trial

3. The claimant sought damages in the agreed sum of £27,500 for personal injury (recognised psychiatric illness) consequent on the sexual assaults. On 19 August 2022 HHJ Carmel Wall sitting as a Deputy High Court Judge ("the Judge") dismissed the claim, holding that the defendant is not vicariously liable for the torts committed against the claimant by PXM.

4. At trial the claimant gave evidence. PXM was not called by the defendant. The defence witnesses included AB, the defendant's current Deputy Head Teacher who in 2014 was an Assistant Head Teacher; EF, the defendant's current and 2014 Head of Student Support Services and a designated safe-guarding lead; and CD, the Head of the PE Department in 2014, an Assistant Head Teacher in 2022.

5. The Judge described the claimant as being a troubled adolescent in 2014, but by the time of the trial she was a mature woman with family responsibilities and professional aspirations. The Judge identified the starting point for findings of fact as the contemporaneous documentary evidence which included police interviews and the Facebook messages between the claimant and PXM. The recovered messages begin in July 2014; the claimant said that previous messages had been exchanged but she deleted them at the instigation of PXM who wanted to ensure that their relationship remained a secret. The first time PXM sent the claimant indecent images of himself was on 4 July 2014.

6. The claimant's pleaded case as to the first interaction between herself and PXM focused upon his suggestion to her that she should attend the school's badminton club. In her first witness statement dated 22 August 2021 she stated:

> "On one of the final days of his training at the school, I saw [PXM] talking to my friend… He then called my name and told me to come over. … I had never spoken to him before … this was our first conversation. He asked me if I wanted to play badminton after school as he ran the after school club. I told him that I did not know how to play badminton but [PXM] said that he would teach me to play. I went to the badminton club that afternoon and PXM stood behind me and showed me how to hold the badminton racket and hit the shuttlecock. He paid me a lot of attention, which was nice because I was so unhappy at the time and was being bullied."

7. The Judge identified "the only relevant reference" in the Facebook messaging as to the circumstances in which the claimant first had any meaningful interaction with PXM as messages on 18 August 2014 which she set out as follows [54]:

> "MXX: ... I remember the first time I ever spoke to you:) omg xx
>
> PXM: When was that then Xx
>
> MXX: In school? Lunch, Wednesday was when I spoke to you, you were just so fucking hot:(and still are!! And I was ugly I look like trash in the uniform omg:,) I was like how old are you, you would [not] tell me so I asked daisy, the I was like omg only 4 years:,) then I ran off:.) Then I got closeoth daisy e.c.t xx
>
> PXM: I remembering you running of shouting it's not that much of an age difference haha Xx
>
> MXX: Omg:,) I had the biggest crush on you, I even had the fucking courage to talk to you again asking can you teach my set #TOP SET. Then you didn't: (xxxx"

The Judge's findings of fact

8. The claimant transferred to the defendant's school in December 2013 because of bullying at previous schools. PXM would not have known of the circumstances of her becoming a pupil at the school [65] – [68].

9. Prior to commencing his WEP, PXM attended an induction meeting with CD and was told by CD that he would have to be with a member of staff at all times. CD went through the defendant's policy documents and written guidance with PXM which included "Guidance for safe working practices for the protection of all children, young people, vulnerable adults and staff at A Secondary School". The guidance applied to all adults working or volunteering for the school and stated that: "A relationship between a member of staff and a student cannot be a relationship between equals … There is potential for exploitation and harm of vulnerable young people and staff have a responsibility to ensure that an unequal balance of power is not used for personal advantage or gratification. … Staff should not establish or seek to establish social contact with students for the purpose of securing a friendship or to pursue or strengthen

a relationship." PXM was required to sign a form headed "Staff Declaration" which confirmed that he had read the guidance and understood his responsibility for child protection at the school. The declaration he signed was that for all employed staff. CD also referred PXM to the "Staff Code of Conduct" which stated that it applied to all adults working or volunteering for the school whatever their position, role or responsibilities [79] – [86].

10. The Judge accepted CD's evidence and found that (i) The defendant's expectations of PXM were that he would provide some limited help with lessons by running warm ups, coaching groups of students under guidance, assisting with sorting out equipment, washing bibs and the "general day to day PE stuff". PXM was expected to attend the school from 8:15am until 2:40pm when the school day ended. After school clubs might run until 3:45pm. PXM's attendance at clubs was not compulsory but there was a strong expectation that he would attend [87] – [88]. (ii) PXM would have been introduced to the pupils at the start of the classes in which the claimant was present in terms of "[t]his is Mr PXM who is on a WEP and should be treated as any member of staff should be. He is here to support in lessons" [89]. (iii) The class teacher would have talked through with PXM what they wanted him to do by way of assistance on a lesson by lesson basis. The lesson would be delivered by the teacher and not by PXM. PXM would always be supervised in the assistance he was providing to the class teacher [90] – [91].

11. As to the interaction between PXM and the claimant, the Judge found (i) There were two occasions when the claimant had some interaction with PXM, the first was when he suggested to her that she attend the after school badminton club, the second was the club session itself [93] – [94]. (ii) PXM did not undertake any of his WEP in any of the claimant's PE lessons because the claimant was in the high band set and PXM taught the low band set. PXM and the claimant had some conversation which led to the claimant attending the badminton club. This occurred at lunch time on 26 or 28 February despite the school policy that PXM should be with PE staff at all times. Nothing untoward occurred, it was a brief meeting [107] – [109].

12. At [110] and following the Judge made the following findings:

> "110. I find that this was not grooming behaviour. I am not satisfied there is evidence from which it could reasonably be inferred that PXM had any ulterior motive during this first interaction with the Claimant.
>
> 111. The Claimant does not persuade me there was any further interaction between them before the badminton club session. … It cannot reasonably be inferred that PXM had any ulterior motive towards the Claimant during this brief meeting.
>
> 112. I am satisfied that the badminton club took place on Friday 28 February after school. It was supervised by a teacher whom the Claimant believes was GH. …
>
> 113. I am satisfied that PXM attended the club as part of his WEP because there was an expectation on the part of the Defendant he would do so, because he was keen to maximise the experience

he would gain from the WEP and probably also to make a good impression. It is likely that he was already planning to attend the club before he spoke to the Claimant about it.

114. PXM was supervised for the duration of the club. There is no suggestion that GH, an experienced teacher, was not present at all times.

115. PXM assisted the Claimant to play badminton. That was the purpose of the club.

116. The Claimant does not satisfy me that the interactions between herself and PXM at the badminton club amounted to grooming behaviour. There is no sufficient basis to infer that by this time PXM was engaging with the Claimant for any ulterior purpose.

117. In reaching that conclusion I have attached weight to the following factors.

118. Firstly, on my findings PXM had had only a brief and inconsequential meeting with the Claimant once previously, either earlier that same day or a couple of days before. No part of the badminton club did or would have been expected to afford any opportunity for a private meeting. All pupils attending the club were together in the sports hall. The club was supervised throughout by an experienced staff member whom PXM was likely to want to impress. There is no suggestion that any objectively untoward or unusual activity occurred. The Claimant does not suggest that anything was said or done to her that was not entirely in keeping with the legitimate activity being pursued.

119. That is flimsy evidence from which to infer that PXM conducted himself during this second meeting with the intention of encouraging the Claimant to have an illicit relationship with him or to engage in any sexual activity. I am sure that there came a time when his intentions towards the Claimant changed, but I am not satisfied that the badminton session was any more than it appeared.

120. Secondly, for the reasons I have set out earlier in this judgment, I am not satisfied that at the time, the Claimant regarded the badminton club as a particularly significant event. It was not until her second witness statement made very shortly before trial that the Claimant first suggested that PXM had ‘mainly concentrated on spending time with me during the lesson’ and it was not until her oral evidence that she spoke of the ‘massive’ impact that this had had on her.

> 121. I find that PXM did not carry out any grooming activity at this second meeting with the Claimant nor at any time while undertaking his WEP with the Defendant.
>
> 122. By 5 March 2014 the Claimant and PXM had a social media connection because they had become Facebook friends. It is not suggested that there was any social media contact between the Claimant and PXM before he had completed the WEP and I find accordingly."

13. The Judge expressly did not find that prior to late April 2014 there was any significant communication between the claimant and PXM either in content or frequency. She stated that "[i]t is unlikely that the messages contained any manipulative or exploitative content before mid-April when they became more frequent" [129]. The first meeting between the claimant and PXM took place on 2 August, and it was at that meeting that PXM committed a serious sexual assault against the claimant [132]. It was the claimant's friend who became aware of the Facebook messages between the claimant and PXM, she reported them to the defendant in September 2014 as a result of which the police were informed and PXM was arrested for sexual crimes committed against the claimant.

14. The defendant does not dispute that PXM committed acts of assault and battery at the time he sexually abused the claimant. The Judge was satisfied that the torts were committed on 2 and 5 August, and it was possible they were committed on later occasions. A battery occurred each time PXM committed a sexual assault upon the claimant, and assault immediately preceded each battery [149].

The tort of intentional infliction of harm

15. The Judge at [150] identified three elements of the tort: a) the conduct element requiring words or conduct directed at the claimant for which there is no justification or excuse; b) the mental element requiring an intention to cause at least severe mental or emotional distress; and c) the consequence element requiring physical harm or recognised psychiatric illness: *Rhodes v OPO* [2015] UKSC 32. The Judge described grooming behaviour as conduct that may be objectively unobjectionable but is part of a process of building a relationship for the purpose of manipulation, exploitation and abuse, often sexual. The approach taken by the Courts when considering cases of grooming behaviour is to consider the entirety of that conduct rather than to separate it from the sexual abuse that causes the injury. The Judge sought to identify the point at which the grooming behaviour started with reference to the ulterior motive of the primary tortfeasor [152].

16. The Judge found that the tort was completed at the time that sexual activity took place on 2 August. The consequence element was present no earlier than the time at which sexual activity took place. The claimant suffered a recognised psychiatric illness as a result of PXM's abuse of her [163] – [164]. Neither the completed tort nor any element of it was committed during the WEP [165]. The Judge was not satisfied that it had been proved that PXM had the intention of exploiting or manipulating the claimant for the purpose of sexual abuse from the outset [166]. She stated that PXM's state of mind changed at a time later than mid-April but earlier than 4 July [167]. The Judge

concluded that the conduct and mental elements of the tort were not present until many weeks after the WEP had ended [169].

Vicarious liability

17. The Judge identified the two stage test for the imposition of vicarious liability and cited a number of authorities beginning with *The Catholic Child Welfare Society v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56 Lord Phillips at paragraph 47. Stage one: was PXM in a relationship with the defendant that was akin to that between an employer and employee? [177] Stage two: is there is a sufficiently close connection between the relationship between PXM and the defendant and the wrongdoing perpetrated against the claimant such that the "wrongful conduct may fairly and properly be regarded as done by the [tortfeasor] while acting in the ordinary course of the firm's business or the employee's employment": *WM Morrison Supermarkets PLC v Various Claimants* [2020] UKSC 12 approving the test set out in *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48 [208].

18. As to stage one the Judge found that there was not a relationship akin to employment [188]. PXM had approached the defendant effectively asking for a favour and that was how the defendant treated his request. PXM was 18, unqualified, and the purpose of the WEP was for PXM to learn from the defendant's teachers. It was an altruistic gesture by the defendant; it could not have been intended that the defendant would derive benefit from the presence of PXM in any real sense notwithstanding that he performed "some minor ancillary tasks during the WEP". PXM was supervised by staff at all times and was closely directed in any activity he undertook such that he was never given responsibility for the teaching or other care of the defendant's pupils [192]. A student at PXM's stage imposed a burden on the defendant rather than any benefit [193]. The defendant's requirement that PXM should understand and accept its policies for safeguarding was a neutral factor as was the fact that pupils were required to treat PXM with respect [195] – [196]. The Judge rejected a submission that PXM's role was integral to the defendant's business; the "very limited" role he played in the school's activities barely went beyond his own learning. It was "artificial to describe PXM as performing a teaching role or even that of a classroom assistant. He had no independent responsibility for any aspect of the Defendant's undertaking. He did not ever, nor was it ever intended that he have pupils entrusted to his care to any extent." [198]. It followed that it would not be fair, just or reasonable to conclude that a WEP with the defendant of one week's duration in the circumstances amounted to a relationship akin to employment [199].

19. Notwithstanding the findings, the Judge considered Lord Phillips' five incidents of the relationship between employer and employee which make it fair, just and reasonable to impose vicarious liability on a defendant and found that although the defendant has more funds than PXM to compensate the claimant that is not a principled reason to found liability. The tort was not committed as a result of activity being undertaken by PXM for the defendant. It was committed well after the WEP ended. The sexual grooming and assaults had no connection with the defendant's activity. PXM's activity within the school was not in any real sense part of the defendant's business activity. PXM was undertaking the WEP to learn from the defendant's staff who were supporting PXM in pursuance of his own studies. The limited tasks PXM performed were minor and ancillary to the defendant's undertaking, not integral to it. The defendant did not create the risk of PXM committing the tort. The most that the defendant did was to

provide PXM with the opportunity to meet its pupils. The identified factors fortified the Judge's conclusion that this was not a relationship akin to employment [200] – [206].

Stage two

20. The Judge concluded that even if the first stage had been established the second stage was not satisfied. She took as her starting point the finding that the entirety of the wrongdoing occurred many weeks after PXM's relationship with the defendant had ceased. The role performed by PXM was extremely limited, he was kept under close supervision at all times, he had no private access to the claimant at the school nor any opportunity for the same. PXM had no caring or pastoral responsibility in relation to the claimant or any other pupil. He had no teaching responsibility. No aspect of the defendant's function was delegated to him. PXM was not placed in a position of authority over the pupils; he was allowed to spend a week learning from the school staff and while doing so provided the staff with some minor practical assistance under close supervision. The Judge stated that did not significantly increase any risk created by the defendant's enterprise of the claimant later becoming a victim of abuse. Compliance with the defendant's safeguarding policies did not imply any delegation of any function to PXM nor was it an acknowledgment of responsibility or role. The use of Facebook was "nothing whatever to do with the defendant's school activities" and the defendant's policies forbade social media contact. The Judge found that the communication shown to be wrongful did not commence until at least several weeks after the placement had ended. All the wrongdoing took place after the relationship between PXM and the defendant had ceased. The most that could be said about the relationship between the defendant and PXM was that it provided an opportunity for PXM to meet the claimant which was not sufficient to satisfy the second stage of the test for vicarious liability [235] – [243].

Grounds of appeal

21. The Judge was wrong:

(1) to conclude that the entirety of the wrongdoing occurred many weeks after PXM's relationship with the defendant had ceased;

(2) to find that the conduct and mental elements of the tort of intentional infliction of injury were not made out until after the end of PXM's placement at the school;

(3) to find that the relationship between the defendant and PXM was not akin to employment;

(4) to find that PXM's torts were not sufficiently closely connected with his relationship with the defendant so as to give rise to vicarious liability.

22. I granted permission to appeal on all grounds on 31 January 2023.

Ground 1

The Judge was wrong to conclude that the entirety of the wrongdoing occurred many weeks after PXM's relationship with the defendant had ceased.

The appellant/claimant's submissions

23. At the core of this ground of appeal is the contention that the Judge erred in not including or addressing the final sentence in the Facebook exchanges between PXM and the claimant on 18 August 2014 which read: "I tried but I couldn't find your class, what about the other two lads that did work experience after me, we're they hot? Xx".

24. The Judge's omission is said to be significant given: (i) the evidential weight which the Judge attached to contemporaneous documents, in treating them as the starting point for findings of fact; (ii) the Judge's definition of grooming, namely conduct that may be objectively unobjectionably but is part of the process of building a relationship for the purpose of manipulation, exploitation and abuse, often sexual; (iii) the message represented evidence of PXM's state of mind which was relevant to the Judge's finding that during the WEP there was no ulterior motive on the part of PXM and it follows that no grooming took place.

25. The only other reference in the judgment to this exchange of messages is at para 102:

> "The Facebook message about the first time the Claimant says she spoke to PXM has been quoted earlier in this judgment. It is consistent with the police interview insofar as it mentions Daisy being present. The Claimant says she asked PXM his age but he refused to tell her and it was Daisy who told her before she "ran off". There is then a reference to her "talk[ing] to you again" asking for PXM to teach her set but that he did not do so. That supports the information given to the police that PXM did not teach the Claimant in a PE class."

It is of note that the Judge appears to derive from the Facebook messages only the fact that PXM did not teach the claimant in a PE class.

26. The claimant contends that this exchange of messages demonstrates that when PXM was doing his WEP he: (i) must have known that the claimant had a crush on him; (ii) was prepared to act on that knowledge; (iii) tried to manipulate his schedule to spend time with her; (iv) tried to engineer opportunities to spend time with the claimant by inviting her to the badminton club.

27. The Judge's error is said to cascade through the judgment and to findings subsequently made. When PXM was encouraging the claimant to attend the badminton session he was doing the work of the PE department and using that legitimate objective in order to facilitate time with her. PXM was fostering his relationship with the claimant but misusing his position. PXM's ulterior motive was an intention to spend time with a 13 year old girl whom he knew had a crush on him. This was the start of their relationship and what followed was an objectively obvious progression.

28. Further, the claimant relies upon a Facebook exchange on 25 July 2014 in which the claimant told PXM that she approached him when he came to her school, he responded: "don't apologise for that, it's one of the best things that happened while I was at the school. Xx".

29. It is the claimant's case that had the Judge quoted and addressed the totality of the messages, she should have found that PXM possessed an ulterior motive while still at the school, namely an intention to exploit or manipulate the claimant for the purpose of sexual abuse. It follows that the Judge was wrong to conclude that no grooming took place during the entirety of the WEP and that wrongdoing did not occur until many weeks after PXM's relationship with the defendant had ceased. This led the Judge wrongly to find that PXM's intentional infliction of injury against the claimant did not occur until after the WEP and his wrongdoing was not closely connected to his relationship with the defendant such that the defendant could not be vicariously liable for the wrongdoing.

30. The Judge accepted that by 5 March 2014 the claimant and PXM had become Facebook friends [122]. She found that there was no social media contact between the claimant and PXM before he completed the WEP. When interviewed by the police the claimant said that she found PXM on Facebook and had a browse through his information after he left the school. PXM then sent her a friend request which she accepted. The Judge did not address the fact that within a week of leaving the school PXM invited the claimant to become a Facebook friend.

The respondent/defendant's submissions

31. The defendant contends that the claimant's criticism of the Judge elevates one piece of evidence above all the others, and seeks to go behind the Judge's careful and reasoned analysis of various diverse sources of evidence, which led her to properly find that the badminton club session or PXM's position at the school had no significant impact on the claimant.

32. The Judge's omission of the final message is explicable; she introduces the messages at [54] as the only Facebook messages relevant to the first meaningful interaction between the claimant and PXM – the omitted message relates to PXM's conduct *after* that first interaction and is not evidence of any other interaction between the claimant and PXM. The only conclusion the Judge could draw from the message was that PXM had not taught the claimant's class.

33. Further, the omitted exchange contains messages which are retrospective and cannot be taken as evidence in isolation of the claimant and PXM's motivation in February.

34. In any event, the Judge did have regard to the omitted message at [102], demonstrating that she did not ignore it.

35. The Judge properly considered all the evidence including the omitted message and concluded that nothing untoward occurred during the WEP nor did PXM have any ulterior motive towards the claimant during this time; the Judge therefore properly found that the wrongdoing constituted by PXM's grooming behaviour did not begin until many weeks after the WEP ended. The Judge was entitled to make the factual findings which she did.

Discussion

36. Appellate courts will not interfere with the findings of fact by a trial judge unless compelled to do so. This applies not only to findings of primary facts but also to the

evaluation of those facts and to inferences to be drawn from them. In *Fage UK Limited v Chobani UK Limited* [2014] EWCA Civ 5; [2014] ETMR 26, Lewison LJ at [114] identified the reasons for this approach which include:

> "(i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
>
> (ii) The trial is not a dress rehearsal. It is the first and last night of the show.
>
> (iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
>
> (iv) In making his decision the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping….."

37. In *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600 Lord Reed considered the authorities and the principles governing the review of findings of fact by the appellate courts and stated at [67] that:

> "…in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

38. The events upon which the claimant founded her claim took place between February and September 2014. The hearing of the claim took place in July 2022, some eight years later. Given the passage of time, the Judge's approach in treating contemporaneous documents as the starting point for findings of fact was reasonable. The content of the Facebook messages was properly before the court in order to identify any relevant exchanges. The Judge accepted the accuracy of the contemporaneous messages. At trial PXM was not a witness; therefore his intention had to be judged by his words and actions. The intention to be considered by the court for the tort of infliction of intentional harm is that of PXM. The Judge identified exchanges on 18 August 2014 as being the "only relevant reference in the Facebook messaging about the circumstances in which the claimant first had any meaningful interaction with PXM". In my view such messages were relevant not only in identifying when the first interaction took place but also to the issue, relevant to the tort of intentional infliction of harm, of what if any motive could be discerned on the part of PXM at that time.

39. Given the care which the Judge brought to this judgment, I have difficulty understanding why the response of PXM to the last quoted message of the claimant as set out in [54] of the judgment was not included. It read: "I tried but I couldn't find

your class, what about the other two lads that did work experience after me, we're they hot? Xx". In my view, this message was clearly relevant to any finding as to what PXM was thinking and doing during his WEP. It plainly supports the claimant's contention that PXM was prepared to act on his belief that the 13 year old claimant had a crush on him by seeking to spend more time with her. One asserted instance of such behaviour was his attempt to find the claimant's class. The judge did not explain why she did not deal with this critical response, which was one of the key building blocks of the claimant's case.

40. By 5 March 2014 the claimant and PXM had become Facebook friends. The defendant's guidance which PXM had read, prohibited those working and volunteering at the school exchanging messages in social media with pupils. At the very least, the proximity in time between PXM leaving the school on 28 February and the Facebook friendship by 5 March raised a question or an inference which should have been addressed as to the motive of PXM at this time. It was not.

41. In considering the limited evidence as to the events which took place during the course of the WEP, I believe the Judge overlooked evidence, or aspects of the evidence. Quite apart from PXM's critical response, the following factors were also highly relevant:

    i) Why and by what right the unsupervised PXM invited a girl in Y9 or Y10 to the badminton class where he would be teaching?

    ii) The claimant's words contained in the 18 August Facebook exchange: "I even had the … courage to talk to you again asking you can you teach my set…". The Judge rejected the claimant's case that there had been another meeting between herself and PXM. Was the claimant's request made at the badminton lesson or was the claimant lying in August 2014 when she sent this message and when she had no thought of making a claim? How can the judge's rejection of this aspect of the claimant's case be reconciled with her acceptance of the accuracy of the Facebook messages?

    iii) PXM's final message of 18 August 2014, para 39 above. This was evidence of PXM's state of mind and actions which was relevant to any ulterior motive of PXM and the issue of when the grooming began.

    iv) The Judge did not confront the obvious inference from the identified Facebook messages that the claimant and PXM had an immediate sexual interest in each other, nor does the Judge explain what she made of the Facebook exchange.

    v) The Judge attached no significance to the fact that the Facebook messaging started within a week of the WEP. What innocent interest could PXM have had in inviting the claimant to be a Facebook friend when he knew it was forbidden? The Judge did not address this issue.

    vi) The Judge found in PXM's favour that there had been no improper messages before mid-April despite the evidence that PXM had persuaded the claimant to delete months' worth of messages.

42. In my judgment, this was relevant evidence which was at the core of the claimant's case as to what took place during the WEP. The evidence should have been considered by

the Judge and its implications addressed. I regard the absence of any such consideration by the Judge as representing a demonstrable failure to consider relevant evidence. The failure by the judge to address the matters set out in paras 39 – 41 above, provides a basis for intervention by this court. In the absence of consideration of this relevant evidence, I am unable to conclude that the findings made by the Judge namely that grooming behaviour by PXM did not take place during the WEP (110, 111, 116, 121) and that before late April 2014 at the earliest there was no significant communication between the claimant and PXM (129) are supportable.

43. It follows, and I so find, that ground 1 is allowed.

44. Given my determination as to the Judge's findings of fact as to when the grooming behaviour of PXM and any significant communication between the claimant and PXM commenced, I set aside the Judge's findings set out at paras 110, 111, 116, 121 and 129 of the judgment. Considering the evidence as a whole, in my judgment there are powerful pointers towards a conclusion that on the balance of probabilities the grooming by PXM of the claimant began during the WEP at the defendant's school. As to whether this court can and should make its own findings, given my conclusions in relation to the remaining grounds of appeal, I do not consider it necessary for us to do so. However, my subsequent analysis will proceed upon the assumption that a finding had been made that the grooming of the claimant by PXM began during his WEP at the defendant's school.

Ground 2

The Judge was wrong to find that the conduct and mental element of the tort of intentional infliction of injury were not made out until after the end of PXM's placement at the school.

45. The claimant and the defendant accept that success upon ground 2 is dependent upon findings by this court that the grooming behaviour of PXM commenced during the WEP and that his ulterior motive was to foster a relationship with the claimant.

46. The court having made the assumption that such a finding had been made, it is accepted by the parties that the Judge correctly set out the requirements of the tort of intentional infliction of injury as follows:

> "150. The modern restatement of the rule in *Wilkinson v Downton* [1897] 2 QB 57 is found in the judgment of the Supreme Court in *Rhodes v OPO* [2015] UKSC 32. The Court identified three elements of the tort: 'a) the conduct element requiring words or conduct directed at the claimant for which there is no justification or excuse, b) the mental element requiring an intention to cause at least severe mental or emotional distress, and c) the consequence element requiring physical harm or recognised psychiatric illness.'
>
> 151. Recklessness is not sufficient for the mental element (paragraph 87). Intention may be inferred as a matter of fact and there may be 'consequences or potential consequences [which] are so obvious the perpetrator cannot realistically say that those

> consequences were unintended'; but it cannot be imputed in the sense that a person cannot be taken as a matter of law to intend the natural and probable consequences of his acts (paragraphs 45 and 81).
>
> 152. The approach taken by Courts when considering cases of grooming behaviour (that is, conduct that may be objectively unobjectionable but is part of a process of building a relationship for the purpose of manipulation, exploitation and abuse, often sexual) is to consider the entirety of that conduct rather than to separate it from the sexual abuse that causes injury. That was the approach taken in *X & Y v London Borough of Wandsworth* [2006] EWCA Civ 395 in the context of negligence; and in *ABC v WH & Whillock* in the context of the conduct element of the intentional infliction of harm). In both cases the court sought to identify the point at which the grooming behaviour started, with reference to the ulterior motive of the primary tortfeasor."

47. The claimant relies on the authority of *ABC v WH Whillock* [2015] EWHC 2687 (QB) ("*ABC*") in which it was found that a teacher acted unjustifiably towards a pupil by emotionally manipulating her, encouraging her to send indecent images of herself to him and engaging in sexual banter in text messages. The teacher's manipulation was successful and led to sexual assaults. The claim was for damages for physical sexual assault but the claimant also contended that if the court did not find she had been the victim of the assaults she was entitled to damages for the emotional manipulation which she suffered which amounted to the intentional infliction of harm. Sir Robert Nelson found that physical touching did take place but he also determined that a claim for intentional harm was made out as the perpetrator had acted unjustifiably towards the claimant and the consequences or potential consequences to her were so obvious that he could not realistically say that these were unintended.

48. The claimant maintains that *ABC* represents similar facts to the present case, namely that the wrongful conduct was the entire course of conduct from PXM first befriending the claimant and speaking with her at school, encouraging her to attend the badminton session at which he would be present and moving on to the increasingly inappropriate messages and sexual contact.

49. The Judge found that the tort of intentional infliction of injury was made out but found that "neither the completed tort nor any element of it was committed during the WEP … The conduct and mental elements of the tort on the balance of probabilities were not present until many weeks after the WEP had ended". The reason for this being the Judge's findings of fact that PXM did not engage in any grooming of the claimant during the WEP including during their interactions at the school.

50. It is accepted that the mental element was satisfied because as the Judge stated: "It must have been obvious to PXM, even allowing for his youth, that severe emotional stress would be caused to a child with the additional vulnerabilities of which he was by then aware, if he met with her illicitly for sexual activity to take place. Even if her distress were not to be immediate, it was virtually inevitable." [158]. It is accepted that the Judge made these remarks in relation to PXM meeting the claimant for sexual activity but the claimant contends that they apply equally to the entire course of conduct as it

can only have been obvious to PXM that grooming the claimant would lead to nothing but misery for her. I agree.

Discussion

51. The Judge was satisfied that the tort of intentional infliction of injury was made out. The only issue in contention were her findings that neither the completed tort nor any element of it was committed during the WEP. For the reasons given, and on the assumption that I have made, PXM engaged in unjustified conduct while at the school in attempting to manipulate his schedule or suggesting to the claimant that she attend the badminton session in order to spend time with a 13-year-old girl whom he knew had a crush on him. I also accept that it would have been obvious to PXM from the outset that grooming the 13-year-old claimant would lead to nothing but misery for her.

52. It follows that I am satisfied that the conduct and mental elements of the tort of intentional infliction of injury were made out during PXM's placement at the school. Accordingly, on the assumption that the finding of fact underpinning ground 1 was made, I would allow ground 2.

Ground 3

The Judge was wrong to find that the relationship between the defendant and PXM was not akin to employment.

Vicarious liability

53. The two stage test for vicarious liability was identified by Lord Phillips in *Various Claimants v Catholic Child Welfare Society and others* [2012] UKSC 56 ("*Christian Brothers*") at para 21: (i) The first stage is to consider the relationship of the defendant and the tortfeasor to see whether it is one that is capable of giving rise to vicarious liability. (ii) The second stage requires examination of the connection that links the relationship between the defendant and the tortfeasor and the act or omission of the tortfeasor. Stage one is capable of being satisfied in relationships other than those of employment. In *Christian Brothers* at para 47 Lord Phillips stated:

> "… Where the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the ground that it is 'akin to that between an employer and an employee'. …"

54. Lord Phillips also identified five policy reasons which make it fair, just and reasonable to impose vicarious liability on the employer, namely: (i) the employer is more likely to have the means to compensate the victims and 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 employers; (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.

55. In *Cox v Ministry of Justice* [2016] UKSC 10 ("*Cox*") Lord Reed at para 24 described Lord Phillips' analysis in *Christian Brothers* as developing a modern theory of vicarious liability. Lord Reed stated:

> "…The result of this approach is that 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."

56. Lord Reed at para 30 stated:

> "It is also important not to be misled by a narrow focus on semantics: for example, by words such as 'business', 'benefit', and 'enterprise'. The defendant need not be carrying on activities of a commercial nature … It need not therefore be a business or enterprise in any ordinary sense. Nor need the benefit which it derives from the tortfeasor's activities take the form of a profit. It is sufficient that there is a defendant which is carrying on activities in the furtherance of its own interests. The individual for whose conduct it may be vicariously liable must carry on activities assigned to him by the defendant as an integral part of its operation and for its benefit. The defendant must, by assigning those activities to him, have created a risk of his committing the tort."

57. In *Cox* the issue was whether the prison service could be vicariously liable for injuries caused to a prison catering manager by the negligence of a prisoner who was working under her direction on prison service pay. There was no contract of employment between the prison and the prisoners. The Supreme Court held that the prison was vicariously liable. Addressing the concept of benefit at para 34, Lord Reed observed that the activities assigned to those who work in the prison kitchen "are not merely of benefit to themselves: a benefit which is, moreover, merely potential and indirect. Their activities form part of the operation of the prison, and are of direct and immediate benefit to the prison service itself." At para 35 Lord Reed observed:

> "… 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."

58. In *Various Claimants v Barclays Bank Plc* [2020] UKSC 13 ("*Barclays Bank*") the Supreme Court considered whether Barclays Bank was vicariously liable for the acts of a doctor who allegedly sexually assaulted individuals when carrying out pre-employment medical examinations. The issue was whether the doctor was an

independent contractor. Lady Hale reviewed the authorities including *Christian Brothers* and *Cox* and identified the question as being "whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant?". She stated:

> "In doubtful cases, the five 'incidents' identified by Lord Phillips [in *Christian Brothers*] may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. … But the key … will usually lie in understanding the details of the relationship. Where it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents."

59. Lady Hale made clear that the expansion of vicarious liability to include, at the first stage, whether the relationship was "akin to employment" did not extend to rendering an employer vicariously liable for the torts of "true independent contractors" (para 29).

60. In *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2023] UKSC 15 ("*BXB*") Lord Burrows reviewed the authorities on the law of vicarious liability. At para 42 he stated that in *Cox* Lord Reed:

> "… made clear that the first and fifth of [Lord Phillips'] policy factors (deep pockets and control) were of limited importance and it was rather the other three policy factors that were helpful in understanding the modern rationale for the doctrine. They were that the tort had been committed while acting on behalf of the employer and as part of the employer's business and that the employer had thereby created the risk of the tort. Lord Reed JSC pointed out that those three policy factors are inter-related and together give an underlying rationale for vicarious liability which, going beyond a relationship of employment, he expressed in the following way, at para 24:
>
> > '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.'"

61. Having reviewed the authorities, Lord Burrows identified the legal principles applicable to vicarious liability in tort as follows (para 58):

> "(i) 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.

(ii) The test at stage 1 is whether the relationship between the defendant and the tortfeasor was one of employment or akin to employment. In most cases, there will be no difficulty in applying this test because one is dealing with an employer-employee relationship. But 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. It is important to recognise, as made clear in *Barclays Bank*, 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.

(iii) The test at stage 2 (the 'close connection' test) 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. This is the test, subject to two minor adjustments, set out by Lord Nicholls in *Dubai Aluminium* [2003] 2 AC 366, drawing on *Lister* [2002] 1 AC 215, and firmly approved in *Morrison*. The first adjustment is that, to be comprehensive, it is necessary to expand the test to include 'quasi-employment' as one may be dealing with a situation where the relationship at stage 1 is 'akin to employment' rather than employment. The second adjustment is that it is preferable to delete the word 'ordinary' before 'course of employment' which is superfluous and potentially misleading (e g none of the sexual abuse cases can easily be said to fall within the 'ordinary' course of employment) and was presumably included by Lord Nicholls because 'in the ordinary course of business' were the words in section 10 of the Partnership Act 1890. The application of this 'close connection' test requires a court to consider carefully on the facts the link between the wrongful conduct and the tortfeasor's authorised activities. That there is a causal connection (i e that the 'but for' causation test is satisfied) is not sufficient in itself to satisfy the test. Cases such as *Lister* and *Christian Brothers* [2013] 2 AC 1 show that sexual abuse of a child by someone who

> is employed or authorised to look after the child will, at least generally, satisfy the test. But, as established by *Morrison*, the carrying out of the wrongful act in pursuance of a personal vendetta against the employer, designed to harm the employer, will mean that this test is not satisfied.
>
> (iv) As made particularly clear by Lady Hale in *Barclays Bank*, drawing on what Lord Hobhouse had said in *Lister*, the tests invoke legal principles that in the vast majority of cases can be applied without considering the underlying policy justification for vicarious liability. The tests are a product of the policy behind vicarious liability and in applying the tests there is no need to turn back continually to examine the underlying policy. This is not to deny that in difficult cases, and in line with what Lord Reed JSC said in *Cox* [2016] AC 660, 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. … Lord Phillips referred to five policies in *Christian Brothers* but, as Lord Reed JSC recognised in *Cox*, a couple of those have little, if any, force. At root the core idea (as reflected in the judgments of Lord Reed JSC in *Cox* and *Armes*: see paras 42 and 47 above) 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.
>
> (v) The same two stages, and the same two tests, apply to cases of sexual abuse as they do to other cases on vicarious liability. Although one can reasonably interpret some judicial comments as supporting special rules for sexual abuse, this was rejected by Lord Reed JSC in *Cox*. The idea that the law still needs tailoring to deal with sexual abuse cases is misleading. The necessary tailoring is already reflected in, and embraced by, the modern tests."

62. It is the claimant's case that all the features of employment were present in the relationship between the defendant and PXM save for salary. PXM's position was indistinguishable from the work of a junior PE teacher or teaching assistant. He was at the school to experience the work of a teacher which he did with the defendant's pupils. The Judge accepted CD's evidence that the defendant's expectation of PXM was that he would provide some limited help with lessons by running warm ups, coaching groups of students under guidance, assisting with sorting out equipment, washing bibs and "general day to day PE stuff".

63. The defendant supports the Judge's findings that the WEP was not integral to the school's business nor performed for the defendant's benefit. PXM did not fulfil a teaching role nor that of a classroom assistant because he had no independent responsibility for any aspect of the defendant's undertaking, pupils were not entrusted to his care to any extent. PXM was not paid, he did not undertake any substantive

activity on behalf of the defendant and had no rank within the school. There was no control over the manner in which PXM conducted the defendant's work. The activity in which PXM was engaged was described as "shadowing and observing personnel", which did not give rise to an enterprise risk.

Discussion

64. It is accepted that the Judge correctly set out the law as to the two stages of vicarious liability and correctly identified the test for stage one, namely whether the relationship between the defendant and PXM was "akin to employment". *BXB* was subsequently determined by the Supreme Court but the approach of the Judge is accepted as being consistent with the words of Lord Burrows at para 42.

65. The issue on stage 1 (ground 3), relates to the Judge's factual findings concerning the relationship between the defendant and PXM and the application of the law to these facts. The Judge's acceptance of the evidence of CD relating to the role of PXM is set out at para 10 above. The findings of fact made by the Judge relevant to stage 1 are set out at paras 18 and 19 above.

66. I accept the claimant's contention that PXM was at the school to experience the work of a teacher which he did with the defendant's pupils. It may be that the school did treat PXM's request as a favour but the Judge's reliance on this finding is inconsistent with the Judge's correct identification of the law (*Cox* at para 35) where it was stated that there need not be an alignment between the objectives of the defendant and the tortfeasor. The benefits of the relationship to each may be different.

67. The Judge's description of the tasks which PXM performed as being "minor ancillary tasks" does not fairly represent what PXM was doing. He was carrying out some of the work of the PE department (para 10 above) and was given responsibility for the same. Providing physical education classes to pupils at the school was a part of the National Curriculum and a part of the business of the school. In that business PXM played a role. The tasks carried out by PXM were for the benefit of the defendant as they released its staff thereby enabling them to spend time on other tasks or with pupils. They were also for the benefit of the pupils who learned sports skills. Further, WEPs provide generic benefits to organisations by encouraging suitable people to enter the workplace in due course and thereby enabling organisations to recruit staff when necessary. It follows that the benefit is not merely transactional.

68. I regard the fact that the defendant had to ensure that PXM was supervised by its staff at all times, and closely directed in any activity which he undertook with a pupil, as demonstrating that PXM was subject to the defendant's close direction and control which is suggestive of an employment type relationship. It was one of the five incidents which Lady Hale identified as being helpful in doubtful cases.

69. The Judge's description of the defendant's requirement that PXM should understand and accept its safeguarding policy as being a neutral factor does not give it the weight which I believe it deserves. It demonstrated not only how the defendant was regulating its relationship with PXM, but also how PXM was treated similarly to employees in being required to accept the policy. I view acceptance of the policy as a factor pointing towards a relationship that is being regulated in a way "akin to employment"

notwithstanding that such acceptance is insufficient of itself to render a relationship "akin to employment".

70. I accept the claimant's contention that the Judge's description at [89] that "pupils were required to treat PXM with respect" does not reflect the evidence that pupils were told that PXM should be addressed as "Mr PXM" and "should be treated as any member of staff should be. He is here to support in lessons". In my view, that evidence is consistent with PXM being held out by the defendant as being akin to a member of staff such as a junior teacher or teaching assistant.

71. I have difficulty accepting the Judge's rejection of the submission that PXM's role was integral to the defendant's business [197]. The limited role played by PXM in the activities of the school is of more relevance to stage two rather than stage one. Further, and for the reasons given, reference to PXM's role as "shadowing or observing" does not fairly reflect what he did during the course of the WEP. In any event such a role, which is akin to an individual undergoing training, is not inconsistent with status as an employee or being akin to an employee.

72. Finally, the Judge in considering Lord Phillips' five incidents of the relationship found at [204] that the defendant did not create the risk of PXM committing the tort. She found that "[t]he most that the defendant did was to provide PXM with the opportunity to meet its pupils". I accept the claimant's contention that the precise risk which materialised had been anticipated by the defendant in the guidance documents that PXM had been taken through and been required to sign at his induction day. It was the defendant who brought PXM into the school, it permitted him to play a part in coaching groups of pupils who were instructed to treat PXM as a member of staff.

73. The reality of the relationship as between the defendant and PXM was that the defendant identified the terms on which PXM would be at the school. It required him to read and accept the defendant's procedures and guidance which applied to its members of staff, it regulated PXM's time, supervised him and directed and controlled what PXM did. Pupils were told to treat him as a member of staff. The badminton session which the claimant attended at the suggestion of PXM was open only to pupils and staff, and PXM was not a pupil. At [115] the Judge found that "PXM assisted the Claimant to play badminton. That was the purpose of the club." I am satisfied that in undertaking the tasks assigned to him by the defendant, PXM did assist with the business of providing PE classes and after school sports clubs to the defendant's pupils. During his time at the school PXM was not a pupil nor is there any evidential basis to support an assertion that he was carrying on business on his own account.

74. For the reasons given, I conclude that the Judge was wrong to find that the relationship between the defendant and PXM was not akin to employment. It follows that I am satisfied that stage one of the test for vicarious liability is made out.

75. Accordingly, ground 3 is allowed.

Ground 4

The Judge was wrong to find that PXM's torts were not sufficiently closely connected with his relationship with the defendant so as to give rise to vicarious liability.

76. In *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11 ("*Wm Morrison*") Lord Toulson identified the approach of the courts to stage two as follows:

> "44 In the simplest terms, the court has to consider two matters. The first question is what functions or 'field of activities' have been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. As has been emphasised in several cases, this question must be addressed broadly; …
>
> 45 Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice which goes back to Holt CJ. To try to measure the closeness of connection, as it were, on a scale of 1 to 10, would be a forlorn exercise and, what is more, it would miss the point. The cases in which the necessary connection has been found for Holt CJ's principle to be applied are cases in which the employee used or misused the position entrusted to him in a way which injured the third party… that is the reason why it was just that the employer who selected him and put him in that position should be held responsible."

77. In *Lister and others v Hesley Hall Ltd* [2001] UKHL 22 ("*Lister*") the claimants were residents in a boarding house attached to a school owned and managed by the defendants. The warden of the boarding house employed by them, without their knowledge, sexually abused the claimants. At para 28 Lord Steyn identified the question as being whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable. On the facts of the case, the answer was yes, as the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in the house. Lord Millet at para 82 stated:

> "… the warden's duties provided him with the opportunity to commit indecent assaults on the boys for his own sexual gratification, but that in itself is not enough to make the school liable. The same would be true of the groundsman or the school porter. But there was far more to it than that. The school was responsible for the care and welfare of the boys. It entrusted that responsibility to the warden. He was employed to discharge the school's responsibility to the boys. For this purpose the school entrusted them to his care. He did not merely take advantage of the opportunity which employment at a residential school gave him. He abused the special position in which the school had placed him to enable it to discharge its own responsibilities, with the result that the assaults were committed by the very employee to whom the school had entrusted the care of the boys… there is an inherent risk that indecent assaults … will be committed by those placed in authority over them, particularly if they are in close proximity to them and occupying a position of trust."

78. The Judge compared the circumstances of the WEP to those in the Canadian case of *Jacobi v Griffiths* [1999] 2 SCR 570; (1999) 174 DLR (4th) 71 ("*Jacobi*"), cited with approval by Lord Steyn in *Lister*. The tortfeasor in *Jacobi* was employed by a children's club and his responsibility was to organise recreational activities and outings. Children from the club visited at his home out of hours and he sexually assaulted them. The court accepted that the club had provided an opportunity to establish a friendship with the children but that did not constitute a sufficient connection.

79. In *Various Claimants v Wm Morrison Supermarkets plc* [2020] UKSC 12; [2020] AC 989 Lord Reed emphasised that the close connection test was not merely a question of timing or causation but of the application of orthodox common law reasoning, based on applying the facts of the case in the light of guidance to be derived from decided cases (paras 24 and 26).

80. The "close connection" test has been clarified in *BXB* as being "whether the wrongful conduct was so closely connected with the 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" (para 58(iii)). "But for" causation is not sufficient. A close connection is required, for example those placed in a position of authority over a child being responsible for the child's pastoral care and using that position to commit sexual abuse. Sexual abuse cases do not form a special category (para 58(v)). The status of the tortfeasor without more does not satisfy the test of close connection (para 71).

81. The Judge did not have the benefit of the judgment in *BXB* but it is accepted that she correctly identified the close connection test and applied it to the facts of the case using guidance from the authorities.

82. The claimant criticises the judge's findings on two grounds, the first being that the factual findings that PXM did not start to groom the claimant until after the WEP had terminated were wrong. This is addressed in ground 1. Secondly that PXM's role was sufficiently closely connected to the abuse that it satisfied the "close connection" test rather than merely providing an opportunity in the form of a meeting which led to a subsequent Facebook relationship. Reliance is placed upon a number of factors which include: (i) the chance that PXM had to meet the claimant to invite her to play badminton; (ii) that he did the work of a junior teacher or teaching assistant; (iii) he was introduced to the claimant as a teacher; and (iv) that he had a status which was attractive to the claimant by reason of his WEP at the school.

83. The defendant contends that PXM's role at the school did not give rise to a close connection. In other cases it was the abuser's pastoral role and the misuse of that role which constituted grooming. In *X and Y v London Borough of Wandsworth* [2006] EWCA Civ 395; [2006] 1 WLR 2320 the claimants were subjected to sexual abuse by the teacher who was their Head of Year in which capacity he was entrusted with pastoral responsibility for their welfare. Grooming began over a period of six months with presents, trips, pornographic magazines and videos and led to sexual assaults. The Court of Appeal accepted that the teacher's actions towards Y could fairly be regarded as performed in the course of his employment by the school as the teacher's case fell into a special category because of his pastoral responsibilities for the boys' welfare with which his acts were closely connected. The court distinguished these facts from a case

concerning the acts of a school groundsman or the acts of a teacher in the school holidays which had no connection with his responsibility at the school.

84. It is accepted by the claimant and the defendant that the claimant's perception of PXM's status is not relevant. The issue is what PXM was authorised to do.

Discussion

85. The Judge's starting point was identified as her finding that the entirety of the wrongdoing occurred many weeks after PXM's relationship with the defendant had ceased [236]. Given the court's conclusion in respect of ground 1, this is no longer applicable. The Judge thereafter considered the position upon the basis that PXM was in a relationship with the defendant that was akin to employment but found his role was extremely limited. He had no caring or pastoral responsibilities in relation to the claimant and he was not placed in a position of authority over the pupils. At [239] the Judge found that it had not been proved that the claimant was influenced even by a perception that PXM had authority or status within the defendant's organisation.

86. The findings and assumptions of this court on grounds 1 to 3 as to the time when the grooming started and the role of PXM during the WEP differ from those of the Judge. It follows that I approach stage two of the vicarious liability test on the basis that grooming commenced when PXM was at the school, and his role at the school was akin to employment.

87. In respect of stage two, I agree with the assessment of the Judge as to the limited nature of PXM's role at the school. He had no caring or pastoral responsibility for the pupils, a factor to which considerable weight is given in previous cases. PXM's access to the claimant at school was limited as he was, or should have been, kept under close supervision at all times. Even allowing for the fact that PXM was to be addressed as if he was a member of staff, he held no position of authority over the pupils in the school. It was not until PXM left the school that any communication took place on Facebook and such communication was specifically prohibited by the school.

88. In my judgment, given the limited nature of PXM's role during the course of one week, the facts do not begin to satisfy the requirements of the close connection test. The grooming which led to the sexual offending was not inextricably woven with the carrying out by PXM of his work during his week at the defendant's school such that it would be fair and just to hold the defendant vicariously liable for the acts of PXM. It follows that ground 4 of the appeal is dismissed.

Conclusion

89. I would find for the claimant in respect of grounds 1-3, but for the defendant in respect of ground 4. I therefore find that the defendant is not vicariously liable for the torts of PXM as they do not satisfy stage two of the test for the imposition of vicarious liability. Accordingly, the appeal is dismissed.

Lord Justice Peter Jackson:

90. I agree.

Lord Justice Lewison:

91. I also agree.