

# Vicarious liability after BXB: The decision in BXB

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# Facts of *BXB*

## ▶ Who's who:

- ▶ Claimant Respondent ("BXB"): an adult woman, member of the JW's congregation.
- ▶ Defendant Appellant ("D"): the JW organisation.
- ▶ Perpetrator tortfeasor ("Sewell"): an adult man, initially a Ministerial Servant within the JW community; later promoted to an Elder.

# The claim

- ▶ At first instance:
  - ▶ **C succeeded** in establishing that D was VL.
  - ▶ D appealed.
- ▶ At the Court of Appeal:
  - ▶ **Appeal dismissed.**
  - ▶ D appealed again.
- ▶ At the Supreme Court:
  - ▶ **Appeal succeeded:** after considering the claim afresh, **no VL so the claim failed.**

Timeline
Lister [2001] UKHL 22
Christian Brothers [2012] UKSC 56
Cox [2016] UKSC 10
Mohamud [2016] UKSC 11
Armes [2017] UKSC 60
<b>BXB [2020] EWHC 156 (QB)</b>
Morrisons [2020] UKSC 12
Barclays Bank [2020] UKSC 13
<b>BXB [2021] EWCA Civ 356</b>
<b>BXB [2023] UKSC 15</b>

# SC's exposition of the law: stage 1

- ▶ Is there a relationship of, or akin to employment, between D and the perpetrator?
- ▶ The court must carefully consider features **similar to/ different from a contract of employment**.
- ▶ **Depending on the facts**, relevant features **"may include"**: [58(ii)]:
  - a. Whether the work is remunerated financially or with other benefits (though lack of remuneration is not decisive);
  - b. How integral the perpetrator's work is to the organisation;
  - c. Extent of D's control over the perpetrator in their work;
  - d. Whether the work is for D's benefit or more generally in furtherance of the aims of the organisation;
  - e. Position r.e. the perpetrator's appointment and termination;
  - f. Whether the perpetrator's role fits within a hierarchical structure of seniority.

## SC's exposition of the law: stage 2

- ▶ Is the tort so closely connected to the acts the perpetrator was authorised to do for D, that the tort can fairly and reasonably be seen as done by the perpetrator in the course of quasi-employment or employment?
  - ▶ NB language shifts: the ordinary course of quasi-employment or employment.
  - ▶ Focusing on the link between **wrongful conduct** and **authorised** activities.
  - ▶ A but for connection is not enough by itself (i.e. but for the working relationship the abuse would not have been committed).
  - ▶ Sexual abuse of a child by someone engaged to look after them will “at least generally” meet the test.
  - ▶ A tort committed as a personal vendetta by the perpetrator against D to harm D will not meet the test.

# SC's exposition of the law: the policy considerations

- ▶ Endorsing three of the five policy considerations from *Christian Brothers* [35 and 58(iv)] and endorsing the analysis in *Cox* [35]:
  - ▶ Helpful:
    - ▶ Acting on D's behalf
    - ▶ Being part of D's business activity
    - ▶ D's creation of the risk
  - ▶ Limited importance:
    - ▶ D's deeper pockets
    - ▶ D's control
- ▶ In the "vast majority" of cases they do not need to be considered, but in "**difficult** cases, **and** in line with what Lord Reed said in *Cox*, 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 consider] whether that outcome is consistent with the underlying policy" [58(iv)].

# Application of the law to the facts

## ▶ Stage 1:

- ▶ Upholding CA.
- ▶ Yes, met [65-69].

## ▶ Stage 2:

- ▶ Having found errors in law in the lower courts, applied afresh by the SC [70-72].
- ▶ Not met [73-81]. The lower courts had placed too much reliance on irrelevant factors; and too little on relevant factors.

## ▶ Policy considerations:

- ▶ Applied afresh.
- ▶ Not described as a difficult case but as a final check, they did not provide a “convincing justification” for finding D VL. D’s deeper pockets was “not a justification for extending vicarious liability beyond its principled boundaries” [82].