

Vicarious Liability and a phobia of owls - *Brayshaw v The Partners of Apsley Surgery & O'Brien*

Published 20 December 2018

To what extent can a GP Practice be held vicariously liable for the acts of Locum GPs it engages? That question, and more, was considered by Mr Justice Martin Spencer in the recent decision of *Brayshaw v The Partners of Apsley Surgery & O'Brien* [2018] EWHC 3286 (QB).

Background

Mrs Brayshaw had a substantial history of physical and mental ill-health and was a vulnerable patient with anxiety and depression. She called the Apsley Surgery on 17 August 2012, complaining of feeling desperate and low, and spoke with a Locum GP Mr Thomas O'Brien. The conversation started whilst Mr O'Brien was at the Surgery. He enquired whether she "... had faith ...", and told Mrs Brayshaw that "... his wife knew a different way that could heal [her] that didn't involve any medication ...". He then arranged to call Mrs Brayshaw from his home later that evening with his wife.

What followed could be described as a form of intense religious indoctrination, though Mrs Brayshaw claimed it was both medical treatment and harassment. Mr and Mrs O'Brien took Mrs Brayshaw under their wing, befriending her and taking her to prayer meetings. One of those meetings involved a 'Testimony' given by one 'Persistent Percy' describing how a Witch Doctor had attempted to convince him to murder his son, but that if he killed an owl near a grave, his son would be saved. He went on to perform a public healing and exorcism on Mrs Brayshaw, who found the whole process deeply upsetting. She claimed it caused her to suffer physical illness. Additionally, the parties' expert Psychiatrists agreed it caused her to develop a phobia of owls.

That Testimony (on 12 January 2013) was the beginning of the end for the O'Briens' personal relationship with Mrs Brayshaw. A complaint was made to the GMC and in due course Mr O'Brien was struck off, the GMC finding that he "... abused his position of trust as a doctor by imposing his religious beliefs upon [Mrs Brayshaw] who was and remains a vulnerable patient."

The Claim / Defence

Mrs Brayshaw's claim was that she suffered psychiatric harm as a result of religious practices imposed upon her as part of medical treatment by Mr O'Brien whilst he was a Locum GP engaged by the Surgery. The course of that treatment constituted intentional infliction of harm and/or harassment and/or negligence giving rise to a claim for damages. The Apsley Surgery was said to be liable for Mr O'Brien's actions as the events causing damage were 'so closely connected' to his position as a Locum GP for which the Surgery engaged him so as to give rise to vicarious liability.

The Surgery denied that Mr O'Brien's actions were tortious, or in the alternative that the events in question were sufficiently far removed from his role as a Locum GP that the Surgery should carry no vicarious liability.

Judgment

Spencer J deals relatively swiftly with the allegations of (i) intentional infliction of harm, and (ii) harassment: roundly rejecting them. Conversely, he was clear that Mr O'Brien negligently "... exposed [Mrs Brayshaw] to the meeting of 12 January 2013 when, given [her] psychological and psychiatric make-up, together with her physical problems, it was foreseeable that she might react adversely in the way that she did." His actions caused or contributed to the deterioration in her mental health, and he was found liable for that.

Vicarious Liability

As to the Surgery's potential liability, Spencer J sets out a helpful restatement of the law on vicarious liability, drawing on Lord Reed's Judgment in *Cox v Ministry of Justice* [2016] AC 660 and the essential factors required to find a claim in vicarious liability (key also to which is that there is no requirement for an employer - employee relationship):

- i) That the tort had been committed as a result of activity being undertaken by the tortfeasor on behalf of the defendant;

- ii) That the activity was integral to the defendant's business activities; and
- iii) That engaging the tortfeasor to carry out that activity had created the risk of commission of the tort.

He clarified that such liability should only be established if it is 'fair, just and reasonable' to do so, and looked to Various Claimants v Catholic Child Welfare Society [2013] 2 AC 1 for the 5 steps of guidance there:

- i) Does the employer have means to satisfy a judgment, where the individual perpetrator may not?
- ii) Was the tort committed as a result of an action taken by the individual on behalf of the employer?
- iii) Was the causative action taken as part of the employer's business activity?
- iv) Was the risk of commission of the tort created by the employer engaging the employee?
- v) Was the employee 'under the control of' the employer?

Spencer J found that the Surgery was not vicariously liable for Mr O'Brien's actions from the moment he called Mrs Brayshaw from his home on 12 August 2012. It was clear from the evidence that Mrs Brayshaw continued to attend the Surgery for her other complaints over the months in question and that she both knew and understood that Mr O'Brien was assisting her in a spiritual sense and not in his role as a GP. Spencer J found that "... *religious proselytization cannot be fairly regarded as reasonably incidental to the risk of carrying on the business of a doctor's surgery.*"

The decision was heavily fact-specific and in that context, Mrs Brayshaw's evidence to the GMC FTP Panel investigation, along with her written and oral evidence for the trial in the civil action, worked against her. Her evidence was frequently inconsistent and she was heavily criticised by Spencer J concluding "... *that there was very little of Mrs Brayshaw's evidence that I could rely on. It seemed to me that, with his cross-examination, [Counsel for the Surgery] effectively destroyed [her] credibility and she was not a witness upon whom any reliability could be placed.*"

Lessons Learned

This very unusual decision serves to highlight a number of important points, including:

- 1) Do not believe one is immune from vicarious liability if there is no traditional employer - employee relationship: liability can supersede that.
- 2) If facing an allegation of vicarious liability, thoroughly consider the nature of the act(s) complained of and how they relate to the employer's business, and how they relate to the role the employee or engaged party is contracted to perform. That the events start in the workplace does not always mean they continue to do so.
- 3) Forensically consider the complainant's evidence to check for (fatal) inconsistencies, especially where there are preceding investigations.

Our national teams of clinical risk lawyers have extensive experience of supporting and advising healthcare providers in matters just like this and we are on hand to provide advice on the impact of this decision.

Authors



Kristian Hansen

Bristol

khansen@dacbeachcroft.com