



CASE NOTE: The evolution of Vicarious Liability for intentional torts

By Luke Geary, Partner

Plaintiffs A, B, C & D v Bird, Clancy and Little Pigeon Pty Ltd t/as Footprints Childcare Centre [2020] NSWSC 1379

Judgment of Schmidt AJ

Facts

From the opening paragraphs of the judgment:

1. “Little Pigeon Pty Ltd owned the Footprints childcare centre which B and D attended between 2008 and late 2010 when they were removed after Mr Bird, who worked at the centre and was a 1% shareholder of the company, was arrested and charged with two offences involving another child who had made disclosures about him. Ms Clancy, Mr Bird’s daughter, owned 99% of Little Pigeon’s shares. Little Pigeon Pty Ltd was also the licensee of the centre.
2. B and D and other children later also made disclosures about Mr Bird. While police investigations resulted in further criminal charges being laid against him in relation to B and another child, none were laid in relation to D. The DPP finally did not pursue any of the charges to trial.
3. In these proceedings the plaintiffs seek damages for Mr Bird’s alleged assaults of B and D and also claim that Little Pigeon and Ms Clancy are not only vicariously liable for his acts, but that they were all also negligent.
4. A and C, who are B and D’s mothers respectively also pursue claims for breach of contract, given Little Pigeon’s alleged failures to provide quality childcare; retain adequately trained staff to work at the centre; follow relevant and necessary procedures required to be followed by such centres; and to ensure that the children were safe and appropriately cared for, while under its control and supervision.”

Issues

5. Her Honour identified the following issues for determination in the case:
 - (1) Whether the assaults occurred;
 - (2) Whether Mr Bird was Little Pigeon’s employee;
 - (3) Whether Mr Bird had unsupervised access to or the opportunity to interact with B or D, out of sight of carers employed by Little Pigeon;
 - (4) Whether Ms Clancy or the carers were aware of Mr Bird having such access or opportunity;
 - (5) Whether either Little Pigeon or Ms Clancy are vicariously liable for any assault proven;



- (6) Whether Little Pigeon or Ms Clancy breached the duty of care which they owed B and D;
 - (7) Whether Little Pigeon or Ms Clancy owed a duty to A and C and whether it was breached;
 - (8) Causation;
 - (9) Whether there had been any breach of contract;
 - (10) Whether A or C sustained a recognised psychiatric illness as a result of Mr Bird's assaults;
 - (11) The admissibility of:
 - (a) Representations made by B and D to their mothers and others about what Mr Bird had done to them;
 - (b) Admissions made by Mr Bird in his police interviews;
 - (c) Tendency evidence;
 - (12) The credibility and reliability of various witnesses.
6. Following the liability issues being assessed in the judgment, various considerations as to damages were considered by her Honour, though they are not considered for the purposes of this case note.
7. This case note will focus exclusively on the Court's comments regarding vicarious liability.

Where we last left off: Prince Alfred College

8. To recap, the law on vicarious liability for intentional (criminal) torts was last substantively dealt with by the High Court of Australia in *Prince Alfred College Incorporated v ADC* [2016] HCA 37.
9. Significantly, in *Prince Alfred College*, the Court described what it called "the relevant approach", namely that the relevant role of the employee must not only be the opportunity but also the occasion for the abuse. In giving limited direction, the High Court noted:

"[131] The "relevant approach" described in the other reasons is necessarily general. It does not and cannot prescribe an absolute rule. Applications of the approach must and will develop case by case. Some plaintiffs will win. Some plaintiffs will lose. The criteria that will mark those cases in which an employer is liable or where there is no liability must and will develop in accordance with ordinary common law methods. The Court cannot and does not mark out the exact boundaries of any principle of vicarious liability in this case."

This plaintiff won

10. Her Honour ultimately found the intentional torts alleged against Mr Bird were proven, on the evidence, and as a consequence of s.3B of the *Civil Liability Act 2002* (NSW), the operation of that Act was excluded and the common law applied. This was relevant because anyone found to have been vicariously liable for those intentional torts of Mr Bird, would also be subject to a common law assessment of damages.



11. Her Honour's consideration of the issues surrounding vicarious liability begins at paragraph [411] of the judgment and continues until paragraph [458].
12. In essence, a main point of the defendants was that vicarious liability could not attach for the conduct of Mr Bird because he was not an employee but rather was a *volunteer*. They argued that as such, the state of the law of vicarious liability meant that volunteers were not sufficiently connected to attach liability.
13. Her Honour found that on the evidence, Mr Bird was in fact an employee (and not a volunteer) but said that even had she not done so, she could see no reason, in principle, why there should not have been vicarious liability for his acts, given the tests discussed in *Prince Alfred College*. Her Honour then stated (at [420] to [425]):
 - [420] A case like this does not appear previously to have arisen for consideration in Australia, as it has in the UK. There in *Cox v Ministry of Justice* [\[2016\] AC 660](#) [\[2016\] UKSC 10](#) the advent and principles of a "modern theory of vicarious liability" which extends beyond the strict relationship of employment was explained by reference to *Catholic Child Welfare Society v Various Claimants* [\[2013\] 2 AC 1](#); [\[2012\] UKSC 56](#) at [\[24\]](#) and [\[29\]](#)-[\[31\]](#). Those principles were considered in *Barclays Bank plc v Various Claimants* [\[2020\] UKSC 13](#) at [\[27\]](#).
 - [421] Those principles are concerned with harm done by an individual who carries on activities as an integral part of a business and for its benefit, rather than as part of the conduct of a recognisably independent business of his own, or of a third party, where the commission of the wrongful act is a risk created by the assigned activities.
 - [422] Thus in *DSN v Blackpool Football Club Ltd* [\[2020\] EWHC 595 \(QB\)](#) the application of those principles resulted in the Club being vicariously liable for abuse committed by an unpaid volunteer: at [\[175\]](#).
 - [423] These principles do not entirely accord with those established in *Prince Alfred College*, which must be applied in this case, but they do demonstrate how the common law develops, when new situations arise for consideration.
 - [424] I consider that application of the Australian principles to the facts I have found, would permit the conclusion that Little Pigeon was vicariously liable for Mr Bird's acts, even if he provided his services to Little Pigeon as a volunteer, rather than as an employee.
 - [425] But it is not necessary to decide the case on that basis."
14. Her Honour went on to state:
 - [444] Given the vulnerable children aged 0 to 5 years for whom Little Pigeon cared for at Footprints under the legislative scheme by which it was closely regulated, there is considerable importance in the deterrent effect of it having liability for Mr Bird's activities. That follows from its ability to control his work, in order to reduce accidents and the opportunity for intentional wrongs towards the vulnerable young children it cared for, by efficient organization of how it operated the centre, by adherence to regulatory requirements and by supervision of its staff.



[445] Thus holding Little Pigeon vicariously liable for Mr Bird's wrongs may encourage it and others like it to take steps to reduce the risk of future harm: *Hollis* at [53].

[446] In the result I am satisfied that the considerable authority which Mr Bird was given at the centre, which permitted him to have the same close contact which other staff employed there had with children; the control which Little Pigeon had and Ms Clancy exercised over all that he did; his integration into the business; how he was represented to others as being an integral part of its operations and how he was supervised in the same way as other staff, rather than being accompanied in the way reg 57 required volunteers to be accompanied, must result in the conclusion that in truth he was an employee, not a volunteer.

[447] That Mr Bird received little reward for his work does not allow a different conclusion. What he did undoubtedly contributed to the profitable operation of the business, ultimately partly to his own benefit. But as explained in *Hollis* "considerations respecting economic independence and freedom of contract are not, with respect, determinative of the legal character of the relationship": at [46].

15. After finding that Mr Bird was an employee (or in any event, whether he was a volunteer would not be a bar), the Court then turned to consider whether the other defendants were liable for the acts of Mr Bird. It was not in issue in the case that if Mr Bird was an employee, then both Little Pigeon and Ms Clancy (as its controlling mind) *could* be found to be vicariously liable for his criminal acts.

16. Her Honour broke down and analysed relevant aspects from the *Prince Alfred College* decision as follows (i.e. the "relevant approach"):

"[449] In *Prince Alfred College* vicarious liability of a school for sexual abuse of a student by a teacher arose for consideration. It was observed by the plurality that:

- Vicarious liability "has not to date been regarded as a form of absolute liability", but that a general principle has eluded the common law for a long time: at [44].
- That a wrongful act is a criminal offence does not preclude the possibility of vicarious liability. But the fact that employment affords an opportunity for the commission of a wrongful act, is not of itself a sufficient reason to attract vicarious liability, because the act may still be unconnected with the employment: at [80].
- An employer may be vicariously liable for a criminal act where, in the commission of that act, the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim: at [80]
- The role which is given to the employee and the nature of the employee's responsibilities may not only provide an opportunity, but also the occasion for the commission of the wrongful act: at [80].



- It is necessary to consider the special role the employer has assigned to the employee and the position in which he or she is thereby placed in relation to the victim: at [81]. To determine whether the apparent performance of that role created the "occasion" for the wrongful act, features which may be taken into account include:

“authority,
power,
trust,
control and the ability to achieve intimacy with the victim, which may be especially important.”

- If the evidence establishes that the employee has taken advantage of his or her position with respect to the victim, that may be sufficient to conclude “that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable”: at [81].
- It is thus important to determine the actual role assigned to the employee: at [85].

17. The application of those principles to the facts of the case was then undertaken as follows:

[450] On the evidence I am satisfied that Little Pigeon was vicariously liable for Mr Bird’s wrongful acts. That conclusion flows from:

- The actual roles which Little Pigeon assigned Mr Bird, which placed him in a position of considerable power and trust, which he abused;
- That those roles gave Mr Bird the opportunity to have the close contact with children which he, Ms Clancy and other witnesses described;
- The authority Mr Bird was given by effectively being left unsupervised when he had such contact, which he also abused;
- This lack of supervision permitting him to not only achieve intimacy with his young victims, but to control them while committing the wrongful acts he admitted and his victims disclosed; and
- It was Mr Bird’s performance of the roles he was given, which created the occasion for his wrongful acts.

[451] The evidence I have discussed well established that Mr Bird took advantage of the roles he was given by Ms Clancy, Little Pigeon’s controlling mind. Those roles and the nature of the responsibilities which he had, provided him the opportunity and occasion for his wrongful acts, while he had close contact with his victims.

[452] That allowed him to abuse of the position of trust in which he was placed, vis-à-vis each of his vulnerable young victims, in ways closely connected with his employment.



- [453] I have also discussed the authority which Little Pigeon gave Mr Bird as part of its management team, which permitted him to abuse the close contact he was given with children both inside and outside the centre, contact of a kind which otherwise only trained primary contact staff were permitted to have. It was also that authority which helped him exploit the opportunity he was given to touch the children, the result being the various inappropriate acts that he admitted to police, many of which were notifiable to DOCS, had they been detected, as well as the assaults the children disclosed.
- [454] It was the trust that was placed in him which also gave him the opportunity and occasion to assault the children in the ways established on the evidence.
- [455] The evidence of those with whom Mr Bird worked established the trust which the positions which Little Pigeon gave him generated with children, parents and other staff. Ms Kasim, for example, told police that she did not know of the detail of the allegations which child 1 had made, but that every day Mr Bird would sit outside and supervise the kids and play with them, that he was a great person who was adopted by the children; and that she had never seen anything at all that she thought was inappropriate, even though she had seen him pat child 1 on the back.
- [456] Yet when cross examined about the acts which Mr Bird had admitted, Ms Kasim's evidence as a mandatory reporter was that acts Mr Bird's had admitted, such as touching a young female child below the waist area, massaging a child's bare body, squeezing a child on the bottom and rubbing children underneath shirts, were all reportable. Ms Clancy gave similar evidence.
- [457] The evidence thus well established that Mr Bird's work, how he was instructed to approach it and how it was supervised, together gave him the necessary control over and ability to achieve intimacy with the children, which he abused when he repeatedly assaulted them in the various ways established on the evidence.
- [458] Contrary to the defence case, the evidence I have discussed did establish that what Little Pigeon and Ms Clancy did both created and enhanced the risk of abuse which materialised, when Mr Bird conducted himself as he admitted, unlike the circumstances which arose for consideration in *Withyman v State of New South Wales* [\[2013\] NSWCA 10](#): at [\[143\]](#)."

18. The case is significant for how it dealt with all of the issues set out early on in this case note. This note has only considered those relevant to the development of the issues of vicarious liability but that is not to say that it is not worth reading carefully on the damages issues. The total verdict and assessment in favour of the plaintiffs exceeded \$2m. Damages were awarded to the children under common law principles and to the mothers under the *Civil Liability Act*. The fact that both children and mothers were successful is a significant issue. However, probably most significant in this area of the law is the Court's finding that a volunteering relationship can still give rise to a finding of vicarious liability and that employment is not a precondition.



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19. More cases will no doubt follow to consider this issue, as well as what other roles would fall within the *Prince Alfred College* criteria for determining vicarious liability. The significant damages awards that are available if a party can succeed in a vicarious liability argument, rather than being stuck with the limitations of the *Civil Liability Act*, make this area of the law ripe for further development.

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