Michaelmas Term
[2017] UKSC 60
On appeal from: [2015] EWCA Civ 1139

JUDGMENT

Armes (Appellant) *v* Nottinghamshire County Council (Respondent)

before

Lady Hale
Lord Kerr
Lord Clarke
Lord Reed
Lord Hughes

JUDGMENT GIVEN ON

18 October 2017

Heard on 8 and 9 February 2017

Appellant	*Respondent*
Christopher Melton QC	Steven Ford QC
Philip Davy	Adam Weitzman QC
(Instructed by Uppal Taylor Solicitors)	(Instructed by Browne Jacobson LLP)

LORD REED: (with whom Lady Hale, Lord Kerr and Lord Clarke agree)

1. As a child, the claimant was abused physically and sexually by foster parents with whom she was placed while in the care of the defendant local authority. The local authority were not negligent in the selection or supervision of the foster parents. The question the court has to decide is whether the local authority are nevertheless liable to the claimant for the abuse which she suffered, either on the basis that they were in breach of a non-delegable duty of care, or on the basis that they are vicariously liable for the wrongdoing of the foster parents.

The facts

2. The claimant was taken into the care of the local authority in February 1985, when she was aged seven. Statutory care orders followed. Between March 1985 and March 1986 she was fostered by a Mr and Mrs Allison. The judge found that during that period, she was physically and emotionally abused by Mrs Allison. Between October 1987 and February 1988 she was fostered by a Mr and Mrs Blakely. The judge found that during that period, she was sexually abused by Mr Blakely. In each case, the abuse took place in the foster home in the course of day-to-day care and control of the claimant. Mrs Allison employed grossly excessive violence to discipline her. Mr Blakely molested her when bathing her and when she was alone in her bedroom.

3. The fostering arrangements involved in the two placements were different, and demonstrate that analogies with ordinary family life need to be treated with care. Mr and Mrs Allison generally had a large number of children living with them at any given time, and their home had been categorised as a "family group foster home". The appellant was one of nine or ten children fostered there at the relevant time. Mr and Mrs Allison also had four children of their own. The fostering arrangements gave rise to a fairly rapid turnover of foster children, mostly under the age of ten. Mr and Mrs Blakely, on the other hand, fostered children in a more conventional family setting. They had two foster children living with them at the material time - the claimant and a younger girl - besides two older children of their own.

The statutory framework

4. The statutory framework during the relevant period was contained in the Children and Young Persons Act 1969 ("the 1969 Act"), the Child Care Act 1980

("the 1980 Act"), and the Boarding-Out of Children Regulations 1955 (SI 1955/1377) ("the Regulations"). The claimant was committed to the care of the local authority by virtue of a care order made under section 1 of the 1969 Act. Section 10 of the 1980 Act set out the powers and duties of a local authority when a care order was made:

> "(1) It shall be the duty of a local authority to whose care a child is committed by a care order ... to receive the child into their care and ... to keep him in their care while the order ... is in force.
>
> (2) A local authority shall, subject to the following provisions of this section, have the same powers and duties with respect to a person in their care by virtue of a care order ... as his parent or guardian would have apart from the order ..."

In terms of section 12(2) of the 1980 Act, those functions were in addition to the functions conferred on the authority by Part III of that Act. Part III included section 18(1), which imposed a general duty on the local authority, in reaching any decision as to a child in their care, to give first consideration to the need to safeguard and promote the welfare of the child throughout his childhood, and so far as practicable to ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding.

5. Section 21 of the 1980 Act provided:

> "(1) A local authority shall discharge their duty to provide accommodation and maintenance for a child in their care in such one of the following ways as they think fit, namely, -
>
> > (a) by boarding him out on such terms as to payment by the authority and otherwise as the authority may, subject to the provisions of this Act and regulations thereunder, determine; or
> >
> > (b) by maintaining him in a community home or in any such home as is referred to in section 80 of this Act; or

> (c) by maintaining him in a voluntary home (other than a community home) the managers of which are willing to receive him;
>
> or by making such other arrangements as seem appropriate to the local authority.
>
> (2) Without prejudice to the generality of subsection (1) above, a local authority may allow a child in their care, either for a fixed period or until the local authority otherwise determine, to be under the charge and control of a parent, guardian, relative or friend."

6. It follows from section 10(1) of the 1980 Act that the local authority were required to keep the claimant in their care, and to comply with the duties imposed by section 10(2), so long as the order remained in force, even if the claimant was "boarded out" in accordance with section 21(1)(a): that is to say, was placed with foster parents. It is implicit in the opening words of section 21(1) that the local authority's duties included a duty to provide accommodation and maintenance for a child in their care, and it follows from section 21(1)(a) and (2) that a foster placement, and a placement with the child's family, were among the means by which that duty could be discharged.

7. Section 22 of the 1980 Act enabled the Secretary of State to make regulations making provision for the welfare of children boarded out by local authorities under section 21(1)(a), including provision "for securing that children shall not be boarded out in any household unless that household is for the time being approved by such local authority as may be prescribed by the regulations" (section 22(2)(b)), and provision "for securing that children boarded out under section 21(1)(a) of this Act, and the premises in which they are boarded out, will be supervised and inspected by a local authority and that the children will be removed from those premises if their welfare appears to require it" (section 22(2)(d)).

8. Turning to the Regulations, regulation 1 provided that the Regulations applied to the boarding of a child to live with foster parents in their dwelling as a member of their family. Regulation 4 required the local authority not to allow a child to remain boarded out with any foster parents if it appeared that the boarding-out was no longer in his best interests. Regulation 5 provided for the child to be removed from the foster parents forthwith if the visitor appointed under the Regulations to supervise his welfare considered that his health, safety or morals were endangered. Regulation 6 required the child to undergo a medical examination before being placed with foster parents, except in a case of emergency. Regulation 7 required the

local authority to arrange medical examinations of boarded-out children every six to 12 months, depending on the age of the child. Regulation 8 required adequate arrangements to be made for the child to receive medical and dental attention. Regulation 9 required visitors to make written reports about the children and houses they visited. Regulation 10 required the local authority to maintain case records in respect of every child boarded out by them. Regulation 11 required the local authority to maintain a register of foster parents and boarded-out children.

9. In relation to boarding-out arrangements expected to last for more than eight weeks, regulation 17 required that the foster home should be visited in advance, and a report obtained from the visitor as to its suitability. Regulation 19 required that, where possible, a child should be boarded out with foster parents who were of the same religious persuasion, or who gave an undertaking to bring the child up in that religious persuasion. Regulation 20 required the local authority to obtain an undertaking from the foster parents, stating (amongst other things) that they had received the child into their home as a member of their family, that they would allow the child to be medically examined at such times and places as the local authority might require, that they would inform the local authority immediately of any serious occurrence affecting the child, that they would at all times permit any person authorised by the local authority to see the child and to visit their home, and that they would allow the child to be removed from their home when so requested by any person authorised by the local authority. Regulation 21 required the local authority to ensure that a visitor saw the child and visited the foster parents' house within one month after the commencement of the placement, and thereafter as often as the welfare of the child required, but not less often than every one to three months, depending on the age of the child, the length of the placement, and any change of address. Regulation 22 required the local authority to ensure that reviews of the child's welfare, health, conduct and progress were carried out, by persons who did not usually act as visitors, within three months after the child was placed with any foster parents, and thereafter as often as was expedient in the particular case, but not less often than once in every six months.

10. It is apparent from the Regulations that, although the local authority did not exercise day-to-day control over the manner in which the foster parents cared for the claimant, they nevertheless had powers and duties of approval, inspection, supervision and removal without any parallel in ordinary family life.

Relevant practice

11. The evidence of social care experts was that children in care are placed in foster care wherever it is considered safe and appropriate to do so, since it is a fundamental principle of social work practice that children are best placed in a family environment. That principle had been established by the time the claimant

was in care. The process of becoming a foster carer involves extensive safeguarding and reference checks, assessment of potential to foster by a supervisory social worker, and attendance at pre-approval training. The process was broadly similar, although less highly developed, at the time when the claimant was in care. Foster carers were described in evidence led on behalf of the local authority as "home based professionals ... acting as a public parent in a private household".

12. According to the evidence, the local authority recruited individuals as prospective foster parents. A social worker employed as a substitute family care worker assessed and prepared them for placements, and supported them in their role as carers. Arrangements for specific placements reflected the legal status of the child (in particular, whether she was received into care voluntarily or was the subject of a care order), the purpose of the placement, the skills and experience of the foster parents in dealing with children who belonged to a particular age group or presented particular problems, and the circumstances of the child and her family.

13. The substitute family care worker dealt with the foster parents on a long term basis. She reviewed their training needs and provided or co-ordinated the necessary training. This might include specialised training: for example, the records relating to Mr and Mrs Allison indicate that they were to receive training prior to their designation as family foster group parents, while, somewhat ironically, Mr and Mrs Blakely received training in dealing with abused children.

14. The substitute family care worker also monitored placements, assessing how the foster parents were coping with the child or children in the placement, the impact the foster child was having on their own children, the difficulties they might be experiencing, and the support or information they might require. This involved visits to the foster family, which took place at least monthly, but might be more frequent if the need arose. There were also less frequent case reviews, which were typically chaired by a senior member of the local authority's social work department, and attended by the substitute family care worker, the child's social worker (whose focus was on the child, and whose involvement with the foster parents would last only as long as the child's placement with them), the foster parents, and members of the child's family.

15. The foster parents also attended planning meetings at the social work department, when the care arrangements for fostered children were discussed. A minute of such a meeting, involving Mr and Mrs Blakely, indicates that they were provided with diaries in which to record the behaviour, development and statements of children whom they were fostering. In the case of family group foster parents, such as Mr and Mrs Allison, there were also annual reviews attended by social work staff and the foster parents themselves.

16. The documents relating to Mr and Mrs Allison, and Mr and Mrs Blakely, for the period in question also indicate that it was the practice for a foster carer agreement between the foster family, the substitute family care worker and the child's social worker to be recorded in writing at the beginning of the placement, covering such matters as contact between the child and her family, visits by the child's social worker and activities during those visits, visits by the substitute family care worker, and case reviews. This was additional to the undertaking given in accordance with regulation 20 of the Regulations. In the case of Mr and Mrs Allison, a written agreement was also entered into between themselves and the local authority when they were given the status of family group foster parents, recording the number and age of the children to be placed with them, and their use as an emergency foster home for out of hours placements.

17. Foster care does not involve a complete break from the child's family. That is reflected in the fact that the fostering agreements contemplated contact between the child and her family. In the present case, it was envisaged that the claimant would return to the care of her mother. Consequently, she had contact with her mother during the foster placements, and spent a significant period of time between the foster placements living with her mother.

18. It appears from the evidence that, besides the matters specifically mentioned in the Regulations, there were other aspects of the life of a child in foster care which were decided by the local authority, reflecting the fact that it was the local authority, not the foster parents, which possessed parental powers in relation to the child. It was the local authority which agreed to medical treatment of the child, and which decided the level of contact between the child and her family. The local authority also decided whether or not the child could go on holiday, whether the child could have a passport, and whether the child could go on school trips or on overnight stays with friends. According to the evidence, if the foster parents needed child care because they were working, generally the social worker would make the arrangements because of the need to ensure that any substitute carer was suitable. Sometimes extended members of the foster family were "approved" to care for the child in the foster carer's absence.

19. A few matters, including the religion in which the child was brought up, remained under the control of the child's parents. Areas where either the foster parent or the social worker could become involved included attending parents' evenings at the child's school, making arrangements for contact with members of the child's family, and buying clothes and equipment for the child. The foster parents were expected to undertake the daily care of the child and to take the child to the dentist and the optician.

20. Foster parents received boarding-out allowances from the local authority. In the case of "family group foster homes", such as Mr and Mrs Allison provided, the allowances were paid at a scale which was higher than normal. Foster parents also received additional allowances or grants for such matters as taxi fares, holidays and childminding costs incurred in respect of the children. For example, Mr and Mrs Allison received payments to cover the cost of childminding when they took children on various visits and outings, and when they attended reviews. They also received equipment, such as beds and mattresses, when necessary.

The proceedings below

21. The trial judge, Males J, dealt with the issues of liability and limitation, leaving issues concerning causation and quantum of damages to be dealt with later if necessary: [2014] EWHC 4005 (QB); [2015] PTSR 653. In relation to limitation, the judge decided that the limitation period should be disapplied pursuant to section 33 of the Limitation Act 1980. In relation to liability, there was no case that the local authority had failed to exercise reasonable care in the selection of the foster parents or in the supervision and monitoring of the placements. The claimant's case was that the local authority was responsible in law for the tortious conduct of the foster parents, either on the basis of vicarious liability, or on the basis of a non-delegable duty of care. In a carefully reasoned judgment, the judge rejected both arguments.

22. In relation to vicarious liability, the judge considered the law as stated in Lord Phillips of Worth Matravers' judgment in *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 (the *Christian Brothers* case), and focused on the question whether the relationship between the local authority and the foster parents was akin to that between an employer and an employee. He concluded that it was not.

23. Considering the five features listed by Lord Phillips in para 35 of the *Christian Brothers* judgment, he accepted that the first and fourth features were present: the local authority were more likely to have the means to compensate a claimant and would have insurance, and by placing the child with the foster parents the local authority would have created the risk of abuse being committed by the foster parents. On the other hand, he considered that the remaining features were not satisfied. Treating the activity of the foster parents as the provision of family life, they did not in his view provide family life on behalf of the local authority, and their provision of family life was not part of the activity of the local authority. The foster parents were not, in his view, under the control of the local authority to any material degree. In agreement with the majority of the Supreme Court of Canada in *KLB v British Columbia* [2003] 2 SCR 403, he considered the lack of control to be decisive. In his view, the local authority not only did not have control over the foster parents, whether to direct what they did or how they did it, but it was essential to the whole

concept of foster parenting that the local authority should not have that control. The foster parents' role was to provide family life, bringing up the child as a member of their own family. That was only possible if a foster parent enjoyed independence from direction by the local authority and autonomy to determine how the child should be parented.

24. In relation to the case based on a non-delegable duty, the judge found that the five features identified by Lord Sumption in *Woodland v Essex County Council* [2013] UKSC 66; [2014] AC 537, para 23 were all present. First, the claimant was a child who was in care. Secondly, the relationship between the parties existed before the acts of abuse: it was created by a care order, and gave rise to statutory responsibilities. Thirdly, the claimant had no control over how the local authority chose to perform its obligations. Fourthly, the local authority's duty to care for the child was delegated to the foster parents: it was they who exercised the day to day care of the child. Fifthly, the foster parents' tortious conduct had been committed in the performance of the very function delegated to them. In that regard, the judge rejected a contention that a non-delegable duty could be breached only by negligence, and not by the commission of an intentional tort.

25. The judge, however, interpreted *Woodland* as imposing a separate *Caparo*-like criterion, to be considered as a second stage of the analysis, and which must also be satisfied (*Caparo Industries plc v Dickman* [1990] 2 AC 605). Applying that approach, he concluded that the imposition of a non-delegable duty on the local authority would not be fair, just and reasonable. He gave a number of reasons for reaching that conclusion, including the following. First, it would impose an unreasonable financial burden on local authorities providing a critical public service. Funds used to compensate the victims of historical abuse would not be available to meet current needs. There would also be a significant financial impact on local authorities in terms of recruitment practices, training requirements and supervision, all of which might become more intensive. Those factors could affect the capacity of local authorities to maintain the provision of foster care resources. Financial compensation was in any event an unsatisfactory form of recompense for abuse. Secondly, there was a real danger that the imposition of a non-delegable duty would discourage local authorities from placing children with foster parents, even where reasonable steps had been taken to ensure their suitability. Thirdly, it was inherent in foster care placements that the local authority did not have the same control over the day to day lives of the children as they had over children in residential homes. That was a benefit to the children in foster care and was necessary in order to give them the experience of family life which was the purpose of fostering. Fourthly, it would be difficult to draw a principled distinction between liability for abuse committed by foster parents and liability for abuse committed by others with whom a local authority decided to place a child, including her own parents.

26. An appeal against the judge's decision was dismissed by the Court of Appeal: [2015] EWCA Civ 1139; [2016] QB 739. In relation to vicarious liability, Tomlinson LJ considered that the local authority did not exercise sufficient control over the foster parents for vicarious liability to arise. The provision of family life could not be part of the activity of the local authority or of the enterprise upon which they were engaged, because inherent in it was a complete absence of external control over day to day family routine. The control retained by the local authority was at the "higher or macro level", as opposed to "micro-management of the day to day family environment" (para 15). It was therefore "irrelevant to the risk of abuse occurring during the unregulated course of life in the foster home" (ibid). Black LJ also rejected the imposition of vicarious liability, for similar reasons, and Burnett LJ agreed with both judgments on this issue.

27. The argument for a non-delegable duty was also rejected, although each of the members of the Court of Appeal gave different reasons for their conclusion. Tomlinson LJ noted that a non-delegable duty must relate to a function which the local authority had assumed a duty to perform. Fostering was not a function which the local authority could perform: it must be entrusted to others. By placing the child with foster parents, the local authority discharged rather than delegated their duty under section 21 of the 1980 Act to provide accommodation and maintenance for a child in their care (paras 23-24).

28. Burnett LJ, on the other hand, considered that the relevant duty was the duty of the local authority to care for the child: to promote her welfare and to protect her from harm, so far as reasonably practicable (para 30). If, applying the principles summarised in the *Christian Brothers* case, there was no vicarious liability for an assault upon a child in care, then in his view the common law should not impose liability via the route of a non-delegable duty (para 34). He also doubted whether a claim for breach of a non-delegable duty could arise in consequence of an intentional wrong (paras 36-37). In relation to these matters, he cited the decision of the High Court of Australia in *State of New South Wales v Lepore* [2003] HCA 4; 212 CLR 511. Furthermore, he considered that section 10 of the 1980 Act, in tying the powers and duties of the local authority to those of a parent or guardian, was incompatible with the imposition of a non-delegable duty of the kind contended for: parents who let their children stay away from home could not sensibly be fixed with liability for an assault on the basis of a non-delegable duty (para 41). In addition, he agreed with the judge's reasoning in relation to the *Caparo* rubric, treated as a separate issue.

29. Black LJ was in broad agreement with the judge. She considered that the local authority delegated to the foster parents the obligation to care for the claimant as a parent or guardian would, which was an integral part of the positive duty which they had assumed towards her (para 55). Like the judge, however, she also considered that it would not be fair, just or reasonable to impose a non-delegable duty on the local authority. In that regard, in addition to the resource implications of the

imposition of strict liability for torts committed by foster parents, she also emphasised the risk that local authorities would be reluctant to place children in their care with foster parents, or with their own parents, if a non-delegable duty were imposed (paras 62-63). Like Burnett LJ, she noted that the duties of local authorities were assimilated by section 10(2) of the 1980 Act to those of parents, and observed that parents were not subject to a non-delegable duty (para 64). Unlike Burnett LJ, she did not treat the absence of vicarious liability as bearing on the question whether there was a non-delegable duty, and she questioned the idea that a non-delegable duty could not be breached by deliberate wrongdoing (para 59).

The priority of the issues

30. Liability in tort normally depends on the breach of a duty owed by the defendant to the claimant. The only true exception to that principle under the common law is vicarious liability, where for reasons of policy the defendant is held liable for the breach of a duty owed to the claimant by a third party. There cannot, however, be any rationale for imposing vicarious liability on a defendant where he is directly liable for the harm caused by the third party. It therefore makes sense to consider the scope of the defendant's own duties before considering whether vicarious liability may exist.

Non-delegable duties of care

31. The expression "non-delegable duties of care" is commonly used to refer to duties not merely to take personal care in performing a given function but to ensure that care is taken. The expression thus refers to a higher standard of care than the ordinary duty of care. Duties involving this higher standard of care are described as non-delegable because they cannot be discharged merely by the exercise of reasonable care in the selection of a third party to whom the function in question is delegated.

32. Tortious liabilities based not on personal fault but on a duty to ensure that care is taken are exceptional, and have to be kept within reasonable limits. Yet there are some well-known examples: it is well established that employers have a duty to ensure that care is taken to provide their employees with a safe system of work, that hospitals have a duty to ensure that care is taken, in the treatment of their patients, to protect their health, and that schools have a duty to ensure, in the education of their pupils, that care is taken to protect their safety. The question which arises in the present case is whether local authorities have an analogous duty to ensure that care is taken, in the upbringing of children in their care, to protect their safety.

33. In the *Woodland* case, Lord Sumption identified two broad categories of case in which a non-delegable duty of care has been held to arise. The first was "a large, varied and anomalous class of cases in which the defendant employs an independent contractor to perform some function which is either inherently hazardous or liable to become so in the course of his work" (para 6). The present case does not fall within that category. The second broad category was said to comprise cases where the common law imposed a duty which had three critical characteristics. First, the duty arises because of an antecedent relationship between the defendant and the claimant. Secondly, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury. Thirdly, the duty is by virtue of that relationship personal to the defendant (para 7).

34. Lord Sumption went on to identify a number of characteristic features of cases in the second category. These included the assumption by the defendant of a positive duty to protect the claimant from harm, and the delegation by the defendant to a third party of some function which is an integral part of the positive duty which he has assumed towards the claimant (para 23). In such a situation, the defendant may delegate the performance of the function, but he remains under a duty to ensure that the function is performed and that, in doing so, care is taken to protect the claimant from harm. It follows, as Lord Sumption explained, that "in the absence of negligence of their own, for example in the selection of contractors, [the defendants] will not be liable for the negligence of independent contractors where on analysis their own duty is not to perform the relevant function but only to arrange for its performance" (para 25).

35. Lord Sumption described the five features he had identified as "criteria" (ibid). He stated that "a non-delegable duty of care should be imputed to schools [with which the case was concerned] only so far as it would be fair, just and reasonable to do so", but added that he did not "accept that any unreasonable burden would be cast on them by recognising the existence of a non-delegable duty on the criteria which I have summarised above" (ibid). Lady Hale agreed that "the principle [of personal liability for the breach of a non-delegable duty] will apply in the circumstances set out by Lord Sumption ... subject of course to the usual provisos that such judicial statements are not to be treated as if they were statutes and can never be set in stone" (para 38). She also agreed with Lord Sumption that "recognising the existence of a non-delegable duty in the circumstances described above would not cast an unreasonable burden on the service-providers" (para 40).

36. The five criteria set out by Lord Sumption were thus intended to identify circumstances in which the imposition of a non-delegable duty was fair, just and reasonable. It is important to bear in mind Lady Hale's cautionary observation that such judicial statements are not to be treated as if they were statutes, and can never be set in stone. Like other judicial statements, the criteria articulated by Lord

Sumption may need to be re-considered, and possibly refined, in particular contexts. That does not, however, mean that it is routinely necessary for the judge to determine what would be fair and just as a second stage of the analysis. As was made clear by this court in *Cox v Ministry of Justice* [2016] UKSC 10; [2016] AC 660, para 41, in relation to vicarious liability, having recourse to a separate inquiry into what is fair, just and reasonable is not only unnecessarily duplicative, but is also apt to give rise to uncertainty and inconsistency.

37. The critical question, in deciding whether the local authority were in breach of a non-delegable duty in the present case, is whether the function of providing the child with day-to-day care, in the course of which the abuse occurred, was one which the local authority were themselves under a duty to perform with care for the safety of the child, or was one which they were merely bound to arrange to have performed, subject to a duty to take care in making and supervising those arrangements.

38. Although Lord Sumption focused upon situations in which a non-delegable duty of care was deemed to have been assumed voluntarily, it is of course possible for the necessary relationship to be created by statute. It is a familiar aspect of the legislation governing safety at work, for example, that duties are laid on employers which they cannot escape by employing competent contractors. But everything turns on the particular statute. The point is illustrated by the decision of the Court of Appeal in *Myton v Woods* (1980) 79 LGR 28, where a claim was made against a local education authority for the negligence of a taxi firm employed by the authority to drive children to and from school. The authority had no statutory duty to transport children, but only to arrange and pay for it. The claim was therefore dismissed. Lord Denning MR said at p 33 that the authority was not liable for an independent contractor "except he delegates to the contractor the very duty which he himself has to fulfil". That decision was approved in the *Woodland* case. One could similarly ask in the present case whether the local authority had a statutory duty to provide the children with day-to-day care, or only to arrange, supervise and pay for it.

Discussion

39. An appropriate starting point is section 10 of the 1980 Act. As was explained earlier, section 10(1) requires a local authority to whose care a child is committed by a care order "to receive the child into their care and ... to keep him in their care while the order ... is in force". Section 10(2) provides that "a local authority shall, subject to the following provisions of this section, have the same powers and duties with respect to a person in their care by virtue of a care order ... as his parent or guardian would have apart from the order ...". None of the subsequent provisions of section 10 bears on the present issue.

40. Section 10 thus confers or imposes upon a local authority, in relation to a child who is in their care by virtue of a care order, the powers and duties which a parent or guardian would have by virtue of their relationship to a child of which they were the parent or guardian: that is to say, the powers and duties which they have by reason of their status. Those powers and duties are many and various. They include, for example, the power to consent to medical treatment on behalf of a child below the age of capacity. Perhaps most relevantly in the present context, they include the general duty to safeguard and promote the child's health, development and welfare, and the right to direct, control or guide the child's upbringing. Should these parental powers and duties be construed as imposing a tortious duty not merely to take care for the safety of the child, but to ensure that care is taken?

41. There is ample authority that the duty of a parent, or of a person exercising temporary care of a child in loco parentis, is a duty to take reasonable care. For example, in *Carmarthenshire County Council v Lewis* [1955] AC 549, concerned with a nursery teacher, Lord Reid stated at p 566:

> "There is no absolute duty; there is only a duty not to be negligent, and a mother is not negligent unless she fails to do something which a prudent or reasonable mother in her position would have been able to do and would have done."

More recently, in *Harris v Perry* [2008] EWCA Civ 907; [2009] 1 WLR 19, concerned with parents holding a birthday party attended by other people's children, the Court of Appeal held at para 19 that the relevant standard of care was that which a reasonably careful parent would show for her own children (see also *Surtees v Royal Borough of Kingston upon Thames* [1991] 2 FLR 559, concerned with a foster parent). On the other hand, there are no authorities suggesting that parents, or persons with analogous responsibilities, must not merely take personal care for their children's safety, but must ensure that reasonable care is taken by anyone else to whom the safety of the children may be entrusted.

42. There are good reasons for adopting that approach in a domestic setting. If parents both wish to work, they may have to place their child in a nursery, or employ a nanny. If they wish to maintain a social life, they may have to entrust their children to babysitters. Their children may stay with friends overnight, or with their grandparents in the holidays. If, notwithstanding the exercise of reasonable care by the parents, the law of tort were to hold them liable if their child were injured because of a lack of care on the part of the nanny or the babysitter, or if the child were abused by a friend or a grandparent, that would be liable to interfere with ordinary aspects of family life which are often in the best interests of children themselves.

43. Local authorities are in a different position from parents, or other individuals having temporary care and control of children, in a variety of ways. For example, as Lord Hutton observed in *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 587-588, a local authority employs trained staff to make decisions and to advise it (see also *Surtees* at pp 123-124 per Sir Nicolas Browne-Wilkinson V-C). That fact, however, forms part of the context in which the question whether reasonable care was taken must be answered: it does not entail that a different duty altogether should be imposed.

44. Although there are differences between the position of local authorities and that of parents, children in care have the same needs as other children. In particular, it may be in their best interests to spend time staying with their parents or grandparents, or with other relatives or friends. That is specifically permitted by section 21(2) of the 1980 Act, as explained earlier. Furthermore, in deciding whether to exercise their power under section 21(2), the local authority are required by section 18(1) to give first consideration to the need to safeguard and promote the welfare of the child throughout his childhood, and, so far as practicable, to ascertain the wishes and feelings of the child regarding the decision and give due consideration to them.

45. If, however, local authorities which reasonably decided that it was in the best interests of children in care to allow them to stay with their families or friends were to be held strictly liable for any want of due care on the part of those persons, the law of tort would risk creating a conflict between the local authority's duty towards the children under section 18(1) and their interests in avoiding exposure to such liability. Furthermore, since a non-delegable duty would render the local authority strictly liable for the tortious acts of the child's own parents or relatives, if the child was living with them following a decision reasonably taken under section 21(2), the effect of a care order, followed by the placement of the child with his or her family, would be a form of state insurance for the actions of the child's family members (and, indeed, their friends, relatives and babysitters, if the child were left with them).

46. Section 21 is also relevant in another respect. As explained earlier, section 21(1) requires the local authority to "discharge" their duty to provide accommodation and maintenance for a child in their care in whichever of the specified ways they think fit, "or by making such other arrangements as seem appropriate to the local authority". The specified ways include "boarding him out on such terms as to payment by the authority and otherwise as the authority may ... determine".

47. The implication of the word "discharge" is that the placement of the child constitutes the performance of the local authority's duty to provide accommodation and maintenance. It follows that the local authority do not delegate performance of

that duty to the persons with whom the child is placed. This is difficult to reconcile with the idea that, when the foster parents provide daily care to the child placed with them, they are performing a function which remains incumbent on the local authority. That is not to say that the local authority are absolved of all responsibility: on the contrary, they remain subject to numerous duties towards the child in their care, some of which will be considered shortly. Nevertheless, in the language used by Lord Sumption in *Woodland* (para 25), this suggests that the duty of the local authority is not to perform the function in the course of which the claimant was abused (namely, the provision of daily care), but rather to arrange for, and then monitor, its performance.

48. Section 22 is also relevant. As explained earlier, it enables the Secretary of State to make regulations imposing duties on local authorities in relation to the approval of households where children are boarded out, the inspection and supervision of the premises where they are boarded out, and the removal of the children from the premises if their welfare appears to require it. As McLachlin CJ observed in a similar context in the Canadian case of *KLB v British Columbia* at para 36, it might be thought that there would be no need to set out in regulations a catalogue of duties with respect to placement and supervision which are incumbent on the local authority, if they were in any event responsible for all the wrongs that might befall children in foster care. The implication of section 22 is rather that the continuing responsibility of the local authority for the care of the child, in accordance with section 10, is discharged in relation to the boarding-out of children by means of prior approval of the households in which they are placed, and subsequent inspection, supervision and removal if appropriate, in accordance with the relevant regulations. The objective of section 22, and of the regulations made under it, is to ensure that potential problems arising during a foster placement are avoided if possible by means of prior approval of the households involved, and that any problems subsequently arising are identified and addressed once they have become capable of observation by means of inspection and supervision. The statutory regime does not impose on the local authority any other responsibility for the day-to-day care of the child or for ensuring that no harm comes to the child in the course of that care.

49. For all these reasons, I conclude that the proposition that a local authority is under a duty to ensure that reasonable care is taken for the safety of children in care, while they are in the care and control of foster parents, is too broad, and that the responsibility with which it fixes local authorities is too demanding. I therefore reach the same conclusion as the Court of Appeal on this aspect of the case, although for somewhat different reasons.

50. In particular, I am unable to agree with Burnett LJ's view that if, applying the principles in the *Christian Brothers* case, there is no vicarious liability for an assault upon a child in care, then the common law should not impose liability via

the route of a non-delegable duty. That, with respect, is to conflate two distinct legal doctrines with different incidents and different rationales, and to misunderstand the relationship between them. As explained earlier, it is the imposition of vicarious liability which is implicitly premised on the absence of direct liability.

51. Nor am I able to agree that a non-delegable duty cannot be breached by a deliberate wrong: see, for example, *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, a bailment case which was treated as a case of non-delegable duty in *Woodland*, para 7. On Burnett LJ's approach, the local authority would seemingly be liable if the foster parents negligently enabled a third party to abuse the child, but not if they abused her themselves. That can hardly be right. The judgment of the Privy Council in another bailment case, *Port Swettenham Authority v T W Wu and Co* [1979] AC 580, 591, is instructive:

> "When, a bailee puts goods which have been bailed to him in the care of his servants for safe custody, there can be no doubt that the bailee is responsible if the goods are lost through any failure of those servants to take proper care of the goods ... *Cheshire v Bailey* [1905] 1 KB 237 laid down the startling proposition of law that a master who was under a duty to guard another's goods was liable if the servant he sent to perform the duty for him performed it so negligently as to enable thieves to steal the goods, but was not liable if that servant joined with the thieves in the very theft. This proposition is clearly contrary to principle and common sense, and to the law: *Morris v C W Martin and Sons Ltd* [1966] 1 QB 716,740. Their Lordships agree with the decision in *Morris v C W Martin and Sons Ltd* and consider that *Cheshire v Bailey* mis-stated the common law."

Vicarious liability

52. The question whether local authorities are vicariously liable for torts committed by foster parents against children placed with them while in care was previously considered by the Court of Appeal in *S v Walsall Metropolitan Borough Council* [1985] 1 WLR 1150. Oliver LJ, giving an ex tempore judgment with which Balcombe LJ agreed, treated the critical question as being whether the foster parents were acting as the agents of the local authority. He concluded that they were not: the statutory scheme was "entirely inconsistent with the notion that the foster parents are in any way the agents of the local authority in carrying out their duties" (p 1155). On that basis, the claim was rejected. The approach adopted by the court treated vicarious liability as confined to particular legal relationships, such as employment and agency. A more fine-grained approach has been adopted in more recent

authorities, as will shortly be explained. The decision does not, therefore, provide a satisfactory guide to the resolution of the issue.

Cox v Ministry of Justice

53. The general principles governing the imposition of vicarious liability were recently reviewed by this court in *Cox v Ministry of Justice*. As was said there, the scope of vicarious liability depends upon the answers to two questions. First, what sort of relationship has to exist between an individual and a defendant before the defendant can be made vicariously liable in tort for the conduct of that individual? Secondly, in what manner does the conduct of that individual have to be related to that relationship in order for vicarious liability to be imposed? The present appeal, like the case of *Cox*, is concerned only with the first of those questions. It is conceded that, if the relationship between the local authority and the foster parent is one which can give rise to vicarious liability, then the abuse of the child is a tort for which vicarious liability is imposed.

54. Under the doctrine of vicarious liability, the law holds a defendant liable for a tort committed by another person. Plainly, the doctrine can only apply where the relationship between the defendant and the tortfeasor has particular characteristics justifying the imposition of such liability. The classic example of such a relationship is that between employer and employee. As was explained in *Cox* and in the earlier case of the *Christian Brothers*, however, the doctrine can also apply where the relationship has certain characteristics similar to those found in employment, subject to there being a sufficient connection between that relationship and the commission of the tort in question.

55. In *Cox*, reference was made to five incidents of the relationship between employer and employee which had been identified by Lord Phillips in the *Christian Brothers* case as usually making it fair, just and reasonable to impose vicarious liability, and which could properly give rise to vicarious liability where other relationships had the same incidents and could therefore be treated as akin to employment. They were: (i) the employer is more likely to have the means to compensate the victim than 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 employer; (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; and (v) the employee will, to a greater or lesser degree, have been under the control of the employer.

56. As was indicated in *Cox*, the weight to be attached to these various factors will vary according to the context. It was said that the first was unlikely to be of independent significance in most cases, although there might be circumstances in which the absence or unavailability of insurance, or some other means of meeting a potential liability, might be a relevant consideration. As explained below, that is an aspect of the present case. In relation to the fifth factor, it was said at para 21:

> "The fifth of the factors - that the tortfeasor will, to a greater or lesser degree, have been under the control of the defendant - no longer has the significance that it was sometimes considered to have in the past, as Lord Phillips PSC immediately made clear. As he explained at para 36, the ability to direct how an individual did his work was sometimes regarded as an important test of the existence of a relationship of master and servant, and came to be treated at times as the test for the imposition of vicarious liability. But it is not realistic in modern life to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee; nor indeed was it in times gone by, if one thinks for example of the degree of control which the owner of a ship could have exercised over the master while the ship was at sea. Accordingly, as Lord Phillips PSC stated, the significance of control is that the defendant can direct what the tortfeasor does, not how he does it."

57. The three remaining factors were that (1) the tort will have been committed as a result of activity being taken by the tortfeasor on behalf of the defendant, (2) the tortfeasor's activity is likely to be part of the business activity of the defendant, and (3) the defendant, by employing the tortfeasor to carry on the activity, will have created the risk of the tort committed by the tortfeasor. It was explained in *Cox* that those factors are inter-related, and reflect the principal justifications which have been put forward in our law for the imposition of vicarious liability:

> "The first has been reflected historically in explanations of the vicarious liability of employers based on deemed authorisation or delegation, as for example in *Turberville v Stampe* (1697) 1 Ld Raym 264, 265, per Holt CJ and *Bartonshill Coal Co v McGuire* (1858) 3 Macq 300, 306, per Lord Chelmsford LC. The second, that the tortfeasor's activity is likely to be an integral part of the business activity of the defendant, has long been regarded as a justification for the imposition of vicarious liability on employers, on the basis that, since the employee's activities are undertaken as part of the activities of the employer and for its benefit, it is appropriate that the employer

> should bear the cost of harm wrongfully done by the employee within the field of activities assigned to him: see, for example, *Duncan v Findlater* (1839) 6 Cl & Fin 894, 909-910; MacL & Rob 911, 940, per Lord Brougham and *Broom v Morgan* [1953] 1 QB 597, 607-608, per Denning LJ ... The essential idea [of the third factor] is that the defendant should be liable for torts that may fairly be regarded as risks of his business activities, whether they are committed for the purpose of furthering those activities or not." (para 23)

As the references to authority in that passage demonstrate, the approach adopted in *Christian Brothers* and *Cox* does not depart from the normative roots of the doctrine of vicarious liability, but provides guidance to assist in discerning circumstances in which the doctrine applies.

58. The resultant position was summarised in *Cox* as follows:

> "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." (para 24)

As was explained, words such as "business" do not confine vicarious liability to activities of a commercial nature (para 30). That is apparent from *Cox* itself, which concerned a prison operated by the prison service, and from the *Christian Brothers* case, which concerned a religious organisation, as well as from many other cases concerned with hospitals and public authorities.

The five factors in the present case

59. Applying the approach adopted in *Cox* to the circumstances of the present case, and considering first the relationship between the activity of the foster parents and that of the local authority, the relevant activity of the local authority was the care of children who had been committed to their care. They were under a statutory duty to care for such children. In order to discharge that duty, insofar as it involved

the provision of accommodation, maintenance and daily care, they recruited, selected and trained persons who were willing to accommodate, maintain and look after the children in their homes as foster parents, and inspected their homes before any placement was made. They paid allowances to the foster parents in order to defray their expenses, and provided the foster parents with such equipment as might be necessary. They also provided in-service training. The foster parents were expected to carry out their fostering in cooperation with local authority social workers, with whom they had at least monthly meetings. The local authority involved the foster parents in their decision-making concerning the children, and required them to co-operate with arrangements for contact with the children's families. In the light of these circumstances, the foster parents with which the present case is concerned cannot be regarded as carrying on an independent business of their own: such a characterisation would fail to reflect many important aspects of the arrangements.

60. Although the picture presented is not without complexity, nevertheless when considered as a whole it points towards the conclusion that the foster parents provided care to the child as an integral part of the local authority's organisation of its child care services. If one stands back from the minutiae of daily life and considers the local authority's statutory responsibilities and the manner in which they were discharged, it is impossible to draw a sharp line between the activity of the local authority, who were responsible for the care of the child and the promotion of her welfare, and that of the foster parents, whom they recruited and trained, and with whom they placed the child, in order for her to receive care in the setting which they considered would best promote her welfare. In these circumstances, it can properly be said that the torts committed against the claimant were committed by the foster parents in the course of an activity carried on for the benefit of the local authority.

61. Considering next the issue of risk creation, the local authority's placement of children in their care with foster parents creates a relationship of authority and trust between the foster parents and the children, in circumstances where close control cannot be exercised by the local authority, and so renders the children particularly vulnerable to abuse. Although it is generally considered to be in the best interests of children in care that they should be placed in foster care, since most children benefit greatly from the experience of family life, it is relevant to the imposition of vicarious liability that a particular risk of abuse is inherent in that choice. That is because, if the public bodies responsible for decision-making in relation to children in care consider it advantageous to place them in foster care, notwithstanding the inherent risk that some children may be abused, it may be considered fair that they should compensate the unfortunate children for whom that risk materialises, particularly bearing in mind that the children are under the protection of the local authority and have no control over the decision regarding their placement. In that way, the burden

of a risk borne in the general interest is shared, rather than being borne solely by the victims.

62. So far as the issue of control is concerned, it was explained earlier that the local authority selected foster parents and inspected their homes prior to the placement of children with them. The local authority were required under the Regulations to arrange regular medical examinations of fostered children, to ensure that the children were regularly visited, to carry out regular reviews of their welfare, health, conduct and progress, and to remove them from the foster parents forthwith if the visitor considered that their health, safety or morals were endangered. It was also explained that foster parents had to agree that they would allow the children to be medically examined at such times and places as the local authority might require, that they would inform the local authority immediately of any serious occurrence affecting the children, that they would at all times permit any person authorised by the local authority to see the children and to visit their home, and that they would allow the children to be removed from their home when so requested by any person authorised by the local authority. It was explained that a number of aspects of the lives of children in foster care were decided by the local authority, reflecting the fact that it was the local authority, not the foster parents, which possessed parental powers in relation to the children. The arrangements made in practice for the monitoring of placements were described earlier. Accordingly, although the foster parents controlled the organisation and management of their household to the extent permitted by the relevant law and practice, and dealt with most aspects of the daily care of the children without immediate supervision, it would be mistaken to regard them as being in much the same position as ordinary parents. The local authority exercised powers of approval, inspection, supervision and removal without any parallel in ordinary family life. By virtue of those powers, the local authority exercised a significant degree of control over both what the foster parents did and how they did it, in order to ensure that the children's needs were met.

63. In relation to the remaining issue, that of the ability to satisfy an award of damages, vicarious liability is only of practical relevance in situations where (1) the principal tortfeasor cannot be found or is not worth suing, and (2) the person sought to be made vicariously liable is able to compensate the victim of the tort. Those conditions are satisfied in the present context. Most foster parents have insufficient means to be able to meet a substantial award of damages, and are unlikely to have (or to be able to obtain) insurance against their own propensity to criminal behaviour. The local authorities which engage them can more easily compensate the victims of injuries which are often serious and long-lasting.

64. Consideration of the factors discussed in *Cox* therefore points towards the imposition of vicarious liability. What, then, of the reasons given by the Court of Appeal for reaching the opposite conclusion (prior, it should be said, to the decision in *Cox*)? As was explained earlier, Tomlinson LJ rejected vicarious liability

principally on the basis that the local authority did not exercise sufficient control over the foster carers. The provision of family life "by definition" could not be an activity of a local authority or part of the enterprise on which it was engaged, since inherent in it was a complete absence of external control over day to day routine. The local authority's control was at the "higher or macro level", rather than "micro-management". Control at that level was irrelevant to the risk of abuse occurring. Black LJ similarly considered that the provision of the experience of family life through fostering precluded the degree of control required for the imposition of vicarious liability. Burnett LJ agreed with both judgments.

65. It is important not to overstate the extent to which external control was absent from the fostering with which this case is concerned, as explained earlier. The local authority controlled who the foster parents were, supervised their fostering, and controlled some aspects of day to day family life, such as holidays and medical treatment. More fundamentally, it is important not to exaggerate the extent to which control is necessary in order for the imposition of vicarious liability to be justified. The possibility that vicarious liability may arise in relation to the provision of elements of family life is consistent with such cases as *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 AC 215, where vicarious liability was imposed for the abuse of children by the warden of a school boarding house, and the Canadian case of *Bazley v Curry* [1999] 2 SCR 534, where it was imposed for abuse committed by a "father figure" employed to perform parental tasks at a children's home. It is not necessary for there to be micro-management, or any high degree of control, in order for vicarious liability to be imposed. There are countless cases where vicarious liability has been imposed for torts committed by professional persons who carry out their work without close supervision. The example was also given in *Cox* of a ship at sea in the age before modern communications, where the owner could exercise little control over the master employed by him. Recent examples of vicarious liability being imposed in the absence of micro-management include *E v English Province of Our Lady of Charity* [2013] QB 722, where the relationship between a Roman Catholic priest and his diocesan bishop was sufficient, and the *Christian Brothers* case, where liability was imposed on a religious association for a tort committed by one of its members while working for a third party.

66. The Court of Appeal's analysis, like that of the judge, was influenced by the reasoning of the majority of the Supreme Court of Canada in the case of *KLB v British Columbia.* That reasoning emphasised that the degree of control which could be exercised over foster parents was insufficient to prevent abuse from taking place, and that the imposition of vicarious liability would not result in the deterrence of such abuse. On the other hand, it was said, it might discourage the use of foster care in favour of residential care: an alternative which would be less effective in promoting the welfare of children. It is unfortunate that the Court of Appeal does not appear to have been referred to the case of *S v Attorney General* [2003] NZCA 149; [2003] 3 NZLR 450, where the New Zealand Court of Appeal unanimously

reached the opposite conclusion. Vicarious liability was imposed in circumstances similar to those of the present case, the view being taken that policy considerations supported its imposition.

67. The decision of the Canadian court in *KLB* reflects the view taken in that jurisdiction that the deterrence of tortious behaviour is one of the principal justifications for the imposition of vicarious liability: see *Bazley v Curry.* Although the decision in that case was endorsed by the House of Lords in *Lister v Hesley Hall*, their Lordships did not adopt the reasoning of the Canadian court: see at pp 230 (Lord Steyn), 237 (Lord Clyde), 238 (Lord Hutton), 242 (Lord Hobhouse of Woodborough), and 250 (Lord Millett). As explained earlier, a number of justifications for the imposition of vicarious liability have been advanced in the British case law, but deterrence has not been prominent among them (although it was advanced as a partial explanation by Pollock, *Essays in Jurisprudence and Ethics* (1882), p 130). It was not mentioned in either *Christian Brothers* or *Cox*. The most influential idea in modern times has been that it is just that an enterprise which takes the benefit of activities carried on by a person integrated into its organisation should also bear the cost of harm wrongfully caused by that person in the course of those activities.

68. The idea that the imposition of vicarious liability might discourage local authorities from placing children in care with foster parents, and encourage them instead to place them in residential homes, is difficult to accept, even if one grants the premise that local authorities might be deterred by financial considerations from performing their statutory duty to promote the welfare of the children in their care. Local authorities are vicariously liable for the abuse of children by those whom they employ in residential care homes. There could therefore be an economic advantage, from the perspective of local authorities or their insurers, in placing children in local authority residential care rather than in foster homes, only if, assuming all other costs were equal, the incidence of abuse was lower in the former than in the latter. No evidence has been produced as to whether that is the position. Furthermore, other financial considerations would have to be taken into account: for example, one would expect the cost of care in a residential home to be much higher than the relatively modest payments to foster parents which were mentioned in this case. That would also be the answer if it were suggested that the imposition of vicarious liability could incentivise local authorities to place children in residential homes provided by private operators. Not only is private residential care more expensive than foster care, but the operators of residential care homes might be expected to pass on to the local authorities the costs arising from their own vicarious liability.

69. If, on the other hand, there is substance in the floodgates arguments advanced on behalf of the local authority - if, in other words, there has been such a widespread problem of child abuse by foster parents that the imposition of vicarious liability would have major financial and other consequences - then there is every reason why

the law should expose how this has occurred. It may be - although this again is empirically untested - that such exposure, and the risk of liability, might encourage more adequate vetting and supervision. It is all very well to point to the cost of such precautions, and to the cost of compensating the victims, and to complain that this will divert the resources of local authorities from other channels. That is a point which might be made in relation to many claims against public bodies, including claims against local authorities arising from the abuse of children in residential homes.

70. As the New Zealand Court of Appeal pointed out in *S v Attorney General* at paras 71-72, there is also a considerable cost to society if appropriate mechanisms are not put in place to protect vulnerable children. As they noted, the victims of abuse commonly experience a range of long-term emotional and behavioural problems, are disproportionately represented both in the criminal justice system and in users of mental health services, often need to receive state benefits because they are unable to take up employment, and are often entitled to compensation from public funds under the criminal injuries compensation scheme. More fundamentally, the problem with the resources argument is that, if it is accepted, the greater the problem, the less likely there is to be a remedy.

71. There remain the concerns raised by Lord Hughes. The first is that the imposition of vicarious liability for the torts committed by the foster parents in the present case would logically entail vicarious liability for torts committed at the present time by parents and other family members with whom a child is placed. It is important to emphasise that the decision that vicarious liability should be imposed in the present case is based on a close analysis of the legislation and practice which were in force at the relevant time, and a balancing of the relevant factors arising from that analysis, some of which point away from vicarious liability, but the preponderance of which support its imposition. Applying the same approach, vicarious liability would not have been imposed if the abuse had been perpetrated by the child's parents, if the child had been placed with them, since the parents would not have stood in a relationship with the local authority of the kind described in *Cox*: even if their care of the child might be described as having been approved by the local authority, and was subject to monitoring and might be terminated, nevertheless they would not have been recruited, selected or trained by the local authority so as to enable it to discharge its child care functions. They would have been carrying on an activity (raising their own child) which was much more clearly distinguishable from, and independent of, the child care services carried on by the local authority than the care of unrelated children by foster parents recruited for that purpose.

72. It would not be appropriate in this appeal to address the situation under the law and practice of the present day, on which the court has not been addressed, and which would also require a detailed analysis. It is sufficient to say that, for the

reasons explained by Lord Hughes, the court would not be likely to be readily persuaded that the imposition on a local authority of vicarious liability for torts committed by parents, or perhaps other family members, was justified.

73. The other concern raised by Lord Hughes is that, in relation to claims of negligence, it is undesirable that the courts should impose unduly exacting standards in the context of family life. Lord Hughes refers in that regard to observations made by Sir Nicolas Browne-Wilkinson V-C in *Surtees v Kingston-on-Thames Borough Council* at p 583, cited with approval by Lord Hutton in *Barrett v Enfield Borough Council*. The case of *Surtees* itself concerned alleged negligence on the part of a foster parent. The Vice-Chancellor's observations in that case would be equally relevant in a case where a local authority was alleged to be vicariously liable for negligence on the part of a foster parent: the local authority can only be vicariously liable in such a case if, in the first place, the foster parent has herself been negligent. Nothing in the present judgment diminishes the force of the Vice-Chancellor's observations in *Surtees* (even if the decision in that case might not be considered equally persuasive).

Conclusion

74. For these reasons I would allow the appeal, and hold that the local authority are vicariously liable for the torts committed by the foster parents in this case.

LORD HUGHES: (dissenting)

75. I respectfully agree with the judgment of Lord Reed as to the possibility of the local authority being under a non-delegable duty imposing liability in a case such as this. Liability under a non-delegable duty is, in effect, a liability to guarantee that others provide all reasonable care and, it may well follow, abstain from deliberate tortious behaviour. A local authority, in relation to children whom it is looking after, is put by statute into a position analogous to that of a parent. A parent does not owe to his or her children an obligation to guarantee that others whom he may ask to help in the management or care of the children will not be careless or deliberately abusive. Nor does a local authority.

76. I have found the debate about vicarious liability a good deal more difficult. It is plain from recent cases, from *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56 (the *Christian Brothers* case) to *Cox v Ministry of Justice* [2016] UKSC 10 that the principles which have long recognised vicarious liability in consequence of employment can apply equally to other relationships. Adopting the helpful analysis of Lord Reed in *Cox*, it follows that those principles can apply

to relationships which not only are not employment but which it is difficult to describe as "akin to employment". Although it is not the only factor, the essential minimum for vicarious liability is that the tortfeasor is acting as an integral part of the defendant's enterprise, which need not only be a commercial enterprise: see para 24 of *Cox*. So the question whether vicarious liability should attach to the local authority in relation to the acts and omissions of foster parents is not wholly answered by the fact that they are clearly not employees and nor can they sensibly be described as akin to employees; they look, if the business model is to be used, a great deal more like independent contractors, carefully selected and supervised as many a panel of such contractors is.

77. Lord Phillips's five policy factors or incidents (*Christian Brothers* paras 35 and 47) were derived by him from the primary model of vicarious liability, namely employment. As this court held in *Cox* (at paras 41 and 42), if these incidents exist, it will usually not be necessary to embark on a separate analysis of whether it is fair, just and reasonable to impose vicarious liability, but the five factors cannot be applied mechanically. An overall view of the justice, fairness and reasonableness of imposing vicarious liability may still be necessary. In the present case, the third factor (business activity) does not apply. The first (deep pockets or insurance), as Lord Reed explained in *Cox* at para 20, cannot by itself be a principled ground for vicarious liability and tends to be circular. The fourth (creation of risk) will in practice apply to virtually all situations in which A asks or authorises B to deal in some manner with C. The principally relevant factors here would seem to be factors 2 (integration), and 5 (control).

78. If one focuses on those factors, it is certainly possible, and maybe initially tempting, to conclude that they point towards vicarious liability. There can be no doubt that foster parents undertake their care of children as part of a scheme administered by the local authority. Some important decisions remain ones which the local authority itself takes. There is careful pre-authorisation and continuing monitoring. National standards have been promulgated by the Department for Education, dealing with matters as disparate as records to be kept of medical treatment, the desirability of separate bedrooms for each child over three years old unless that is not practicable, and the principle that children should be permitted to take part in leisure activities as a reasonable parent would allow and (nowadays) that they should be permitted school trips, holidays and overnight stays with friends at the discretion of the foster parents: *Fostering Services; National Minimum Standards* (DfE 2011) 6.11, 10.6, 7.5 and 7.7. The authority can remove the child at any time. As Lord Reed explained in *Cox*, the minutiae of micro-managerial control have always been absent from the employment of specialists without removing vicarious liability. So the fact that the essence of fostering is that the foster parents bring up the children as integrated members of their own family, without managerial instructions as to how the family is to be organised, who has responsibility for what, or how relationships are to be allowed to develop is not by itself fatal to the

imposition of vicarious liability, although it tends to point away from it. There is also considerable force at first sight in the proposition that if the authority would be vicariously liable for a tort committed against the child by its employee in a children's home, it seems fair for the same to apply to a tort committed by a foster parent. However, when one looks in greater detail at the legal and practical shape of fostering, the position becomes a good deal less clear.

79. Although the present case arises in the context of the regime under the Children and Young Persons Act 1969, the Child Care Act 1980 and the 1955 Boarding Out Regulations, it is instructive to consider also the present regime. The latter does not alter the fundamental nature of fostering, but it does make explicit some things which were matters of practice in earlier times, and it illustrates where vicarious liability would take the law.

80. There is, and always has been in modern times, a spectrum of situations in which the children's services of a local authority may concern themselves with the welfare of children and families in their area, and in particular with where the children should live. First, if a family is in difficulty, the authority's children's social workers will offer advice and assistance, and sometimes may give financial help. Such advice and assistance may well result in children living for long or short periods with other members of the extended family or with friends. The local authority is not formally accommodating them, but it may broker the arrangement and will typically monitor it carefully; sometimes it may be clear that if such an arrangement is not made, or does not work satisfactorily, the authority will consider invoking its formal powers. Next, in other situations, the local authority may accept responsibility for accommodating the child with the voluntary (if sometimes reluctant) agreement of the parent(s). Thirdly, the authority is under an obligation under section 20 of the Children Act 1989 to provide accommodation for any child in its area who is in need, as there defined, chiefly where the family is unable to provide suitable accommodation or care. Fourthly, if satisfied that it is the only way to safeguard the child's welfare and if the statutory test of risk of significant harm is met (section 31), the local authority may seek a care order from the court, which has the effect of vesting it with parental responsibility. There are other routes also by which children may be accommodated by the authority, for example where the police ask it to take children who have been removed from where they were found, or who have been arrested.

81. Children in each of the second, third and fourth situations are known, now, in the legislation as "looked after children": section 22 Children Act 1989. The statute does not distinguish between those who are in compulsory care and those who are voluntarily accommodated when it deals with **how** they are to be accommodated. Section 22C provides for all of them. It identifies a category of potential providers of accommodation who are relatives, friends, and so on; such people are now conveniently referred to as "connected persons". In all cases, the

combined effect of 22C(2) to (7) is that first priority is given to the child being placed, if it is consistent with his welfare and practicable, with a parent or person to whom residence had been given by a family court. Failing that, accommodation may be provided by way of (1) fostering by a connected person who is a local authority foster carer, (2) fostering by a local authority foster parent who is not a connected person, (3) a children's home or (4) some other placement within Regulations made under the Act.

82. The expression "Local authority foster parent", as used in both the statute and Regulations made under it, means a foster parent authorised as such under regulations made under the Act: section 105. The approval of foster carers is governed by regulations, currently the Fostering Services (England) Regulations 2011 (SI 2011/581) ("The Fostering Services Regulations"). It may be accomplished either by local authorities or by registered Fostering Agencies. Approval is normally given for a stated number of children. Although at the time of the events giving rise to the present case, one of the foster homes was a "family group home", where up to 13 or 14 children were living at a time, nowadays the ordinary limit on fostering is three children at a time, unless a larger group of siblings needs to stay together: Children Act 1989, Schedule 7.

83. In selecting the placement, the local authority is required to give priority, if possible, to accommodation with connected persons. That framework reflects a well-established tenet of child support work that where it is not contra-indicated, a child is better cared for in his or her own family than by strangers.

84. The way that this is in practice effected is for placements to be made within the family where possible. As the foregoing summary of the Act makes clear, such placements still require the approval as "Local authority foster parents" of connected persons unless they are either parents, or persons with parental responsibility, or beneficiaries of a court residence order. That is confirmed by the Regulations made under the Act, the Care Planning Placement and Care Review Regulations 2010 (SI 2010/959) ("the Care Planning etc Regulations"), which, however, provide by regulation 25 for temporary authorisation of connected persons for a limited period pending approval as local authority fosterers. Once such in-family placements are with approved local authority connected foster parents, the same raft of regulations applies to them as to placements with the kind of foster parents who are willing to take any children whom the authority may wish to place with them. The supervision and monitoring which must be undertaken by the local authority is the same. The Authority must in all such cases, as in others, prepare a care plan under regulation 4 of the Care Planning etc Regulations. There must be the same Independent Reviewing Officer, specific to each placement, as required by section 25A Children Act. The Authority pays allowances to connected person foster parents, who are entitled to be paid at the same rates as other foster parents: see *R (X) v London*

Borough of Tower Hamlets [2013] EWCA 504 and *Fostering Services; National Minimum Standards* (DfE 2011) sections 28.7 and 30.10.

85. The practice of placing children with either parents, or with connected persons, is in no sense new. It has existed for many years. As long ago as 1955, the Boarding Out of Children Regulations of that year recognised the practice in regulation 2 which (then) provided that only a husband and wife, or a sole woman, could be foster parents, but excepted the case of a grandfather, uncle or older brother of the child being fostered. The same regime for supervision, medical examination, reports and termination of placement applied to such non-parental family placements as to any other fostering. Later, at the time of the commencement of the Children Act 1989, complementary regulations were made for placements with parents or those with parental responsibility or residence orders on the one hand (the Placement of Children with Parents Regulations 1991 (SI 1991/893), and, on the other hand, for all other placements including with connected persons other than that group (the Foster Placement (Children) Regulations 1991 (SI 1991/910). The former required approval at a higher level within the local authority, but the supervision and termination regime was very similar. The latter applied an identical regime to placements with connected persons as to placements with strangers.

86. In order to preserve the aim of enabling children to live where possible with connected persons, there has grown up an extensive practice of approval of what are known as "Friends and Family" carers: see Department for Education Guidance *Family and Friends Care; Statutory Guidance for Local Authorities* (2010). Such approval may be, and commonly is, on terms which are specific to the particular children in question. *Family and Friends Care* makes it clear at para 5.16 that approval can be limited to suitability to care for the particular connected children and that there need be no consideration of qualification to care for looked after children generally. Separate treatment for family placements is recognised by the Regulations, as well as by the DfE guidance. The Fostering Services Regulations by regulation 26(8) specifically relax the normal statutory qualifications for approval of foster carers in the case of relatives who are thus approved for particular children rather than generally; they may, at the discretion of the authority, be approved notwithstanding specified convictions or cautions, either of themselves or members of their households, which would otherwise be a bar under regulations 26(5) and (7). As mentioned above, the Care Planning Regulations by regulations 24 and 25 permit temporary placements with connected persons who are not yet approved foster parents. The *Fostering Services; Minimum Standards* provide at section 20.2 for a different standard of training and development for family and friends fosterers, and at section 30 for the special circumstances of such fosterers. Ofsted's report *National Statistics Fostering in England 2015-2016* (February 2017) suggests that around 5,000 friends and family households were approved at that time, representing about 10-13% of the total.

87. It seems to me to follow that if vicarious liability applies to "ordinary" foster parents, on the basis that they are doing the local authority's business, then it must apply also to family and friends placements with connected persons. What of placements with parents? These too may be in the interests of the children, and even after a care order has been made. If they are, it is desirable that they are encouraged, as at present consideration of them is encouraged. It would, however, be artificial in the extreme to say of such placements that the parent's care was given on behalf of the local authority, or that it was integrated into the caring systems of the authority. Nor would it be fair, just or reasonable, if there were to be behaviour by the parent which amounted to a tort, to impose vicarious liability for that behaviour on the local authority which exercised all due care in making the placement and did so in pursuit of what are recognised to be sound principles of child care. It might in theory be possible to distinguish parents on the basis that they do not have to be approved foster parents and are thus not part of the local authority's "enterprise", but it is not easy to see how they differ in practice from grandparents or from aunts and uncles or close friends who fulfil the same role but have to be approved as foster parents, on limited terms, in order to do so. The reality is that any member of the extended family, or close friend, who undertakes the care of children in need, is doing so in the interests of the family, not as part of a local authority enterprise. What the local authority does, in all cases, whether involving family and friends or strangers, is to take responsibility for making decisions about where the children shall live, and then monitoring the progress with a view to changing the arrangements if they do not benefit the children.

88. It seems to me that this is much the more realistic way of looking at the functions of the local authority, and the relationship between it and foster parents, of whichever type. The detailed controls which the authority exercises, and which are apt at first sight to suggest analogy to employment, are in reality decisions about where the children shall live. These are onerous decisions about young lives, and are properly surrounded by detailed regulations. But once the decision to place has been made, the care of the children is in practice committed to the foster parents. The daily lives of the children are not thereafter managed by the authority, as they are if they are accommodated in a Children's Home. Subject to specific rules (such as a bar on corporal punishment), the practice of the foster parents in relation to their own and the fostered children is for them. The foster carers do not do what the authority would otherwise do for itself; they do something different, by providing an upbringing as part of a family. The children live in a family; a family life is not consistent with the kind of organisation which the enterprise test of vicarious liability contemplates. The children are in reality committed to independent carers, as they also are, although in a different manner, if the authority places the children in a specialist home run by a different authority or by a charity, as may often happen where children have special needs. The authority retains the right, and the responsibility, in all cases including that of children placed in a specialist children's home, to remove the child if the placement is no longer the best for his welfare. In order to exercise that power, the authority monitors progress by way of visits, it

expects reports, and it provides a social worker for the child. Meanwhile, the authority retains the right, in the case of children in care at least, to make major medical decisions if the need arises. But none of that really means, in practice, that the authority is bringing the child up, as it is if the accommodation is one of its own children's homes. This is essentially the reasoning which was adopted by the Supreme Court of Canada in *KLB v British Columbia* [2003] 2 SCR 403 when confronting the same issue as now faces this court and in concluding that vicarious liability does not attach to the Government for the acts or omissions of foster parents. It seems to me both principled and realistic.

89. In the Court of Appeal, Black LJ, as she then was, dealt almost entirely with the possibility of non-delegable duty applying to the local authority. In that context, she expressed the fear that such a duty, if recognised, would be apt to inhibit the generally laudable practice of family placements. I agree, but the same is also likely to be true of vicarious liability. It is not impossible that if such liability were to exist, insurers would insist on additional safeguards in relation to family placements, which would discourage their being made. With or without that factor, the liability is likely to make placement panels more cautious. Almost by definition, family placements are likely to carry a somewhat greater risk of failure - and of tortious wrongdoing - than safer placements with foster parents who have greater independence and greater experience of bringing up other people's children. But the greater safety and lesser mutual involvement of unconnected placements is bought at the expense of sacrificing family trust and loyalties, and of not allowing the natural affection which comes with them to flourish. Family placements are by no means universally the best answer, but they are plainly recognised by those experienced in the care of children as desirable when not contra-indicated. It is not in the interests of children or families generally, nor of the society to which the children when grown up will belong, that those children should be made any less likely to be permitted such placements.

90. The present case arises in the context of deliberate wrongdoing or abuse. If, however, the placement of children with foster parents is to be attended by vicarious liability, it will not only or even chiefly be this kind of fortunately relatively rare behaviour which will generate liability on the part of the local authority. It is more likely to be generated by complaints of acts or omissions said to have been negligent. Since the limitation period does not run during a child's minority, such claims will be possible many years after the event on which they rely. Such claims are theoretically possible, of course, within any natural family, but they are not made, nor is it generally in the interests of family unity that they should be. This principle was recognised by Sir Nicolas Browne-Wilkinson in *Surtees v Kingston-on-Thames Borough Council* [1991] 2 FLR 559, 583:

> "I further agree with Stocker LJ that the court should be wary in its approach to holding parents in breach of a duty of care

> owed to their children. It is accepted that the duty owed by Mr and Mrs H, as foster parents, to the plaintiff was exactly the same as that owed by the ordinary parent to his or her own children. There are very real public policy considerations to be taken into account if the conflicts inherent in legal proceedings are to be brought into family relationships."

That passage was approved by Lord Hutton in *Barrett v Enfield Borough Council* [2001] 2 AC 550, 587 in distinguishing the case of a local authority if it was negligent in the exercise of its statutory powers in relation to children. It is no doubt true that one consequence of this principle is that the law does not impose exacting standards in family situations, and that this caution will be reflected in cases where vicarious liability is relied upon. But it is an additional indication against the imposition of vicarious liability that it is likely to result the litigation of family activity which it is undesirable should be ventilated in the courts.

91. Vicarious liability is strict liability, imposed on a party which has been in no sense at fault. It is necessary, and fair and just, when it applies to fix liability on someone who undertakes an activity, especially a commercial activity, by getting someone else integrated into his organisation to do it for him. Employment is the classic example, but other situations may be analogous. But the extension of strict liability needs careful justification. Once one examines the nature of fostering, its extension to that activity does not seem to me to be either called for or justified, but, rather, fraught with difficulty and contra-indicated. Accordingly, I would uphold the decision of the Court of Appeal and dismiss this appeal.