

Compass Chambers



Vicarious Liability- The Law, Recent Cases and Implications

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2 June 2023



The Law

- *Lister v Hesley Hall* [2002] 1 AC 215

Sets up modern law for VL-what is VL, what is not? How to know?

Facts: Warden, pastoral duties; abuse of children.

Common sense: outwith scope of employment!

Held by HL: Was VL. Employer can do nothing wrong but still be held liable.

Close connection test- of greater use to claimants.

Consider: scope of employment; time and place of acts; opportunity; connection.

Shows: Employer may not have done anything wrong there is still imposition of liability



The Law

The Catholic Child Welfare Society v Various and the Institute of the Brothers of the Christian Schools and others [2012] UKSC 56

Facts: Alleged sex abuse by headmaster and staff.

Held: Was VL. Used the 'close connection' test.

Relationship was 'akin to employment' in absence of employment contract.

2 stage test

1. is the relationship capable of giving rise to VL?

2. was there is a sufficiently close connection between the acts and the relationship?

Q: is there a sufficiently close connection- is wrongful conduct 'fairly and properly to be regarded as being by the wrongdoer while acting in the ordinary course of the firm's business or employee's employment?



The Law

Lord Philips: “the law of vicarious liability was on the move.”

Q: is the relationship capable of giving rise to VL?

5 features for vicarious liability:

- 1- the employer is more likely to have means to compensate
- 2- tort committed as result of activity being taken by the employee on behalf of the employer
- 3- activity likely to be ‘part of some business activity’ of employer
- 4- employer will have created the risk of the tort being committed
- 5- employee will have been under the control to employer



The Law

- *Cox v Ministry of Justice* [2016] AC 660

Facts: Manager injured by prisoner in prison kitchen. Prisoner paid small wage. Wasn't employee. Dropped bag of rice on back!

Q: was MOJ VL for prisoner's negligence?

Could relationship between MOJ and prisoner = VL?

Sufficiently close connection between that relationship and tort?

Held: was VL. Sufficiently close connection.

Lord Reed commented on & applied Lord Philip's famous 5.



The Law

- *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677

Facts: Heated exchange about USB printing! Violent assault on customer by garage employee.

Q: was there a sufficiently close connection between employee's job and assault?

Held: Was VL. The garage owner was held liable for an assault committed by a member of staff

Liability sat with employer regardless of motive of assault.

Employee was going about the business of his employer (albeit wrongly).

Was close connection between his employment and the assault.



The Law

- *Barclays Bank Plc v Various Claimants* [2020] UKSC 13

Facts: 126 claimants sought damages for sexual assaults between 1968 and 1984; independent contractor (GP); no retainer paid; medical examinations at his home. GP dead. BB was only possible recourse for claimants.

Held: 1st instance in 2017 & appeal: was VL. Had looked at Philip's famous 5.

SC Q: is BB vicariously liable for sexual assaults?

Lady Hale: have to get 'under the skin of the relationship'.

If relationship was analogous to employee/employer relationship = VL.

Held: No VL. Relationship with BB not close to employment. Fact dependent.



The Law

- *Wm Morrison Supermarkets plc v Various Claimants v Wm Morrison Supermarkets plc* [2020] AC 989

Facts: internal auditor was disgruntled employee. White powder business! Unlawfully copied data; uploaded onto public server; intentional harm his employer.

Held: No VL. Courts more open to employee ‘on a frolic of his/her own’.

Was connection between what auditor was employed to do and the wrongful conduct BUT... he was not furthering his employer’s interests.

Each case must be judged on its own facts.



Recent decisions

- *Blackpool Football Club Limited v DSN* [2021] EWCA

Facts: sexual abuse of 13 year old by volunteer scout during a tour abroad.

Held: at First Instance, was VL. Applied 2 stage test. 1- relationship akin to employment; and 2- circs of abuse were closely connected.

Judge said sufficient connection between scout's relationship with club and the abuse.

Appeal: Overturned. No VL.

There needed to be more than a strong or close connection. Needs to be measure of control.

There had to be some active involvement in placing the abuser in position.

So sufficient connection between religious order and member of that order but NOT sufficient connection between football club and a football scout!



Recent decisions

- *Armes v Nottinghamshire County Council* [2018] AC 355

Facts: child placed by local authority. Physical and sexual abuse by foster parent.

Court of Appeal: No VL. Insufficient control by LA over daily care of foster children.

Supreme Court: Was VL. Famous 5 again!

Not necessary for high degree of control for VL to be applied.

Compare with:

DJ v Barnsley MBC [2021] 1 WLUK 632

Facts: abuse carried out by boy by his uncle.

Ad hoc foster parenting; no commercial arrangement.

Held: No VL. Relationship was more akin to parenthood than to employment.





Recent decisions

- *MXX v A Secondary School* [2022] EWHC 2207

Facts: 13 year old girl abused by 18 year old college student; student on short work experience placement in PE department; induction at school; compliance with school guidelines re- conduct.

Pled guilty to sexual assault at criminal trial in 2015.

Work placement: Feb. Sexually explicit messages via media contact: Aug.

Abuse outwith school, no connection to school activity.

Was school liable? Apply relevant tests.

Held: no VL. Was insufficient connection between the relationship and the wrongful conduct.



Recent decisions

- *C & S v Norman Shaw & Live Active Leisure Ltd* [2023] CSOH 11

Facts: 2 defenders sued (i) perpetrator of abuse (direct V) and (ii) his employer (VL)

Lord Brailsford: was employer liable for Shaw's abuse?

Applied 2 stage test:

- (i) Did the second defender employ the first defender?
- (ii) Sufficiently close connection between abuse and employment?

Held: connection insufficiently close = no VL.



Recent decisions

- *X v Y & Ors* [2023] CSOH 17

Facts: damages action for £120k brought by legal practitioner for 4 occasions of alleged assaults by Sheriff.

Debate argument: is the Crown VL for alleged acts of Sheriff?

Submission: sexual assault has nothing to do with shrieval function. 2 stages:

Qs: (i) relationship between Crown and Sheriff akin to employment?

(ii) Sufficiently close connection between conduct alleged and that relationship?

Held: (i) and (ii) P not bound to fail. There was relevant case for P on VL for 2 incidents. MAY be VL. PBA to be fixed.

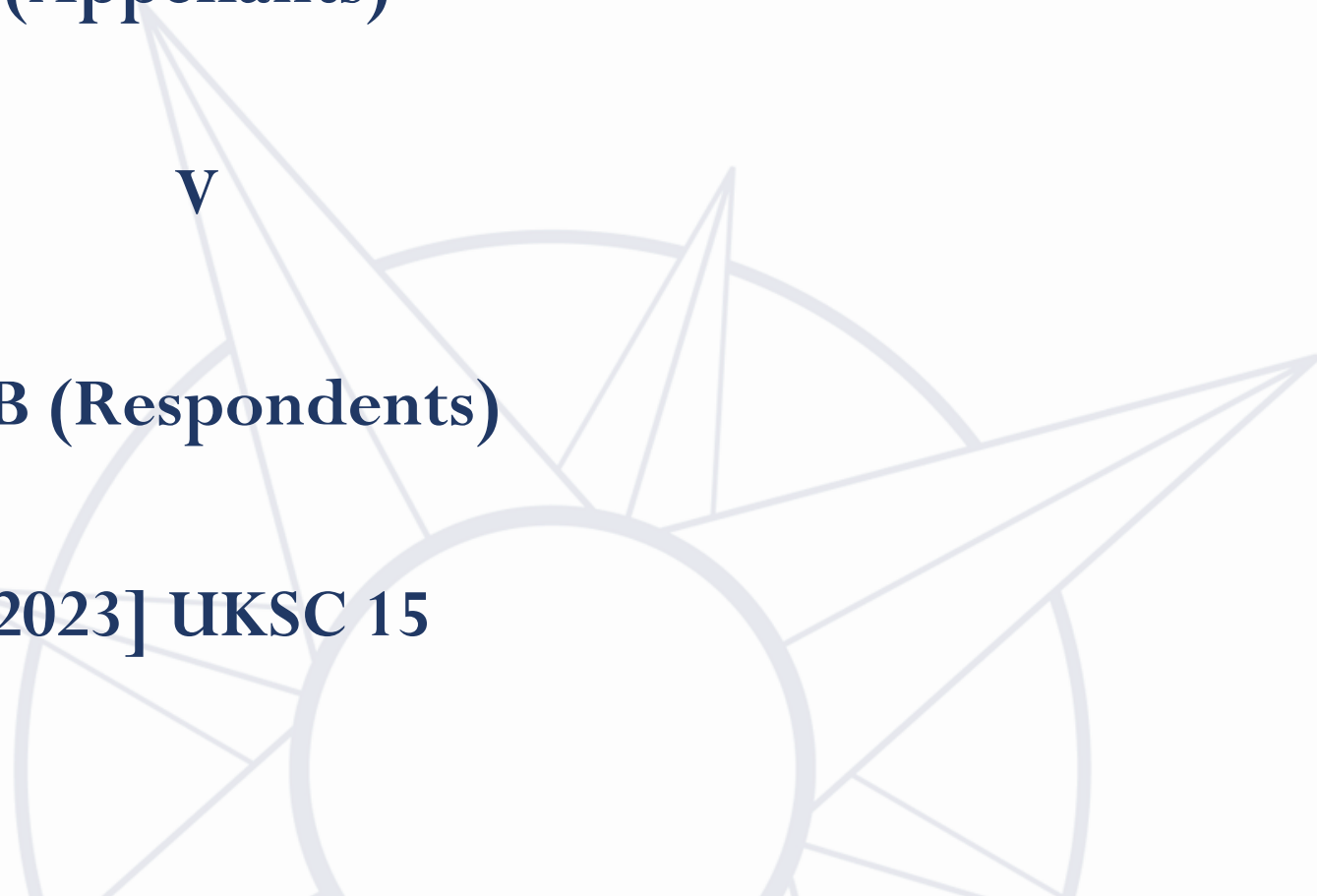


**Trustees of the Barry Congregation of Jehovah's Witnesses
(Appellants)**

v

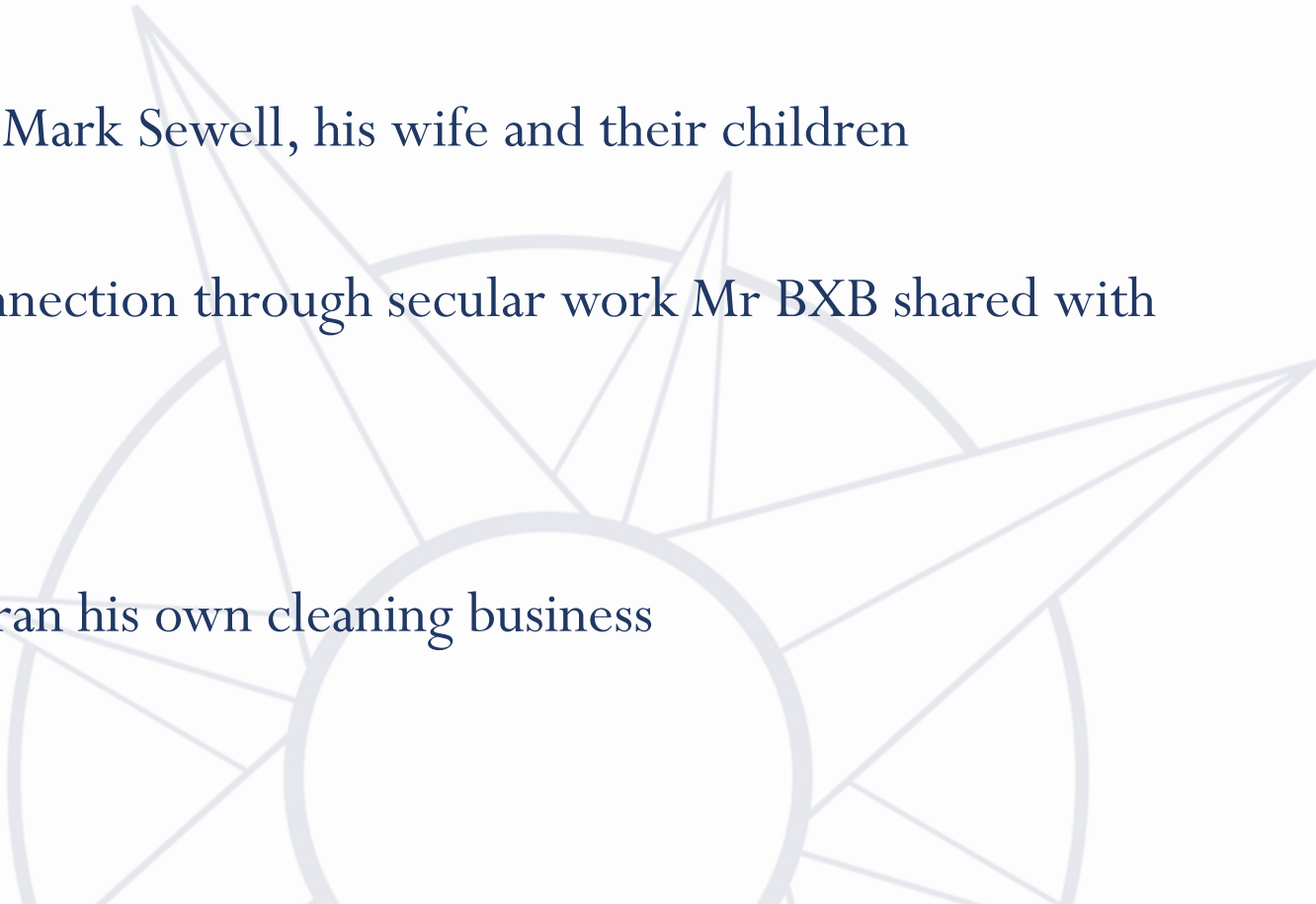
BXB (Respondents)

[2023] UKSC 15





The Facts

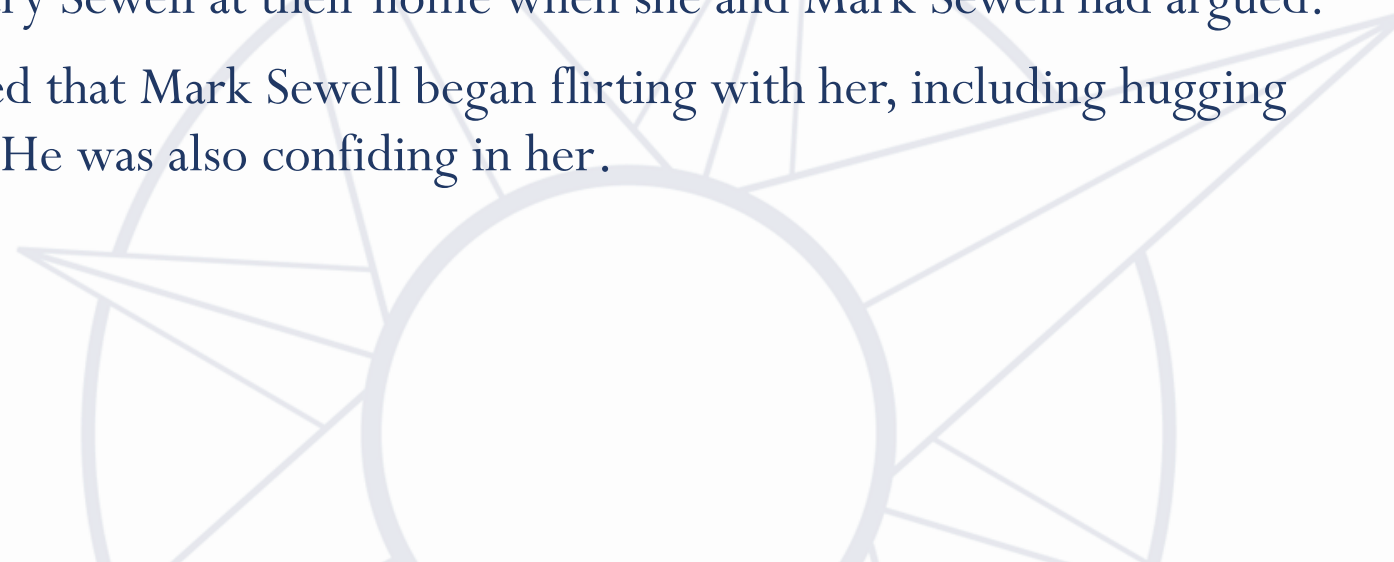
- Mr and Mrs BXB began attending religious services of the Barry Congregation in 1984
 - They made lots of friends, including Mark Sewell, his wife and their children
 - The families initially developed a connection through secular work Mr BXB shared with
Mark Sewell
 - Mark Sewell was self-employed and ran his own cleaning business
- 



- Mrs B's evidence at trial was that the families became close because of Mark Sewell's position as a ministerial servant of the Barry Congregation and then an elder (he became an elder at an undisclosed date in 1989).
- She said that Jehovah's Witnesses were encouraged to associate only with each other, particularly those who were "good associations" because of their standing in the Barry Congregation.
- By about 1988 or 1989, Mr and Mrs B and the Sewells had become very close friends.
- The Sewell children were the same age as theirs, and the children would go round to each other's houses about once a week. The two families had lots in common. They went on a holiday together, they visited each other's houses for tea, they went on days out together, and they went to concerts.

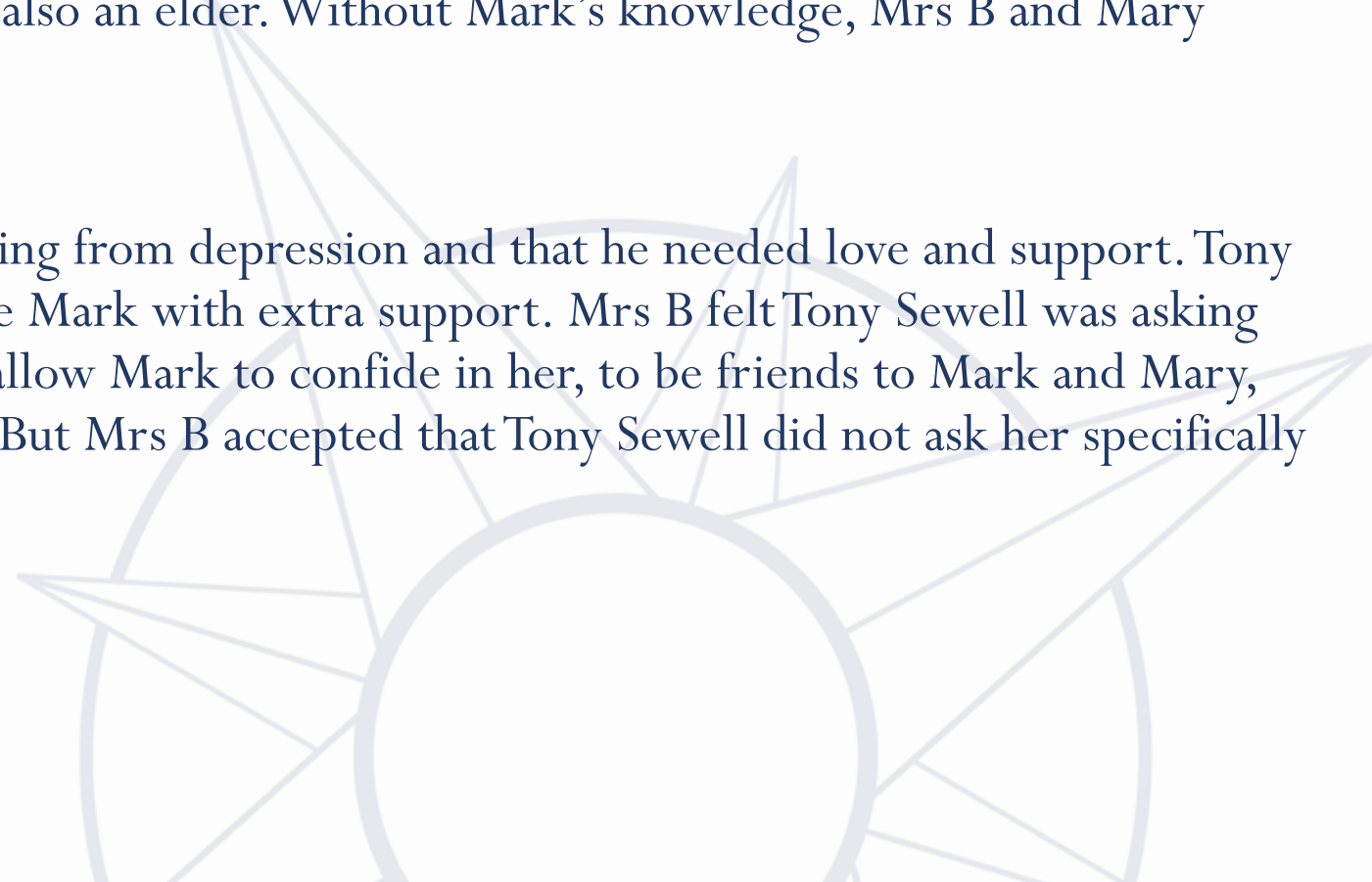


- Mrs B developed a special friendship with Mark Sewell. They were the same age and Mrs B considered that Mark Sewell became her best friend.
- Towards the end of 1989, Mr and Mrs B noticed a change in Mark Sewell's behaviour. He began to abuse alcohol and appeared depressed. Mark and Mary Sewell frequently argued. Mr and Mrs B provided Mark and Mary Sewell and their children with extra support at this time, including baby-sitting the children and hosting Mary Sewell at their home when she and Mark Sewell had argued.
- Around the same time, Mrs B stated that Mark Sewell began flirting with her, including hugging her, holding hands and kissing her. He was also confiding in her.





- At trial, Chamberlain J accepted Mrs B's evidence that, in around late 1989 or early 1990, Mrs B was so concerned about Mark's behaviour that she suggested to Mary that the two of them speak to Mark's father, Tony Sewell, who was also an elder. Without Mark's knowledge, Mrs B and Mary arranged to meet Tony at his home.
- Tony explained that Mark was suffering from depression and that he needed love and support. Tony requested that Mr and Mrs B provide Mark with extra support. Mrs B felt Tony Sewell was asking her and her husband to continue to allow Mark to confide in her, to be friends to Mark and Mary, and to help with Mark's depression. But Mrs B accepted that Tony Sewell did not ask her specifically to be alone with Mark.



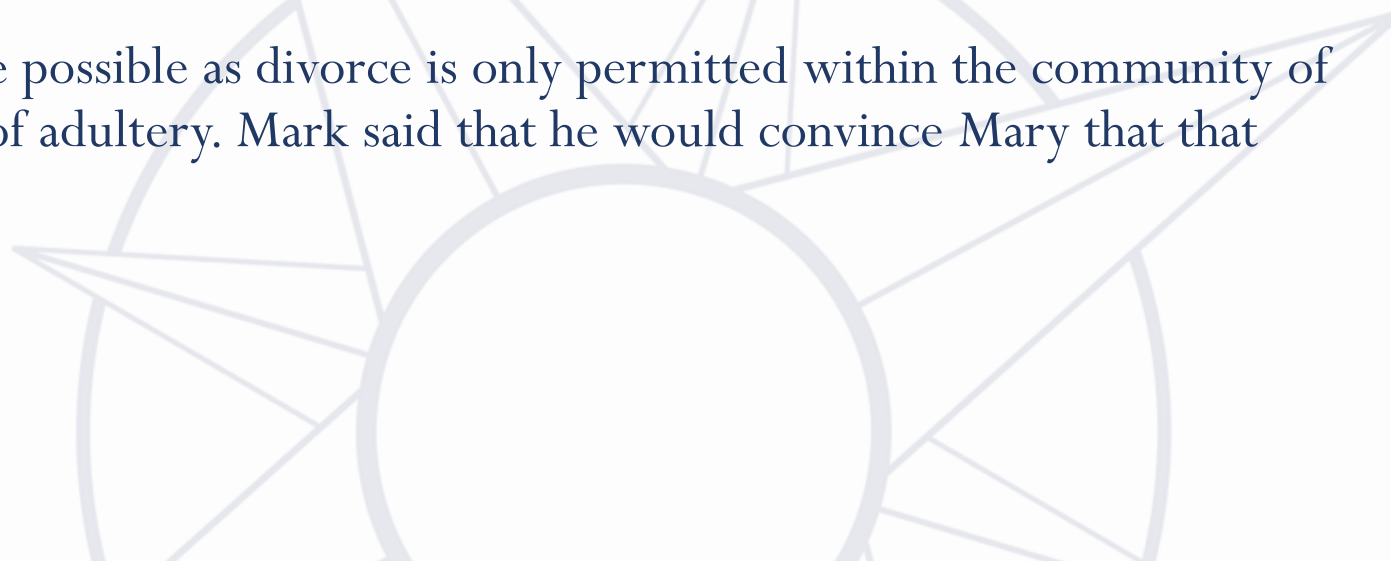


- Chamberlain J accepted Mrs B's evidence that, had it not been for the fact that Mark Sewell was an elder and she had received an instruction from another elder, Tony Sewell, their friendship with Mark and Mary would have come to an end well before the rape occurred
- Over the following weeks, Mr and Mrs B continued to provide Mark Sewell and Mary Sewell with emotional support. At one point, Mark Sewell came to Mrs B's home and asked if she would run away with him. Mrs B refused, stating that they both had children and their own responsibilities





- On the morning of 30 April 1990, Mr and Mrs B and Mark and Mary Sewell were taking part in religious activity known as “auxiliary pioneering” (door-to-door evangelising) in Cowbridge, South Wales. Afterwards, they all went to a local pub for lunch.
- Mark drank beer and wine.
- He argued with Mary and she threw a glass of whisky over him. Mark stormed off. Mr B went to look for him and found him outside with a card from a local solicitor’s office, saying that he wanted to divorce Mary.
- Mr B told him that that would not be possible as divorce is only permitted within the community of Jehovah’s Witnesses on the grounds of adultery. Mark said that he would convince Mary that that ground was made out.





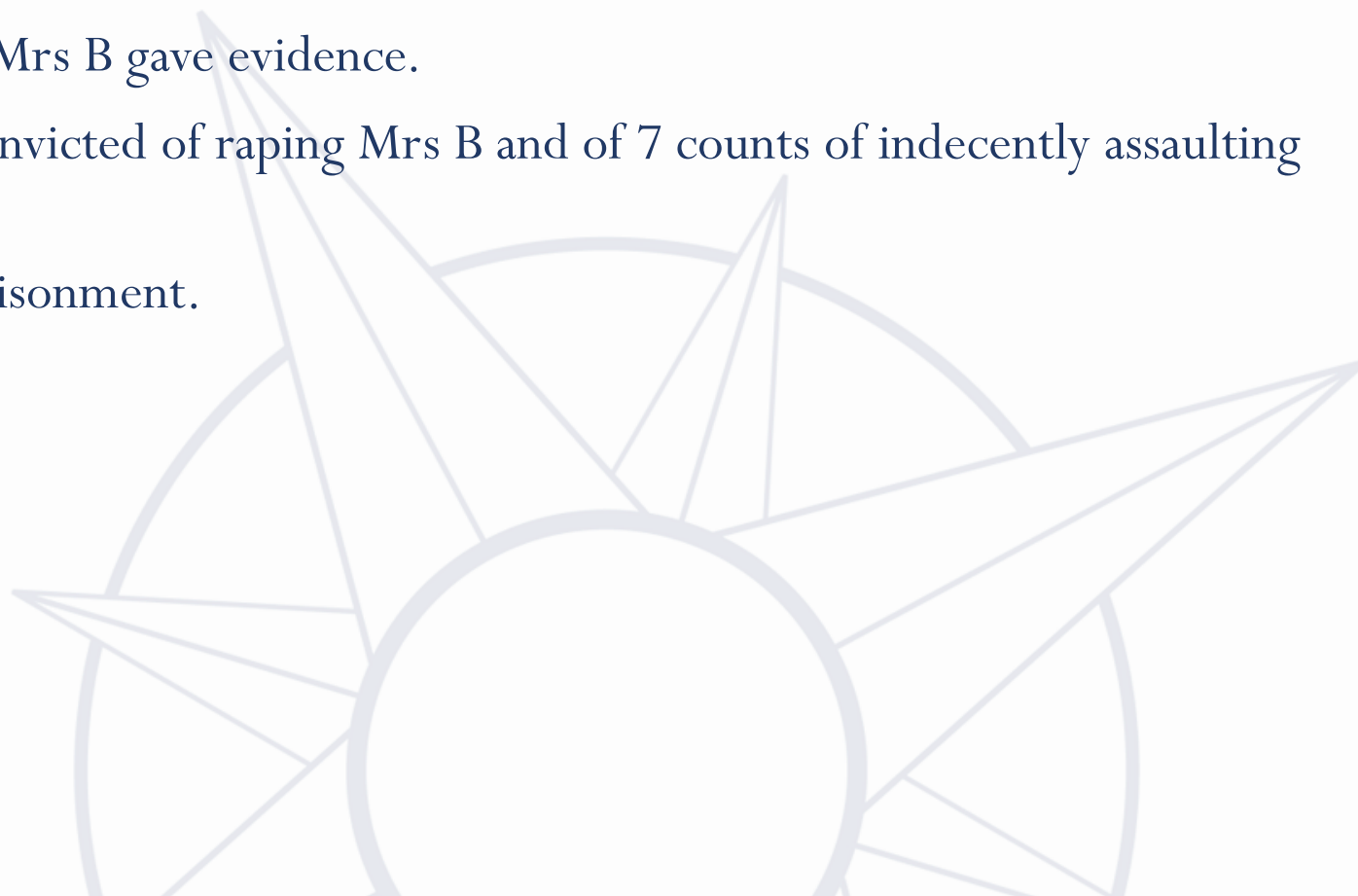
- Later that afternoon, Mr and Mrs B and Mark and Mary Sewell picked up their children and returned to Mark and Mary's house.
- The children were upstairs playing.
- Mark went into a back room.
- At some point, Mrs B enquired about Mark's whereabouts.
- Mary said that he was in the back room and asked Mrs B to see if she could talk some sense into him.
- Mrs B decided that she should go to speak to Mark to try to convince him that he should go to the elders about his depression.
- A conversation ensued during which Mark Sewell pushed Mrs B to the floor, held her down, and raped her



- In 1993, Mrs B reported the rape to the elders in the Barry Congregation after she had learned of an allegation made against Mark Sewell by CXC, a minor.
- Mark Sewell was removed as an elder.
- Mrs B decided not to report the matter to the police at that time.
- Sometime later, an ecclesiastical judicial committee (comprised of elders outside the Barry Congregation) was formed but found the allegations against Mark Sewell unproven (because a rule requiring corroboration was not met).
- He remained a member of the Barry Congregation but later, in August 1994, he was “disfellowshipped” (ie expelled) as a Jehovah’s Witness for unrelated conduct.
- Sometime thereafter, Mrs B ceased her association with Jehovah’s Witnesses



- On 20 March 2013, after learning of an additional allegation made against Mark Sewell, Mrs B decided to report the rape to the police.
- A criminal trial took place at which Mrs B gave evidence.
- On 2 July 2014, Mark Sewell was convicted of raping Mrs B and of 7 counts of indecently assaulting CXC and another individual.
- He was sentenced to 14 years' imprisonment.





The Decision at First Instance

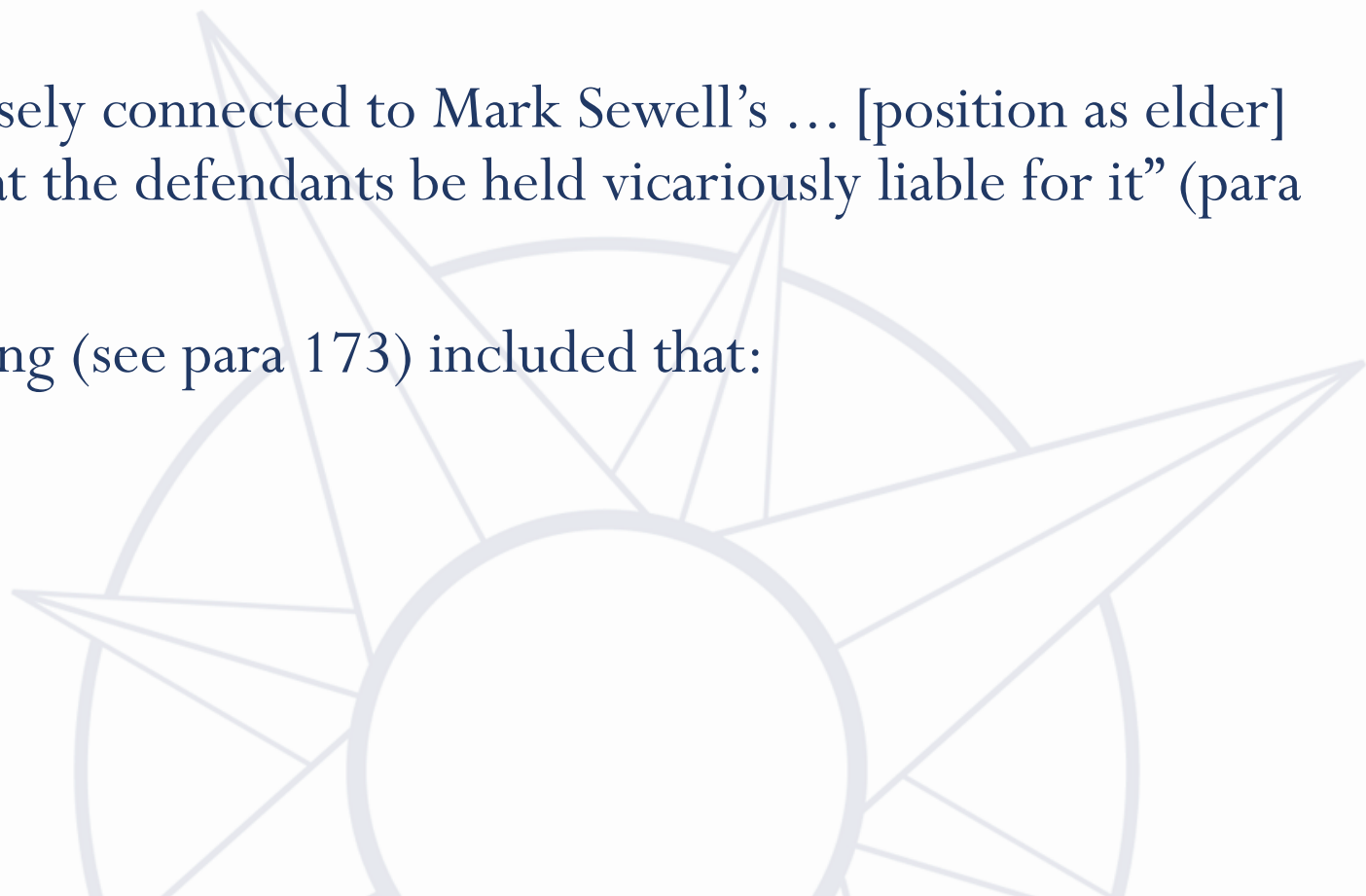
- His reasoning on vicarious liability for the rape was as follows:
 - (i) The relevant law on vicarious liability was to be gleaned from several recent decisions including those of the Supreme Court in *Christian Brothers*, *Cox* and *Mohamud*. It is to be noted that Chamberlain J was examining the law prior to the two latest relevant Supreme Court decisions in *Barclays Bank* and *Morrison*.
 - (ii) The first stage of the vicarious liability inquiry (which Chamberlain J saw as focussing on “whether the relationship between the defendants and Mark Sewell, one of their elders, was capable of giving rise to vicarious liability” (para 157)) was satisfied. This was because, first, Mark Sewell carried on activities as an integral part of the “business” activities carried on by the defendants and for their benefit and, secondly, the commission of the rape was a risk created by the defendants by assigning those activities to Mark Sewell.



- (iii) The second stage of the vicarious liability inquiry was also satisfied.

“The rape was ... sufficiently closely connected to Mark Sewell’s ... [position as elder] to make it just and reasonable that the defendants be held vicariously liable for it” (para 174).

The judge’s more precise reasoning (see para 173) included that:

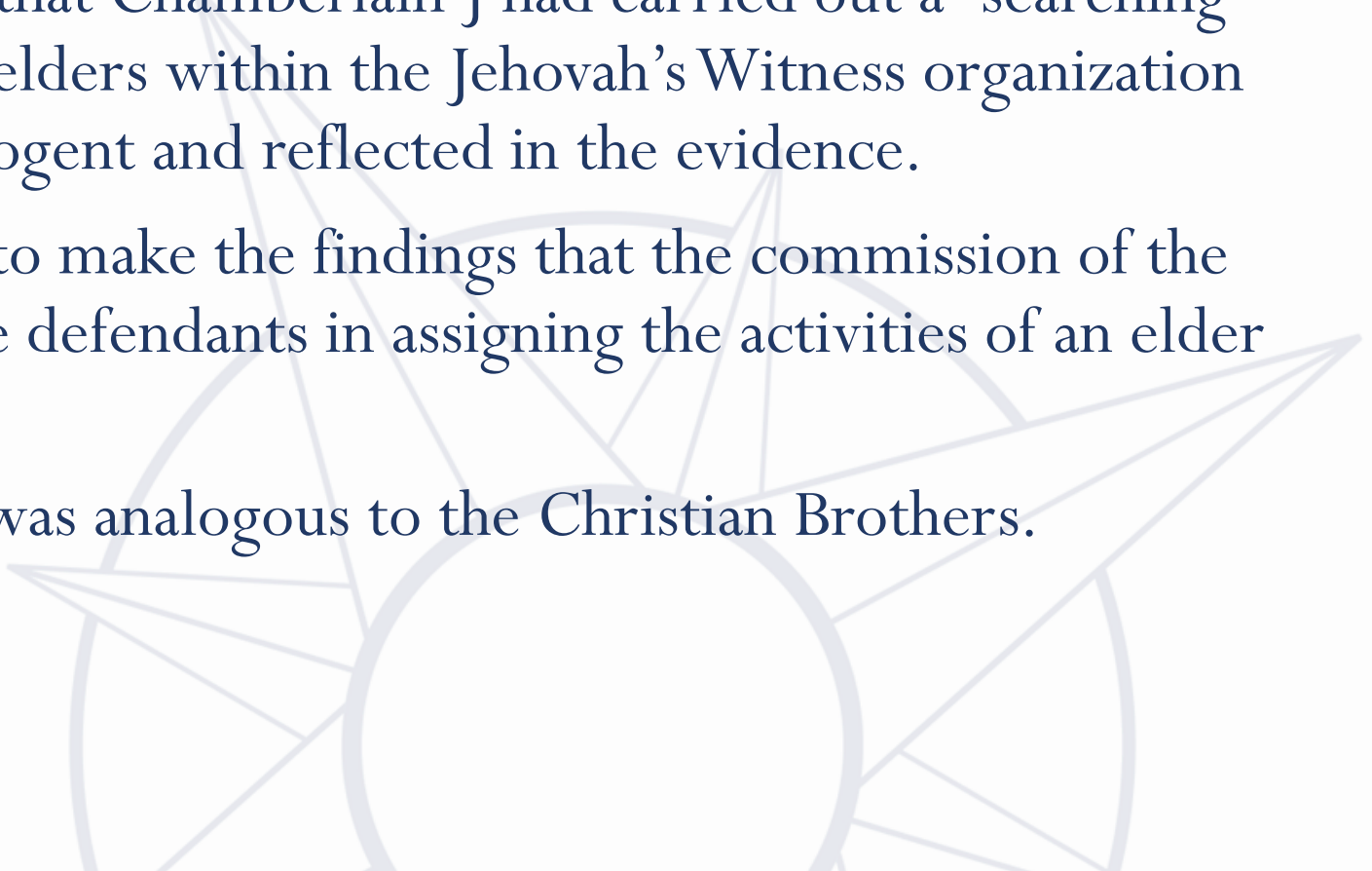




- (a) Mark Sewell's position as a ministerial servant was an important part of the reason why Mr and Mrs B started to associate with Mark and Mary Sewell;
- (b) "but for" Mark Sewell's (and Tony Sewell's) position as elder, Mr and Mrs B would probably not have remained friends with Mark Sewell by the time of the rape;
- (c) the defendants significantly increased the risk that Mark Sewell would sexually abuse Mrs B by creating the conditions (including by Tony Sewell's implied instruction that she continue to act as Mark's confidante) in which the two might be alone together;
- (d) the rape took place in circumstances closely connected to the carrying out by Mark Sewell and Mrs B of religious duties; and
- (e) one of the reasons for the rape was Mark Sewell's belief that an act of adultery was necessary to provide scriptural grounds for him to divorce Mary.



The Court of Appeal

- The Court of Appeal affirmed the decision of Chamberlain J
 - Nicola Davies LJ considered that Chamberlain J had carried out a “searching inquiry” as to the role of the elders within the Jehovah’s Witness organization and his findings were clear, cogent and reflected in the evidence.
 - The judge had been entitled to make the findings that the commission of the rape was a risk created by the defendants in assigning the activities of an elder to Mark Sewell.
 - The relationship in this case was analogous to the Christian Brothers.
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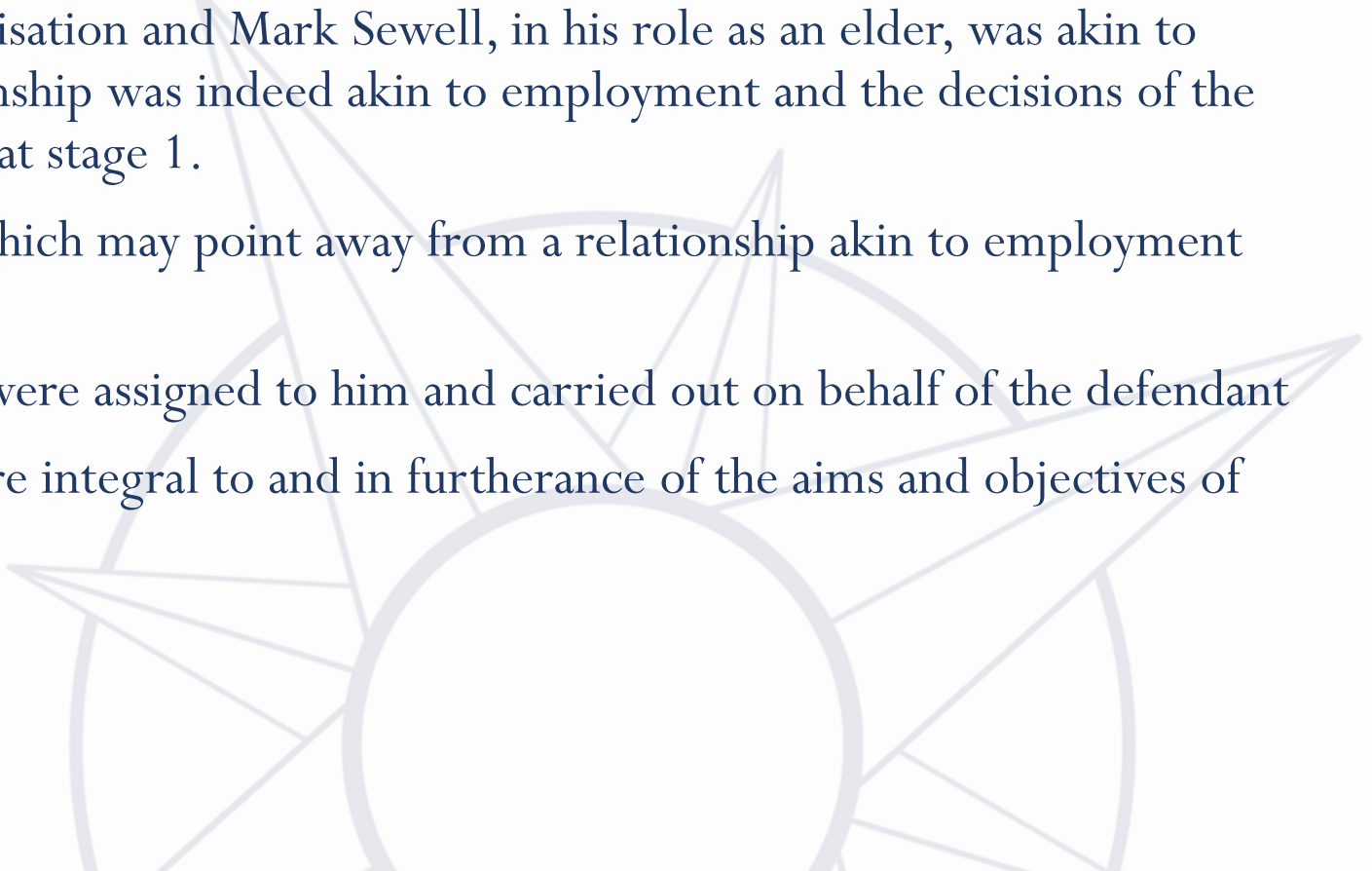


Factors Against Vicarious Liability

- It is important to add that Males LJ had earlier made clear at para 103 that there were significant factors pointing against vicarious liability:
- “As the judge acknowledged, Mrs B was an adult married woman who was 29 years old and it was her decision to continue to associate with Mark Sewell despite his unacceptable behaviour.
- In fact she did have a choice whether to continue to associate with him, although it is fair to say that ending the friendship might have made it difficult for her and her husband to remain as members of the Barry Congregation and would therefore have carried a considerable spiritual cost.
- Moreover, the rape did not occur while Mark Sewell was performing any religious duty. It is true that, earlier in the day, the two couples had been “pioneering” (evangelising door-to-door), but since then much had happened ... It can therefore be said that the rape occurred when the two couples were choosing to be together on an essentially social occasion, albeit one which must have been awkward in view of what had occurred. There is, therefore, at least an argument that by the time of the rape Mark Sewell’s status as an elder had somewhat faded into the background.
- Further, the rape itself did not involve, as the child grooming cases have, any kind of acquiescence by Mrs B because Mark Sewell was an elder. On the contrary, he forced himself on her violently.”

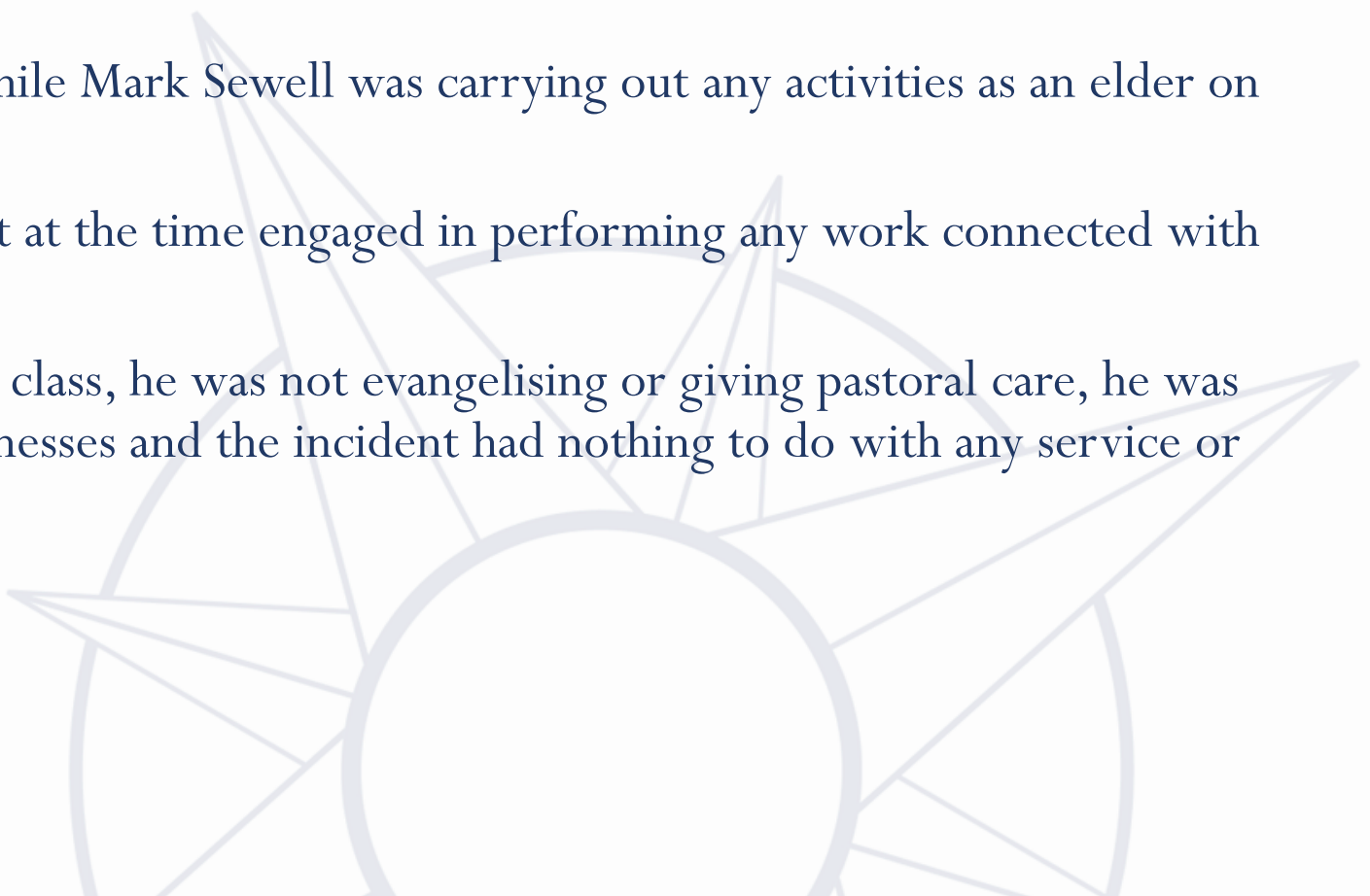


Supreme Court and Clarification of the Law

- **Stage 1 of vicarious liability**
 - At the first stage of the vicarious liability analysis, the test to be applied is whether the relationship between the Jehovah's Witness organisation and Mark Sewell, in his role as an elder, was akin to employment. In my view, the relationship was indeed akin to employment and the decisions of the lower courts were therefore correct at stage 1.
 - The absence of payment was a fact which may point away from a relationship akin to employment existing, but it was not decisive.
 - Mark Sewell carried out duties that were assigned to him and carried out on behalf of the defendant
 - He was performing duties which were integral to and in furtherance of the aims and objectives of the Jehovah's Witnesses.
 - Hierarchical structure
- 



Stage 2 of Vicarious Liability

- First, the rape was not committed while Mark Sewell was carrying out any activities as an elder on behalf of the Jehovah's Witnesses.
 - He was at his own home and was not at the time engaged in performing any work connected with his role as an elder.
 - So, eg, he was not conducting a bible class, he was not evangelising or giving pastoral care, he was not on premises of the Jehovah's Witnesses and the incident had nothing to do with any service or worship of the Jehovah Witnesses.
- 



- The lack of direct connection to the role assigned to him as an elder makes these facts significantly different from the institutional sex abuse cases where, eg, as part of their jobs the warden was on the institutional premises looking after the children in *Lister* or the Brothers were living in the same institution as their victims in *Christian Brothers*.
- It is also significantly different from the facts of *A v Trustees of the Watchtower Bible and Tract Society* where the sexual abuse of the child by the ministerial servant took place, after a grooming period, during or after book study, on field service, at Kingdom Hall or at a Convention of Jehovah's Witnesses and all when he was "ostensibly performing his duties as a Jehovah's Witness ministerial servant" (para 90).



- Secondly, in contrast to the child sexual abuse cases, at the time of the rape, Mark Sewell was not exercising control over Mrs B because of his position as an elder. It was because of her close friendship with Mark Sewell and because she was seeking to provide emotional support to him, and not because Mark Sewell had control over her as an elder, that Mrs B went to the back room.
- The driving force behind their being together in the room at the time of the rape was their close personal friendship not Mark Sewell's role as an elder. Put another way, the primary reason that the rape took place was not because Mark Sewell was abusing his position as an elder but because he was abusing his position as a close friend of Mrs B when she was trying to help him.



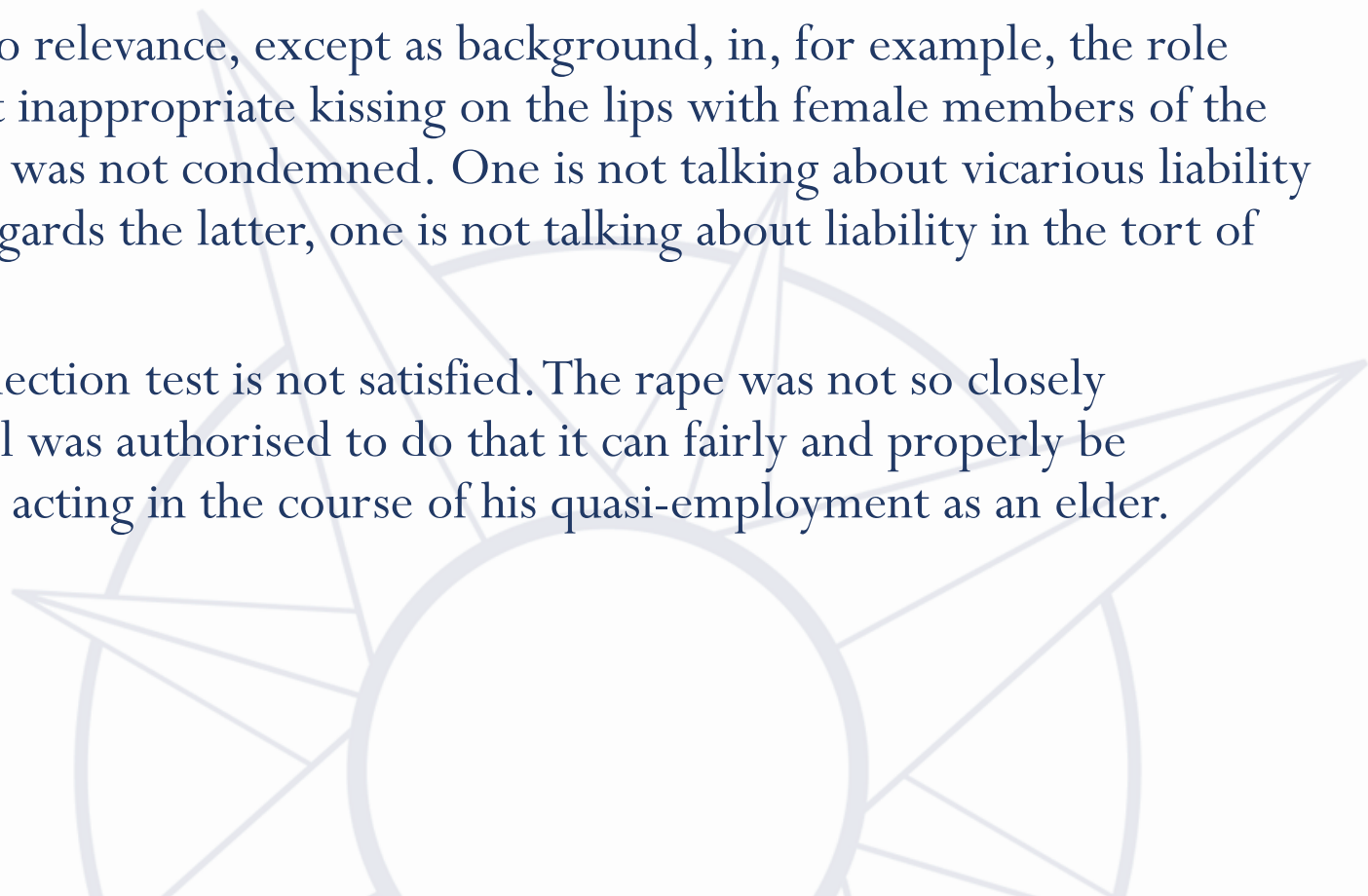
- Thirdly, James Counsell KC submitted that Mark Sewell never took off his “metaphorical uniform” as an elder.
- It was put to him by the court that that would mean that there would be vicarious liability even if he committed the tort of negligence, injuring a customer, while carrying on his cleaning business.
- He accepted that that would not be so and qualified his submission by saying that the metaphorical uniform was never taken off in his dealings with members of Barry Congregation such as Mrs B.
- But that is also an unrealistic submission.
- It cannot seriously be suggested that there would be vicarious liability if, for example, Mark Sewell was driving Mr and Mrs B and their children in his own car to the airport for their holidays and Mrs B was injured in an accident caused by his negligent driving.
- In my view, Mark Sewell was not wearing his metaphorical uniform as an elder at the time the tort was committed.



- Fourthly, I accept that Mark Sewell’s role as an elder was a “but for” cause of Mrs B’s continued friendship with Mark Sewell and hence of her being with him in the back room where the rape occurred. However, as we have seen, “but for” causation is insufficient to satisfy the close connection test.
- Fifthly, I do not accept that what happened in this case was equivalent to the gradual grooming of a child for sexual gratification by a person in authority over that child. James Counsell KC submitted that there was an analogous progression from Mark Sewell’s flirty behaviour with Mrs B, including hugs, holding hands and kisses and his confiding in her, through to his suggestion that they should run away together, and leading finally to the rape.
- In my view, the violent and appalling rape was not an objectively obvious progression from what had gone before but was rather a shocking one-off attack. In any event, the prior events owed more to their close friendship than to his role as an elder.

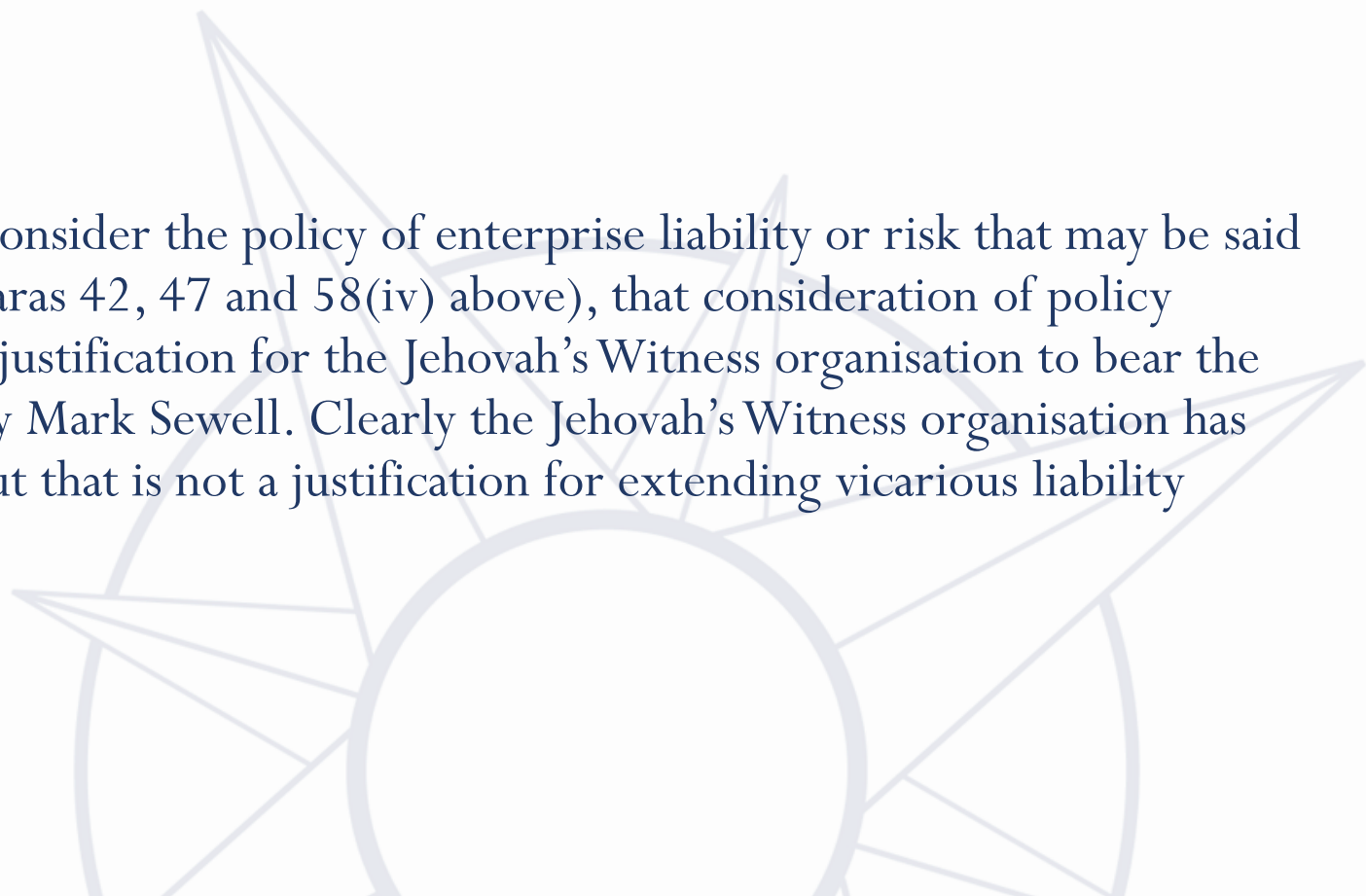


- Sixthly, as I have indicated, there is no relevance, except as background, in, for example, the role played by Tony Sewell or the fact that inappropriate kissing on the lips with female members of the congregation when welcoming them was not condemned. One is not talking about vicarious liability for any tort of Tony Sewell and, as regards the latter, one is not talking about liability in the tort of negligence.
- In my view, therefore, the close connection test is not satisfied. The rape was not so closely connected with acts that Mark Sewell was authorised to do that it can fairly and properly be regarded as committed by him while acting in the course of his quasi-employment as an elder.





- As a final check, if I stand back and consider the policy of enterprise liability or risk that may be said to underpin vicarious liability (see paras 42, 47 and 58(iv) above), that consideration of policy confirms that there is no convincing justification for the Jehovah's Witness organisation to bear the cost or risk of the rape committed by Mark Sewell. Clearly the Jehovah's Witness organisation has deeper pockets than Mark Sewell. But that is not a justification for extending vicarious liability beyond its principled boundaries.



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