



Woodlands v Essex County Council

Should schools be liable for failings of third party contractors?

This was the question put to the Supreme Court in *Woodland v Essex County Council* [2013]UKSC 66. The unfortunate circumstances of the case involved a 10 year old schoolgirl who suffered severe brain damage during a swimming lesson organised by her maintained school but provided by a private contractor.

The Law Lords unanimously overturned the decision of the Court of Appeal and held that the school was indeed subject to a non-delegable duty of care for the negligent acts of the swimming teacher. The ruling significantly widens the potential liability of schools (and other public bodies assuming duties towards vulnerable members of society) for the negligent acts of private contractors to which they have contracted services.

Civil Liability for Injury

Subject to the exception of vicarious liability (where an employer may be liable for the actions of its employees), the general principle is that liability in tort depends upon proof of a personal breach of duty. Generally therefore one person is usually not liable for the behaviour of another.

However, when giving the leading judgment in the Woodlands case Lord Sumption stated that *“the expression ‘non-delegable duty’...[describes] those cases in which the ordinary principle is displaced and the duty extends beyond being careful, to procuring the careful performance of work delegated to others”*.

So when will a non-delegable duty of care arise? Lord Sumption identified the following key criteria:

- The injured person must be a patient or a child, or for some other reason especially vulnerable or dependent on the protection of the defendant against the risk of injury (therefore, the non-delegable duty could for example extend to prisoners and residents in care homes).
- There must be an existing relationship between the injured person and the defendant which places him or her in the defendant’s care and from which it is possible to infer a positive duty to protect him or her from harm (ie. there needs to be an element of control over the claimant).

- The injured person has no control over how the defendant chooses to perform those obligations (ie. whether personally or by use of an employee or third party contractor).
- The defendant must have delegated to a third party some function which is an integral part of its positive duty and the third party is therefore exercising the defendant’s care of the injured person and the control that goes with it.
- The third party has been negligent in the exercise of that function.

Applying this test to the facts of the case, it was held that the school had assumed a duty to its pupil to ensure the swimming lessons were carefully conducted and supervised. The pupil was entrusted to the school for certain essential purposes which included teaching and supervision - the swimming lessons were an integral part of the school’s teaching function. The lessons occurred in school hours, in a place where the school chose to carry out part of its functions (as opposed to extra-curricular activities for which a non-delegable duty will not arise). The teaching and supervisory functions of the school had been delegated to the private contractor to the extent necessary to give swimming lessons and the alleged negligence had occurred in the course of the carrying out of these delegated functions. Therefore, if the contractor is found to have been negligent in performing those functions and the pupil was injured as a result, not only the contractor but the school as well, is in breach of duty.

Lady Hale comments in the judgment that the boundaries of what the school has undertaken to provide may not always be clear and will have to be worked out on a case by case basis as they arise, which may cause concern for maintained schools and local authorities. However, in a political climate which has seen more and more activities being outsourced, the rationale of the judges reflects the wider policy of the law to protect the vulnerable by placing financial burdens on those providing critical public services where it is fair, just and reasonable to do so.

The case will now be returned to the High Court to make findings on the relevant facts.

Health and Safety

In addition to civil claims, duties of care will also arise under safety law the breach of which can give rise to a criminal regulatory prosecution. The extent of this duty is different from the duty which gives rise to a potential claim for injuries. In essence any institution is obliged to ensure the safety of individuals affected by its undertaking and that can extend to taking reasonable steps in relation to contractors.

Although this case does not deal directly with prosecution for safety breaches, it remains possible to imagine a court taking into account a 'non-delegable' duty of care in civil claims in assessing the degree of control an institution has over its contractors and the steps it should take in relation to their actions for safety law reasons.

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