

Breakingbury v Croad: Should We Have Seen This Coming?

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Sir, The recent case of *Breakingbury v. Croad*¹ triggered shock waves amongst practice owners.² Indeed many of us empathised with the retired Mr Croad when he was found liable for negligent work carried out at his dental practice by self-employed dental associates. However, since the principles which led to the findings of a non-delegable duty of care and vicarious liability by the County Court have been made clear by the Supreme Court for almost a decade, should we have seen this coming?

In *Woodland v Essex County Council*,³ the Supreme Court emphasised that there are 5 defining features whose presence give rise to non-delegable duties of care. With words pertinent to dental services highlighted herein in brackets, these are: that the claimant is a patient; there is an antecedent relationship between the claimant (the patient) and the defendant (the practice owner) which places the claimant in the actual care of the defendant and from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm; the claimant has no control over how the defendant chooses to perform those obligations; the defendant has delegated to a third party (a dental associate) some function which he has assumed towards the claimant, and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's care of the claimant and the element of control that goes with it; and the third party has been negligent in the performance of the very function assumed by the defendant and delegated by the defendant to him. Given that the circumstances in *Breakingbury* allowed all five factors to be resolved in the affirmative, a non-delegable duty of care was therefore found.

Meanwhile, *Catholic Child Welfare Society v. Various Claimants and The Institute of the Brothers of the Christian Schools*³ expanded the boundaries of vicarious liability to include those whom, while not strictly speaking employees, stand in a relationship which is 'akin to employment'. According to the Supreme Court, liability can be imposed when the following 5 criteria are satisfied. Again, with words relevant to dental services highlighted in brackets, these are when the defendant (a practice owner) is more likely to have the means to compensate the victim (the injured dental patient) than the tortfeasor (the dental associate) and can be expected to have insured against that liability; the tort (dental negligence) will have been committed as a result of activity being taken by the tortfeasor on behalf of the defendant; the tortfeasor's activity is likely to be part of the business activity of the defendant; the defendant, by employing the tortfeasor to carry on the activity will have created the risk of the tort committed by the tortfeasor; and the tortfeasor will, to a greater or lesser degree have been under the control of the defendant. Since those criteria were fulfilled in *Breakingbury*, vicarious liability was therefore found.

In short, the principles which led to a finding of negligence in *Breakingbury* have been made clear by the Supreme Court for almost a decade. The County Court was merely applying the existing law. The profession's reaction to the case underlines the significance for defence unions to draw attention to the implications of relevant cases, particularly those decided by the Supreme Court, to the dental profession soon after those judgments are handed down. This can ensure the provision of up-to-date advice and the acquisition of appropriate cover by indemnity holders.

References

1. *Breakingbury v. Croad* (2021) County Court, case no. F14YY.
2. L. D'Cruz, 'The Legal Case Against the Practice Owner', available at <https://www.bda.org/news-centre/blog/Pages/The-legal-case-against-the-practice-owner.aspx>.
3. *Woodland v. Essex County County Council* [2013] UKSC 66.
4. *Catholic Child Welfare Society v. Various Claimants and The Institute of the Brothers of the Christian Schools* [2012] UKSC 56.