

## “Non-delegable duties” – who is responsible if something goes wrong?

### **Non-delegable Duties - where a local authority outsources work regarding service provision to a vulnerable person, who is responsible if something goes wrong?**

Generally, a legal person must have done something or failed to do something which has directly caused harm to another legal person, in order to be liable for that harm. However, when an organisation outsources work to a third party, under certain circumstances, the organisation will remain liable if the *third party* does something which causes harm to a person. This is when a non-delegable duty arises – the work may well be delegable, but the legal responsibility is not.

#### **When will a non-delegable duty arise?**

There are various instances where the courts have departed from the default legal position and have imposed a non-delegable duty upon an organisation. These situations tend to arise in exceptional circumstances, as they place legal responsibility on one party for the actions of another.

In the case of [Woodland v Essex County Council \[2013\]](#), the Supreme Court identified that a non-delegable duty would arise where the following circumstances were present:

- 1) The claimant is a vulnerable person dependent on the protection of the organisation (the defendant) against the risk of injury.
- 2) There is a pre-existing relationship between the claimant and defendant that places the claimant in the defendant's care. This will generally involve an element of control. The duty is personal to the defendant.
- 3) The claimant has no control over whether the defendant carries out its obligations personally or contracts them out.
- 4) The defendant has delegated an integral part of its duty to the claimant to a third party, so that the third party exercises an element of control over the claimant.
- 5) The third party has been negligent in performing the delegated function.

The key element is whether the defendant has assumed responsibility for the exercise of due care by the third party. The court will consider the nature of the relationship between claimant and defendant, along with the extent of the claimant's vulnerability when determining this.

The Supreme Court also stated that the courts should be sensitive about imposing unreasonable financial burdens upon those providing critical public services. They made it clear that the courts will only impose a non-delegable duty where they regard it as fair, just and reasonable to do so.

## Some Practical Examples

Non-delegable duties will often arise when government bodies contract out elements of services being provided to vulnerable people. For example, if a local authority is responsible for the care of disabled person and contracts out the running of a care home in which that person is a resident; it is likely that a non-delegable duty will arise. In [Woodland v Essex County Council \[2013\]](#) the court held that an education authority which outsourced junior school swimming lessons to an independent contractor had a non-delegable duty of care to those children.

It may also be possible that a charity which outsources a function could be held to have a non-delegable duty if the relevant conditions are present.

## Outsourcing contracts

The legal effect of non-delegable duties will inevitably be taken into account when contracts for outsourcing relevant work are being drafted. Government bodies that are outsourcing work to third party charities will be aware that if a vulnerable person suffers harm as a result of the action or inaction of any charity, the vulnerable person could bring a claim directly against the government body.

In order to mitigate this risk, the government body may carry out checks on the charity and enquire about the charity's operating processes in detail. Additionally, the government body may request an indemnity from the charity, with the effect that if the government body suffers any loss as a result of the action/ inaction of the charity, the charity must pay the government body that amount in full.

Charities taking on relevant work from government bodies need to be aware of this and to negotiate their contracts carefully. To what extent the risk, or the cost of meeting the risk via appropriate insurance policies, is divided between the parties is a point of commercial negotiation. The trustees must be satisfied that any assurances they give to the government body do not place too great a risk on the charity and that the terms of any contract the charity enters into are within its objects. First and foremost, of course, the charity must be convinced that it has the requisite expertise and resource to take on the responsibilities under the contract.

## Summary

As a result of *Woodland v Essex County Council [2013]*, a greater level of risk is placed on the government body when the relevant conditions are met. This means that, barring contractual negotiations to the contrary, less risk is placed on charities taking on work from government bodies. Charities may want to point out this to their insurers, as less risk could potentially mean lower premiums.

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