aware

Abuse

Keoghs
a Davies business

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Welcome

Welcome to the April edition of Keoghs Abuse Aware. The sensitive and challenging area of abuse law has continued to develop over the past year, which has included far-reaching legal decisions surrounding issues of vicarious liability both north and south of the border, as well as further concerning, but important, reports from IICSA on issues such as child sexual exploitation and abuse in residential schools. I am, therefore, pleased to bring you the insight and expertise of several members of Keoghs market-leading abuse team in relation to these developments. I hope that you find Abuse Aware interesting and informative. If you would like to speak to any of the contributors, they would be delighted to hear from you.

- Dan Tyler, an Associate in the abuse team, considers IICSA's recent compelling report on residential schools and its impact, and comments upon Ali v Luton BC concerning vicarious liability of employers and the principles which apply to abuse claims.
- Sarah Swan, abuse team public sector Partner, and Shannon Boyce consider IICSA's recent report into Child Sexual Exploitation by Organised Networks and its widespread implications.
- Nicola Markie comments on Court Guidance concerning an interesting and evolving area –Human Rights Act allegations in 'failure to remove' claims.
- Chris Wilson, Associate, and Matthew O'Neill discuss the Court of Appeal decision in a case that they handled surrounding the actions of a football scout in relation to vicarious liability – the implications of which affect many sectors as well as football.
- Ian Carroll, Partner and head of our abuse team, discusses the judgment in the high-profile case of TVZ & Others v Manchester City FC – which Ian and other members of the team handled.
- Calum Fife, Partner in our Scottish office, looks into engaging issues of trustees and vicarious liability in a historic Scottish abuse case.
- Paul Edwards, a Director in our in-house costs team, provides a summary of a case in which he acted (TRX v Southampton FC) concerning the appropriate award of Claimant solicitor hourly rates and grades in abuse claims.

Keoghs market-leading abuse team has members who are listed in the legal directory rankings as being experts in this area. The team has over 20 years' experience in both recent and non-recent abuse and safeguarding cases involving a number of sectors, most notably:

- Education
- Religion
- Local Authority
- Police
- Sporting Clubs and Associations
- Charities
- Care Homes/Private Care
- Military
- Inquiries

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IICSA Residential Schools

On 1 March 2022 the Independent Inquiry into Child Sexual Abuse (IICSA) published an investigation report into safeguarding issues in educational institutions – principally residential schools, but also some day schools.

The Inquiry heard evidence about child sexual abuse, harmful sexual behaviour between children and other safeguarding concerns at 12 English schools. It also examined institutional responses to safeguarding issues which arose at a boarding school in North Wales, as well as information about eight schools which are no longer operating. The allegations in question were largely reported and investigated or responded to between 1990 and 2017, and related to incidents alleged to have taken place from the 1960s to 2014.

The report is timely. As of September 2021, almost 42% of reports of child sexual abuse made to Operation Hydrant (the police coordination hub for non-recent child abuse investigations concerning persons of public prominence or abuse in institutional settings) were connected with an educational institution.

Meanwhile, last year the 'Everyone's Invited' initiative brought to light the prevalence of harmful sexual behaviour between school-age children.

Phase one

The first phase of the investigation concerned residential specialist music schools and residential schools for children with special needs where, for different reasons, pupils faced heightened risks of sexual abuse and there had been numerous allegations and convictions.

Music schools

The Inquiry heard evidence about child sexual abuse and safeguarding concerns at England's four specialist music schools:

- Chetham's School
- The Yehudi Menuhin School
- The Purcell School
- Wells Cathedral School

Child sexual abuse allegations have arisen at all four schools, and five former members of staff had been convicted or cautioned for sexual offences at three of them.

The Inquiry noted that music schools present particular safeguarding challenges. Instrumental tuition often involves one-to-one teaching, usually with the same tutor, and there can necessarily be a degree of physical contact. Children who aspire to become successful musicians may understandably look up to their teacher, which can lead to particularly significant imbalances of power and authority that could be exploited. There can also be great pressure on children to succeed and make a career in the world of classical music thereby dissuading them from making complaints.

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Specialist schools

The Inquiry also looked at residential schools for pupils with special educational needs and disabilities. These pupils are amongst the most vulnerable children in society. Indeed, disabled children are almost three times more likely to experience sexual violence than non-disabled children.

This investigation considered evidence from five residential special schools:

- Appletree School, Cumbria
- Royal School Manchester
- Southlands School, Hampshire
- Stony Dean School, Buckinghamshire
- Stanbridge Earls School, Hampshire

Incidents considered included abuse by staff as well as by fellow pupils.

The investigation identified a number of issues that make pupils of specialist schools especially vulnerable. Many have significant communication impairments, which can make it particularly hard to disclose sexual abuse. Moreover, many live a long way from their parents and other family members who can be the people best placed to tell if there is something wrong and in need of following up.

Phase two

The second phase concerned incidents of child sexual abuse and related concerns in three other schools:

- Clifton College, an independent boarding school
- Headlands School, a maintained day secondary schoo
- Hillside First School, a maintained infant school

The incidents at Clifton College included abuse perpetrated between 1998 and 2014 by the teacher Jonathan Thomson-Glover, which involved covertly filming pupils at the day house where he was housemaster. This episode and others helped to demonstrate the specific challenges facing boarding schools.

These include the fact that boarders "... are under the authority of adults in the school and are dependent upon them for their welfare. Staff may live on site and spend time alone with individual children, creating opportunities for grooming and abuse."

The Inquiry also observed that some boarding schools have highly developed traditions which can lead to tolerance of perceived idiosyncrasies from staff, thereby masking abusive or grooming behaviour.

Overall conclusions

While acknowledging the enhanced focus on safeguarding in schools in the last 20 years, the Inquiry found "many shortcomings and failings in ... protection, regulation and oversight which need to be addressed".

- Leadership on safeguarding was poor in many of the schools examined in which children were sexually abused. Too often, the Inquiry saw examples of headteachers "who found it inconceivable that staff might abuse their positions of authority to sexually abuse children, were unaware of current statutory guidance or did not understand their role in responding to allegations against staff", and indeed "Some were more focussed upon protecting the reputation of the school than protecting the interests of the children."
- The Inquiry found that the quality of school governance was variable. At many of the schools under consideration governors did not monitor the implementation of safeguarding arrangements through the scrutiny of safeguarding incidents at the school. There were a variety of reasons for this. In some schools, governors lacked the necessary training, experience or knowledge. In others, governors appeared to be hampered by "autocratic" headteachers who found it difficult to accept where ultimate authority lies.
- The inspection regime emerged as another key concern. The report acknowledged that inspections have inherent limitations with inspectors reliant on school staff being open and honest. Ultimately, it is the responsibility of the school, not the inspectorates, to ensure effective safeguarding. Nonetheless, the report identified weaknesses in the inspection regime. Arrangements are complex, confusing, and fragmented with Estyn in Wales and the Office for Standards in Education, Children's Services and Skills (Ofsted) and the Independent Schools Inspectorate (ISI) in England inspecting against their own, sometimes differing frameworks. Moreover, there is a lack of information sharing from other bodies such as local authorities, the Teaching Regulation Agency and the Department for Education, which means that inspectorates are not always alert to safeguarding issues before inspections.
- The report also had much to say on training and awareness-raising. It noted that in England and Wales there are no national standards for safeguarding training for school staff, including those with specific safeguarding roles. The upshot is "an inevitable lack of consistency across schools".
- Initial teacher training (ITT) is another problem: currently there is no minimum content for its safeguarding component. Moreover, the Inquiry raised concern that "Governors, trustees and proprietors of independent schools are not required to have any safeguarding training".

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Recommendations

The report emphasised that there is "no single, simple solution to the problem of child sexual abuse in schools". It proposes, therefore, incremental changes across a number of areas.

Not surprisingly these involve a series of new duties. For example, the report recommends that the Independent School Standards include "requirements that there is an effective system of governance, based on three principles of openness to external scrutiny, transparency and honesty within the governance arrangements, and the ability of governors to have difficult conversations both internally and with those providing external scrutiny".

Information sharing is also given priority. The report proposes a duty on boarding schools and residential special schools to inform inspectors of "allegations of child sexual abuse and other serious incidents, with professional or regulatory consequences for breach of this duty". There is also a major emphasis on awareness raising, with a recommendation to set "nationally accredited standards and levels of safeguarding training in schools".

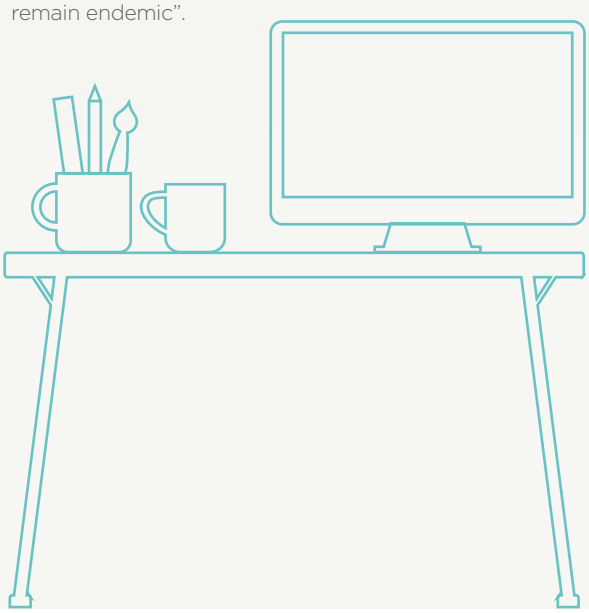
Implications

The Inquiry's report reinforces the view that child sexual abuse cases are not confined to the era before safeguarding.

In spite of "20 years of enhanced focus on safeguarding" it concludes that "schools are not as safe for children as they should be, and children's interests do not always come first when allegations or concerns of sexual abuse arise". This is reflected in the case studies, which include numerous examples of abusive behaviour during the 1990s and 2000s.

As such, there is the potential for a significant number of claims against schools arising from relatively recent abuse by staff. Such claims provide specific challenges: for example, since the abuse will have been within the last 20 to 30 years, limitation will in many cases be a much less central issue.

In addition, while harmful sexual behaviour between children was not the primary focus of this investigation, the report warns that the Everyone's Invited website shows that "currently, for children in some schools, sexual abuse and harassment between peers remain endemic".



While vicarious liability will not attach to schools for peer-on-peer abuse, they can be found directly liable in the tort of negligence if they breached their duty of care. This will depend on whether a school had reasonable systems in place for protecting pupils' safety and if so, whether those systems operated as intended.

Context will also be important. Schools have a duty to take reasonable care that pupils are reasonably safe during the school day and for a reasonable period after the end of the school day while they are still on the school premises. As such, abuse that takes place on the school site presents significant liability risks. However, Ofsted's 'Review of sexual abuse in schools and colleges', published June 2021, suggested that sexual violence typically takes place in "unsupervised spaces outside of school, such as parties or parks without adults present". In those cases, the risk to schools is less clear-cut, though cases will need to be considered carefully on their individual facts.

The report also underlines that child abuse takes many forms. For example, the abuse perpetrated by the Clifton College housemaster Jonathan Thomson-Glover consisted of filming pupils without their knowledge in bathrooms and bedrooms. The sending of sexually explicit text messages was also referenced in a number of case studies. Whilst not involving physical contact, behaviour of this nature can still be actionable in tort either via the intentional infliction of harm or the statutory tort of harassment under the Protection from Harassment Act 1997. Such claims are becoming increasingly common and with the development of technology they tend to be disproportionately recent.

In summary, the report is a sobering reminder that child abuse in schools is a current and ongoing problem. As the report concludes: "The imperative of doing much more to make schools places where children can be free from the threat and the fear of sexual abuse is obvious."

Sarah Swan
Partner

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Case Handler

Child Sexual Exploitation
by Organised Networks

As Keoghs currently handles the largest child sexual exploitation civil claims group in the country involving a local authority and the police, we read with interest the long-awaited IICSA report into child sexual exploitation by organised networks, which has now been published.

Child sexual exploitation is a form of sexual abuse which occurs "where an individual or group takes advantage of an imbalance of power to coerce, manipulate or deceive a child or young person under the age of 18 into sexual activity (a) in exchange for something the victim needs or wants and/or (b) for the financial advantage or increased status of the perpetrator or facilitator". The unique feature of child sexual exploitation is that children are coerced, controlled, groomed, manipulated or deceived into sexual activity. This is usually done through alcohol, drugs, actual or threatened violence, kindness and even affection. Exploitation by organised networks which was published in February 2022

The Inquiry chose six case study areas – Durham, Swansea, Warwickshire, St Helen's, Tower Hamlets and Bristol. Eight themes were examined in each area:

Problem profiling and disruption of child sexual exploitation

The Inquiry notes the importance of not making any presumptions when it comes to profiling child exploitation, and exploitation can occur in any community. The Inquiry heard the accounts of survivors who had experienced this exploitation and abuse. The research identified various indicators of situations in which a child would be at a higher vulnerability of experiencing child exploitation, which include residential care, children who have a disability, boys and young men, children from ethnic minority groups and LGBTQ+ children.

Empathy and concern for child victim

The Inquiry stresses the importance of recognising the child as a victim; it is said too many are treated as offenders and it is crucial that adults show empathy. There are many examples whereby a victim has been charged with criminal offences and, subsequently, have criminal records, however, the criminal offences were carried out as a result of the exploitation. The Inquiry heard victims' accounts of this throughout its investigation. It is noted that section 45 of the Modern Slavery Act 2015 provides a statutory defence for children who carry out certain criminal offences as a consequence of their exploitation; however, no data has been collected in this regard. The Inquiry suggested this data should be collected and published. The Inquiry also found that empathy can be provided by eliminating the victim-blaming attitudes of various professionals, as well as regular audits of case files which are crucial to ensure that the language used is factually appropriate and non-judgemental. Senior leaders in the police force and local authority must take the lead on this.

Risk assessment, protection from harm and outcomes for children

The Inquiry found early identification of signs of child sexual exploitation is crucial: these children are likely to be in contact with frontline services such as GPs and schools who are well placed to identify any changes in a child's behaviour which can be warning signs. The Inquiry found that the evidence on risk assessments was not satisfactory and more needs to be done in this regard.

Missing children

It is generally recognised that there is a link between children going missing and child sexual exploitation; a missing child can be both a cause and consequence of the child being sexually exploited. In 2018/19 there were 143,453 incidents of missing children. The NCA found that 9% of missing children had a child sexual exploitation associated with them (69% girls, and 26% boys). The Inquiry heard case studies of children who had gone missing from home and school, as this is a feature of sexual exploitation, and found that police and local authorities must take steps to prevent this happening and conduct meaningful 'return home' interviews when the child does return. The Department for Education statuary guidance is currently under review, but says that local authorities in England should agree a protocol for responding to children who run away or go missing, and a care plan should include details of the arrangements to be in place to minimise the risk of a child going missing.

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Male victims

Several case studies found that boys and young men were exploited via online contact such as the dating app Grindr and other social media platforms. The ability to risk assess such platforms will prove difficult, but is necessary.

Children with disabilities

Research has suggested that children with disabilities in all settings are at high risk of sexual abuse/sexual violence; perpetrators tend to target children who they identify as vulnerable, which can include children with disabilities. It was found that children who are deaf or have a physical disability are considered three times more likely to experience abuse than those without a disability. The Inquiry noted there needs to be improvement in systems to increase identification of risks, and it is important for institutions and agencies to have adequate staff training and guidance in place.

Partnership working

Various agencies such as the police, social services, health services, education and voluntary organisations have a role in preventing child sexual exploitation. The Inquiry found that while there are resource pressures across these sectors, they need to consider whether there is more they can do.

Audit, review and performance improvement

The Inquiry found that public institutions should continuously evaluate their performance using different methods, and in particular should seek the views of children and families to find out their experience, case file audits and service reviews. This will actively drive improvement in child protection.

The Inquiry found that children are being sexually exploited across England and Wales. Their investigations revealed extensive failings by both local authorities and police forces. Research suggested that many complainants reported dissatisfaction with the responses, and some felt unprotected. As the resources of public sectors become more stretched, perpetrators are finding more ways of committing this abuse by the growing use of social media and dating apps which have their own difficulties in safeguarding.

Numerous recommendations have been made:

1. The response of the criminal justice system needs to be strengthened; this can be done by the government amending the Sentencing Act 2020 to provide a mandatory aggravating factor in sentencing those convicted of offences relating to sexual exploitation of children.
2. The government should publish an enhanced version of its Child Exploitation Disruption Toolkit as soon as possible.
3. The Department for Education should review and publish an updated version of its guidance on child sexual exploitation. This update should specify that the core element of the definition is that a child was controlled, coerced, manipulated or deceived into sexual activity. The Welsh government should also update its guidance.
4. The Department for Education and Welsh government should ensure their updated national guidance makes clear that signs of child exploitation must never be treated as indications that a child is only "at risk" of experiencing this harm. They should distinguish between children who are at risk, who are experiencing and who have experienced sexual exploitation.
5. Police forces and local authorities in England and Wales must consistently collect specific data on all cases of known or suspected child sexual exploitation.
6. The Department for Education should ban the placement in semi-independent and independent settings of children aged 16 and 17 who have experienced, or are at risk of experiencing, sexual exploitation.

The full report can be read here

Keoghs Comment

Child sexual exploitation is a complex and appalling crime, more often carried out by organised networks who initially befriend their victims. We welcome the Inquiry's very detailed and thorough Report and its recommendations. We hope that it helps public sector organisations, other agencies and society generally to work together effectively to understand, prevent, identify and tackle this abhorrent crime so that victims are safeguarded and protected from exploitation and its profound and long-lasting effects.

Nicola Markie
Senior Case Handler

Court Guidance on HRA in Failure to Remove Claims

‘Failure to remove’ claims so far

Since CN v Poole Borough Council [2019] UKSC 25 (“Poole”), the court has been asked to consider a number of claims to assess if claimants can allege negligence on the part of local authorities for failing to remove a child. This litigation has provided clear guidance on what circumstances will not amount to a duty on the part of the local authority. In particular, the cases of DFX v Coventry CC [2021] EWHC 1382 (QB), [2021] PIQR P18, 9 (this was discussed in our article here) HXA v Surrey County Council and YXA v Wolverhampton City Council (see article here) prevent any arguments by claimants that actions taken by local authorities by way of investigating a family position, providing services to try to relieve the family’s position or invoking child protection powers short of obtaining a care order, will impose a duty on local authorities. These decisions make the position in negligence for ‘failure to remove’ relatively clear and claimants are now favouring arguments under the Human Rights Act 1998 (“the HRA”) as an alternative route for ‘failure to remove’ claims.

Claimants allege that local authorities by failing to apply for a care order to remove a child from a parent’s care can be in breach of the following articles under the European Convention of Human Rights:

- Article 3 – “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”
- Article 6 – the right to “... the determination of ... civil rights and obligations ...”
- Article 8 – the “... right to respect for private and family life ...”

Although claims citing the Human Rights Act have been received for some time, until now there had been no judicial consideration of them. The recent case of AB v (1) Worcestershire County Council (2) Birmingham City Council [2022] is the first case to provide guidance on the area.

Background

The claimant lived in Birmingham City Council (“BCC”) area between July 2005 and November 2011 and in Worcestershire County Council (“WCC”) between November 2011 and January 2016. The claimant alleges he was abused and neglected whilst in the care of his mother. He was accommodated by WCC on several occasions in 2013 and was subsequently made the subject of an interim care order in May 2015 followed by a final care order in January 2016. However, AB asserts that BCC should have applied for a care order around or shortly before July 2008 and that WCC should have applied for a care order from about April 2012.

Both authorities had periodic involvements with the claimant through referrals regarding the care of his mother and allegations of neglect and physical abuse. The claimant was not accommodated at any time by BCC, but following a disclosure to his school that he had been physically assaulted by his mother, he and his younger brother were placed in foster care from July 2013 until April 2014. He returned initially confirming he was happy to return, but later complained that his mother was again being abusive to him. In August 2014, he was accommodated by agreement after an allegation was made that he had sexually abused a friend of his brother. He never returned to the care of his parents.

The claimant initially brought a claim alleging negligence and breaches of Article 3, 6 and 8. Following the decision of DFX & Others v Coventry City Council [2021] EWHC, the claimant abandoned his negligence claim against BCC, as there was no care order in this period, and pleaded that both authorities breached the human rights articles by failing to make an application for a care order. The negligence claim against WCC continued.

Both defendants submitted applications to strike out the claimant’s claim and for summary judgment.

By the time of the hearing the claimant only advanced arguments under Articles 3 and 6; all other claims had been abandoned.

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The Judgement

Article 6

Article 6 in civil matters firstly depends on the existence of a genuine and serious "dispute", which must relate to a "civil right" which can be said, at least on arguable grounds, to be recognised under domestic law.

The court found in this case that there was no such right at issue. The claimant did not have a "civil right" to seek a care order or to have one made and in any case it was not arguable that a care order would have been made on the basis of the incidents identified in the claim form. The Article 6 claim was, therefore, struck out.

Article 3

Article 3 provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." This imposes two positive duties to the state: (1) a duty to take reasonable steps to protect individuals from ill-treatment falling within Article 3: the "operational duty", and (2) a duty to investigate an arguable breach of Article 3 in order to increase the likelihood of future compliance: the "investigative duty".

The issue in this case was whether the defendant should be granted summary judgment for the allegations under Article 3.

In order to determine this the court needed to address the following issues:

1. Whether the treatment the claimant received met the threshold for degrading treatment and punishment;
2. Whether an operational duty could be owed to children living in the community; and
3. Whether an investigative duty could be owed under Article 3.

In relation to (1) the court looked at each reported incident relating to the claimant and analysed them individually and this analysis can be found from paragraphs 65–85. In each case it was found that the claimant was undoubtedly vulnerable and at risk. It was also found he was at risk of being subjected to poor and inconsistent parenting and neglect. However, he had no real prospect of establishing he was subject to ill-treatment under Article 3. The reason for this was there was no "real and immediate" risk of treatment failing under the scope of Article 3 as most of the incidents which came to the defendants' attention did not involve persistent or sufficiently serious neglect or abuse to bring them under Article 3. Further, there was no real prospect of showing the defendants should have known of a "real and immediate" risk of Article 3 treatment and finally there was no arguable case that a care order should have been sought in the circumstances.

Turning to (2) which had been raised on behalf of BCC only. The court highlighted that for an operational duty to arise there must be "care and control". BCC did not have "care and control" whilst the claimant was living in that area. Therefore, the operational duty was not engaged and without it being engaged there could be no breach of it. Even if the treatment had been found to be have met the threshold of Article 3 the claim against BCC would fail as there was no operational duty.

Issue (3) dealt with the investigative duty. The claimant argued that the defendants breached their investigative duty, but did not particularise this in their pleadings. Their counsel submitted that the application of the investigative duty will depend on the context and that the duty to investigate should not be limited to the circumstances noted in Supreme Court in the case of D v Commissioner of Police for the Metropolis [2019] AC 196 which was the duty of the police to properly investigate offences.

The judge found that the allegations of ill treatment falling within Article 3 will invariably engage the criminal law and the language used to describe the duty indicates that "investigation" refers to criminal investigation discharged by the police and prosecution. It is not an investigation for the primary purpose to establish the existence of potential future harm and protect the victim against it. The framework and the provisions of the Children Act 1989 are to empower social workers to investigate a child's circumstances in order to take steps and to prevent any risk or further risk of significant harm. The purpose of section 47 investigations is to decide whether and what type of action is required to safeguard and promote the welfare of children; the provisions do not require an independent enquiry to identify what has happened and the purpose is not to punish the wrongdoer. Accordingly the investigative duty did not apply in this case.

Even if it did, the judge said there would not be a breach as only very significant failures could give rise to a breach and there was no evidence of this and the claimant has no reasonable prospect of success.

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Summary

The overall merits of the claim were found to be poor with no realistic prospect of success. Despite there being empathy for the claimant, there was insufficient evidence that the various incidents relied upon by him reached the high threshold to sustain an Article 3 claim and his claim was bound to fail. Further, Article 6 does not disclose a legally recognisable claim.

Implications

The decision of the judge shows that unless there is evidence of consistent ill treatment of sufficient severity, a claimant is unlikely to succeed in demonstrating that the Article 3 threshold will be met for degrading treatment and punishment. The judgment provides an analytic review for many involvements by the local authorities and this will be a useful tool for examining if degrading treatment and punishment will be found in future claims citing Article 3.

Further, and perhaps the more far-reaching argument that the defendant will only have an operational duty if they are in the "care and control" of the defendant. This provides a defence for most 'failure to remove' claims as these arise from children experiencing neglect or abuse within the family home. The question which was not addressed in the judgment was what is required for "care and control" – is it a care order or is temporary accommodation under s20 enough to establish care as the claimant had been accommodated temporarily accommodated when with WCC. The issue of "assumed responsibly" for "care and control" was also referenced in the judgment, but it is unclear if this would have the same meaning in the private law of negligence and, therefore, further clarification is needed on this issue.

The opinion in relation to investigative duty confirms that the claimant's solicitors have a misconception of this duty and that it applies to local authorities. If the operational duty under Article 3 applies then this involves an obligation of inquiry, because there will be a liability if the local authority ought to have been aware of the risk of Article 3 ill treatment. However, there is no separate obligation of investigation where there is no operational duty.

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Court of Appeal: Football Club Not Liable for Actions of Scout

In September 2021 the Court of Appeal handed down it's judgment on a case where Keoghs acted for Blackpool Football Club ('Blackpool FC' or 'the Club') and its insurers. This was an appeal against the judgment of the High Court (Mr Justice Griffiths) handed down in March 2020, in which the court had found Blackpool FC vicariously liable for the tortious actions of a former football scout Frank Roper.

The Court of Appeal unanimously overturned that decision and found that the nature of Roper's role as an unpaid football scout meant the Club did not have any degree of control or direction of him to render it vicariously liable for his actions.

Background

The claimant alleged that he had been sexually abused by Roper on one occasion during a football trip (organised by Roper) to New Zealand in June 1987. Roper ran a junior football team called Nova Juniors which was said to have been a 'feeder team' for Blackpool FC. Whilst the claimant did not play for Nova Juniors, he did attend coaching sessions at Blackpool FC's School of Excellence from about 1985 to 1987. The New Zealand trip was arranged for a representative side from the Blackpool area and consisted of players from Nova Juniors and other local sides plus players from Blackpool FC's School of Excellence. The cost of the trip was estimated to be around £25,000 and it was funded by Roper himself (although it was alleged that the Club had made a contribution of £500).

In 2018 the claimant commenced a civil claim for compensation against the Club alleging that it was vicariously liable for the abuse committed by Roper. The defendant's position was that it was not vicariously liable for Roper, whom it argued was not an employee nor could be considered akin to an employee, and in any event the New Zealand trip was not closely connected to any association Roper had with the Club. The defendant also raised a limitation defence.

The matter proceeded to trial before Mr Justice Griffiths in March 2020 who found in the claimant's favour. He disapplied the limitation period and held that the Club was vicariously liable. He awarded the claimant damages of £19,000. He found that Roper was considered so much a part of the business and organisation of the Club that it was just to make it liable for his torts. The judge considered the recruitment of youth players was a key part of the Club's core business and that it relied on volunteers like Roper. He also noted that many players had gone on from Roper's Nova Juniors team to play for Blackpool FC to the extent that the Club was reliant on the players he referred. Whilst some Nova Juniors' players went elsewhere, they were considered exceptions. In respect of the New Zealand trip, the judge ruled that, since the Club's First Team Manager's had told other parents that it was a good opportunity for the boys and his own son went on the trip, although it was not an official Blackpool FC trip it was so close to being an official trip as made no difference. It was considered to be a trip that formed part of Roper's operation to recruit players for Nova Juniors to then refer on to Blackpool FC.

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Grounds of Appeal

The defendant was granted permission to appeal on four grounds, two of which related to vicarious liability:

- That the trial judge was wrong to hold that Roper was in a relationship with the defendant that was capable of imposing vicarious liability (i.e. Stage 1 of the two-stage vicarious liability test).
- That the trial judge was wrong to hold that there was a sufficient connection between the claimant's assault and any relationship between Roper and the defendant (i.e. Stage 2 of the two-stage vicarious liability test).

The Club was additionally granted permission to appeal on two grounds relating to limitation.

Judgment of the Court of Appeal

In the lead judgment, LJ Stuart-Smith (with whom LJ Macur and Sir Stephen Richards agreed) allowed the defendant's appeal on the grounds of vicarious liability (Stage 1 and 2) and dismissed the claimant's claim in full.

The Court of Appeal carried out a detailed analysis of recent leading cases on vicarious liability, including the two important Supreme Court judgments that were handed down after the High Court's judgment in this case; namely Various Claimants v Barclays Bank plc [2020] AC 973 ('Barclays') which concerned Stage 1 of the two-stage vicarious liability test and Various Claimants v Wm Morrison Supermarkets plc [2020] AC 989 ('Morrison's') which concerned Stage 2 of the two-stage vicarious liability test.

Stage 1

Following Lady Hale's lead judgment in Barclays, the Court of Appeal first examined the nature of the relationship itself to ascertain whether it was one where Roper was carrying on business on his own account or whether he was in a relationship akin to employment with the Club. In doing so, it concluded that:

- Although Roper's scouting activities conferred benefits upon Blackpool FC that were important for the development and survival of its business, these were benefits that could equally have been conferred upon the Club by someone acting independently.
- Whilst there was evidence that Roper was afforded deference and welcomed by the Club in recognition of his having produced good players in the past and in the hope that he may continue to do so in the future, none of the other normal incidents of a relationship of employment were present.
- Roper had a completely free hand about how he went about his scouting activities. There was no evidence whatsoever of any control or direction by the Club as to what he should do.
- The evidence showed no more than an informal association between Roper's Nova Juniors and the Club (this merely being that a number of boys who played for Roper's teams went to Blackpool FC, so was generally regarded as 'a feeder' for the Club). However, his activity was not exclusively for the Club and there was no evidence Blackpool FC had any say in the existence or operation of Roper's teams.

Accordingly, the Court of Appeal came to the 'clear conclusion' that the relationship between Blackpool FC and Roper was not one that could be treated as akin to employment.

The Court of Appeal did not stop there, acknowledging the requirement to test their conclusions with reference to Lord Phillips' five policy reasons for the imposition of vicarious liability (as set out in Various Claimants v Catholic Child Welfare Society [2013] 2 AC 1).

Whilst acknowledging that it is possible to fit the facts of the case within the language of Phillips' first three incidents if it was accepted that Roper's activities were solely for the benefit of Blackpool FC (which the Court of Appeal had already roundly rejected in any event), the fifth incident relating to control was clearly lacking. In particular, the Court of Appeal said Roper was not "in any meaningful sense under the control" of the Club and that:

> "Blackpool FC … had no power to direct Mr Roper to carry out scouting activities: on the contrary, the relationship between Mr Roper and Blackpool FC imposed no power upon the club (other than the power to end its association with him) and no obligation upon Mr Roper to scout either at all or in any particular way"

The Court of Appeal also considered the development of 'enterprise risk' as a possible factor for establishing vicarious liability, but concluded that:

> "it is not sufficient to say that the running of a football club with the need to attract young and talented players gives rise to the risk that it will also attract sexual predators. What is required is to show that the relationship between the defendant and the predator involves a degree of control and direction of the abuser by the defendant that makes it akin to employment rather than the utilisation of someone over whom the defendant does not even exercise a vestigial degree of control. That vestigial degree of control must be present during the course of the relationship: it is not sufficient to show that the employer has the power to terminate it" [our emphasis]

Finally, in summarising their conclusions in allowing the Club's appeal on Stage 1 of vicarious liability, the Court of Appeal said:

> "although the running of Blackpool FC's business gave rise to the risk of sexual offending against young boys, the relationship between Mr Roper and the defendant fell far short of being akin to employment [our emphasis] … On the contrary, while not in any way underestimating the importance of Mr Roper's scouting activities to the club, it is clear that he did so with a degree of independence and lack of control by the club that compels the opposite conclusion. I would therefore hold that the requirements of stage 1 are not satisfied in the present case"

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Stage 2

Turning to Stage 2 of the vicarious liability test, the Court of Appeal disagreed with the High Court's analysis that the New Zealand trip was so close to an official Blackpool FC trip that it made no difference.

The Court of Appeal noted that Blackpool FC had "no involvement at all apart from providing something in the order of 2% of the funding and the use of its social club for meetings … There is no evidence that the trip was even in any sense Blackpool FC's idea, or that they asked Mr Roper to organise and finance it for them, or that they had any hand in choosing who went on the trip." This was "Mr Roper's trip in every sense", evidenced by the last ten days of the tour being spent in Thailand which was purely for Roper's own independent commercial interest and where no football was played.

The Club's appeal in respect of limitation was dismissed on the basis that the Court of Appeal held that the judge was entitled to exercise his discretion and allow the claimant's claim to proceed. However, the Court of Appeal acknowledged that every case must be considered on its individual facts.

Commentary

First and foremost, the judgment will of course be a considerable disappointment to the claimant in circumstances where the court found he had been the subject of abhorrent abuse by Roper in the manner alleged. Notwithstanding this, given the effect of the first instance judgment, the Court of Appeal was compelled to assess and apply the legal principles of vicarious liability to the claimant's case, particularly in circumstances where it is likely to have wide-ranging effects on other organisations.

In this respect, there have been a spate of claims in recent times which have looked to expand the boundaries of the doctrine of vicarious liability. This case is yet a further example. Significantly, this was also the first case in which the courts had been asked to assess the liability of professional football clubs for the actions of independent scouts. Blackpool FC was not the only professional club that relied on the services of independent scouts in similar circumstances (historically, most clubs did), and the implications of this judgment in respect of the many other claims involving independent scouts will be significant. However, the potential implications of the judgment do not stop there.

In Barclays, Lady Hale established that when considering vicarious liability we must look at the nature of the relationship itself, and that is exactly what the Court of Appeal has done here. This emphasises the importance of available evidence addressing the nature of the relationship in contrast to evidence that merely deals with people's perception of the relationship. In this case, there was plenty of evidence that Roper held himself out as being a representative of the Club, but this had little importance when evaluating the true nature of Roper's relationship with the Club for the purposes of establishing the issue of vicarious liability.

It has long been established that control over how individuals carry out their duties on an employer's behalf is not necessarily required for the imposition of vicarious liability (for example, an airline has no control over how a pilot carries out his duties whilst flying a plane). However, this judgment acts as a welcome reminder to organisations and insurers that there must at least be an element of control over what these individuals do on the organisation's behalf for liability to attach: it is not enough that the organisation had the power to terminate the individual's association. The judgment is also a forceful reminder that mere creation of risk is insufficient to engage the doctrine of vicarious liability and that creation of risk needs to be accompanied by a degree of control. Professional football clubs are not the only organisations who rely on the services of such individuals and the Court of Appeal's guidance will equally apply to those situations as well.

Ian Carroll
Partner

TVZ & Others v Manchester City FC

In another related football claim, the High Court handed down it's judgment on 10 January 2022 in eight non-recent sexual abuse claims in which Keoghs acted for the defendant. The matters related to the liability of the defendant for abuse committed by a former football scout and coach, Barry Bennell. Dismissing each of the claims, the court determined that it would not be equitable to disapply the limitation periods and found that the defendant was not vicariously liable for the abuse committed by Bennell.

Background

Between approximately 1980 and 1985 the claimants alleged that the defendant had engaged Barry Bennell ('Bennell') as a local scout and coach and that in the course of those duties he also ran many different local junior 'feeder teams' for the defendant. Each of the claimants played for one or more of these feeder teams and in the course of Bennell's duties for the defendant he sexually abused each of the claimants on numerous occasions.

In 2017/2018 the claimants each commenced separate civil claims for compensation against the defendant alleging that it was vicariously liable for the abuse committed by Bennell. The defendant did not at trial challenge the claimants' accounts that they were abused by Bennell. Whilst the defendant accepted that Bennell held himself out as a representative of the club, the defendant's position was that Bennell stopped being a local scout for it in 1979 when Bennell went to work at a children's home in Derbyshire, and that the teams Bennell ran thereafter had no connection whatsoever with the club and that it was not in any event vicariously liable for Bennell's abuse upon the claimants.

It was agreed that the primary limitation periods expired many years earlier and that the claims had been brought 'out of time'. However, the claimants sought the necessary discretion of the court to disapply the limitation periods.

However, the defendant contended that due to claimants' delay it had suffered significant prejudice in having to meet the claims, particularly given the death of its Chief Scout Ken Barnes in 2010, meaning that it would not be equitable to disapply the limitation periods.

All eight matters proceeded to trial and were heard together at the Royal Courts of Justice on 25 October 2021 and lasted for seven weeks.

Limitation

Even though the judge found that each of the claimants had a good explanation for the delay in issuing proceedings, having regard to the length of the delay and the way in which the delay had affected the available evidence (particularly on the fact sensitive issue of vicarious liability) the judge did not consider that it was fair and just to expect the defendant to meet any of the claims and did not, therefore, consider that it was equitable to disapply the limitation periods.

Reasons for delay

The medical experts were in agreement that each claimant had never lacked the mental capacity to complain or to instruct his legal representatives and that they have never been psychiatrically disabled from making a complaint. However, none of the claimants consciously or capriciously

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delayed the issue of proceedings and the abuse and its consequences were significant factors in each of the claimant's delay. As such, the judge considered that each of the claimants had a good and cogent explanation for the delay in bringing proceedings to the extent that if there was no significant impact on the cogency of the evidence, it would have been fair for the defendant to face these claims.

Cogency of evidence

In considering the impact of delay on the cogency of the evidence, the judge focused on three issues: (1) whether the abuse occurred; (2) whether the defendant was vicariously liable for that abuse; and (3) quantum.

Regarding the first issue, the claimants' accounts of abuse was not challenged and there was very little scope for fallibility of memory on the fundamental question of whether the abuse occurred. In respect of the third issue, the judge recognised that there is considerable scope for reattribution and confirmation bias as the abuse was a hugely significant event. However, the judge considered that in one sense the delay had improved the evidence in relation to quantum as there was no requirement for the experts to engage in a forecasting exercise in respect of how the abuse would impact upon the claimants' future lives. Taking all of this together (and leaving aside the question of the second issue of vicarious liability below), the judge concluded that he would have exercised his discretion to disapply the time limits.

However, regarding the issue of vicarious liability, the judge acknowledged that this is highly fact sensitive and that its resolution was not entirely straightforward: it depended on a detailed assessment of the nature of the relationship between Bennell and the defendant. There was no clear documentary record of the relationship between the defendant and Bennell meaning that greater reliance was to be placed on witness testimony, most of whom the judge said were observing the relationship from a distance and in circumstances where Bennell was overstating his relationship with the defendant for his own purposes.

The judge said that the only remaining witness who was able to give direct first-hand evidence about the relationship was Bennell himself. However, after hearing his evidence the judge found him to be lacking any credibility and thus his evidence was worthless. Accordingly, the judge recognised that the evidence on the key matters relevant to the issue of vicarious liability only stemmed from the recollection of witnesses going back over three decades and related to points of detail which those witnesses had no reason to commit to long-term memory. The judge felt in particular that the evidence of Ken Barnes, who was the Chief Scout, would have been critical and he would have been much better placed to give credible and reliable evidence on the relationship between Bennell and the defendant than any of the witnesses who were alive and able to give evidence; however, Barnes died in 2010. The net result was that if the claims had been brought in time, it is likely that clear, confident and reliable conclusions could be reached about the relationship between Bennell and the defendant. The ability to do so now had been badly compromised by the 27-year delay and the consequential impact on the available evidence.

There were also factors present in these cases that distinguished them from the circumstances in a similar case that was recently heard before the Court of Appeal, namely Blackpool Football Club Limited v DSN [2021] EWCA 1359 ('DSN'), where the limitation period was disapplied. In particular, the delay was longer in these cases; in DSN there was evidence from a number of adult staff members who were all able to assist on the relationship between the abuser and Blackpool FC; there was only one 'feeder team' that was under consideration, whereas the claimants' cases here directly concerned six youth teams, and the basic way in which the single feeder team operated in DSN was tolerably clear, whereas the evidence relating to how the teams operated here was limited.

As such, the judge concluded that it was not equitable to disapply the limitation periods and the claims were dismissed.

Vicarious Liability

Despite his decision in respect of limitation, the judge proceeded to consider the issue of vicarious liability and whether the defendant would have been vicariously liable for the abuse by Bennell. In doing so, he conducted a comprehensive and thorough review of the relevant authorities, including DSN and the Supreme Court's decisions in Barclays Bank and WM Morrison Supermarkets plc, which emphasised the importance of the employee/independent contractor distinction and how it is necessary to focus on that distinction when deciding whether the relationship is akin to employment in order to determine stage one of the established vicarious liability test.

Stage One

The judge acknowledged the 'corrective guidance' provided by Lady Hale at [28] in Barclays Bank in identifying that the key test is as follows:

> The question therefore is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant.

Taking his lead from Stuart-Smith LJ in DSN, the judge proceeded to conduct an extensive examination of the factual relationship between Bennell and the defendant. In doing so, he outright rejected Bennell's evidence on the grounds that he has no credibility, instead focusing on the evidence of others. He concluded that on the evidence, Bennell was engaged by the defendant as a scout from approximately 1974/75 until 1979. However, during the course of 1980, Bennell became involved with a number of junior teams so that his role between 1981 and 1985 was much as it had been during the earlier period, i.e. he was coaching teams in which the defendant took a close interest and some of which were feeder teams for the defendant. However, Bennell's involvement in these teams was not at the instigation of the defendant and was entirely of Bennell's own initiative: the defendant did nothing to associate itself with Bennell's teams and to the extent that boys playing for these teams thought they were playing for a Manchester City junior team, that was a result of Bennell's deception and not because of any actual connection between the defendant and these teams.

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The relationship did not involve payment or any legal obligation from Bennell to the defendant, or vice versa. It was an entirely voluntary arrangement. There was no exclusivity. The defendant was free to use other scouts (and did). There was nothing to stop Bennell from doing other work (and he was employed full time for much of the period). There was nothing to stop Bennell from doing other work in relation to football coaching (and he did – for example his work at Butlins). Accordingly, for the following reasons, the judge determined that the claimants had failed to establish 'the essential ingredient of their case', namely that Bennell was in a relationship with the defendant "akin to employment":

1. Bennell's footballing activities were voluntary and undertaken in his spare time and although not determinative, this was indicative of Bennell's independence;
2. Bennell's activities as a football coach had a distinct existence, independent of the defendant. His teams were not under the control of the defendant and did not have any say in the decision as to whether Bennell ran them (far less how he ran them). In addition, the football courses Bennell ran at Butlins were a separate, private arrangement between Bennell and Butlins and the football trips were undertaken on Bennell's own initiative with no direction or control from the defendant;
3. Bennell took the financial risk of the footballing activities that he arranged. He was not reimbursed expenses by the defendant so if he was unable to recoup the cost of a tour or of a team's activities from subs or fundraising activities, he was left out of pocket;
4. There is very little evidence of the defendant exercising control over Bennell's activities to warrant a finding that it had even a vestigial degree of control over his activities. In particular, there was no evidence that the defendant instructed Bennell in the style of coaching to be adopted, or where games should be played, or what kit should be warn, or when (or where) training should take place. There was plenty of evidence that Bennell recruited players for his teams at his own initiative and (with few exceptions) there was no evidence of any involvement on the part of the defendant. Finally, there was no evidence that the defendant ever told Bennell what he should do beyond the basic allocation of tasks which is equally consistent with a relationship with an independent contractor;
5. There was no evidence that Bennell was under any obligation to comply with instructions given by the defendant;
6. Bennell was not subject to any disciplinary code by the defendant; and
7. Bennell's involvement with the defendant was not part of its core business of running a successful first division team..

For the above reasons, the judge concluded at that:

> Bennell was not in a relationship with MCFC that is akin to employment. His relationship was that of a volunteer football coach who ran a number of junior teams (including teams with a connection to MCFC) and who, in that context, acted as a volunteer unpaid scout ... That was his enterprise, undertaken at his own risk, which MCFC did not control, but was a relationship of mutual benefit to MCFC and Bennell.
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> On the available evidence, the answer to the question of whether the relationship is akin to employment is sufficiently clear: Bennell was carrying on his own independent enterprise and was not in a relationship with MCFC that is akin to employment.

In reaching this conclusion, the judge recognised (per Lady Hale in Barclays Bank) that it was not necessary in circumstances where the nature of the relationship was clear to further consider the five incidents set out by Lord Phillips in Various Claimants v Catholic Child Welfare Society [2012] UKSC 56 [2013] 2 AC 1. However, he replicated the approach taken by Stuart-Smith LJ in DSN and having considered the application of each of Lord Phillips' five incidents to the circumstances of these cases, the judge did not consider that they indicated that the relationship between Bennell and the defendant was akin to employment.

Stage Two

Although the judge had already concluded that there was no vicarious liability (on account of stage one having not been satisfied), he proceeded to consider the second stage as to whether the abuse occurred closely connected to Bennell's duties on behalf of the defendant. This was on the assumption that Bennell was in fact employed or in a position akin to employment as a scout, a coach of feeder teams that included the claimants and as someone who would help organise teams at trial games.

The judge pointed out that the abuse generally occurred either at Bennell's homes or at residential premises occupied by Bennell during a football tour or a holiday. The claimants were staying at Bennell's home because he was their football coach and they and their parents had been persuaded by Bennell that it was sensible and convenient for them to stay with Bennell before or after matches. There was, therefore, a connection between Bennell's role as their coach and the boys staying at his home. Nevertheless, the judge concluded that nothing in the evidence suggested that it was ever contemplated by anyone at the defendant that children would stay with Bennell, far less that he was required to accommodate the children in the course of his ordinary duties as a football scout or coach. The judge concluded by saying at that:

"There is nothing to suggest that MCFC either had or assumed responsibility for the boys staying with Bennell, or that it entrusted them to his care, or that the abuse of the children was the abnegation of any positive duty allocated to him by MCFC. The fact that the children, and their parents, had been groomed into believing that it was in some way part of Bennell's role as scout to have boys stay with him at his home does not mean that that was the case."

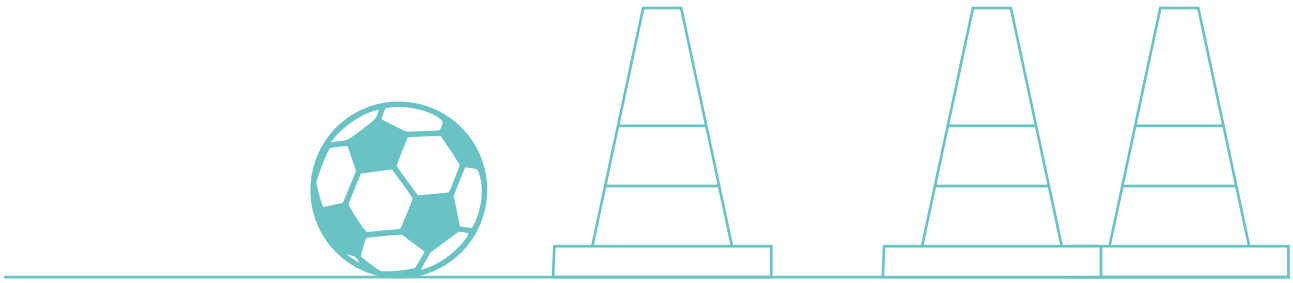
Accordingly, the claimants failed to establish that the abuse occurred in circumstances that were closely connected to any duties Bennell may have been required to carry out as a scout, coach or organiser of trial games sufficient to satisfy the second stage of the vicarious liability test.

Comment

This judgment represents positive reinforcement that the issue of limitation in these cases remains fact specific. As the court acknowledged, after the death of Ken Barnes, who would have been the critical witness on the issue of vicarious liability, the court was simply left with the evidence of Bennell as the person in the best position to know about the detail of his relationship with the defendant. However, given the court could place no reliance upon Bennell's evidence, this only accentuated the prejudice the defendant faced in having to meet the claims which in all of the circumstances was not considered just or equitable.

As the judge also rightly noted, each of the claimants were severely abused by Bennell and helped ensure that he was brought to justice which has meant that others have been protected from abuse and shone a light on what was going on in youth football. However, the judge also noted that in these cases it is not open to a court to impose vicarious liability on an organisation: "... on the basis of an intuitive feeling for where the justice of a case lies. Rather it [is] necessary to apply the tightly controlled legal tests as set down in the authorities." Accordingly, this is what the court has now done and the judgment represents a clear endorsement of the recent Court of Appeal analysis in DSN.

Finally, in relation to stage two of vicarious liability, this judgment also goes one further than DSN in that it considers the vicarious liability for abuse that occurred outside the scope of the activities expected of a junior football coach or scout. There will, therefore, no doubt be far-reaching implications in respect of claims brought by other claimants for abuse said to have occurred outside of the context of duties an individual would be expected to perform.



Dan Tyler
Associate

Ali v Luton BC

The High Court has found for Luton Borough Council in a claim arising from one of its employee's misuse of the claimant's personal data. The case concerned Stage 2 of the test for vicarious liability and so involved the application of the principles set down by the Supreme Court in Various Claimants v WM Morrison Supermarkets [2020] AC 989.

Facts

The employee (RB) was a Contact Assessment Worker in the council's social services department. She was responsible for supervising and assessing contact for looked after children. To fulfil her role, she had full access to social services records held on the council's computer system. This was standard practice.

The claimant was married in 2015 and she and her then husband later had two children. However, the marriage faltered, which led to the family having contact with the council's social services department. On 1 March 2019, the claimant complained to Bedfordshire Police that her husband had engaged in domestic abuse. That in turn prompted a multi-agency referral by the police to the council, on the basis that it gave rise to potential safeguarding concerns.

At no time was RB working on any files concerning the family. However, she had begun a relationship with the claimant's husband and following the police complaint (and apparently at the husband's behest) she wrongfully accessed and disclosed to him a number of records relating to the claimant contained on the council's computer system. When the claimant learned of this she became anxious, distressed, and concerned for her safety. Following an investigation, the council dismissed RB. She was also arrested and charged with one offence of unauthorised access to computer material, contrary to section 1 of the Computer Misuse Act 1990. RB pleaded guilty and was sentenced to three months imprisonment, suspended for 12 months.

RB had clearly breached the claimant's rights under the GDPR, at common law, and under the Human Rights Act 1998. The question was whether the council was vicariously liable.

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Legal backdrop

To succeed in a claim against a defendant based on its vicarious liability for the wrongful action of a primary tortfeasor, a claimant must satisfy a two-stage test. Firstly, there must be a relationship between the defendant and the tortfeasor which is sufficient to trigger vicarious liability. Secondly, the wrongful action committed by the tortfeasor must be sufficiently connected with that relationship to make the defendant vicariously liable for the tort. It was on this second stage that the case turned.

The law on Stage 2 was recently clarified by the Supreme Court in the Morrisons case, which also happened to involve the misuse of personal data. In that case, one of Morrisons internal IT auditors was asked to transfer payroll data for its workforce to its external auditors. Harbouring a grudge against his employer, the auditor did as he was asked, but also made and kept a personal copy of the data, which he then posted online to cause Morrisons embarrassment. Consequently a group of the affected employees sued Morrisons and the High Court and Court of Appeal found in their favour. However, the Supreme Court found for Morrisons instead. Giving judgment Lord Reed emphasised that the test at Stage 2 was whether "the wrongful conduct was so closely connected with acts the employee was authorised to do, that, for the purposes of the liability of his employer, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment". In the Morrisons case, the auditor's wrongful conduct was not so closely connected: he was pursuing a personal vendetta. Lord Reed also observed that in cases involving child sexual abuse the courts have taken a different approach to Stage 2, focusing on factors such as the wrongdoer's abuse of authority over the victims, over whom they have some degree of responsibility or trust.

The legal arguments

The claimant submitted that that the proper application of the Stage 2 test leads to the conclusion that vicarious liability is made out. The claimant further submitted that other decided cases, including those concerning sexual abuse, provide additional helpful guidance. RB's role had welfare and safeguarding aspects and so it was right to apply by analogy, the principles referred to by Lord Reed that had been developed in sex abuse cases.

The defendant submitted that the Morrisons case was not only the starting point, but also the finishing point for the applicable analysis. Both concerned data breaches, and an employee who misused data to further their own personal agenda rather than the business of the employer. Indeed, if anything, the argument against imposing vicarious liability was stronger in this case. In Morrisons the employee had misused data to pursue his own vendetta, but it could at least be said that he had been tasked with using it lawfully for purposes of the employer's business. In this case, by contrast, RB misused for her own purposes data which she was not even required to use in the first place and which she had accessed improperly. In any event the further authorities upon which the claimant relied did not assist her and, in common with the outcome in Morrison, pointed to the conclusion that the claim had to fail.

Why the council was not vicariously liable

Richard Spearman QC, sitting as a Deputy High Court Judge, found for the council. As was the case with the Morrisons auditor, RB "was in no way engaged, whether misguidedly or not, in furthering the business of her employer". While her role gave her the opportunity to access the data, it "formed no part of any work which she was engaged by the defendant to do to access or process those particular records". Indeed, "if (RB) had disclosed her connection with the claimant's husband, as she ought to have done, her access to these records would have been restricted by the defendant". In sum, RB "'was engaged solely in pursuing her own agenda, namely divulging information to the claimant's husband, with whom she had some relationship. Further, that was to the detriment of the claimant (and the children) whose safety and interests as users of the defendant's services it formed part of (her) core duties to further and protect". As such, RB was on "a frolic of her own". Applying Lord Reed's test "her wrongful conduct was not so closely connected with acts which she was authorised to do that, for the purposes of the defendant's liability to third parties, it can fairly and properly be regarded as done by her while acting in the ordinary course of her employment".

Moreover the judge was unpersuaded by the claimant's contention that the principles developed in sex abuse cases applied by analogy to this one. Among other things, RB "was never put in charge of any aspect of the affairs of the claimant (or the children), or indeed information relating to them".

Comment

This is a clear and authoritative judgment and is entirely consistent with Lord Reed's approach in the Morrisons case. After a long period in which vicarious liability was on the move, we now have some welcome stability.

Calum Fife
Partner

Issues of Trustees and Vicarious Liability in Historic Abuse Case

Hugh Kennedy v The Right Reverend Paul Bonnici, The Right Reverent James Warren Cuthbert Madden and Denis Alexander [2021] CSOH 106

Summary of Issues

On 20 October 2021, Lady Wolffe issued her decision following a debate in this case, concerning alleged historic abuse at Fort Augustus Boarding School ("the School") run by the Benedictine Community.

The pursuer seeks £5,000,000 for alleged sexual and physical abuse whilst resident at the school between 1975 and 1977. Two of his alleged abusers are deceased. The surviving alleged abuser is also involved in the proceedings. The school closed nearly 30 years ago.

The pursuer has raised his proceedings against two former trustees of a trust which his representatives aim to prove ought to meet the claim. The defenders' position is that the trust cannot respond to the claim as it was wound up around a decade ago and the trustees discharged.

Legal Debate

At a debate heard on 24 June and 15 July 2021 the defenders argued that:

- the pursuer's case was lacking in specification and irrelevant on a variety of grounds;
- on the merits of the case, even if the pursuer's averments were proved, it would not result in a finding of vicarious liability against the defenders;
- any insurance policy that existed was neither a trust asset nor for the pursuer's benefit; and
- a fair hearing is not possible under section 17D(2) of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"), or that the defenders will be substantially prejudiced by the case being permitted to proceed any further.

The defenders sought dismissal of the case on these bases.

Legal Arguments

The debate involved complex issues covering: trust patrimony, insurance, vicarious liability and limitation. The decision can be accessed here

The issues argued at the debate can be summarised as follows:

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Trust Issues

As regards the trust and whether it is a legally viable vehicle to meet the claim, the pursuer's case relies on the "dual patrimony" theory. They argue that the trust estate has subsisted through time regardless of the change of trustees over the decades since the alleged events complained of. The last known trustees have been sued. It was argued that as long as there is an extant asset of the trust, the trust has not been fully found up, and can, therefore, respond to the claim.

The defenders do not dispute "dual patrimony" as a theory, but contended that there is not one single subsisting trust patrimony. Their position is that there have been multiple patrimonies subsisting only so long as each particular trustee held their office in respect of the trust. Any liability owed by the serving trustees (at their time in office) was private to them. The defenders also argue that the pursuer's reliance on the trust estate or trust patrimony as a continuing entity involves an impermissible reification of the trust, which in Scots law has no separate legal personality.

Lady Wolffe decided at debate that she preferred the pursuer's analysis that a trust patrimony subsists even though for a time it is not vested in a trustee. The pursuer's target in this case is not actually the trust, rather an asset of it, in the form of the contingent right of indemnification under the public liability insurance policy, which he says was in place at the time of the alleged abuse. Lady Wolffe rejected the contention that there are multiple trust patrimonies which only subsist as long as a particular trustee holds their office. In her Ladyship's opinion, where an estate has not been the subject of a final distribution, it is competent for a third party creditor to bring a claim against the trust with a view to it being satisfied from the available estate.

The pursuer contends that the trust has not been subject to a final distribution. He argues that an insurance policy existed at the time of the abuse, which is capable of responding in the form of an indemnity in respect of the trustees. In coming to her decision on the trust issue, and how it ought to be ultimately determined, her Ladyship considered the case of Forbes v Maclean ([2018] CSOH 88), which involved similar difficulties to the present case. In Forbes, Lord Clark held that a number of matters that were uncertain (the question of how, when and in respect of whom any insurance claim might become an asset of an estate), required evidence to be heard before final determination. Lady Wolffe decided that there were parallels with this case with uncertainties which also require evidence to be heard – in particular whether the trustees have been discharged and whether the trust has, as a matter of fact, been subject to a final distribution.

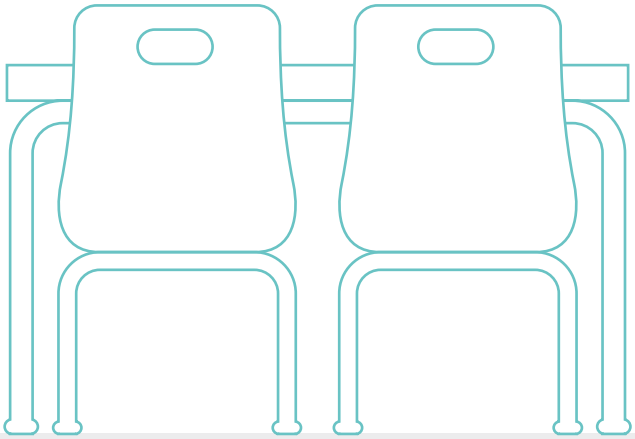
Insurance

The pursuer does not seek to hold the defenders personally liable, but rather establish liability in their capacity as trustees of the trust. He aims to constitute a claim against them with a view to accessing what he says is the (historic) insurer's obligation to indemnify the trustees. The availability of insurance is not generally a threshold or legal requirement for a competent or relevant personal injury action. However, the absence of cover as between the insurer and the trustees, is not a valid reason to bar a claim by a third party against the trustee, if that claim is otherwise well-founded. Lady Wolffe determined that the availability or scope of any insurance cannot be determined without hearing evidence.

Vicarious Liability

On the basis that the court accepts that the last known trustees are the correct defenders, and it is established following a hearing of evidence that a relevant insurance policy existed and remains an asset of the subsisting trust – the pursuer says his claim sounds in damages. In terms of proving liability, the pursuer offers to prove that the serving trustees (in office at the material time the alleged abuse took place) were vicariously liable for the acts and omissions of his alleged abusers. He relies on various high-profile recently reported Supreme Court decisions on the expansion of the doctrine of vicarious liability in support of his position on this front.

The defenders sought to have the case thrown out on the basis that the pursuer had failed to aver a sufficiently "close connection" between the serving trustees and the alleged abusers to lead to a finding of vicarious liability. However, on analysing the pleadings on this point Lady Wolffe noted that averments had been made to the effect that the serving trustees had appointed the headmaster and lay teachers to positions at the school. On that basis her Ladyship was satisfied that there were relevant and sufficiently specific averments to instruct a case that, in taking those steps, the serving trustees had "conferred authority" on those individuals, such that they might be held vicariously liable for their actions. Evidence would be required to determine the issue.



Limitation

The defenders sought to have the case dismissed at the debate. They relied upon section 17D(2) and (3) of the 1973 Act to argue that this is a case where (i) a fair trial would not be possible; and (ii) the defenders would face substantial prejudice if the case were allowed to proceed further. In particular, they drew upon the reasoning outlined by Lady Carmichael in B v Sailors' Society ([2021] CSOH 62) (discussed in detail here) in support of that position.

Lady Wolffe, however, preferred the pursuer's submissions on limitation. Her Ladyship was not persuaded that the court could conclude on the basis of legal submissions alone that the case ought to be struck out. Reliance was placed on the recent decisions in the Sailors' Society case, as well as the English cases of JXJ ([2020] EWHC 1914 QB) and BXB ([2021] EWCA Civ 356) dealing with similar applications. Her Ladyship determined that this case ought to be no different and that these matters required evidence prior to determination.

Decision

Ultimately, Lady Wolffe determined that the defenders' application to dismiss the case on relevancy grounds failed but that issues of both fact and law remained to be determined. Accordingly, her Ladyship indicated that procedurally the case ought to be continued to an evidential hearing in order to decide those issues. Whether that evidence was to be heard at a preliminary proof or proof at large was held over to a procedural hearing on 7 January 2020. Having heard submissions the court has now fixed a four-day preliminary proof in May 2022 restricted to:

- whether a fair trial can take place / the defenders are substantially prejudiced by the case proceeding; and
- whether the defenders are responsible for the acts and omissions of the alleged abusers as claimed.

Commentary

Lady Wolffe was clear that, given the complex and numerous issues at play, this was not a case which could be determined at the debate stage. On all four central issues in dispute, Her Ladyship was unable to form any concluded view on the merits of the case without hearing evidence.

As discussed above, this is not the first abuse case to proceed to preliminary proof and it is anticipated that this may be a trend in this area where fundamental points are taken in defence at an early stage. Although the defenders were unsuccessful in having the case dismissed at debate, this case can be viewed in a positive light for insurers. The courts in Scotland are showing a willingness to (where appropriate) deal with technical legal points at an early stage, and fix limited evidential hearings to deal with those issues. In turn this may lead to cases being determined at a relatively early stage of proceedings, with limited evidence, as opposed to being decided following several days/weeks of evidence at a proof at large.

There are a number of novel issues raised by this case in an area of law where there is little precedent to look to for guidance. The issues are likely to be ones which will feature in future abuse claims involving trusts and historic insurance. Determination of this case is keenly awaited and we shall provide an update on the outcome of the preliminary proof once it has been heard in May.

Paul Edwards
Director of Costs

Senior Costs Court

guidance on appropriate grade of fee earner and applicable rates for abuse claims

Non-recent abuse claims are understandably difficult and sensitive to deal with. As a result, legal costs routinely dwarf the compensation recovered. For some time there has been a growing concern about the level of bills presented in these claims. Senior fee earners often lead these claims with the consequence that claims for excessive hourly rates are made at same the time as relying on counsel and incurring substantial amounts of time. It is, therefore, important that only reasonable and proportionate costs are allowed. This decision, therefore, provided useful guidance on the appropriate make-up of a legal team running such claims within specialist firms and the rates that should be allowed.

In TRX v Southampton Football Club (SC-2020-BTP-001182) Keoghs acted on behalf of the defendant in considering the claimant's bill of costs which arose out of a claim pursued in vicarious liability for abuse committed by a former employee. Bolt Burdon Kemp, a specialist firm in the sector, acted for the claimant with this claim forming one of some 26 similar claims. The claim was settled for £4,000 shortly after proceedings were served and a defence filed, following which £65,523.26 was claimed in legal fees.

The claim was valued on issue up to £50,000. Following service of the defence the matter was allocated to the multi-track. The claim was defended in the first instance on grounds that the abuse was not an actionable tort and on limitation. The claimant's solicitors maintained that the settlement value was on a commercial basis, and that the outcome did not reflect its full value. The matter had been conducted by Bolt Burdon Kemp, with at least five different fee earners involved, with concern being expressed at the time spent and the reliance on counsel, bearing in mind the hourly rates claimed.

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Master Brown concluded that these sorts of claim could, in a specialist firm, be largely conducted by a Grade C fee earner, with some supervision. One conference with counsel was also allowed. Master Brown concluded:

> It seems to me, if one is instructing such a firm one would reasonably expect a Grade C solicitor who will be qualified and would have had experience with sexual abuse claims for up to four years, to be able to conduct the claim as the principal or main fee earner. I do not take the same view as to the generic costs aspect of the bill, in respect of which I consider a greater involvement of Grade A fee earner appropriate. I do also accept that in relation to work on this particular claim, some input by way of supervision, if that is the right term, from a more senior fee earner, a Grade A or a Grade B fee earner, is also reasonable.

Turning to the appropriate hourly rates, TRX lived in a National band 1 area; his solicitors are based in London. For work done in 2019 and 2020 the rates sought ranged from £480 per hour for Grade A to £365 for Grade B, £350 for Grade C and £170 for Grade D.

Following lengthy submissions Master Brown applied:

Grade A £330 per hour

Grade B £250 per hour

Grade C £210 per hour

Grade D £135 per hour

These rates were obviously applied in line with his guidance that most work should be done by the Grade C, with routine tasks such as obtaining records at Grade D. The bill was assessed at £23,008.15, with permission to appeal to the High Court on the issues of rate and grade being refused.

This guidance is to be welcomed and will assist in the assessment of claimant's costs in most non-recent abuse claims.

Directory delight

Thanks to the feedback from our clients regarding the legal directories. We would like to say thank you to everyone who responds to the yearly surveys, and also well done to some of our lawyers who have received fantastic feedback this year, across all of our offices.

Christopher Wilson is undoubtedly the rising star in this area of litigation. He has already been involved in numerous complex and high-profile matters, including at least two that have reached the Court of Appeal. Never one to shirk hard work, his meticulous attention to detail and willingness to go the extra mile in the interests of his clients is invaluable.

Legal 500

The team has a wealth of experience in dealing with coverage issues. They are every bit as good as the London firms in this field. I find they are particularly good at client handling and communication.

Legal 500

Really experienced team who have a huge level of experience in dealing with claims arising out of alleged child sexual exploitation.

Legal 500

Ian Carroll has a good understanding of the strategic and tactical considerations arising out of group actions against Premier League clubs.

Legal 500

The service we have received over the years is always sensitively handed, highly competent, professional, timely and efficient. The team are approachable and always willing to go the extra mile to achieve the desired outcome, we would not hesitate to recommend them.

Police Force Solicitor

For further information about any of the articles or the work done by the team please contact:

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About Keoghs

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Our award-winning teams include acknowledged experts who have been involved in some of the most significant developments in their respective fields. This enables us to bring a rare depth of understanding and expertise to every aspect we handle.

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Keoghs has provided defendant legal and claims related services to the insurance industry since

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