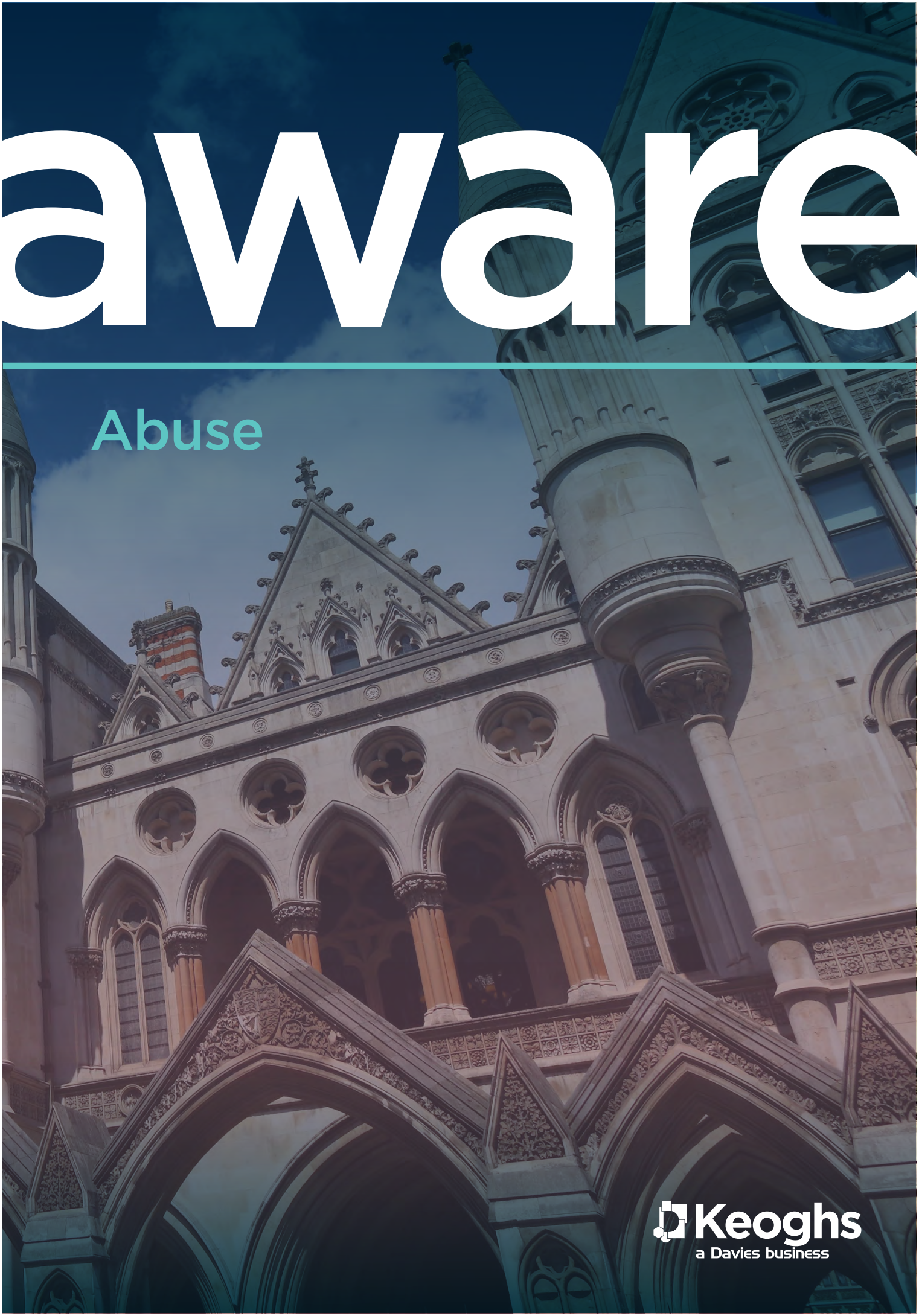
aware

Abuse



Keoghs
a Davies business

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Welcome

Welcome to the autumn edition of Keoghs Abuse Aware update. The imminent publication of the IICSA final report on 20 October 2022, concluding what will be nearly a full year's worth of public hearings and 19 investigation reports, is likely to make a number of important recommendations to better protect children as well consider the future of limitation in civil claims and redress. In anticipation of this important report being published, we endeavour to bring you fully up to speed on developments over the past six months in the sensitive and challenging area of abuse law, including the new guidelines for assessment of damages in abuse claims, as well as case updates on the issues of vicarious liability, limitation and consent.

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 about these issues they would be delighted to hear from you.

- Head of our abuse team Partner Ian Carroll discusses the introduction of the new category of damages for abuse in the Judicial College Guidelines
- Patrick Williams, Associate, provides a summary of redress schemes which will be particularly relevant to any recommendations made by the IICSA. He also considers a recent case relating to vicarious liability in the context of a work experience student which applied an analysis of a number of cases handled by Keoghs
- Lauranne Nolan, Associate, provides an update on the legislative changes which have taken place in relation to abuse and positions of trust as well as the potential introduction of mandatory reporting of suspected incidents of abuse, again which may be relevant to the IICSA recommendations. Lauranne also discusses the recent case she handled concerning vulnerable witnesses and guidance on "best evidence"
- Anna Churchill, Legal Executive, considers the consequences of late acceptance of Part 36 offers in abuse claims.
- Christopher Wilson, Associate, considers a recent case in which the issues of limitation and consent were considered that builds upon the cases he handled where similar issues applied.
- Laura Baxendale, Associate and Khadija Sarwar, Solicitor from our Scottish office, looks into a recent case dealing with the complex issue of quantification of special damages.

Keoghs market-leading abuse team has cross-border expertise and members who are listed in the legal directory rankings as being experts in this area. The team has over 20 years' experience of both recent and non-recent abuse cases and advises on safeguarding issues in a number of sectors including:

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

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Ian Carroll
Partner

Damages in abuse claims: new category of abuse in Judicial College Guidelines

The 16th edition of the Judicial College Guidelines was released in April this year and, as had been widely expected, included for the first time a new category for general damages relating to sexual and physical abuse.

Whilst these Guidelines had always been used to reflect and categorise awards for damages for personal injury made by the courts, there had been relatively few reported decisions to justify a separate category. However, following the recommendations of the Independent Inquiry into Child Sexual Abuse (IICSA), the Judicial College decided to revise its Guidelines to include a freestanding section on abuse.

A new section appears at Chapter 4 – C and makes it clear that there should be a single award for damages relating to:

1. The abuse itself and the psychiatric injury which results from the abuse; and
2. An element for any indignity, mental suffering, humiliation, distress or anger (often previously characterised as aggravated damages)

The brackets of appropriate awards for general damages for abuse have been split as follows:

Severe
£45,000 - £120,000
Moderate
£20,750 - £45,000
Less Severe
£9,730 - £20,570

When undertaking an assessment of the appropriate level of general damages, the Guidelines have now codified and adopted the standard approach which had often been undertaken by the courts and those representatives involved in such cases to include:

- The nature and duration of the abuse and any physical injuries caused
- The nature and duration of any psychological injury and its effect on the injured person's ability to cope with life, education and work
- The effect on the injured person's ability to sustain personal and sexual relationships
- If it involved an abuse of trust
- The extent to which treatment would be successful, any future vulnerability and the prognosis for psychiatric injury

Additional factors are also included for those circumstances where an additional sum equivalent to aggravated damages would be justified. This includes whether there had been any manipulation to prevent the reporting of the abuse or put blame of the victim and even where the victim had to give accounts of the abuse they suffered in criminal or civil proceedings.

It remains to be seen the extent to which these aggravating factors are applied in civil proceedings, particularly where claims are pursued on the basis of no fault vicarious liability. It may be that such factors are used most frequently where the individual abuser themselves are involved in the proceedings and their involvement enhances the level of indignity, mental suffering, humiliation, distress or anger caused to the victim. In addition, the repetition of the nature of the abuse and the extent of the abuse of trust would appear unnecessary, particularly where it is clear that a single award for general damages is proposed by the Guidelines (contrary to the recent obiter comments and approach taken by Johnson J of there being two separate general damages awards in TVZ & Others v Manchester City FC in which Keoghs acted for the defendant).

Patrick Williams
Associate

Redress in non-recent abuse claims

the past, present and the future

We previously reported in March 2020 on the Independent Inquiry into Child Sexual Abuse ('IICSA') hearings where future potential redress schemes for compensating victims of child sexual abuse were being considered.

IICSA's Accountability and Reparation Investigation Report considers a number of redress schemes that have been set up by organisations such as Lambeth London Borough Council, and the governments of the Irish Republic, Jersey and Australia.

Further, the report recognised the importance of a redress scheme to offer accountability and reparation to victims and survivors of child sexual abuse. IICSA is, therefore, due to report further at the end of this year and is expected to include recommendations on redress. In anticipation of this, it is helpful to set out past and current schemes which have been used and the challenges going forward.

Past Schemes

Jersey

The Jersey Redress Scheme opened to applications on 1 July 2019 and closed in August 2020. The scheme was funded by the Government of Jersey and provided redress to people who, as children, were abused or suffered harm between 9 May 1945 and 31 December 2005 while:

a. Resident in a Government of Jersey children's home

b. In a Government of Jersey foster care placement

c. Accommodated at Les Chênes secure residential unit.

Under the scheme applicants could receive financial redress and an individual letter of apology, where the applicant wished to receive an apology. Nearly 70% of applicants requested a letter of apology.

In total, 145 applications were submitted and 139 applicants were offered settlement. The average damages payment was £9,888. The amount of payment to each applicant under the scheme was based upon the nature, severity and frequency of the abuse suffered, and any physical and psychological injuries or long-term effects. In some cases, payments were made for therapeutic or medical treatment for up to £3,000. The average legal costs paid was £892.

Republic of Ireland

The Redress Board was set up under the Residential Institutions Redress Act 2002 to make "fair and reasonable awards to persons who, as children, were abused while resident in industrial schools, reformatories and other defined institutions". The scheme was financed with public funds and contributions from religious organisations and insurers.

To apply for redress, applicants completed an official application. Applications on behalf of persons deceased since 11 May 1999 could be made by their spouse or children. Those who could prove they were resident in a defined institution, and that they were injured consistent with the alleged abuse were given an award. This meant that every applicant needed to be psychiatrically examined, regardless of psychiatric symptoms or not. Any person not satisfied with the award

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could apply for its review, where a decision would be made to either uphold, increase or decrease the original award.

Official figures reported by the Residential Institutions Redress Board in 2015 recorded a total of 16,648 completed cases of which awards were made in 15,579 of those cases. The average damages payment was €62,250 (€969.8m in total). At the time of reporting, costs had been finalised in 15,345 applications in which €192,911,119 had been paid in legal costs.

Savile

The scheme was set up predominantly by the Estate of Jimmy Savile. Qualifying applicants were any alleged victim who had been abused by Savile. The application process was completion of a 'Scheme Claim Form' with any other evidence to provide independent corroboration of their allegations.

Awards were made on a tariff-based system with awards made from £1,500 up to £40,000. If there was more than one assault, then an uplift of 25% was applied.

There were around 200 claimants in total. There was a finite sum in the estate, estimated around £4.3m. It is understood that £1.8m from the estate was paid to 78 claimants and £2.5m was paid in legal fees, although the legal fees were affected by challenges to the scheme. Further, the BBC, the NHS and Barnardos contributed towards the payment of damages and costs.

Due to the finite sums available, civil litigation would have dissipated the available sums from the estate; therefore, the scheme provided a fairer distribution of that finite sum of money in the circumstances. However, the damages were limited by tariff and no special damages could be sought.

Current Schemes

Medomsley Redress Scheme

Medomsley Detention Centre was a prison for young male offenders in Durham from 1961 until the late 1980s. More than 1,800 former inmates reported sexual and physical abuse by staff whilst at the prison. The scheme was set up by the Ministry of Justice and administered by Government lawyers. Applications must have been submitted by 1 January 2022, with the scheme due to close on 1 July 2022.

Initially, victims were only able to make claims directly relating to one of the seven convicted men, but now only need to prove that they were in the prison at the same time as those officers who abused them.

Awards are made on a tariff-based assessment and subject to how long the applicant was at the prison and the severity of the abuse suffered.

It is noted that the scheme accepted claims where there was only physical abuse. In civil claims, a claimant alleging physical abuse would have limited prospects of success due to the issue of limitation and the claim likely being made a number of years after the expiry of limitation. This benefitted some claimants as the scheme made awards in claims that otherwise may have not succeeded in the civil claims process.

Australia

The National Redress Scheme was set up in 2018 by the Australian Government following the recommendations made by the Royal Commission in Institutional Responses to Child Sexual Abuse.

Institutions must agree to join the National Redress Scheme so they can provide redress to people who experienced child sexual abuse in relation to their institution. All state and territory governments as well as the Commonwealth have joined the scheme. Many other non-government institutions have committed to joining the scheme, including the Catholic Church, the Anglican Church, the Uniting Church, the Salvation Army, the YMCA, and Scouts Australia.

Qualifying applicants are individuals who have experienced sexual abuse as a child before 1 July 2018 and where that institution was responsible for bringing the applicant into contact with the person who abused them. Applications cannot be made on behalf of a person who has died. The scheme is open for ten years.

Applicants can receive a redress payment, counselling and psychological services up to AUS$5,000 and a Direct Personal Response (one or more of an apology or statement of regret; opportunity to meet a senior official of the institution and/or assurances that steps have been taken to prevent abuse occurring again). This is a tariff-based redress scheme with a maximum payment of AUS$150,000.

As of February 2022, over 13,948 applications had been received and 8,839 decisions have been made, including 7,611 payments totalling over AUS$656.6m with an average redress payment of AUS$86,270.

Lambeth

The scheme is funded by Lambeth Council with the assistance of public loans from the Government.

Whilst new applications closed on 1 January 2022, applications received before then are still being processed. Qualifying applicants are those who were resident in a Lambeth Children's Home or a Lambeth specialist unit for children with disabilities who were (or feared they would be) subjected to physical abuse/mistreatment, sexual abuse, neglect and/or cruelty.

In regard to awards, there are four different tariff bands with a different number of points. The first three tariffs deal with pain, suffering and loss of amenity and the fourth tariff is designed to award additional points for loss of opportunity. In addition, there is also a Harm's Way Payment of up to £10,000, where anyone who was placed in a Lambeth Children's Home for six months or more and can prove they feared or apprehended abuse, neglect or cruelty is awarded £10,000, whether or not they suffered actual abuse.

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All applicants are entitled to a written apology, a meeting with a senior representative of Lambeth Council, counselling and specialist advice, support and assistance to obtain housing, welfare benefits, access to further education and suitable employment.

By July 2021, 1,887 applications had been made with more than £71.5m having been paid out of the scheme.

The scheme also allows applications where compensation for the same abuse has previously been received and in these circumstances, any prior compensation is treated as an interim payment.

Child Migrants

The scheme is funded by the UK Government, and administered by the Child Migrant Trust.

Payments are being made to applicants in respect of the harm done to them when they were separated from their families and sent overseas as part of the UK Government's historic participation in child migration programmes.

Applications opened on 1 March 2019 and every child migrant alive as at 1 March 2018 (or beneficiary of a child migrant who was alive as at 1 March 2018) will be entitled to a payment of £20,000. The scheme will remain open for a period of two years.

The claimant must have been sent by a church, state, voluntary or other organisation, and not have been accompanied by an adult family member or sent to live with their birth family.

Scotland

Scotland's Redress Scheme opened for applications in December 2021. It is being delivered by Redress Scotland and the Scottish Government, and funded in part by inviting organisations involved with residential care of children in the past to financially contribute.

The scheme replaced the Advanced Payment Scheme, introduced in April 2019, which provided a flat rate of £10,000 to survivors with a terminal illness, or aged 70 or over.

To apply for the scheme, the survivor must have been abused as a child (17 years old or younger), before 1 December 2004, in a defined care setting and in Scotland.

There are two types of application that can be made:

1. A fixed rate payment of £10,000, or
2. An individually assessed payment of up to £100,000 reflecting the nature and severity of the abuse and the lifelong impact on survivors.

Spouses and children of deceased survivors are able to make an application for a next of kin payment.

Applications will remain open for a period of up to five years with ministerial power to extend if required.

The future

Church of England Pilot Redress Scheme

Following the Church of England's appearances before IICSA in 2018 and 2019, the Church's General Synod indicated a commitment to a more victim and survivor-centred approach in the Church's response to the needs of all kinds of survivors of all types of church-related abuse.

As a result, it is understood that the Church is in the process of developing national proposals for redress to include financial compensation, support to survivors, an acknowledgement of wrongdoing on behalf of the Church, an apology and provision of support for rebuilding survivors' lives.

The Church has indicated that its aim is to introduce the redress scheme in 2023, although they urge any survivors in need of urgent support to visit their Interim Support Scheme.

Comment

IICSA has indicated the importance of accountability and reparations for child sexual abuse survivors, but acknowledges this takes many forms and not one system is currently able to deliver on all of the objectives.

Whilst IICSA acknowledges the rights of individual and institutional defendants to defend themselves, it considers there is a "compelling need for claims by victims and survivors of child sexual abuse to be treated differently from other forms of personal injury litigation", and that "claimants should be treated with sensitivity and defendants should recognise that the provision of explanations, apologies, reassurance and access to specialist therapy and support may be as important (or more important) to them than the receipt of financial compensation".

A suitable redress scheme may be able to satisfy a number of these objectives, but there are a number of challenges and issues with redress schemes, such as defining a qualifying applicant, processes in regard to deceased abusers or those who deny or have been acquitted of criminal charges, availability of evidence, assessment of damages under the scheme, funding and administration of the scheme and the finality of redress.

All of the above will require considerable thought by institutions which are considering whether to implement a redress scheme.

Lauranne Nolan
Associate

Abuse and Positions of Trust: Closing the Loophole

The long-awaited Police, Crime, Sentencing and Courts Act 2022 came into force on 28 April 2022 and widened the definition of persons being in a "position of trust" to include sports coaches and faith leaders, who would now commit a criminal offence for engaging in any sexual relationship with a person who was 16 or 17 years old.

Under the Sexual Offences Act 2003 it had always been an offence for someone over the age of 18 who is in a "position of trust" to engage in any sexual relationship with a person who is 16 to 17 years old. However, the categories of those defined as being in positions of trust were always refined to those operating in statutory settings or services, such as people who are employed to look after children under the age of 18, e.g. care workers, teachers and police officers. In this respect, the law was designed to protect people who were above the age of consent but still potentially vulnerable to sexual exploitation from an adult in a position of trust.

In more recent years with the examples of abuse in sports and churches, concerns were voiced that these original positions of trust were too narrow and that an extension was required to protect a wider range of relationships where adults hold a position of influence or power over 16 and 17 year olds. Indeed, it was argued that those who carry out certain roles in sport or religion are particularly influential over a child's development. Sports coaches can hold major influence over a young person's career and future development. Similarly, those who carry out certain activities in a religion often have significant influence over a young person's spiritual and religious development. Both situations have high levels of trust, influence, power and authority and these figures are generally well established, trusted and respected in the community.

The new Act

Under section 22 of the Sexual Offences Act 2003, a person is in a position of trust if they are "regularly involved in caring for, training, supervising or being in sole charge" of a child. The new Act has now created section 22A of the Sexual Offences Act 2003. It was debated in Parliament whether or not it would be easier to simply add to the existing positions of trust contained in section 21. However, because this covered statutory settings in respect of the relationship between the adult and the child, it was felt that it would be clearer to define the additional positions under a new section of the Act.

In simpler terms, the new legislation defines these further positions of trust by reference to the activity which the adult is carrying out in relation to the child, as opposed to the role they hold. This covers things such as coaching, teaching, training, supervising or instructing in a sport or a religion. Both elements would need to be met.

Sport is defined as using games in which physical skill for the purpose of competition or display is the predominant factor. Religion is defined to capture those involved in a religion that holds a belief in one or more gods, and those involved in a religion that does not hold a belief in a god.

It is also a requirement that the adult carries out the activity "on a regular basis", to avoid an approach that is too broad and includes someone who only occasionally helps with a coaching session. A knowledge requirement must also be met: the adult must be made aware that they carry out a certain activity on a regular basis in relation to the child. This is to prevent the positions of trust being drawn too broadly and strengthens the requirement for a prior connection between the adult and child.

Comment

The new Act brings to an end the campaign to 'Close the Loophole' and helps to provide additional safeguards for young people. However, it may take time to fully interpret the meaning of the provisions around the issue of knowledge and as to what is considered to be "on a regular basis". It is important to remember that the law remains clear that it is a crime for anyone to engage in sexual activity with someone under the age of 16, whether or not they consent to that activity.

Lauranne Nolan
Associate

Mandatory reporting of abuse in England and Wales: an update

Following the numerous revelations over the past few years of abuse having taken place in various sectors and organisations, there has been growing support to impose stronger reporting duties on professionals working with children to report suspected cases of abuse to the authorities in England and Wales. This is in the form of mandatory reporting of suspected incidents of abuse, with criminal sanctions for failing to do so. Mandatory reporting is not a new concept and already exists in other jurisdictions, such as Australia, with varying degrees of duties between states to report suspected abuse.

As a result, the Regulated and Other Activities (Mandatory Reporting of Child Sexual Abuse) Bill has now been presented to the House of Lords for its first reading with the aim that it will become law in England and Wales.

The Bill

The Bill proposes to mandate those providing and carrying out regulated or other activities with responsibility for the care of children to report known and suspected child sexual abuse. It is not intended to include other instances of suspected child abuse, such as physical abuse or neglect.

It will create a criminal offence for failing to report concerns of child sexual abuse but also aims to enact provisions to protect mandated reporters from detriment in any personal, social, economic and professional settings.

The Bill states that any providers of one or more of the activities set out in the Bill who have "reasonable grounds for knowing or suspecting sexual abuse of children when in their care" must, as soon as is practicable after it comes to their knowledge or attention, report it to:

- The Local Authority Designated Officer (LADO); or
- Local Authority Children's Services; or
- Such other single point of contact with the Local Authority as that authority may designate for that purpose

If the report is made orally then the maker of the report must confirm the report in writing within seven days. Importantly, the report needs to be made whether the alleged or suspected abuse has taken place in the setting of the activity or elsewhere. If a person fails to make such a report then they will have committed an offence and if found guilty they will be liable on summary conviction a fine of up to £5,000.

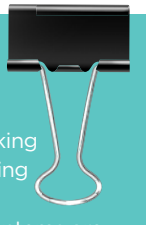
Crucially, a person who makes a report, as required to under the Bill or in good faith, may not be held liable in any civil, criminal or administrative proceeding and may not be held to have breached any code of professional etiquette or ethics, or to have departed from any acceptable form of professional conduct.

For the purposes of this Bill, some of the proposed regulated or other activities would include:

- Education, including schools, sixth form colleges, colleges of further education
- Healthcare, including hospitals, hospices, GP surgeries, walk-in clinics and outpatient clinics
- Private institutions contracted by public bodies to provide services to children
- Organisations providing activities to children, such as sports clubs, music, dance or drama groups and youth clubs

The first reading is simply a formality to signal the start of the Bill's journey. The Bill will now move on to its second reading in the House of Lords with a date yet to be scheduled. If the Bill successfully makes its way through both the House of Lords and House of Commons it is proposed that the Bill, once it receives Royal Assent, would become known as the Regulated and Other Activities (Mandatory Reporting of Child Sexual Abuse) Act 2022.

Comment



There is no doubt mandatory reporting will increase the awareness of professionals working with children when sexual abuse may be taking place. In support of this, some studies have indicated that where mandatory reporting systems are in place, it substantially increases the number of cases of child sexual abuse that are identified. However, if the Bill is enacted into law it will be important for organisations to provide all the necessary training, support and resources to those working with children to enable professionals to comply with their legal duties and report concerns of child sexual abuse promptly and appropriately.

Lauranne Nolan
Associate

Vulnerable witnesses and experts in abuse claims: court guidance on "best evidence"

The court has recently determined an appeal by the defendant on a discrete case management decision relating to whether the court can restrict permission for a party to rely upon a chosen medical expert if there is information about that expert on the internet which might cause the claimant to not give their "best evidence" during an examination as a vulnerable witness pursuant to CPR Practice Direction 1A.

Background

The claimant sought damages in respect of psychiatric injuries in relation to allegations of sexual abuse between approximately 1986 and 1992 when the claimant was between the ages of 15 to 19 years approximately.

At the first CCMC the district judge was invited to refuse permission for the defendant to instruct its chosen expert as this was likely to diminish the quality of her evidence because the claimant was a vulnerable witness for the purposes of the proceedings. This was on the basis that there was information available on the internet about the defendant's expert and if the claimant hypothetically searched the defendant's expert's name, she may have come across this information resulting in her not giving her "best evidence" for the purposes of the proceedings.

Notwithstanding that, the district judge found that the defendant's expert was a suitable expert and that he had the appropriate expertise to be a medico-legal expert in cases of this nature; the district judge agreed that based on information which was available on the internet about the defendant's expert, which the claimant may well find out if she did research before attending any examination, this could have had a dramatic effect on her as a vulnerable party. Accordingly, the district judge refused permission to allow the defendant to rely upon its chosen expert, whilst granting permission for the defendant to rely upon any other named psychiatrist.

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Appeal

Determining the appeal in the defendant's favour, the judge found that the district judge was incorrect in his findings and the defendant was permitted to rely upon its chosen expert.

The defendant's appeal was based upon two grounds:

1. The district judge misunderstood and misapplied CPR PD1A, which is concerned with the ability of vulnerable witnesses to participate in the trial process.
2. The district judge erred:
    a. in allowing unsubstantiated allegations of impropriety and lack of independence against a professional person to be referred to and adopted
    b. in placing any weight upon allegations not supported by evidence
    c. in making a finding for which there was no evidence before him as to the effect on the claimant's evidence of being examined by the defendant's chosen expert as opposed to any other forensic psychiatrist for which he gave the defendant's permission.

The defendant submitted that the practice direction was created to introduce safeguards for vulnerable witnesses and parties which were similar to those already in place in the criminal and family jurisdictions. It was not to be utilised in order to restrict the right of a party to call a witness of its own choosing under the guise of ensuring the best evidence and full participation of a party.

It was further submitted that if a witness or party was intimidated by a reputation and gave an inconsistent account to the expert that would merely mean that an adverse account existed and would not affect their ability to participate in the trial process and to give their best evidence.

It was further submitted that CPR Part 35 is in fact the principal and only process by which expert evidence can be controlled.

Court's Findings

The judge found that care should be taken not to conflate the giving of evidence in court with giving an account or a history to an expert witness, such as a doctor. He also stated that he had little doubt that "giving evidence" under the practice direction was intended to refer to evidence within the trial process. Further, he agreed that it is only CPR Part 35 that can circumscribe expert evidence and there are numerous safeguards built in, including duties owed by experts.

He went further in his conclusion to find that the undoubted primary purpose of the practice direction was to assist the vulnerable party in the trial process as that is the hearing in which evidence is taken and determined by the judge, and where the vulnerabilities are likely to impact on participation.

In respect of the criticism of the defendant's expert, the judge found it to be immaterial that an expert may have been the subject of criticism in the public arena by others who had been examined. Indeed, the judge acknowledged that if it were otherwise, it would be open to any particular group of claimants (or their solicitors) to launch an internet campaign through blogs and other postings when they were faced with a robust and generally adverse expert in a series of cases.

The judge further stated that any material which might be relevant to restrict the choice of an expert because of the subjective impact on an individual with a particular identified vulnerability required a much higher threshold of proof than that which the learned district judge sought to apply in this case with the material in this case falling significantly short of such a high threshold.

Conclusion

It was never intended that the relevant practice direction concerning vulnerable witnesses would be used to restrict expert evidence; it was intended, quite rightly, to introduce appropriate safeguards for the claimant as a vulnerable witness to give best evidence at trial or any court hearing, which understandably will be very traumatic. The finding, therefore, represents a balanced and sensible outcome relating to the ability of any party to instruct a suitably qualified expert, even in circumstances where the claimant is deemed to be a vulnerable witness.

In addition it provides clarity to parties that objections to experts remain firmly within Part 35 of the Civil Procedure Rules.

Anna Churchill
Legal Executive

Courts must follow their head and not their heart:

late acceptance of Part 36 offers in abuse claims

Master McCloud in the Royal Courts of Justice recently handed down a judgment in MRA v Education Fellowship [2022] EWHC 1069 (QB) which considered the impact of late acceptance of an offer made under Part 36 in the context of an abuse claim where the prognosis was uncertain at the time when the offer was made.

Notwithstanding the understandable sympathy for the claimant and the effect that late acceptance was likely to have on the damages recovered, it was determined that the consequences of late acceptance did still apply and, therefore, the defendant's costs from the date of the expiry of the 'relevant period' were to be deducted from the claimant's damages.

Background

This case involved a teacher who exploited her position of trust to abuse a child with severe autism and ADHD. The abuse suffered was described by Master McCloud as serious and greatly harmful to the child. The defendant to the civil action was the school, which was vicariously liable for the actions of their employee. The teacher in question had been convicted. Breach of duty was not an issue in this claim, having been admitted prior to proceedings being issued. The issues in proceedings were those of quantum and causation.

The claim was issued in 2017 and valued at £100,000. On 19 January 2018 the defendant made a Part 36 offer to settle the whole of the claim for £80,000. The claimant's medical evidence diagnosed him with PTSD, depression and suicidal thoughts, but could not comment on the prognosis as this would depend on treatment and intervention. When the defendant's offer was made, the claimant's medical evidence was still pessimistic and stated that the PTSD had in fact worsened and still no prognosis could be given. The claimant made then two requests for extensions to accept the defendant's offer and neither request was granted nor were the requests chased.

Subsequent medical evidence obtained was then more optimistic, but to a point where the claimant was unlikely to improve further. In addition, the defendant had also obtained medical evidence which disagreed with the diagnosis of PTSD.

As a result, the claimant chose to accept the defendant's Part 36 offer of £80,000 on 2 April 2020 (over two years after the expiry of the relevant period) and requested payment of their costs to the date of acceptance. The defendant refused to pay on the basis that the offer had been accepted well beyond the expiry of the relevant period for the purposes of Part 36. The matter, therefore, came before Master McCloud for determination on the issue of costs.

Part 36

It has long been established that Part 36 is intended to encourage parties to make reasonable offers and settle claims early by imposing costs sanctions on parties who do not accept an offer and later fail to better the offer at trial. The effect of the claimant accepting the offer outside the 21-day period is that the defendant's costs from the end of the relevant period to the acceptance of the offer are deducted from the claimant's damages.

There is, however, an exception to this rule under CPR 36.13(5) and the court can disapply the costs consequences if they find that it would be unjust to order the claimant to pay the defendant's costs. The rule is, therefore, clear: the costs consequences must apply unless it is unjust to do so and the burden is on the claimant to establish that it would be unjust.

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The parties' submissions

The claimant's main arguments were that at the time that the offer was made the prognosis was uncertain, and it was only after the latest medical report that the offer could be competently assessed. Furthermore, the claimant was a minor and so the court would have to approve the settlement in any event and the court would not have been able to do so at the time the offer was made due to the lack of prognosis.

It was also argued that to deduct the costs from the damages would reduce the claimant's settlement. As the claimant was a victim of abuse this was said to be unjust.

The defendant argued that the offer was made deliberately high and was reasonable. The claim value was stated at £100,000 and the offer was 80% of this. The offer was made on the basis of a worst case evaluation and was based on an assumption of a lack of improvement. The worst possible prognosis had already taken into account. It would, therefore, have been possible to ask the court to approve the settlement on the basis that it was a very reasonable offer given the evidence available.

It was further argued by the defendant that the claimant had been diagnosed by their expert at the outset and it was just the prognosis that was unclear. The range of possible prognosis in this case was simply a normal risk of litigation and such risks were intended to form part of Part 36. If the claimant's arguments were right then this case could potentially set a worrying precedent where any uncertainty over prognosis makes a case exceptional and, therefore, the rules under Part 36 would never apply.

Finally, the defendant disputed that the court should consider the effect of the deduction on the claimant's damages as this would mean all deductions would likely be considered unjust and not just in abuse claims.

Judgment

In her judgment Master McCloud found that:

- Part 36 remains an important rule with beneficial consequences. To depart from it requires the party to discharge a heavy burden and they must show that they will suffer injustice if the rules are not disapplied.
- The question is not whether it was reasonable to reject the offer at the time, but whether it is unjust to apply the costs consequences of Part 36. A reasonable decision to reject an offer may transpire to not have been the best decision, but this does not make it unjust for the purposes of Part 36.
- The offer was an early, well-judged high-end offer based on the diagnosis, regardless of the prognosis. It was based on the worst potential outcome for the claimant. Whilst recognising the stated claim value could be increased, the offer was 80% of the stated value and considering the Judicial College Guidelines and the claimant's prospects of employment, but for the abuse, the offer was reasonable.
- A lack of certainty in prognosis is a common factor in litigation and is regularly seen in personal injury cases. A court could have assessed the damages and approved the offer and judges are experienced in doing so and understand the risks posed by Part 36.
- If it was the case that an uncertain prognosis was sufficient to establish that it was unjust to apply Part 36, this would undermine Part 36 and the QOCS regime, causing insurers to face costs even where they correctly make high and well-judged early offers.
- Finally, it was not appropriate for the court to consider the impact of the deduction on the claimant's damages. Courts must follow their head and not their heart when considering this issue, even in abuse cases.

Other points to note

Two other interesting points were raised in the judgment.

Firstly, Master McCloud questioned whether this issue may have been avoided had there been an abuse-specific Pre-Action Protocol. This was proposed by the Historic Abuse Litigation Forum. To date, there is no proposal to implement such a protocol. It may be that this option is raised again in the future.

Secondly, claimant's counsel raised an issue regarding the wording of Part 36 potentially prejudicing claimants who require the court to approve their settlements. This is due to Part 36 requiring a judgment or order for damages before costs consequences apply. It follows that claimants who have to bring their settlement before the court for approval attract these consequences automatically. This issue was not fully argued by either side so Master McCloud did not come to any conclusions regarding this in her judgment.

Comment

This judgment provides a clear reminder about the importance of Part 36 and the consequences of making well-judged reasonable offers at an early stage in proceedings. Reasonable offers under Part 36 made at an early stage can be of significant financial benefit to defendants who are later able to offset their costs against the claimant's damages. This serves to encourage early settlement and avoid unnecessary litigation. It is clear that this is a key principle that courts do not wish to undermine.

The judgment also places significant emphasis on the fact that the offer was high and well-judged. It remains to be seen how a court would approach a similar issue where a lower offer had been made.

Finally, the case shows that an uncertain prognosis is not a barrier to settlement and will not prevent a court approving a settlement for a child or protected party.

Chris Wilson
Associate

Update on consent in abuse claims:

ABC v Durham County Council [2022]

Sitting in the Middlesbrough District Registry, His Honour Judge Gargan handed down judgment on 27 April 2022 in this non-recent sexual abuse claim, finding for the defendant on the issues of consent and limitation.

Background

The claim was for damages arising out of alleged sexual abuse by XY, a residential social worker, who the claimant says raped her on 12 January 2008 whilst she was in care at Framwellgate Moor Children's Home ("the Home"). At the time, the claimant was 16 years and 9 months old and had been in the care of the defendant since 2002, living at the Home since August 2007. XY was 29 years of age and was employed by the defendant as a senior residential worker. XY denied the allegations in their entirety.

In support of her claim, the claimant relied on a complaint made by another resident on 4 March 2009 that the claimant told this resident about the incident the morning after it happened. The defendant investigated this report, but when the claimant was interviewed, she denied that it had taken place. In evidence, she said she denied it as: she did not wish to ruin XY's life; she was in a relationship with her boyfriend (both at the time of the incident and at the time of disclosure); and the incident had made her feel special and she "did not yet consider that his having sex with [her] was wrong or an abuse of trust". There was also evidence that the claimant and XY bumped into each other some years later at a pub. XY recalled the incident and gave evidence that the claimant apologised for the allegations raised in 2009, which the claimant accepted.

In 2014, the claimant and at least three of her siblings sought legal advice from her current solicitors, Irwin Mitchell, with a view to bringing a claim against the defendant for failing to promptly remove them from their mother's care. As part of this claim, the claimant was interviewed by Dr Tacchi; however, the claimant failed to mention the incident involving XY and it did not feature in Dr Tacchi's report. Similarly, the incident was not mentioned in the proceedings despite the claimant accepting in her witness statement that she had mentioned it to her solicitor.

On 28 November 2016, the claimant's sister contacted the defendant's safeguarding team and reported that the claimant had been abused by XY. The police were subsequently informed in December 2016 and the claimant was interviewed about the incident. XY was interviewed by the police and again by the FA (in respect of his work as a football coach). However, no conviction was secured and the claimant also discontinued her failure to remove claim against the defendant in July 2019 (4 weeks before issuing this claim).

The key issues before the court were as follows:

1. Whether there was any sexual interaction between the claimant and XY;
2. Whether the claimant consented to any such sexual interaction; and
3. Whether the limitation period should be disapplied.

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Court's findings

1. Whether there was any sexual interaction between the claimant and XY?

HHJ Gargan was unable to make a finding on this issue (see below).

2. Whether the claimant consented to any such sexual interaction?

As a residential care worker, it was accepted that XY was in a position of trust vis-à-vis the claimant for the purposes of the Sexual Offences Act 2003. Therefore, if XY had engaged in any form of sexual activity with her, he had committed a criminal offence, regardless of whether the claimant consented or not.

However, the parties agreed that although any sexual activity was a crime, it did not amount to the tort of battery (or assault) if the claimant consented to it, and the issue of whether or not the claimant consented was a factual one.

HHJ Gargan held that it was clear that the claimant had capacity to consent and that the question is whether or not she did so. Having considered the evidence, HHJ Gargan concluded that the claimant had the freedom to consent and that she did consent to any intercourse that took place. He reached this view for the following reasons:

- The claimant was sexually aware at the relevant time;
- There was no evidence that XY had subjected the claimant to special treatment before the incident, save possibly for showing her where he lived, but the claimant does not appear to have regarded this as being designed to make her feel special;
- There was no evidence that XY offered any inducement to the claimant to consent to intercourse;
- The claimant's contemporaneous understanding was that the intercourse was consensual in that she described "bragging about it" to others and that it made her feel special;
- Whilst the claimant was right to assert that any sexual intercourse was 'wrong' (it would have been a criminal offence), it was not a tort if she was 'willing' in the sense that she freely consented to it;
- It is not the law that no one under 18 can consent to intercourse with someone in a position of trust. There is a clear distinction between rape and sexual activity in breach of trust and the dividing line between them is consent;
- The claimant's psychological history (her vulnerability and her need for love and affection) explained why she consented rather than explaining that her consent was not freely given;
- Whilst the claimant was right to assert that she was not an adult and that she may not have realised that XY was committing a crime, she understood what intercourse was and that having such with XY was inappropriate. Despite this, the claimant agreed to it; and
- The claimant may have lacked the maturity to place the act in its full social context. However, that is something that may be said of many teenagers who have sexual intercourse. There is a myriad of situations in which greater maturity or hindsight can lead people to conclude that they had been unwise to engage in sexual intercourse. However, that does not mean that they did not give a valid consent at the material time.

Accordingly, HHJ Gargan concluded that even on the claimant's strongest case (i.e. that the assault occurred as alleged) it is more likely than not that she freely consented to engage in sexual intercourse with XY.

3. Whether the limitation period should be disapplied?

It was agreed prior to trial that the limitation period expired in April 2012 (3 years after the claimant's 18th birthday). The claim was not issued until 13 August 2019, more than 11½ years after the incident and more than 7 years after the expiry of the limitation period.

Reason for the delay

HHJ Gargan concluded that whilst there were good reasons why the claimant failed to bring a claim prior to 2015, there was no good explanation for failing to do so thereafter. This was on the basis that there was no reasonable explanation for the claimant's delay: after her solicitors had obtained a second report from Dr Tacchi in September 2018 addressing the abuse; after she had been informed of the conclusion of the police investigation in March 2017; after the police had traced and spoken to a material witness in February 2018 and quickly concluded that no further action would be taken; and in reporting the matter in 2015. In particular, from 2015 onwards she was actively engaged in litigation based upon her childhood experiences and she had ready access to legal and psychiatric advice. She also told her solicitor about the abuse in 2015 so was in a position to obtain legal advice about bringing a claim at that point.

Cogency of the evidence

HHJ Gargan had already concluded that assuming the intercourse took place, it is more likely than not that the claimant freely consented to engage in it. However, even if he had not made that finding, he was firmly of the view that the cogency of the evidence on this issue had been significantly affected by the delay in bringing the proceedings. He pointed out that whether or not the claimant consented depended on her state of mind at the time the intercourse occurred. However, the claimant's own view as to whether or not she consented had developed with time and maturity from regarding intercourse as something which made her feel special to realising that it was wholly inappropriate. Therefore, the sooner that issue had been litigated the more easily the state of the claimant's mind at the relevant time could have been determined. As time had passed, it became more difficult for the court to ascertain which views have been formed with the benefit of hindsight/maturity and what truly reflected the claimant's position at the time. The claimant was able to and did consent to any intercourse which took place; and/or the cogency of the evidence on this issue has been significantly affected by the delay and absent a finding in the defendant's favour, there could not be a fair trial on the issue.

In respect of the issue of whether or not the abuse occurred at all, HHJ Gargan was clear in his view that the delay has had an effect on the cogency of the evidence and made the court's task of trying to make a finding materially more difficult to the extent that there could not be a fair trial on this issue.

Finally, he also concluded that the experts were right to consider that the delay has affected the cogency of the evidence on the issue of causation, which was another factor preventing a fair trial.

Comment

Consent defences in abuse claims are relatively rare given the sensitive nature of the issues involved and in recognition of the impact such defences are likely to have on claimants. Defendants should, therefore, continue to be cautious when using such defences. However, this judgment acts as a reminder that there will be limited cases where it may be appropriate to do so. The judgment also emphasises the fact that criminal and civil law do not always see eye to eye on the issue of consent: just because an act is a criminal act, does not mean that it is tortious for the purposes of a claim for compensation.

The judgment builds on the court's recent guidance in respect of consent, most notably the authorities of JL v (1) Archbishop Michael George Bowen (2) Scout Association [2017] EWCA Civ 82, London Borough of Haringey v FZO [2020] EWCA Civ 180 and EXE v The Governors of the Royal Naval School [2020] EWHC 596 (QB) in which Keoghs acted on behalf of the defendants in each case. In FZO, the Court of Appeal distinguished between submission and consent, establishing that the claimant was incapable of consenting as a resulting of having been groomed. Here (and in EXE), the key distinguishing factors when compared to FZO appear to have been the lack of any evidence of grooming and the claimant's apparent acceptance at the time that the activity was consensual (in contrast to their later retrospective view that it was not).

In respect of limitation, HHJ Gargan's conclusions very much follow on from recent authority, including the Court of Appeal's comments in JL and Griffiths J's judgment in EXE which emphasised the importance of contemporaneous evidence when deciding the factual issue of whether a claimant consented to the alleged sexual activity. In particular, this case further highlights the prejudice to a fair trial where the court is required to determine such a fact-specific issue in the face of a lack of cogent evidence and where a claimant has failed to provide a justifiable explanation for their failure to advance the claim earlier.

Patrick Williams
Associate

Another restriction on vicarious liability: school not liable for abuse by work experience student

The High Court recently handed down its Judgment in MXX v A Secondary School [2022] EWHC 2207(QB), finding that the school could not be vicariously liable for the abuse committed by a work experience student. Patrick Williams, Associate in the Keoghs abuse team, considers this judgment and its implications on organisations who engage with such individuals.

Background

The defendant was a co-educational secondary school providing education for children between the ages of 11 and 16. In December 2013, the claimant joined the school as a Year 8 pupil when she was aged 13.

Between 24 and 28 February 2014, a former pupil of the school ('PXM') undertook a Work Experience Placement ('WEP') at the school. He was 18 years old and hoping to qualify as a PE teacher. The claimant first met PXM during the period of the WEP and it was following this, in August 2014, that she was subjected to sexual assaults by PXM.

The claimant alleged the defendant was vicariously liable for the torts of assault and battery and intentional infliction of injury perpetrated upon her by PXM. The claimant relied upon the convictions of PXM on 2 November 2015 in regards to serious sexual offences perpetrated against her.

While it was admitted that the claimant had been the victim of serious sexual abuse, the defendant denied that it was vicariously liable.

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Court's findings

The Court identified the following key issues to be considered:

1. What was the nature of the interaction between the claimant and PXM; when did it take place; and in what circumstances?

The judge found that on the basis of the contemporaneous evidence (which she attached greater weight to than the claimant's account during the civil claim), PXM did not undertake any of his WEP in any of the claimant's PE lessons. It was found that there had been a conversation between the claimant and PXM in regards to attending the badminton club after school. Nothing untoward occurred during this conversation. Further, this was the first interaction between the claimant and PXM, and the court was not satisfied that there was any evidence from which it could be reasonably inferred that PXM had any ulterior motive during this first interaction with the claimant. The judge found that PXM did assist the claimant to play badminton as that was the purpose of the club, although the claimant did not satisfy the judge that the interactions between the claimant and PXM at the badminton club amounted to grooming behaviour.

2. Were the torts proved to have been committed by PXM against the claimant?

The judge was satisfied that the torts of assault and battery were committed against the claimant on 2 and 5 August 2014, and that it was also possible that they were committed on later occasions. However, in regards to the tort of intentional infliction of injury the judge found that the conduct and mental elements of the tort on the balance of probabilities were not present until many weeks after the WEP had ended.

3. Was the defendant vicariously liable for any/all of those proven torts?

Finally, in regards to vicarious liability, the judge set out the two-stage test for the imposition of vicarious liability as set out in the judgment of Lord Phillips in The Catholic Child Welfare Society v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others [2012] UKSC 56 at paragraph 21.

Stage One

In regards to stage one of vicarious liability, as PXM was neither an employee of the defendant nor an independent contractor, it was necessary to consider whether he was in a relationship with the defendant that was 'akin to employment'.

The judge considered the relevant case law, Cox v Ministry of Justice [2016] UKSC 10, Mohamud v Wm Morrison Supermarkets PLC [2016] UKSC 12 and Barclays Bank PLC v Various Claimants [2020] UKSC 13.

In regards to stage one of vicarious liability, the judge concluded that this was not a relationship 'akin to employment' for the following reasons:

- It was PXM who had approached the school asking for the opportunity to spend one week as a WEP in the defendant's school. He was, in effect, asking for a favour and that was how the defendant treated his request.
- PXM was aged only 18 and he was unqualified. The purpose of the WEP was for PXM to learn from the defendant's teachers. It was an altruistic gesture by the school and it cannot have been intended that the defendant would derive benefit from the presence of PXM in any real sense, notwithstanding that PXM performed some minor ancillary tasks during the WEP.
- PXM was never given nor was it intended that he would have any responsibility for the teaching or other care of pupils.
- The very limited role PXM played in the school's activities barely went beyond his own learning.
- The WEP was always understood to be for no more than one week. There was no real degree of integration into the school's business.

While the judge did not consider this to be a doubtful case, she went on to consider the five incidents as set out by Lord Phillips in Various Claimants v Catholic Child Welfare Society [2012] UKSC 56 [2013] 2 AC 1. Having considered the five incidents, the judge did not consider that they indicated that the relationship between PXM and the defendant was one which was 'akin to employment'.

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Stage Two

Although the judge had already concluded there was no vicarious liability on behalf of the defendant (given that she found that stage one had not been satisfied), she considered the second stage in regards to whether the abuse occurred closely connected to PXM's duties on behalf of the school.

The judge considered that even if the first stage of vicarious liability had been established, the second stage of the test for vicarious liability was not satisfied. The judge found:

- The entirety of the wrongdoing occurred many weeks after PXM's relationship with the defendant had ceased. That was fundamentally different to when abuse which begins when the abuser is in a relationship with a defendant and continues outside or beyond the scope of that relationship.
- PXM had no caring or pastoral responsibility in relation to the claimant or any other pupil. He did not even have any teaching responsibility. No aspect of the defendant's function was delegated to him.
- Although the school required its pupils to treat PXM with respect, he was not placed in a position of authority over the pupils.
- The most that can be said about the relationship between the defendant and PXM was that it provided an opportunity for PXM to meet the claimant, which is not sufficient for a finding of vicarious liability.

Accordingly, the claimant failed to establish that the defendant was vicariously liable for the assaults perpetrated against her by PXM and the claim was dismissed.

Comment

This is yet another example of a case against an organisation in regards to non-recent sexual abuse where vicarious liability was not established. The judgment follows on from and applied in its analysis the recent Court of Appeal and High Court authorities of DSN v Blackpool FC and TVZ & Ors v Manchester City FC in which Keoghs acted, which further restricted the scope of circumstances in which vicarious liability would apply to stages one and two.

While the position may have been different on stage two had it been proven that elements of grooming or abuse had taken place during the WEP, it remains that PXM was never in a relationship with the school giving rise to vicarious liability. As the Court found, shadowing or observing, while not incompatible with employment, is generally a precursor to the performance of a role within an employer's organisation. It formed part of the preparation and/or training of an employer and neither side of the relationship expected that it would lead to more.

Accordingly, organisations who engage work experience students or other volunteers should consider the circumstances in which they engage with these individuals and the potential for vicarious liability to attach. While the position remains that merely providing the opportunity to commit abuse is insufficient for liability to follow, if an organisation provides greater responsibility to individuals beyond a role of, say, shadowing or observing, the risks will inevitably increase.

Laura Baxendale
Associate

Khadija Sarwar
Solicitor

D v The Bishop's Conference of Scotland

D v The Bishops Conference of Scotland examined how to quantify special damages in a case of historic abuse.

Introduction

Following the removal of limitation in respect of actions relating to historic abuse, the courts have been required to quantify not only solatium in respect of the injury sustained, but also to value lifelong losses which have been sustained as a result.

In D v The Bishops Conference of Scotland, D was sexually abused at a residential school when aged between 14 and 16 in the 1970s while training to be a priest. He claimed damages in respect of the abuse and financial losses as a result of having to leave the priesthood. Liability was admitted. The issues for proof were:

1. Causation: whether D's departure from the priesthood was caused by the abuse; and
2. Quantum

Facts

D was a seminarian at a residential school ("the College"). The College was operated by the defenders. While attending the College, D was abused by a priest, Father X who was his Spiritual Director. D went on to become a priest, and after several years he left the priesthood.

D claimed that he left the priesthood (a process known as laicisation) as a result of the abuse sustained. Since leaving the priesthood, D has worked in a self-employed capacity.

D claimed that as a priest he received various forms of income. Part of the income was a "stipend", in effect a small salary from the Church. Another part was "mass stipends", which are paid to a priest in exchange for a mass being dedicated to, or offered in respect of, an individual (usually a person who is sick or who has died). Mass stipends or offerings are restricted to one per day and the amount paid is not fixed. The final part was "stole fees", which are offerings given to the priest as a token of thanks for celebrating funerals, baptisms and weddings.

In addition to income as a parish priest the pursuer also received "benefits in kind". These included the use of furnished accommodation, certain car costs, housekeeping (including all food and drink, and other household bills, such as payment of a TV licence and the services of a housekeeper), a landline telephone, payment of utility bills, payment of council tax and payment of household insurances.

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Change In Career

D's ambition was to serve as a priest until aged 75. As an adult, he underwent therapy to help him try to deal with the memories and thoughts of the abuse.

D began getting flashbacks of the abuse and knew the time would come when he would have to deal with the past. He did not want the fact that he been subjected to sexual abuse by Father X to become public. In addition, he had concerns about how the Catholic Church was dealing with past sexual abuse. He took the decision to laicise as he felt he could not continue in the priesthood.

He claimed there were a variety of reasons for his decision. In particular, he felt that he was seen as "damaged goods" and continuing with therapy was not enough to resolve his problems. But for the sexual abuse, he would still be a parish priest.

On the other hand, the defenders argued that the decisions D made were not caused by mental health. They argued his decision to leave was the result of his disapproval of the Catholic Church and their handling of sexual abuse allegations, thus he felt that he could not be a public face of that organisation.

Lord Clark held that, at the very least, the sexual abuse made a material contribution to the pursuer's decision to leave the priesthood. Its impact on his personality, his ability to trust others and to properly function plainly influenced his decision. It was held that while laicisation was a decision made by D and that he had the capacity to make it, he was not truly exercising an option.

Quantifying Consequential Loss

It being established that D left the priesthood because of abuse, the court required to quantify the loss, if any, which resulted from D's change in careers.

Central to Lord Clark's reasoning on quantum was the observation that, "The object of an award of damages is, so far as is possible, to put the pursuer back into the position in which he would have been, absent the injury".

But how does the court assess what the pursuer's position would have been, but for the abuse?

When considering loss of earnings, the general approach is the multiplier/multiplicand method of calculation. A "multiplicand" is an annual figure for loss which is multiplied by the "multiplier", which represents the number of years of future loss to be claimed.

There are occasions where this is not appropriate, and the court can use a broad-brush approach known as the "Blamire approach". (From Blamire v South Cumbria Health Authority [1993] PIQR Q1). This approach is a where a lump sum is awarded after consideration of all the circumstances.

D argued that the multiplier/multiplicand approach was the correct approach. On the other hand, the defenders argued that where a number of imponderables gave rise to uncertainties, the likely future pattern of earning made the multiplier/multiplicand approach inappropriate.

Settling on the correct multiplicand was an impossible task. The only certainty regarding D's earnings as a priest was the level of stipend that was automatically payable. Everything else was variable: mass stipends and stole fees varied from diocese to diocese; the size of the parish; the popularity, or otherwise, of D within that parish; and the affluence or generosity of the parishioners. Accordingly, this approach would be "manifestly unsuitable, and unfair to the defenders". The court was being asked to engage in "speculation" or "estimation".

In addition, as well as considering the loss, the court required to consider the benefits that D received as a result of laicisation. These included no longer being required to adhere to the strictures of the priesthood; not being on call "24/7"; being financially able to service a mortgage and purchase property; able to choose where he lives and works; able to form relations; and able to get married.

Taking the above into account, the defenders argued that the broad-brush Blamire approach ought to be used.

Discussion

Having considered both approaches, the court encountered various difficulties in applying the multiplier/multiplicand approach.

The aim of any award was to put D back into the position in which he would have been, but for the abuse and its consequences, not a better position. In doing so, the court identified several key points that were required to be taken into account, which in effect diminished the loss:

- Value had to be given to the fact that on leaving the priesthood D was able to purchase a house and made a substantial gain, albeit with payments of mortgage rates and council tax and any repair costs. This in effect created a very significant imponderable for past loss.
- It was held that it was reasonable to conclude that further gains from the money made from the sale of the house are likely to prevail in the future. This again is a significant imponderable.
- A number of other imponderables arise.

Given the above difficulties, the court decided that the only way forward was to treat the consequential loss issues as containing imponderables of such significance as to warrant the Blamire approach.

Decision

Applying the Blamire approach, the court concluded that on the evidence, there was support for the benefits in kind in the priesthood giving rise to consequential loss of some significance, on the broad basis that they result in a higher figure than D's post-laicisation income and that they are by no means wholly set-off by that income and the financial benefits of not being in the priesthood.

It was therefore acknowledged that a reasonably significant amount was due, however, the post-laicisation benefits could not be ignored.

The broad conclusion was therefore that the total figures for past and future loss relied upon by D fell to be reduced . As a result of the adjustments and the imponderables, the sums sought were required to be reduced by roughly 50% and then reduced further by taking into account past and future gains. Following a broad-brush approach, the court concluded that a sum of £400,000 for consequential loss was a fair and reasonable award, with £140,000 for the past and £260,000 for the future.

Will This Be Followed?

Following the introduction of the Limitation (Childhood Abuse) (Scotland) Act 2017, the court requires to assess the trajectory of a claimant's life over several decades in an effort to quantify lifelong losses.

The court does not have a crystal ball to predict the outcome of every 'sliding doors' moment to accurately assess how an individual's life might have turned out. There are bound to be several imponderables in life that have to be factored in. In this case, the court found that the best way of taking account of life's uncertainties was the Blamire approach and awarded damages accordingly.

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

The Keoghs costs team is...singled out by clients as 'the premier team for historic abuse claims in England and Wales' and has handled a broad range of work stemming from claims of abuse.

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

Notable experience in advising public sector bodies in abuse cases.

Chambers and Partners

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

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