aware

Public Sector

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Welcome

Welcome to the first edition of Public Sector Aware, which we hope will provide you and your colleagues with some interesting and helpful updates from our public sector team

We are pleased to include a number of articles affecting the sector.

Ian Carroll (Partner – Bolton office and handler of this claim) considers the latest High Court case concerning Vicarious Liability and Limitation in abuse cases and its ramifications across all sectors.

Christopher Stanton (Partner – Liverpool office) looks at whether there is a future for data privacy representation action under DPA 2018/GDPR as we are aware this is currently affecting many public sector organisations.

Rob Gray (Partner – Bolton office and handler of this claim) comments on the Court of Appeal decision in a case involving a teacher assaulted at a pupil referral unit and Causation.

Anna Churchill (Senior Case Handler) and Sarah Swan (Partner – Bolton office) consider an emotive, yet interesting area on the effects of the pandemic on Safeguarding.

Emma Welsh (Director of Casualty Fraud – Bolton) looks at two important decisions from the High Court in 2021 relating to Fundamental Dishonesty and considers whether to plead or not to plead.

The Supreme Court decision in Ho v Adelekun [2021] UKSC 43 is considered by Paul Edwards (Director – Liverpool office), particularly concerning the application of Qualified One-Way Costs Shifting (QOCS) and whether a defendant's costs can be set off against a claimant's costs in a personal injury claim.

We are proud that our public sector team has strength and depth with team members having substantial knowledge and experience in their particular field of expertise. We have had some great feedback for the team in the latest legal directory rankings so have highlighted some of the quotes which demonstrate this. Thanks to everyone who kindly provided feedback.

After a tumultuous couple of years and as we head into 2022 there are many pressing issues on the horizon for public sectors, but be assured that our public sector team will keep you up to date with new developments and evolving law. If you would like to speak to any of the contributors about their particular area of expertise, they would be delighted to hear from you.

Sarah Swan

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Ian Carroll
Partner

TVZ & Others v Manchester City Football Club Limited

[2022] EWHC 7 (QB)

Whilst not a public sector case, the recent High Court case of TVZ & Others v MCFC Ltd, applies across all sectors in relation to the areas of limitation and vicarious liability.

The TVZ case involved offences committed by a former football scout and coach Barry Bennell. 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 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

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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. 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:

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.

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.

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.
5. 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;
6. There was no evidence that Bennell was under any obligation to comply with instructions given by the defendant;
7. Bennell was not subject to any disciplinary code by the defendant; and
8. 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.

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.

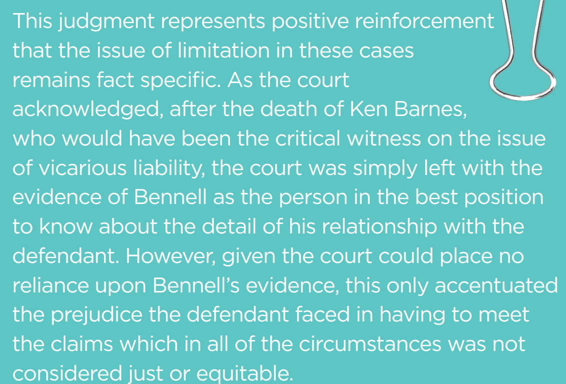
Stage Two

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." Finally, in relation to stage two of vicarious liability, this judgment considers the vicarious liability for abuse that occurred outside the scope of the activities expected of a junior football coach or scout.

This case brings far-reaching implications in respect of claims brought by other claimants, not only in respect of limitation, but also for abuse said to have occurred outside of the context of duties an individual would be expected to perform. This is true in all sectors including the public sector where abuse may occur by individuals with various roles outside of employment including entertainers, coaches and mentors, independent visitors, owners of and staff at non-public sector owned establishments and also taxi drivers.

For more information please contact either Ian Carroll or Sarah Swan

Christopher Stanton
Partner

Is there a future for data privacy representative action?

Background

Between August 2011 and February 2012, it was alleged that Google had installed software onto the iPhone (described as a Safari workaround), which enabled them to track users across third party websites in order to target adverts and generate commercial profit.

The consumer rights champion Richard Lloyd issued a representative action under CPR 19.6 seeking damages for himself and the 4-5 million users with "the same interest" who were allegedly affected by the Safari workaround. It was alleged that the class of users all had the same interest because they could all claim damages for loss of autonomy or loss of control over their personal data.

Mr Lloyd required permission to serve proceedings outside the jurisdiction. Google argued that the conditions for pursuing a representative action were not met because each affected user had a different entitlement to damages and damages for loss of control of data were not recoverable. Mr Lloyd's application was rejected in the High Court, but succeeded in the Court of Appeal.

The Supreme Court upheld Google's appeal, dismissing the action. In this article we look at the reasons why the claim failed; and the implications for future representative actions.

Supreme Court's Judgment

The claim arose from data breaches in 2011/12 and was brought under s. 13 DPA 1998, which states that: "An individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage." It was axiomatic that the requirements of s. 13 had to be met.

The representative action was brought under CPR 19.6, which does not limit the number of people who can be represented but gives the court a discretion whether or not to allow the claim to proceed as a representative action. The only condition is that the representative (here Lloyd) has the same interest in the claim as the people represented. The reason is to ensure that there is no conflict of interests and that the action is conducted for the benefit of all.

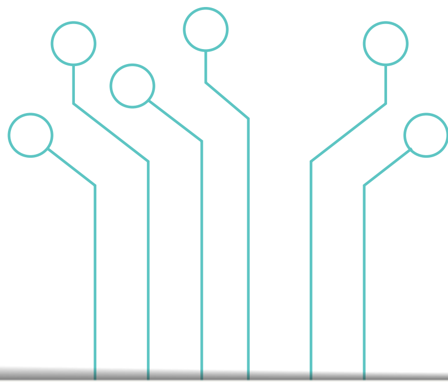
Mr Lloyd argued that there was a uniform loss for the loss of control of data, available for each data subject. He sought damages under s. 13 of £500-750 for each individual member of the represented class (c.4-5 million people). However, given the size of the representative class, the cost and the inherent impossibility of proving damage for each of the 4-5 million individual data subjects, he:

i. Did not show (or attempt to show) that any wrongful use was made by Google of personal data relating to each individual person; and

ii. Did not establish (or seek to establish) that the individuals he represented had each suffered any material damage or distress as a result of the alleged breach.

In the lead judgment, Lord Justice Leggatt held that, for the claim to succeed, s. 13 DPA 1998 required proof that wrongful use had been made of each individual's personal data and that each individual had suffered damage as a consequence. Without such proof, the claim for damages could not succeed. Mr Lloyd had not sought to adduce the requisite evidence and, therefore, it was held that the claim was not viable. The claim was dismissed.

The court confirmed that loss of control damages were available for the misuse of private information. However, they are not available as of right under s. 13. Mr Lloyd needed to prove damage or distress for each data subject, which he had not even sought to do. The claim was dismissed.



Implications for Future Claims

In theory, Mr Lloyd could have pursued as a representative action to establish the liability of Google, which would have been Stage 1 of a two-stage process. Stage 2 would have been to establish what damage each claimant had suffered (though, in reality, that was not possible for 4–5 million data subjects).

Mr Lloyd's claim related to a breach of DPA 1998. GDPR and DPA 2018 have strengthened the rights of data subjects. Under Article 82:

> Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.

Section 168 DPA 2018 states that non-material damage includes distress. However, the difficulty in any future representative action will remain 'how do you value the damage suffered by each data subject when different types of data will have been used for different purposes and in different ways'. That requires the 'Stage 2' analysis.

The Supreme Court has reiterated that representative actions are possible. However, crucially, it has held that a representative must prove what damage each individual has suffered as a result of the fault event.

The sort of damage an individual has suffered will likely depend upon the type of data used and the purpose for which it was used. It is difficult to envisage that someone who had one piece of non-sensitive personal data impacted would (or should) be compensated in the same way as someone who had twenty items of sensitive personal data. Each case needs to be reviewed on its merits.

A representative action could not proceed without litigation funding and the judgment is likely to make a potential funder think twice about pursuing a similar action reliant upon DPA 2018/GDPR, where the requirement to prove loss for each data subject remains. Group actions arising from data breaches have a mixed history (the Equifax claim was abandoned following service of a defence). Funders may be concerned about the risks they face in backing future representative actions.

Conclusion

The Supreme Court's judgment is certainly helpful for insurers and data controllers. The prospects of a representative action being pursued are much diminished because of the requirement to prove the damage caused by the data breach to each data subject.

Rob Gray
Partner

Court of Appeal dismisses teacher assault case

Rob Gray and Lee Cook successfully represent Local Authority in the Court of Appeal teacher assault case.

On 19 November 2021, the Court of Appeal handed down judgment in Cunningham v Rochdale Metropolitan Borough Council [2021] EWCA Civ 1719. This claim concerned an incident at a Pupil Referral Unit "PRU" run by Rochdale MBC, educating pupils with emotional and behavioural difficulties. On 3 November 2015, the claimant, a teacher at the school, sustained serious injuries after being punched in the face by a pupil there.

Background

The pupil's behaviour had declined and he had been involved in other incidents at the school earlier on during 2015, which included an earlier assault on the claimant on 22 September 2015 and one involving another teacher in October 2015.

The claimant contended that the school should have removed the pupil and placed him in a more therapeutic setting following the first incident. He also alleged that they had failed to produce risk assessments relating to the pupil or to arrange a return to school interview or a restorative justice meeting between the pupil and him after the previous assault on 22 September 2015, in accordance with school policies. It was also alleged that, had it been done, the assault on 3 November 2015 would probably not have occurred.

First instance High Court decision

HHJ Platts was critical of the lack of relevant documentation completed by the school. The deterioration in the pupil's condition was undisputed. There was a failure to carry out or record any formal risk assessment on the pupil and there was no documentation in place to show that a properly updated behavioural support plan was in place either. However, evidence was given that the senior staff at the school were aware of the pupil's deterioration generally and the type of events that manifested it. The court accepted that the staff carried out "dynamic risk assessments" and that informal communications within the school had been sufficient to bring issues concerning any individual pupil to the attention of relevant staff.

The court found there was no established pattern of violence against teachers although it was arguable that it was beginning to develop. The pupil had been at the school since he was aged 12 and to remove or move him would have been disruptive to him. There was still hope of the pupil returning to mainstream education, so exclusion from a PRU setting would, bluntly, have been the end of the line for his ability to access mainstream education. In his Judgment HHJ Platts stated it was clear that the school was still trying to work with the pupil and there was no evidence of any threats of violence to staff. Given that, the school was not in breach of its duty of care by failing to remove the pupil.

The court was not persuaded that, if there had been any formal written risk assessment or proper written behavioural support plan in place, it would have altered the school's approach to the pupil and his difficulties. It was a small community and it was not established that this incident arose because of a lack of awareness by any individual of the deterioration in behaviour or of any risk posed. It was not suggested or established that the claimant would have acted any differently had he been aware of a properly completed risk assessment or behavioural support plan. Although the school was criticised for failing to have and retain documents, it had no practical effect in the particular circumstances of the relevant assault.

The Judge decided, when looking at the totality of the evidence, he could not be satisfied that the Defendant was in breach of its duty either to the pupil or Claimant pre incident. It was clear that the senior staff at the school were already aware of the pupil's difficulties and deterioration in his behaviour including the previous incidents. It was clear that significant steps were taken to help the pupil

Arguments in the Court of Appeal

The claimant's Appeal focussed on the school's failure to produce risk assessments and to follow policies or arrange a return to school interview and restorative justice meeting between the pupil and him any time after the initial assault in the months preceding the relevant assault.

On causation, the claimant relied on the earlier Court of Appeal decision of Vaile v London Borough of Havering [2011] EWCA Civ 246, contending that had the school sufficiently risk assessed the danger posed by the pupil and ensured a restorative meeting took place, the assault would have probably been prevented. It was argued that where a claimant proves both that a defendant was negligent and that a loss ensued which was of a kind likely to have resulted from that negligence, it is ordinarily enough to enable a Court to infer that it was probably so caused, even if the claimant is unable to prove positively the precise mechanism.

The defendant argued that the trial Judge was right to find that the risk assessments in place were sufficient and that there was no breach of duty in relation to their failure to ensure a restorative meeting took place. Further, the second assault was unforeseeable and could not have been prevented.

Regarding the earlier Vaile v Havering LBC decision, the defendant submitted that it did not alter the conventional rules on causation. In Vaile, causation was established because if that teacher had known about the pupil's condition and received training it was more likely than not that she could have taken steps to avoid the attack. As such, the loss was of a kind likely to have resulted from the negligence in failing to warn that teacher about the pupil's condition and to train her on how to deal with it.

Court of Appeal Decision

The Appeal was dismissed as the claimant had failed to establish causation. In doing so, the Court of Appeal clarified the approach to be taken to causation where the precise mechanism of causation is unclear. Giving the judgment, Dingemans LJ held:

- The defendant was in breach of its duty to carry out suitable and sufficient risk assessments by failing to complete risk assessments, contrary to the decision of the High Court.
- The defendant was also in breach of its duty to comply with its own policies in failing to arrange a return to school interview and restorative justice meeting after the incident on 22 September 2015. Although the pupil was not regularly attending school, there was no reason given by the school to explain why these meetings could not take place.
- The crucial issue in the appeal was causation. The claimant relied on the Vaile decision to suggest that a court can infer causation from proof of negligence and that a loss of a kind likely to result from that negligence occurred, even where the precise mechanism of causation is not clear.
- The decision in Vaile had not changed the established principles on causation, with Dingemans LJ stating;

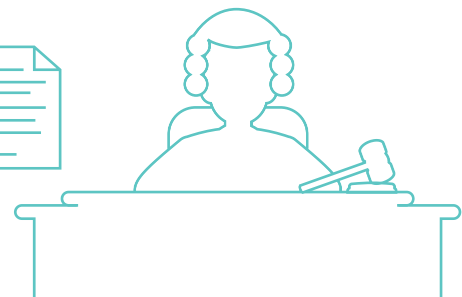
In my judgment Vaile v Havering LBC did not establish any new principles of law in relation to the issue of causation in general, or causation in particular relating to attacks on teachers by pupils. It was a case where the Court of Appeal considered that if a teacher had been warned about a pupil's ASD and had been trained in how to manage a pupil with ASD, the attack would, on the balance of probabilities have been avoided, even though the mechanism by which that would have occurred could not be shown. By contrast in this case, the judge found on the basis of evidence of records of TAC meetings and the witness evidence, that "the senior staff at the school were aware of the [pupil's] deterioration generally and the events that manifested it". The evidence also established that Mr Cunningham was experienced and trained. The situation in this appeal is different from that in Vaile v Havering LBC, and the issue of causation requires a careful analysis of the relevant factual situation.

- On the facts of this specific case at paragraph 41 – 42 of the Judgment, the Court held;

The prospect that the pupil would, in the final event, have not assaulted Mr Cunningham because he had had a return to school interview and a restorative justice interview with Mr Cunningham is possible, but it is not probable and more likely than not to have prevented the attack. This is because the pupil had had the benefit of extensive interventions over the course of the year as his behaviour deteriorated coinciding with the time of his grandfather's death, his father's illness and subsequent death. As already recorded, the judge found that the school had been involved in referring the pupil to various bodies including: CAMHS, Early Help and Family Support, Resolve, Hype, The Youth Offending Team, Crisis Intervention, the school counsellor, Outreach Intervention, one to one youth work, Early Break and Strengthening Families. The pupil had had contact with the school counsellor, although he had refused external counselling. The pupil had been referred to bereavement services. The pupil and his mother and sibling had undertaken a Strengthening Families course, which had been described in the evidence as a step forward.

In all of these circumstances the attack in this case was not of a kind likely to have resulted from the failure to have the return to school interview and the restorative justice meeting. This appears from the sustained nature of the incident, the circumstances of the assault, and the fact that all of the other interventions did not prevent the assault. In my judgement, therefore, the appellant is unable to show on the balance of probabilities that a return to school interview or a restorative justice interview would have prevented the pupil's serious assault on Mr Cunningham. This means that Mr Cunningham is unable to show that if there had not been any breaches of duty on the part of the school, the attack and Mr Cunningham's loss would have been avoided, and therefore causation is not established.

Accordingly, the appeal was dismissed.



Comment

This Court of Appeal decision should come as a relief to insurers and local authorities given the Court's positive assertion that their earlier 2011 decision in Vaile v Havering LBC did not rewrite the Court's determination of causation in cases of this nature. It serves to emphasise that each case must be decided on its own merits.

Defendants should carefully consider and assess whether any potential breach(es) of duty were in fact causative of the assault, or if it would have probably occurred anyway had they not arisen, which is sometimes not straightforward.

This decision also highlights the importance for defendants to identify the positive actions/steps taken prior to any such incident and the point that a failure to prepare prior risk assessments etc. does not automatically lead to an inability to successfully defend an employers' liability claim.

Anna Churchill
Senior Case Handler

Sarah Swan
Partner

Spotlight on Children's Services in the pandemic

The cases of Arthur Labinjo-Hughes and Star Hobson have been well publicised over recent weeks. Arthur's untimely death at the hands of his father's partner, Emma Tustin, during the first lockdown and the death of Star Hobson at the hands of her mother's partner, Savannah Brockhill, in September 2020 have inevitably led to questions around social services' involvement with the children. Many of the details regarding the involvement of social services are unclear at present, but the cases highlight issues that may become recurrent when considering children's services during the height of the pandemic.

Keoghs previously commented on the increases in child abuse and pressures on social services during the pandemic in an article drafted by Partner Sarah Swan in September 2020: Keoghs Insight | Keoghs. At that stage, we suggested it was likely that public sector organisations would face a raft of claims stemming from events in lockdown. Sadly the cases of Arthur and Star illustrate the issues faced by social services during this unprecedented period, and the possible effects of the restrictions on children's services and, ultimately, the vulnerable children they protect.

Arthur's story

According to media reports, in February 2019, Arthur's mother was convicted of manslaughter for killing her partner, who it is reported was abusive to her. Following her conviction Arthur was cared for by his father, Thomas Hughes. In August 2019, Mr Hughes met Ms Tustin online.

In November 2019 Mr Hughes was called to Arthur's school to discuss issues with his behaviour, including a fixation with death.

In March 2020, Mr Hughes took Arthur to a Children and Adolescent Mental Health Services practitioner. She reported that his physical appearance was fine, and his anxiety and aggression had reduced. When the lockdown restrictions were announced on 23 March 2020, Mr Hughes and Arthur moved in with Ms Tustin.

It is said that concerns about Arthur were consequently reported to social services by numerous people on more than one occasion, but initial assessments by social services concluded that there was no safeguarding concern. Concerns were also reported to the police, who are said to have taken no further action due to the involvement of social services. It is now clear that during this period Arthur was suffering from horrific abuse and neglect. Arthur did not return to school when they reopened in June 2020.

Arthur was left with an unsurvivable brain injury following an assault by Ms Tustin on 16 June 2020.

Ms Tustin was convicted of murder and Mr Hughes of manslaughter, and they were imprisoned for 29 and 21 years respectively. The details of the case were so upsetting that the jury asked the court to observe a minute's silence following their guilty verdicts.

Star's story

On 14 December 2021 Star Hobson's mother's partner, Savannah Brockhill, was found guilty of her murder, and her mother, Frankie Smith, was convicted of causing or allowing the death of a child. Star was just 16 months old at the time.

Hers is another incredibly sad sequence of events. Media reports state that concerns were first raised to social services in January 2020. The case is said to have been closed in May 2020. No details around the investigation or the closure are available. In May 2020, another referral was made following allegations that Brockhill has used a wrestling move on one-year-old Star. A social worker is said to have visited the same day. Numerous referrals are said to have been made in June and visits were conducted, but the case again closed in July 2020.

On 2 September 2020, it is said that another referral was made following bruising to Star's face. An investigation began, but the case was again closed on 7 September. Tragically, Star died on 22 September 2020 following a severe physical assault by Brockhill.

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Issues arising from the pandemic

These tragic cases appear to be chronologically tied to the pandemic and consequent lockdowns. Although it is impossible to say whether the outcomes may have been different, it has been widely reported that children's services struggled (and have continued to struggle) during lockdown and as a result of the wider effects of the pandemic.

During the first lockdown, social workers were told to minimise going into children's homes where possible by seeing children and parents on doorsteps, in gardens and on Zoom. Whilst in homes, social workers were instructed to wear PPE and stay two metres away from others. There is no doubt that such assessments are not of the standard usually expected from social workers, and make assessing risks to children incredibly difficult.

There is also the added issue of the number of childcare professionals absent with Covid-19, or forced to isolate, alongside increasing mental health problems in the general population, which will inevitably have affected staffing levels during this period.

The closure of schools also had a significant effect on children's services. Arthur's school was closed from March until the beginning of June. The school did raise concerns about his welfare in 2019 prior to lockdown. Schools are key in recognising safeguarding issues and making referrals to relevant bodies. Removing this resource means that schools cannot perform this function. Additionally, school closures meant children were spending significant time at home.

The effect of GPs only taking telephone appointments during the pandemic (and to some extent to this day), the closure of children's groups, support groups for mental health and early years services, lack of multi-agency face-to-face meetings, the heavy workload of the police, and lack of contact with wider family members and friends also meant that further safeguards were removed. For children in abusive households this was unquestionably damaging, and eroded a support network of adults outside of the home.

Incidents of child abuse and referrals to social services have increased significantly over the past 18 months. There is now a record number of children in care. Social workers are reported to be suffering from burnout after handling large (and increasing) caseloads in the context of the pandemic, in comparison with their colleagues employed in the private sector. The pressures on social services during that period and to date are clear. It is an unfortunate fact that these issues lead to the service provided to children being affected.

Other factors

Although Covid-19 has clearly had an impact, it would be simplistic to suggest that the current pressures on children's services are solely a result of the pandemic. Funding for local authorities and children's services has been consistently reduced in the past ten years. There is no question that this impacts the care available.

Lord Laming, who led the Victoria Climbie Inquiry, recently stated that the

marked reduction in funding of local authorities in the last 10 years has had a real withdrawal from frontline services. And I think it's become something of a crisis service, rather than a preventive service.

The suggestion that funding reductions mean social services are possibly no longer able to prevent child abuse, and instead focus on children in crisis is incredibly worrying. This is clearly relevant, particularly when considered alongside the impact of the pandemic and cases such as these.

Commentary

Unfortunately it seems inevitable that public sector organisations will be presented with civil claims relating to the actions of their workers during the pandemic. It is without question that these organisations, already struggling from a lack of funding, were faced with an unprecedented situation and had to adapt. However, this did not erode the duties that local authorities owe to children in their care. The question is how the courts will look at these cases and potential failures in light of the wider context of the claims.

There are as yet, we believe, no reported cases where the court has had to consider the effect of Covid-19 on public services, and the consequences when it comes to liability for civil claims. It will be interesting when this issue is addressed and what effect this has on public sector liability and also the Bolam test for social workers and other care practitioners.

However, the first thought must go to how to minimise the prospects of a repetition of these tragedies. No doubt they are extreme and incredibly sad cases. The context of the cases provides a glimpse into the issues faced by social workers during that period and beyond. It is unclear whether social services were at fault, and it is noteworthy that neither child appears to have been in the care of a local authority. Nevertheless, it is an example of cases which are likely to give rise to civil claims, due to an almost perfect storm of issues. Careful analysis of the effect of the pandemic on these cases will be necessary when considering the legal issues.

In the meantime, it is necessary for public sector organisations to be alive to the issues and the risks to children presented by the pandemic. Conceivably, it would be worthwhile to pay careful attention to referrals dealt with during the lockdown period so as to consider whether these may require reassessment to protect the children involved. Any action that can be taken to reduce the risk of similar tragedies must be prioritised.

Should you wish to discuss further, please contact Anna Churchill or Sarah Swan.

Emma Welsh
Director of Casualty Fraud

Fundamental Dishonesty

To plead or not to plead, that is the question

There were two important decisions from the High Court of Justice in 2021 in which the court was invited to consider whether to allow a defendant permission to amend its defence to specifically plead Fundamental Dishonesty against the claimant.

By way of background, a defendant can apply to have the claimant's claim dismissed via section 57 of the Criminal Justice and Courts Act 1957, or to enforce costs from which otherwise the claimant would have been protected under QOCS (Qualified One-Way Costs Shifting) under CPR 44.16. Both instances relate to the conduct of the claimant and the objective assessment of whether they are dishonest by the standards of ordinary people. In other words, what the claimant knew or understood needed to be assessed before going on to test that by reference to objective standards. It is not what his solicitors knew. It was not what he should have known. It is only what he did, as a matter of fact, know.

Given the relatively new ability for defendants to allege fundamental dishonesty (as opposed to fraud), it is unsurprising that there has been plenty of satellite litigation in this arena, particularly regarding whether fundamental dishonesty has to be positively asserted and, more particularly, positively pleaded.

This was initially considered in Howlett v Davies [2017] EWCA Civ 1969. The defendant's insurer resisted the claim and entered a defence saying it "did not accept that the index accident occurred as alleged, or at all", and the claimants were put to strict proof that they were involved in an accident. At the start of trial, claimants' counsel applied to strike out the defence on the basis that the defendant was not entitled to 'sit on the fence' and that a positive case of fraud has to be pleaded, or they have to accept that the accident occurred as alleged. The judge rejected the application and the case proceeded to a four-day trial, following which the court found there was no accident and that the claimants were "fundamentally dishonest". The decision was upheld by the Court of Appeal where it confirmed that there was no requirement to plead "fundamental dishonesty" in the defence and it was open to a judge at the conclusion of trial to consider such a finding.

The issue surrounding pleading fundamental dishonesty raised its head again in 2021 in the case of Mustard v Flowers & Ors [2021] EWHC 846. Here breach of duty was not in dispute; however, the nature and extent of the claimant's injuries were hotly contested. The claimant alleged to have suffered a serious brain injury, although the defendant disputed any brain injury whatsoever.

The matter was listed for trial in November 2021. In March 2021 the defendant made an application to amend its defence due to the claimant's account of the accident, immediate aftermath, and the nature and severity of her symptoms having varied over the course of litigation. The primary amendment read: "In the event that the court finds that the claimant has consciously exaggerated the nature and/or consequences of her symptoms and losses, the defendant reserves the right to submit that a finding of fundamental dishonesty (and the striking out of the claim pursuant to section 57 Criminal Justice and Courts Act and/or costs sanction including disapplication of QOCS) is appropriate."

The application to amend was refused. The Master's reasons for the refusal were threefold:

1. The amendment served no purpose – the defendant could, if appropriate, make the allegation without having to foreshadow it in a pleading. The wording proposed was a reservation of the right to apply for a finding of fundamental dishonesty and. therefore. unnecessary;
2. The amendment had no real prospect of success on the evidence presently available; and
3. It caused prejudice on the claimant as this plea of fundamental dishonesty would have to be reported to her legal expenses insurer, which could raise further fear and anxiety of the claimant when there was no proper basis for the averment.

The decision in Mustard was shortly considered again in Covey v Harris [2021] EWHC 2211 (QB). In this matter, primary liability was admitted and an application was made by the defendant to amend its defence to plead fundamental dishonesty less than one month before trial. The amended defence alleged that the claimant had been fundamentally dishonest in relation to both liability and quantum and particularised its case in support of that allegation. In considering the application the court reaffirmed the Howlett decision that there was no obligation to plead fundamental dishonesty, but that it was right and fair that a claimant knows the case they have to meet. This case was distinguished to that of Mustard as the defendant in this instance sought to positively allege fundamental dishonesty and the claimant had known about the position for some time.

Comment

Pleading fundamental dishonesty is a useful tool in a defendant's armoury and can result in an early discontinuance as it forces the claimant to consider the risk. Whilst there are some cases in which a defence pleading dishonesty can be made at the outset, the majority of cases require further, more detailed, investigation and disclosure before the position can be confirmed. Howlett is still good case law and so long as the claimant has been put on notice in good time of the defendant's intention to raise fundamental dishonesty arguments at trial, this should suffice. However, on those cases where there is clear, overwhelming evidence in support of your allegation of dishonesty, an amended defence should be entered, positively asserting fundamental dishonesty setting out the particulars of the allegations with evidential support.

Whilst there are pros and cons of pleading fundamental dishonesty, the claimant should always be put on notice either via pleadings or in open correspondence of the defendant's intention. However, should the claimant subsequently discontinue and the defendant want to pursue recovery of costs on the basis of fundamental dishonesty, then it will always have a stronger case if this has been positively pleaded beforehand.

Paul Edwards
Director of Costs

Green light

for claimants' solicitors to pursue weak or unmeritorious claims and applications?

The Supreme Court decision in Ho v Adelekun [2021] UKSC 43 concerns a long-fought issue relating to the application of Qualified One-way Costs Shifting (QOCS) and whether a defendant's costs can be set off against a claimant's costs in a personal injury claim. The decision was largely as expected; however, it raises concerns as to its unintended consequences. This article will focus on those and how paying parties should respond, as well as looking at the likely next steps from government and the courts.

The rules on QOCS have been in force since 2013, where a defendant has an order for costs in a personal injury claim it can only be enforced against a claimant where there is an "order for damages and interest" in the claimant's favour, and the amount of those costs can only be enforced up to the level of damages and interest recovered. The rules on QOCS contained in Section II of CPR Part 44 were silent concerning a right to set-off of costs against costs as a mechanism for the defendant to receive credit for any entitlement to costs against the claimant.

Many paying parties have been reluctant to offset against damages, because that might leave the claimant, usually an injured party, without any compensation. Instead, offsets were regularly applied against the costs sought by the claimant's solicitors. This was also usually the preferred way forward, necessitated by case law that restricted the ability of defendants to offset.

The Court of Appeal case of Cartwright v Venduct Engineering [2018] held that a Tomlin Order was not an "order for damages and interest" within the meaning of CPR 44.14(1), meaning that many defendants in personal injury claims consequently found that they were unable to enforce a costs order in their favour. As such they looked to offset costs against costs by seeking an exercise of the court's discretion under the general set-off provision at CPR 44.12.

Set-off in these circumstances had previously been allowed by the Court of Appeal in the under publicised case of Howe v MIB No 2. That case permitted a defendant to set off their costs against any costs the claimant was entitled to recover. The effect of this was to allow the defendant credit for the costs it was due by reducing the overall costs the claimant recovered. In Ho v Adelekun, the Court of Appeal considered themselves bound by Howe, but permission to appeal was granted.

The appeal was allowed, the Supreme Court finding that the intention of QOCS was to set a cap on the costs that a defendant could recover out of the claimant's damages and interest. A defendant could, therefore, recover the costs ordered, by any means available, including set-off against an opposing costs order, but only up to the monetary amount of the claimant's orders for damages and interest.

The Supreme Court seemed unconcerned with the suggestion that the court would be giving a green light to claimants pursuing weak interim applications and unmeritorious points, or that it would remove any real incentive to settle before trial if the adverse costs consequences of losing at trial (or failing to beat a Part 36 offer) led to a purely unenforceable costs sanction absent there being an order for damages and interest made in the claimant's favour.

Comment

Whilst the judgment didn't come as a surprise, it does present a number of challenges and commercially defendants should consider carefully their approach to matters where there is a risk that even if they win, whether on an interim application or a full claim, they may not make any costs recovery. As such, risk assessing matters may lead to claimants 'getting away' with poor behaviours.

We expect that the law will be reviewed at some point and that there will be some concern in judicial circles at the implications of the Supreme Court guidance. The current law will lead to more satellite litigation, as defendants implement strategies in order to overcome the set-off conundrum.

This will particularly see an increase in applications made against claimant's solicitors personally, pursuant to CPR 46.2(1)(a) and section 51 of the Senior Courts Act. These applications will, we expect, be of two types. The first, more conventional, type of application will be where claimant's solicitors make errors that cause wasted costs to be generated, for example with adjourned hearings and the like. The second developing area of law is something that we have recently been given permission to pursue in the SCCO, in that defendants may pursue claimant's solicitors where the proceedings, particularly cost proceedings, are being run solely for the benefit of the solicitors. Such scenarios will typically apply where a CFA lite has been entered into. We are running such an application, due to be heard later in 2022, and will report further.

To conclude, whilst the law has been confirmed to be essentially what everyone expected, the recent clarification has potentially encouraged unintended consequences that need to be carefully managed.

Paul Edwards

the interview

We thought that it would be helpful to introduce some of our public sector team members to you in each edition of Public Sector Aware. In this edition, we focus on Paul Edwards, Costs Director. Paul manages our costs team in Liverpool. He specialises in complex and high value costs disputes, with particular expertise in group litigation and abuse claims. The costs team is recognised in Chambers Guide.

How long have you been working in the costs arena?

A long time! It's something like 25 years. During this period, my team transferred from Hill Dickinson to Keoghs. I have advised and led submissions to the MOJ on reform proposals and how they will impact the public sector.

What's your main focus?

While I deal with costs over a range of claims types, my primary focus over the last 15 years has been abuse cases (many of those being in the public sector). I'm currently leading costs in the UK's largest child sexual exploitation group.

In your view, how important is getting the right costs solution?

It's crucial, because usually costs are greater than damages. Abuse claims, and other claims that are typically seen by public bodies, are specialist and require bespoke solutions. It's important that those dealing with these sorts of matters actually understand the claims themselves, for example having an appreciation of differences between the steps required in a VL claim, compared to say a claim in negligence. This dramatically affects the way a claim should be brought, and the costs that should be payable. It's also necessary to be alive to the sensitivities that come with some of these claims.

How do you think you differentiate the way your team deals with legal costs?

We don't simply act on a transactional, file by file approach. We conduct these cases with a whole series of considerations; maximising savings being the primary driver but also to act strategically to change the behaviour of Claimant solicitors in both the way they conduct the substantive claims, but also claim costs.

Can you explain how you do this?

There are many ways! For example, we work to understand each clients own priorities and concerns. We are able to get involved throughout the life cycle of claims so we support by advising on costs budgeting, on the implications of the terms of offers and changes in the law. We provide extra support by risk assessing new types of claim, monitoring trends, assisting in the preparation of "cost marker" correspondence where an opponents behaviour is cost building or non-progressive. We also carry out a costs benefit analysis – considering the benefit of contesting an issue and the ramifications of same not just regarding its impact on an individual file but across a tranche of claims and the wider sector.

Since 2017 we have reduced the average claim for costs by opponents, as well as seen the average spend by clients on the costs of abuse claims drop by over 40%, something I am really pleased with.

How do Claimant's solicitors find you?

Because of my experience in this area, I know our opponents and help drive Keoghs' Know Your Opponent strategies. This has had the effect of changing their behaviour and driving down costs. These strategies encompass support to fee earners during the life of the claim and how costs are to be dealt with. We have seen real changes in the way some of our opponents bring these claims.

Would you consider yourself to be innovative?

Absolutely! It's important to always be challenging and adapting our own strategies. Apart from the Know Your Opponent strategy, the article that I have drafted in this edition sets out recent challenges for paying parties as a result of Ho v Adelekun and is an example of where we have been looking to support clients with new approaches to both minimise legal spend on third party costs and discourage Claimant solicitors from unreasonable behaviours.

Paul is happy to discuss any aspect of costs with you, so please don't hesitate to get in touch if he can help.

Client Comments

We would like to share some of the fantastic feedback we have received from our clients along with Chambers and Legal 500.

Knowledge and experience in this area is obvious and is reflected by the settlements that they achieve. They are always willing to assist and provide us with valuable advice. We would highly recommend them.

Local Authority Insurance Manager

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

Force Solicitor

From the moment of contact, the school felt that we were in both safe and expert hands. Prompt, helpful, and reassuring responses were received to all our queries and we were kept appraised of all developments.

School Head

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

Legal 500

Over the last four years our costs team have reduced the average third party spend on the costs of abuse claims by 41%.

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