Spring 2025 - Abuse

AWARE

Keoghs
a Davies business

Contents

Contributors

Ian Carroll
Partner and Head of Abuse team
E: icarroll@keoghs.co.uk

Laura Baxendale
Partner
E: lbaxendale@keoghs.co.uk

Patrick Williams
Associate
E: patrickwilliams@keoghs.co.uk

Daniel Tyler
Associate
E: dtyler@keoghs.co.uk

Lauranne Nolan
Associate and Safeguarding Lead
E: lnolan@keoghs.co.uk

Heather Lillis
Solicitor
E: hlillis@keoghs.co.uk

Welcome

Welcome to the spring edition of Keoghs Abuse Aware update. This newsletter contains a collection of several important developments in abuse claims that have taken place over the last six months. This includes the government's response to the outcome of the consultation in respect of reforming limitation law and apologies in abuse claims following the recommendations made by the Independent Inquiry into Child Sexual Abuse (IICSA), developments in relation to the courts' application of the 17th Edition of the Judicial College Guidelines and assessment of general damages in abuse claims, vicarious liability in abuse claims for 'akin' to employees in Australia, and vicarious liability (stage two) and negligence in cases of non-recent abuse in Scotland.

I am 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 this edition of Abuse Aware interesting and informative. If you would like to speak to any of the contributors, they would be delighted to hear from you.

Head of our abuse team, Partner Ian Carroll, considers the government's intention to introduce legislation to remove the three-year statutory limitation period for child abuse claims and the recent High Court decision in Samrai & Ors v Kalia [2024] EWHC 3143 (KB) where the issue of fundamental dishonesty was raised and adjudicated upon in the context of alleged abuse. He also discusses with Lauranne Nolan, Associate and Safeguarding Lead, the High Court of Australia decision in Bird v DP [2024] HCA 41 where it was found that a Roman Catholic Diocese could not be vicariously liable for abuse committed by one of its priests, and contrasts this decision with the approach taken in England and Wales.

Patrick Williams, Associate, considers the government's intention to reform the law of apologies in civil proceedings in England and Wales and provides an update in relation to the assessment of general damages in abuse claims in the context of the court's application of the 17th edition of the Judicial College Guidelines in the High Court decision in LXB v John Ridley [2024] EWHC 3352 (KB).

Daniel Tyler, Associate, considers two Court of Appeal judgments in Woodcock v Chief Constable of Northamptonshire and CJ and others v Chief Constable of Wiltshire EWCA Civ 13 regarding the circumstances in which the police may be held liable for failing to protect someone from harm caused by the criminal actions of a third party where in both cases the court found for the police.

Lauranne Nolan, Associate, and Safeguarding Lead, discusses the Swim England review of all historic safeguarding investigations amid concerns children have been left at risk of harm.

Heather Lillis, Solicitor, provides an update on Scottish abuse case law, specifically regarding the Scottish abuse case of NM v Graeme Henderson and the Scottish Ambulance Service [2024] CSOH 84 that considered the issues of vicarious liability (stage two) and negligence.

Laura Baxendale, Partner, provides and update on a recent historical abuse case handed down in the Court of Session, the case provides guidance on several areas including the divisibility of psychiatric injury in abuse claims and the approach to be taken to quantification of consequential loses.

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 several sectors, including:

Education	Faith	Local Authority
Police	Military	Charities
Inquiries	Care Home and Private Care	Sporting Clubs and Associations

Three-year statutory limitation period to be removed for child abuse claims

The Government has announced its intention to introduce legislation to remove the three-year statutory limitation period for child abuse claims.

Further, the Government has also confirmed that it intends to reverse the burden of proof so that the onus will be on defendants and organisations to show that it is not possible for there to be a fair trial so that a civil claim should not proceed.

Author:
Ian Carroll
Partner and Head of Abuse

This announcement followed the Government's consultation in July 2024 that sought views on how limitation law could be reformed to allow more claimants to pursue civil claims for abuse. While the Government has indicated it intends to change the law with regards to the statutory limitation period, with one exception, it has declined to proceed with any of the remaining proposed options for reform.

In summary, the Government's responses are as follows:

1 Complete removal of the three-year limitation period in child sexual abuse cases

The Government now supports this and has said that the "removal of the limitation period would send a clear message of the Government`s intent that victims and survivors of child sexual abuse should not have to suffer the further injustice that responses to this consultation show a limitation period may impose". This was one of the recommendations made by the Independent Inquiry into Child Sexual Abuse (IICSA).

However, this removal is only on the basis that safeguards remains in place and "the right of defendants to a fair trial is protected and as recommended by the IICSA, would seek to ensure that any legislative changes in this area expressly recognise the importance of a fair trial".

2 Reverse the burden of proof in child sexual abuse cases

The Government now supports the reversal of the burden of proof "in view of the exceptional nature of historic child sexual abuse claims". It was stated that most respondents to the consultation supported a reversal of the burden of proof to place the onus on defendants to show that there cannot be a fair trial, contrasting with the present position, where claimants have to show that there can be a fair trial. This was another aspect of the recommendation made by IICSA.

3 Codify existing judicial guidance

This option will not now be pursued. The Government's position on this option had been that "there would be merit in codifying existing judicial guidance and putting it on a statutory footing". However, the Government has now acknowledged that existing judicial guidance "remains part of the common law and courts will therefore continue to take it into account when considering claims of this nature".

4 Additional factors to be included in judicial guidance about section 33 of the Limitation Act 1980

The Government has declined to add additional factors to the exercise of the court's discretion around whether to allow a claim to proceed under section 33 of the Limitation Act 1980. The Government has stated that it "is content that no additional factors should be included in judicial guidance about S33".

5 Allow the reopening of claims that have already been adjudicated or settled

This option will also not be pursued. The Government has previously stated that it supported IICSA's views, noting that: "it would not be appropriate to legislate to enable claims which have already been determined to be reopened". The Government has agreed "that certainty and finality are among the key aspects of the rule of law".

6 Whether the change in the law should apply to claims not yet settled or dismissed by a court

Based on "overwhelming support from respondents", the Government now believes that "in the interests of equity... any change made to the limitation period should apply to all cases that have not yet been settled or dismissed by a court". Accordingly, when any change in the law occurs, it will apply to all existing ongoing claims which had not at that point been settled or determined by the court.

7 Extending the definition of abuse (beyond child sexual abuse)

Any change in the law will be limited to child sexual abuse claims only. The Government has maintained the initial view in the consultation and believes that reform should be limited to child sexual abuse claims. The reason for this is that IICSA was focused solely on the sexual abuse of children rather, which it "comprehensively explored", rather than other forms of abuse such as physical and/or emotional abuse, which will therefore still be subject to the standard limitation periods.

8 Adjusting the factors in Section 33 of the Limitation Act in relation to Child Sexual Abuse Cases

The Government has declined to support there being bespoke Section 33 factors of the Limitation Act 1980 for child sexual abuse. It believes that Section 33 "already offers discretion in cases concerning child sexual abuse claims" and anticipates that the removal of the three-year limitation period "means there will be less reliance or use of this part of the legislation" in any event.

9 An extended limitation period for child sexual abuse cases

The Government has agreed that there should not be an extended limitation period for child sexual abuse claims. It was originally "not minded to set a different fixed limitation period for child sexual abuse claims" as it would introduce an equally arbitrary time limit. The Government has preferred the complete removal of a limitation period instead.

10 A Pre-Action Protocol for child sexual abuse claims

There was strong support for a bespoke Pre-Action Protocol for child sexual abuse claims. The Government has therefore indicated that it is "sympathetic to the development of a specific Pre-Action Protocol for child sexual abuse claims" and seek the views of the Civil Procedure Rules Committee and Civil Justice Council.

Summary

The Government's response gives effect to the two key recommendations made by IICSA concerning the law of limitation in England and Wales for child sexual abuse claims: (1) the removal of the three-year limitation period; and (2) reversal of the burden of proof.

However, the extent of the reform has been limited in scope only to those claims involving child sexual abuse. It is not proposed that the approach in England and Wales will seek to widen the categories of civil claims, which will not be subject to limitation periods for other types of abuse as seen in Scotland, such as physical and emotional abuse and neglect. The current limitation regime will remain in place. It will also not be extended to those claims previously pursued and settled or adjudicated upon by a court.

It also remains to be seen the extent to which this will have any material impact on the prevalence of civil claims for child sexual abuse in the future. It was recognised during IICSA that many victims and survivors of child sexual abuse can understandably take several years to pursue civil claims in respect of their abuse. As a result, many civil claims for non-recent abuse have already been successfully pursued outside the statutory three-year limitation period. Further, notwithstanding the formal burden of proof has rested with claimants, existing judicial guidance has required defendants to have an evidential burden which they must discharge in each case of establishing any prejudice as a result of the claimant's delay and must show that any evidence adduced, or likely to be adduced, is less cogent as a result of the passage of time. This would still be the position even if the burden was reversed.

The prospect of a bespoke pre-action protocol for child sexual abuse claims is also encouraging and should be welcomed. Given the nature of abuse claims and often the period to which the allegations relate, the pre-action protocol for personal injury claims under which child sexual abuse claims currently sit does not adequately fit or reflect the reality of civil claims for abuse. In principle a specific pre-action protocol for child sexual abuse claims remains the most proportionate and effective way in which to resolve issues at an early stage and minimise any potential distress to claimants caused by the inherent delays in the current civil claims process.

Whilst no timetable has been given, the precise wording of primary legislation introduced by the Government as to how these reforms are to be achieved will be key and require careful consideration to ensure that the necessary balance in fairness to both claimants and defendants remains.

Reform of the Law of Apologies in Civil Proceedings in England and Wales

The government has announced its intention to reform the law of apologies in civil proceedings in England and Wales.

Author:
Patrick Williams
Associate

Background

This announcement follows the recommendations made in September 2019 by the Independent Inquiry into Child Sexual Abuse (IICSA) when it published its Accountability and Reparations Investigation Report ('the Report').

In April 2020, the government provided its response to some of the recommendations made by the Report, which included the sensitive issue of apologies and the circumstances in which any apology would constitute an admission of liability where an institution was potentially vicariously liable for the abuse committed upon a claimant.

On 8 April 2024, the government published its consultation paper: Reforming the Law of Apologies in Civil Proceedings in England and Wales. The consultation period closed on 3 June 2024.

Current Law

Section 2 of the Compensation Act 2006 ('the Act') currently provides that: "an apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty". However, given the development of the law concerning non-recent abuse claims since 2006, a significant proportion of claims are now pursued in vicarious liability (rather than negligence or breach of any statutory duty). The absence of any mention of vicarious liability in the Act, therefore, created significant uncertainty and confusion for institutions as to whether an apology would, in fact, be deemed to constitute an admission of liability. The effect of this was that victims and survivors who sought apologies from institutions did not receive them on the basis that institutions were cautious about potentially prejudicing insurance cover if they gave an apology which was then relied upon in any civil claim as an admission of liability.

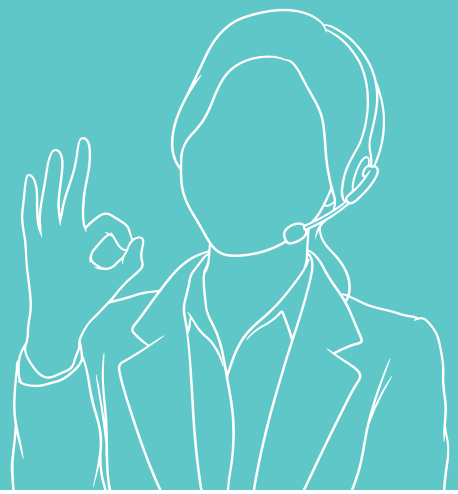
This issue was subject to some detailed scrutiny by IICSA which resulted in a recommendation that the government should introduce legislation revising the Act "to clarify that section 2 facilitates apologies or offers of treatment or other redress to victims and survivors of child sexual abuse by institutions that may be vicariously liable for the actions or omissions of other persons, including the perpetrators".

The government previously responded to provide some helpful guidance and indicative views on the interpretation of the Act. In particular, the response indicated that section 2 of the Act was "intended to reflect the existing law and encourage businesses, insurers and other organisations not to be deterred from offering apologies by a perception that doing so would necessarily constitute an admission of liability". Significantly, the government stated that "the focus of the 2006 Act on claims in negligence and breach of statutory duty is not intended to suggest that the provision is only of relevance to those proceedings". The government's response specifically referenced vicarious liability as being such common law cases to which the Act may equally apply.

Summary of responses to the consultation

A total of 36 responses to the consultation paper were received. In summary:

- All respondents believed that the use of apologies in civil litigation is intrinsically a good thing and saw it as having potential benefits. There was general support for additional guidance and communications on the use of apologies in legal terms, as well as an interest in more being done via pre-action procedures and utilising alternative dispute resolution (ADR).
- There was broad support for any such reform to be introduced through primary legislation rather than through secondary legislation or rule changes.
- There were mixed views on using the Apologies (Scotland) Act 2016 as a model for amended legislation in England and Wales and on the value of a statutory definition of an apology. However, there was broad support overall for an apology to be defined regardless of the type of legislation adopted.
- A large number of respondents showed strong support for vicarious liability to be added on the face of the Compensation Act 2006, as a form of litigation to be covered by the legislation.
- There was, however, strong opposition by all respondents on legislation being retrospective in effect, with the general view that this would lead to uncertainty and ambiguity on cases already settled or determined.



Conclusion and next steps

In summary, the government's responses to the consultation are as follows:

- It would be reasonable and sensible to make some modest reforms to encourage greater use of apologies. This is because the use of apologies can have a positive effect on the civil dispute process, and this was a theme supported by responses to the consultation.
- The government has decided to pursue reform by means of primary legislation and as part of those reforms the government will include a clear definition of an apology, which will reduce uncertainty over the distinction between apology and admission of liability.
- The government will also implement the recommendation from IICSA by making it explicit that vicarious liability is covered in the amendments to the legislation to clarify the legal risks for organisations.
- New legislation on the law of apologies will not be retrospective.

The implementation of reform will be through primary legislation when parliamentary time allows it.

Comments

The government's response gives effect to the recommendations made by IICSA in their Report in September 2019, namely the revision of section 2 of the Compensation Act 2006 so as to remove the anomaly that at present it is arguable that apologies made in vicarious liability cases can amount to an admission of liability. This revision would bring vicarious liability cases into line with claims in negligence for breach of duty, in which it is already permissible to make an apology that does not amount to an admission.

However, the government have been clear that the implementation of reform will be through primary legislation when parliamentary time allows it, therefore we anticipate that it will be a significant period of time until such primary legislation is introduced.

Update on damages in abuse claims – LXB v John Ridley [2024] EWHC 3352 (KB)

In the autumn edition of Abuse Aware we reported on the case of IMX v Peter Mark Bicknell [2024] EWHC 2183 (KB), which was one of the first abuse cases to be decided since the 17th edition of the Judicial College Guidelines ('JC Guidelines') was published on 5 April 2024.

Since then, a second case of LXB v John Ridley [2024] EWHC 3352 (KB) has been decided, which considered the appropriate level of damages in an abuse claim post-JC Guidelines.

Author:
Patrick Williams
Associate

Background

The claimant alleged sexual assaults perpetrated against him by the defendant, John Ridley, between approximately 2004 and 2008 when the claimant was aged 12 to 16.

In or around 2003, the claimant was 11 years old and joined a Lawn Tennis Club in North London ('the Club') as a junior member where the defendant was the captain of the men's team.

The abuse

Between the ages of 12 and 14, the claimant was asked to partner the defendant in a competitive doubles tournament. They won and the defendant gave the claimant money for their success. Thereafter, they played together as doubles partners and the defendant would take the claimant and other young members of the Club for food and to various sporting events. It is alleged that the value of the gifts and money given to the claimant by the defendant mounted up, and after a while the defendant informed the claimant that he would have to repay the money he had given to him. The claimant was unable to repay and so the defendant said he would have to subject himself to being whipped by the defendant instead.

On the first occasion, the defendant then stood behind the claimant and hit him at least three times on his bare buttocks with his hand.

On the second occasion, the defendant arranged for the claimant to come to his house where he repeated what took place on the first occasion but this time using a bamboo stick rather than his hand, making it even more painful.

There were then no further requests for repayment or assaults on the claimant by the defendant.

On 26 March 2018, the claimant reported the assaults perpetrated on him by the defendant to the police. In April 2021, the defendant was convicted of two counts of indecently assaulting the claimant and three counts of sexually assaulting another boy. The defendant was sentenced to five years imprisonment and a ten-year sexual harm prevention order was imposed.

Assessment of damages

In her judgment, Mrs Justice Stacey found that the claimant had proved the entirety of his Complex Post-Traumatic Stress Disorder was attributable to the assaults committed upon him by the defendant. Further, it was noted that both psychiatric experts agreed that the sexual assaults caused the claimant to turn to drink and drugs to block out unpleasant thoughts of what had happened.

Accordingly, and notwithstanding the frequency and severity of the abuse was less than in IMX, Mrs Justice Stacey considered that the abuse fell into the new moderately severe bracket of chapter 4(c)(b) of the JC Guidelines, between £54,920 and £109,830. Mrs Justice Stacey accepted that while the abuse was not as serious as many cases that come before the courts, the effect of the abuse had been severe/moderately severe and had caused prolonged psychiatric injury. Further, an aggravating factor was included in the assessment related to the fact that the defendant had continued to deny the allegations notwithstanding his criminal conviction that amounted to "gaslighting".

An award for damages caused by the pain, suffering and loss of amenity was made in the sum of £70,000.

Comment

It is worth noting that the IMX decision was by a Deputy Master (who erroneously followed the obiter comments in TVZ v Manchester City Football Club) and the LXB decision was delivered extempore. Both cases involved the abuser as the named defendant. In IMX the abuser was unrepresented and in LXB he was represented by a barrister. In addition, both defendant abusers had received convictions in respect of the claimant pursuing the claims against them. Given both abusers were directly involved as defendants, the court was able to make findings on aspects of the claim including aggravating factors to increase the level of awards and were far simpler than if the claims were pursued against organisations who may have been deemed to have been vicariously liable for their actions.

On this basis, while both cases are representative of assessments of damages post-JC Guidelines, there are some distinguishing issues which make them fact specific. Both decisions are therefore arguably distinguishable and might attract limited weight as any authorities on the assessment of general damages post-JC Guidelines. It therefore remains to be seen what further cases come before the courts with regards to the assessment of damages in abuse claims to provide further guidance.

Bird v DP: Australia restricts the scope of vicarious liability in abuse claims for 'akin' to employees

The High Court of Australia has unanimously overturned the decision of the appellate court to allow an appeal and find that a Roman Catholic Diocese could not be vicariously liable for abuse committed by one of its priests. Ian Carroll, Partner and Head of Abuse Law, and Lauranne Nolan, Associate and safeguarding lead in the Keoghs Specialist Abuse team, consider the decision in Bird v DP [2024] HCA 41 and contrast the decision with the approach taken in England and Wales.

Author:
Ian Carroll
Partner and Head of Abuse

Author:
Lauranne Nolan
Associate and Safeguarding Lead

Background

The claimant, DP, pursued a claim against the Roman Catholic Diocese of Ballarat in respect of two sexual assaults perpetrated on him by a priest of the Diocese, Father Bryan Coffey (Coffey). The abuse was alleged to have occurred when the claimant was five years old, in approximately 1971 and when Coffey, now deceased, was an assistant priest in the parish of Port Fairy in the Diocese of Ballarat.

At first instance, the Diocese was found to be vicariously liable for the assaults committed by Coffey. While the judge found that Coffey was not an employee of the Diocese, he concluded that vicarious liability applied by reason of the totality of the relationship between the Diocese and Coffey as well as his role within the Port Fairy Catholic community. The judge assessed DP's damages in the sum of $230,000.

The Appeal

The Diocese appealed on the following issues relevant to vicarious liability:

1. Whether, under the common law of Australia, absent a relationship of employment between a wrongdoer and a defendant, vicarious liability applies or should be extended to a relationship which is not one of employment, a relationship sometimes described as 'akin to employment'.

2. If the relationship between Coffey and the Diocese was one which gave rise to a relationship of vicarious liability, whether the Diocese was liable for Coffey's conduct.

In allowing the appeal, the High Court, therefore, found that as there was no relationship of employment between the Diocese and Coffey, the first instance judge had extended the current law as opposed to applying it and there was no basis or foundation for this. Accordingly, the Diocese could not be vicariously liable for the abuse committed by Coffey.

As the High Court concluded there was no relationship of employment they did not, therefore, proceed to consider the second issue, often referred to as the 'close connection' test.

England and Wales

In England and Wales, an organisation can be vicariously liable for assaults of those individuals who are not employees but are deemed to be "akin" to employees. This arises from the Court of Appeal's decision in JGE v Portsmouth Roman Catholic Diocesan Trustees [2012] EWCA Civ 938 in which it was found that a Roman Catholic priest was akin to an employee of the Bishop of a Roman Catholic Diocese to render it vicariously liable for any abuse committed by one of its priests.

By contrast, the position in Australia is there can be no such liability for the acts of those who are not in an employment relationship but are in a relationship "akin to employment" instead. On this basis, the decision in DP v Bird is now in direct conflict with the decision in JGE, both of which sought to address the exact same question as to whether a Roman Catholic priest is in a relationship of employment with a Bishop/Diocese.

Close connection

While the High Court in Australia did not need to address the close connection test, it is worth noting that one of the judges also commented that she would have found the abuse was not committed by Coffey in the course of or closely connected with his duties as a priest. Gleeson J stated that "the Diocese is not vicariously liable for the sexual assaults that Coffey inflicted upon DP because those torts occurred in circumstances where Coffey opportunistically took advantage of his role to commit them. The torts were therefore not committed in the course of Coffey's performance of his role as assistant parish priest."

Again, this is in direct contrast to the position in England and Wales following the Court of Appeal's decision in MAGA v Trustees of the Birmingham Archdiocese of the Roman Catholic Church [2010] EWCA Civ 256 which found that the special role of the priest meant that in effect they were never 'off-duty' and so the abuse was committed so closely connected with his role as a priest that it would be fair and just to hold the Diocese vicariously liable. Indeed, the comments by Gleeson J more closely follow the recent comments of the Supreme Court in England and Wales in BXB v Trustees of the Barry Congregation of Jehovah's Witnesses [2023] UKSC 15.

Conclusion

This decision in Australia is significant in relation to restricting the scope of vicarious liability for those who are not in a formal relationship of employment. However, it is also significant in terms of the contrast with the position in England and Wales in which a directly opposite approach has previously been taken with regard to the liability of Roman Catholic Dioceses for abuse committed by their priests.

This decision is also potentially reflective of the move by courts in common law jurisdictions since 2020 to restrict the expansion of vicarious liability which had been occurring in the years before. It will, therefore, be interesting to see whether the decisions of JGE and MAGA will be subject to challenge in England and Wales and move towards the approach that has been taken by Australia in Bird.

Fundamental dishonesty and abuse claims: a high bar

It is well established that section 57 of the Criminal Justice and Courts Act 2015 allows the court to strike out a personal injury claim of a claimant who would otherwise be entitled to damages if the court was satisfied that, on the balance of probabilities, they had been "fundamentally dishonest" in relation to the primary claim or a related claim. While the issue of fundamental dishonesty has previously been the subject of several judicial decisions in personal injury claims, it has perhaps understandably never been raised and adjudicated upon in the context of abuse claims, particularly given the burden is on the defendant to establish the claimant's dishonesty, which would often be extremely difficult, if not inappropriate, without unquestionable and clear evidence of such dishonesty in the claim.

However, in the recent High Court decision in Samrai & Ors v Kalia [2024] EWHC 3143 (KB) the issue of fundamental dishonesty was raised and adjudicated upon in the context of alleged abuse. It is a wide-ranging decision and raises other issues on consent and limitation. Ian Carroll, Partner and Head of Abuse at Keoghs, considers this decision and the potential impact on other claims where fundamental dishonesty might be considered.

Author:
Ian Carroll
Partner and Head of Abuse

The claim

The case related to seven claimants who pursued claims against the defendant, Rajinder Kalia (Kalia), for alleged sexual and financial abuse. The first four claimants' allegations related to sexual abuse and the remaining three claimants for financial abuse only. Kalia was the founder and priest of a Hindu temple in Coventry, and it was alleged he used his position as a priest of the temple to commit the alleged sexual and financial abuse upon the claimants.

Kalia denied the allegations in their entirety and alleged that all the claimants were lying and had conspired to tell lies to the court.

The matter proceeded to trial and the court found in favour of the defendant and dismissed each of the claimants' claims (having already struck out two of the claimants' claims for financial abuse due to procedural failings).

Consent

In relation to the first claimant, it was alleged that whilst she was an adult she had engaged in sexual activity with Kalia but her ability to consent to sexual intercourse had been compromised as her will had been overborne by the undue influence which the defendant held over her. The court agreed with the first claimant and found that Kalia's denial of any sexual activity with her was untrue. However, applying the test for consent under section 74 of the Sexual Offences Act 2003, the court found that the first claimant had the freedom and capacity to consent to the sexual activity. While she may have been persuaded to do so, and to have allowed herself to be influenced by the Kalia's teachings and thus consent, this did not give rise to an action for damages.

In relation to the remaining three claimants who alleged sexual abuse, the court rejected their evidence and found that they had not been sexually assaulted by the defendant

Limitation and credibility

In respect of each of the claimants, the court refused to exercise its discretion to allow any of the claims to proceed. This was on the basis that the court did not consider that the claimants were credible witnesses and their conduct in their claims meant that it would not have been equitable to allow their claims to proceed.

Some examples were provided as to why the claimants' claims were not deemed to be credible, including:

- A failure by claimants to disclose medical records because it was inferred that those records would have contained relevant material.
- The court found it untrue that one of the claimant's mobile phones had been lost in a cinema shortly before the deadline of the court's order for specific disclosure of the phone. This included a finding that it had been suppressed because it would have revealed contact between the claimants about their accounts and their evidence.
- A finding that one of the claimants, despite knowing there was an order for disclosure of the same, had deliberately deleted WhatsApp messages on her mobile phone. The court also found this was done in order to conceal evidence important to the case and that her explanation in evidence that she did so "because it contained details of her new job and colleagues, and she didn't want to get harassed in her department" was untrue.
- The conduct of all the claimants who were found to have tried to persuade other witnesses to tell lies against the defendant.
- A finding that one claimant gave her evidence "from a standpoint whereby she said whatever she thought best suited her case rather than from a standpoint of telling the truth and assisting the court".
- One claimant was found to have not told the truth but attempted to mislead the court about her reasons for leaving her job at HSBC, which she alleged in her witness statement was due to other people from the temple working there, when in fact she was under investigation by HSBC for gross misconduct.
- A finding that one claimant was "evasive, occasionally deliberately obtuse and dishonest in her evidence".
- The presentation of schedules of loss, one of which was "patently exaggerated" and included "fictitious claims", and another which was "significantly exaggerated and clearly inaccurate", despite having been endorsed with a statement of truth.

Fundamental dishonesty

In view of the above issues on credibility, the defendant invited the court to make findings of fundamental dishonesty against the four claimants who alleged sexual abuse against him.

In relation to the first claimant, given the court had found that she had engaged in sexual activity with the defendant, the court considered such a finding would be inappropriate.

In relation to the remaining three claimants, the court had found that they had not been sexually assaulted as children, nor were they raped or sexually assaulted in adulthood. On this basis, a finding of fundamental dishonesty was possible. However, despite the court's findings concerning the claimants' dishonesty in the conduct of the claims and its express reference to dishonesty, the court declined to make a finding of fundamental dishonesty in the case of any of the claimants. The court's explanation for this was as follows:

> It is sufficient for the purposes of their claims that I have found that their evidence was not sufficiently credible for me to conclude that they have proved their claims to the required evidential standard. While, of course, that carries with it the conclusion that they were not raped or assaulted by the defendant, that is because that is a binary issue within this litigation, and one which is decided on the balance of probability. But I do not consider it appropriate to follow that through to the conclusion that they have lied and been dishonest in relation to the allegations they have made. Accordingly, I decline to make a finding of fundamental dishonesty.

Comment

Given the court's findings concerning the credibility of each of the claimants, which included exaggerated Schedules of Loss, suppressing and concealing evidence, giving dishonest evidence and attempting to mislead the court at trial, it is reasonable to assume that if there were ever cases in which a court would be inclined to make findings of fundamental dishonesty in abuse claims it would be these. However, it appears the court has chosen to focus solely on the extent to which the claimants were fundamentally dishonest in their accounts of alleged sexual abuse. This would appear to ignore the wider issues related to the primary claim, not just the binary issue of the happening of the abuse.

Notwithstanding that the court's findings indicate that the claimants' conduct was likely to be considered dishonest by the standards of ordinary decent people (as per the guidance in Shaw v Gillian Wilde [2024] EWHC 1660 (KB)), it appears that in the context of abuse claims, unless there is clear evidence of dishonesty concerning the occurrence of abuse itself, it is extremely unlikely a court will make any findings of fundamental dishonesty, even where the claimant's claim has been significantly exaggerated and/or their evidence has been found to been untruthful in other aspects of their claim.

Woodcock v Chief Constable of Northamptonshire and CJ and others v Chief Constable of Wiltshire EWCA Civ 13

The Court of Appeal has given judgment in two cases regarding the circumstances in which the police may be held liable for failing to protect someone from harm caused by the criminal actions of a third party. In both cases, the court found for the police.

Author:
Dan Tyler
Associate

Woodcock v Chief Constable of Northamptonshire

Facts

For about two years until February 2015, the claimant had been in an on-off relationship with Riza Guzelyurt. During this time, Guzelyurt had been convicted of assaulting the claimant's ex-husband and had been given harassment warnings in relation to the claimant. Matters escalated further after the claimant ended the relationship. On 6 February, Guzelyurt was arrested in relation to a complaint from the claimant that he had harassed her and damaged her car. Over the following weeks, the claimant complained on several occasions that he had approached her in breach of his bail conditions. On 18 March, she reported that he had threatened to kill her. Returning home, she found evidence of an attempted entry and CCTV showed him jumping over her fence. Later that day, police attended her home to take a statement; shortly after they left, she reported that Guzelyurt had kicked her front door and threatened to kill her. The police returned and gave the claimant safety advice. At the claimant's request, an officer was present for much of the time until about 3 am. Meanwhile, police tried – without success – to trace and arrest Guzelyurt. At just shortly after 7:30 am the following morning a neighbour of the claimant rang 999 to say Guzelyurt was outside the claimant's house. The neighbour said she thought he was going to attack the claimant when she left for work at 7:45 am. The neighbour had unsuccessfully tried to contact the claimant by phone but did not wish to go over in person. The neighbour was told that officers would be "straight round". An officer was sent to arrest Guzelyurt and a Sgt Randall was also sent to the claimant's house. However, the police did not contact the claimant to tell her of the neighbour's call or that they were about to attend. Less than 15 minutes after the call with the neighbour (and before the police arrived) the claimant left her house at which point Guzelyurt brutally attacked her. He was later convicted of attempted murder and given a life sentence.

The proceedings

The claimant brought a claim against the police on the grounds that they had been negligent in not informing her about Guzelyurt's presence. The trial judge dismissed the claim. However, in the High Court, Andrew Ritchie J held that police owed the claimant a duty of care and they had breached this duty by failing to warn the claimant of the danger. After noting the general rule that the police are not liable for failing to catch criminals or to prevent crime, he identified exceptions as being (1) cases in which the police had assumed a specific responsibility to protect a specific member of the public from attack by a specific person or persons, and (2) cases in which exceptional or special circumstances existed which created a duty to act to protect the victim and/or it would be an affront to justice if they were not held to account to the victim. Ritchie J determined that both of these exceptions applied. In relation to (1) there was an assumption of responsibility because the police's words and actions in the run-up gave rise to the claimant having a reasonable expectation that they would inform her that her ex-partner was outside her house when she was likely to leave soon and there would be 5–10 minute gap before the arrival of the police to arrest him. In relation to (2) exceptional or special circumstances existed because the necessary factors were satisfied. Summing them up, Richie J noted that the police were given knowledge "of an imminent and risk-laden event with pretty precise timing, a specific victim, a specific address, a perpetrator who was already the subject of a large manhunt and a vulnerable victim who was going to walk into a dangerous trap". The police "had advised the claimant to set up an early warning system specifically to provide the police and the claimant with advance warning of the ex-partner approaching her house." This "was specifically for the claimant's protection from attack (and for her children) ". Further, "there was going to be a time lag between the dispatching of police officers and their arrival at the scene." These circumstances gave rise to a common law duty on the police to call the claimant. The police appealed this.

The Appeal

The Court of Appeal found for the police, setting aside Ritchie J's judgment.

First, the court found that there had been no assumption of responsibility. At the outset, it noted that for a claimant to establish one, it will usually be necessary to show that:

1. There was something in the way of a specific representation or promise by the police to take a particular action; and
2. That the representation or promise was relied on (though that will not be required if, for example, the case concerns an assumption of responsibility towards a vulnerable child).

While the question of whether there has been an assumption is highly fact-specific, the test is not elastic: the court is not free "to stretch the concept of an assumption of responsibility beyond its proper limits". Here there was no assumption of responsibility. The police had not promised the claimant "that they would warn her of any sighting of Guzelyurt near her home, and had not promised to pass on to her any information they received alerting them to a danger". Further, the person handling the neighbour's call "said nothing which could be construed as an assurance that the police would pass on the neighbour's information to (the claimant) or would otherwise prevent any attack upon her".

Second, the court rejected Richie J's finding that there were "exceptional circumstances" such as to justify imposing a duty. The case law to which he was bound made it impossible to find that the police were under a narrow and specific duty to warn the claimant.

Finally, the court rejected other potential routes for finding the police liable. For instance, it considered in some detail "the interference principle", which had recently been invoked by the Supreme Court in Tindall v Chief Constable of Thames Valley Police [2024] UKSC 33. According to this principle, "If A [here the police] knows or ought to have known that B [here, the claimant] is in need of help to avoid some harm, and A knows or ought to have known that he has done something to put off or prevent someone else [here the claimant's neighbour] helping B, then A will owe B a duty to take reasonable steps to give B the help she needs." The court rejected the notion that this applied to this case. Firstly, there was no direct evidence as to what, if anything, the neighbour would have done if the call handler had said something different to her. Indeed, if anything, the neighbour had given the impression that she did not wish or intend to take any further action herself, telling the caller "I've tried contacting her but she's changed her mobile number so there's no way of me, unless I go over, I don't really want to get involved." Secondly, and in any event, there was no evidence "that the police could reasonably have foreseen that the call handler's words would cause the neighbour to refrain from taking action which she otherwise would have taken".

CJ & Others v Chief Constable of Wiltshire

Facts

This case arises from sexual abuse by an individual anonymised to MP. MP's father BP had previously been convicted of sexual offences against his daughter, DJ. After being released from prison, BP gave his old laptop to another of his daughters, CP. The laptop was used by various members of the family. In December 2012, CP discovered a folder on the laptop containing indecent images of children. Her mother questioned the male members of the household about this, including her son MP. No one admitted responsibility. CP and her mother went to the police. Given his history, suspicion fell on the father BP. A police officer seized the laptop. He looked at the relevant files and established that they had been created earlier in December 2012. He did not question any members of the family. Instead, he submitted a request to the Hi-Tech Crime Unit to examine the laptop. The examination was not carried out until April 2014. By this point, the police officer had already closed the case on the information management system. He later explained that cases that remained open without being updated attracted internal criticism. In May 2014, the Hi-Tech Crime Unit provided a report. The report indicated that the son MP had downloaded the images. The police officer was also provided with a police laptop on which the contents of the seized laptop were present so that these could be used in interviews and was told that this would be valid for six weeks. However, the police officer took no further action: indeed he did not even seek any advice on what further he should do. Subsequently, it emerged that after the seizure of the laptop in December 2012, MP had sexually abused five children. Three of these were children he encountered through his work as a childminder, while the other two were his niece and nephew. In November 2015, MP pleaded guilty to the 40 offences and was sentenced to 10 years' imprisonment.

The proceedings

MP's five victims brought claims against the police. All five brought a claim under the Human Rights Act 1998 (HRA) for breach of their rights under article 3 of the Convention ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment"). Moreover, two of the claimants brought claims in negligence. At the heart of both sets of claims was the contention that the police officer's failures regarding the laptop had enabled MP to avoid detection and so go on to abuse the claimants.

In the High Court, Martin Spencer J dismissed all of the claims. The claimants failed in common law negligence because no duty of care arose. At the outset he noted that "failing to confer a benefit will not generally bring a person, or a public authority, within the sphere of tortious liability in negligence, even where the public authority has a duty to act but fails to do so". While "making matters worse by one's actions does give rise to a duty of care", this was not the case here. On a proper analysis, the police officer had acted ineffectually, but he had not made matters worse. Spencer J also dismissed the HRA claims. While the sexual abuse of the claimants amounted to inhuman treatment for the purposes of article 3, the investigation into the indecent images did not engage article 3. As such, the police's article 3 duty was not animated until May 2015, when the investigation into the sexual abuse got underway. Consequently, the claimants appealed.

The Appeal

The Court of Appeal found in favour of the police both in relation to the common law and the HRA.

At common law, the court agreed with Spencer J that the claims were for a failure to confer a benefit/omission. The police officer's failings were serious, but they amounted to omissions rather than making matters worse. The court accepted the police's submission that "if [the police officer] had not taken any action at all, none of the appellants would have been in any better position: MP's sexual interest in children would have remained undetected, and the abuse of his victims would have occurred". The court also rejected the contention that the interference principle was engaged, partly because [the police officer's] failings amounted to omissions rather than positive acts, and partly also because it rests on speculation as to what MP's family would otherwise have done.

As to the HRA, the court agreed with Spencer J that the images on the laptop "were not of a level to trigger article 3". Further, even if they had been, "the article 3 rights initially engaged were those of the children depicted in the images, and there is no suggestion that they could be identified." Moreover, a generalised future risk of harm bound up with C's interest in children would not suffice to engage article 3 "because it would not satisfy the requirement of a real and immediate risk of ill-treatment in breach of that article". Article 3 was only engaged in April 2015 and this cannot retrospectively transform the earlier investigation into the indecent images into one of that type.

Comment

These judgments confirm that at common law the circumstances in which the police will be held liable for failing to protect someone from harm caused by the criminal actions of a third party are limited. While there can be liability under "the interference principle" it did not arise in either case just as it did not arise in the Tindall case. Moreover, the Wiltshire case underlines challenges claimants face under the HRA: a general future risk of harm is not sufficient to trigger the article 3 investigative duty. As ever, though, much rests on the specific facts.

Scotland Abuse Case Update - Divisibility of psychiatric injury, causation and the assessment of damages in historic abuse matters

The Court of Session has handed down a judgment in a claim for historic abuse and provided further guidance on several areas, including divisibility of psychiatric injury in abuse claims and the approach to be taken to quantification of consequential losses.

Author:
Laura Baxendale
Partner

Background and Facts

The pursuer, F, originally sought damages from five defenders relating to two distinct chapters of abuse. (The first chapter concerned abuse by a parish priest while F was a pupil at primary school. The second chapter of abuse was alleged to have occurred at boarding school). At proof, the case proceeded against the second defender only in respect of the first chapter of abuse.

F had been diagnosed with Complex Post-Traumatic Stress Disorder (CPTSD) and claimed for general damages and consequential losses as a result of the abuse, including past and future wages loss, pension loss and treatment costs.

The matter called in front of Lord Clark.

Issues

The parish priest had been convicted of serious sexual assaults against F. There was no dispute that the abuse had taken place. The key issue for the court was the extent to which other factors in his life beyond the abuse at primary school, having regard to whole circumstances, including the allegations of physical and serious sexual abuse at boarding school as well as other adverse life experiences suffered by F.

F's allegations had developed over time. At proof, there were significant problems with F's evidence to the court. For example, he had given previous accounts of serious sexual assault at his boarding school. In evidence, F denied that this had happened. As a result, there was a real difficulty drawing conclusions from his evidence alone.

It was largely accepted by the medical experts that F's varying accounts made attribution of harm to each event challenging. However, medical experts agreed that the injury suffered by F was multifactorial.

The question for the court was attribution of harm and how the losses should be assessed as a result.

Causation and Assessment of Damages

SF sought to argue that the abuse at primary school had materially contributed to CPTSD. Therefore, the defender should be liable for that injury and the entire resulting loss.

They considered that full losses should be assessed on a multiplier multiplicand basis. This total figure should then be, where appropriate, discounted for other factors.

In relation to special damages, F argued that absent the abuse at primary school, he would have worked consistently until retirement. Accordingly, a substantial award for loss of past and future earnings would be required together with pension loss.

The defender's position was that there were numerous other adverse life experiences over the last 50 years that had contributed to the development of CPTSD.

While the abuse at primary school and the abuse perpetrated at boarding school were the most significant contributors to the pursuer's CPTSD, they were of equal causal significance, a reasonable estimate of the causal potency of each being 35% to 40%, respectively. In addition, the multifactorial nature of the injury made a multiplier multiplicand approach to special damages impossible.

Interest

The Interest on Damages (Scotland) Act 1958 empowers the courts in Scotland to award interest for any period between the date when the right of action arose and the date of the court decree (i.e. award). The rate of pre-decree interest is at the court's discretion.

The parties differed as to the appropriate approach in relation to calculating interest.

The defender contended that the court ought to exercise its discretion and argued that but for the removal of limitation by virtue of the 2017 Act, the claim could not have been made. In addition, having regard to actuarial evidence demonstrating the likely consistent investment return, the interest rates in JM v Fife Council overcompensated.

The pursuer submitted that the court should follow the guidance of the Inner House in JM v Fife Council, awarding interest from date of incident. In addition, alternative investment options justified the rates applied in JM v Fife Council.

Decision

In relation to causation, Lord Clark held that: "The onus of proof is on the pursuer and he will succeed if he can prove that the delictual acts made a material contribution to his disability. However, if it is raised in evidence that factors other than those for which the defender is liable contributed to the injury, the defender is only liable for the relevant proportion which the delictual acts made.

> The diagnosed form of psychiatric injury suffered by the pursuer is CPTSD, which as the experts and parties agreed is multifactorial. It is therefore a divisible injury and it is for the court to assess the levels of contribution to this injury by the three main causes: the abuse at [primary school; the abuse at boarding school]; and the various other adverse factors.

because of psychiatric injuries arising from the abuse and the other adverse experiences.

Taking the abuse at primary school out of the equation, F would not have had so many interruptions, but undoubtedly still would have had some interruptions caused by other issues.

> **Lord Clark noted that:**
>
> It is quite clear, including from parts of his own evidence and what he said to others, that the abuse at [boarding school] had a serious impact on him and would have continued to do so during his working career... he may well have managed to do more work... but when and at what rate cannot be determined and so again it is not possible to reach any accurate arithmetical figure.

Accordingly, a Blamire/broadbrush approach was appropriate

In relation to interest, his lordship noted that:.

> the court has a wide discretion in terms of the rate of interest to be applied and the period over which such interest accrues

In his view, only allowing interest to run from the 2017 Act would interfere with the wide discretion of the court. Having heard the actuarial evidence, he was not minded to assess interest rates on a specific and limited basis. However, he did not consider that interest should be assessed on the basis of a highly volatile investments which could result in significant gains.

He concluded that the same approach in JM v Fife Council should be applied.

Commentary

Consequential losses can have a significant impact on the level of award, especially in Scotland. In particular, whether the court chooses to award a lump sum or assess losses on a multiplier/ multiplicand basis.

A multiplier/multiplicand approach requires arithmetic accuracy. This approach is not appropriate where the court requires to assess the trajectory of a claimant's life over several decades. The court is unable to predict accurately how an individual's life might have turned out. There are bound to be several imponderables in life that must 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.

The decision in F provides helpful guidance and further demonstrates that courts in Scotland will seek to adopt consistent approaches on divisibility of injury and consequential losses.

Swim England to review historic safeguarding cases

Swim England, the national governing body for swimming, is set to review all historic safeguarding investigations amid concerns children have been left at risk of harm. Lauranne Nolan, Associate and Safeguarding Lead in the Keoghs specialist abuse team, considers this further.

Author:
Lauranne Nolan
Associate and Safeguarding Lead

As the national governing body for swimming in England, Swim England covers every area of swimming, diving, water polo, open water swimming and artistic swimming, including individuals from learners to teachers, from athletes to coaches as well as assisting swimming providers with information on facilities and best practice. In recent times, the governing body has been under criticism following complaints about how they have dealt with allegations of mistreatment, bullying, emotional abuse and weight-shaming. To address this, they commissioned Sports Resolutions to conduct a review which was carried out by barrister Louis Weston of Outer Temple Chambers and completed in March 2023.

The review looked at the handling of three complaints, looking specifically at the safeguarding processes and the culture around the complaints process. The review made the following nine recommendations for Swim England to:

1. Reassess its policies and recommendations and adopt a current meaning for "child abuse" which would trigger a safeguarding concern.
2. Introduce a new reporting process and investigation which makes it clear to whom safeguarding complaint reports should be made and how evidence should be recorded and prepared.
3. Provide sufficient training to volunteers where responsibility for safeguarding and other disciplinary functions falls to them.
4. Aim to create an independent disciplinary structure in order to resolve disputes independently of Swim England law officers.
5. Streamline and simplify its disciplinary processes with simplified rules, procedures and standard directions.
6. Redraft and reconsider the structure of Regulation 241 which relates to child protection and the powers entrusted under that Regulation to the CEO.
7. Give urgent consideration to the creation of a new disciplinary process.
8. Revisit its disciplinary and safeguarding processes so that any case in which sanctions are imposed are only reached after contested hearings in which the basis of sanctions are explained and justified against relevant criteria.
9. Review and reframe its regulations so that any sanction imposed can be subject to review by an independent person as well as any decision not to pursue a safeguarding investigation and/or inquiry are capable of being challenged by review by either an independent disciplinary officer or the body's prosecutorial team.

The number of cases to be looked at as part of this historic review will be determined in due course and it is expected to be time-consuming, challenging to implement and costly. It is intended to cover complaints that are not only serious in nature, but also those where disciplinary action was not taken when it ought to have been. Swim England has stated that it is committed to creating a culture and environment in the sport that makes everyone feel safe, included and welcome.

NM v Graeme Henderson and the Scottish Ambulance Service

The case of NM v Graeme Henderson and the Scottish Ambulance Service recently called for a debate (strike out hearing) in the Court of Session and was heard by Lord Clark.

Author:
Heather Lillis
Lillis - Solicitor

Background

NM pursued the claim on the basis that she had met Graham Henderson ("GH"), an ambulance technician, when he attended in an ambulance to take her to hospital. GH then attended the pursuer's home on several other occasions but was not working at those times; when he visited, he is said to have physically and sexually assaulted her, harassed and abused her.

NM sued GH for damages in respect of alleged sexual assaults and the Scottish Ambulance Service ("SAS") on the basis that they were vicariously liable for GH's actions and that they were negligent

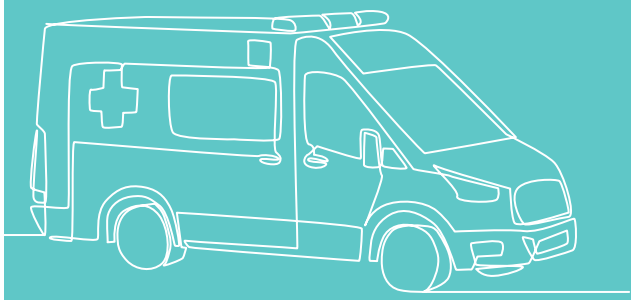
NM maintained that SAS were negligent on the basis:

1. That they had failed to act upon a previous complaint in 2015 that GH had acted inappropriately to another woman; and
2. Had they appropriately investigated the allegations, GH would have been relieved of his duties and therefore would not have come into contact with NM and she would not have been assaulted.

First Defender's Position

At the hearing, GH sought to have the case against him struck out on the basis that:

- The case against him did not establish that there was any wrongdoing, and NM did not offer to prove that there had been wrongful (tortious) conduct. While NM claimed that she had sexual intercourse with GH, it was unclear whether this was consensual or not. Accordingly, NM's position was unclear as to whether GH's conduct was criminal or not.
- There was no basis to say that there was ongoing knowledge that GH was aware that NM was vulnerable.
- NM claimed that GH should have reported himself to the Health and Care Professions Council (HCPC), however, GH was not registered with this professional body at the time.
- The previous incident where GH was accused of being inappropriate with another woman had no relevancy as GH was acquitted and the investigation was dropped.



Second Defender's Position

SAS accepted that they employed GH and so stage 1 of the two-stage test set out by Lister & Ors v Hesley Hall Ltd in relation to the doctrine of vicarious liability was met. However, they disputed that there was sufficiently close connection between the duties of GH in the course of his employment and the abuse he perpetrated. Therefore stage 2 could not be satisfied.

The alleged incidents occurred when GH was off duty. SAS argued that the only incident that was connected with his employment was the initial meeting with the pursuer and GH. A single incident is not enough to establish sequence of events or a seamless episode which was closely connected to GH's job.

There were no pleadings to establish that GH's conduct was in furtherance of the second defender's business. On this basis, the case on vicarious liability was bound to fail and should be struck out (mere opportunity was insufficient).

In relation to negligence, NM argued that she was owed a duty of care by SAS. NM's position was that the second defender should have known that GH was a risk to vulnerable females following the unrelated complaint raised in 2015.

SAS argued that there was not sufficient proximity between the parties to impose a duty of care. NM required to establish that there was a special relationship with SAS (Thomson v Scottish Ministers); she had failed to do so, therefore there was no duty owed.

In any event, the lack of proximity between the parties meant that the pursuer's case failed the tripartite test and there could be no duty of care as a result.

Pursuer's Response

In relation to GH, NM argued that the pleadings were sufficient to give notice of the case against the defenders.

GH's knowledge, the HCPC's reporting, and the course of conduct is an issue that could be explored at trial. The pleadings gave fair notice of the case and evidence which they intended to lead at trial.

In relation to SAS, the pursuer offered to prove that GH's employment with the second defender provided more than just an opportunity to meet the pursuer, but rather the opportunity to form a relationship with the pursuer.

The pursuer was a vulnerable person, so the GH as an employee of the second defender was in a position of trust when carrying out the functions of his employers – the employer becomes liable where that position has been abused (Mohamud v WM Morrison Supermarkets).

Decision

- His Lordship acknowledged that the pleadings were limited but the pursuer still must give notice to the parties of the case against them.
- There was sufficient information available in the pleadings for the defenders to carry out investigations, therefore fair notice was given. The facts are a matter that will require evidence to be led and be dealt with at trial.
- In relation to the previous complaint involving GH, this had not been established, and the pursuer did not offer to prove that these allegations were true. Therefore, this was not relevant to the case against GH and this element was struck out.
- In relation to SAS, the judge thought there was merit in their position that the wrongful conduct was not closely connected to GH's employment. However, there were statements of fact which needed to be explored further. Whether there was a close connection required evidence to be lead at trial.
- There is no authority to say that a vulnerable person who may need an ambulance is owed a duty of care by the service. During the time that the previous complaint was being investigated, the pursuer did not have a relationship with the ambulance service that placed her at a greater risk than others. Not everyone with a physical/mental condition satisfies the test for proximity.
- In the circumstances, imposing a duty of care on the second defender would not be fair, just, and reasonable.
- The second defender's argument in relation to direct duty of care was upheld on the basis that there was no relevant basis for them to owe a direct duty of care. The second defender's argument to dismiss the case based on lack of close connection was refused as this is a matter which needs to be explored at trial.

Comment

There is no singular test for establishing whether there is a sufficiently close connection between the nature of employment and the abuse in terms of that second stage test. The facts of each case need to be considered to determine whether there is a sufficiently close connection and whether evidence will be required.

The courts are reluctant to dismiss sensitive claims at a preliminary stage without giving the pursuer the opportunity to lead evidence in support of their case. However, a pursuer must provide sufficient notice in their written case so that the defender has the opportunity to respond to the case against them. What the court considers fair notice will vary from case to case.

In the context of claims made in negligence, it should be remembered that there is no general duty to protect or prevent harm and this must be factored in when considering whether a duty of care is owed. Simply because a person uses a service does not necessarily mean that they are owed a duty of care. Consideration must be given to the relationship between both parties and whether there was a reasonable foreseeability of harm.

Keoghs LLP

Registered Office:
2 The Parklands, Bolton, BL6 4SE

E: info@keoghs co.uk W: keoghs.co.uk F: 01204 677 111

Belfast | Bolton | Bristol | Coventry | Dublin | Glasgow | Leeds | Liverpool | London | Manchester | Newcastle | Southampton

869974334_03_25_Abuse Aware Spring 2025_01_MB