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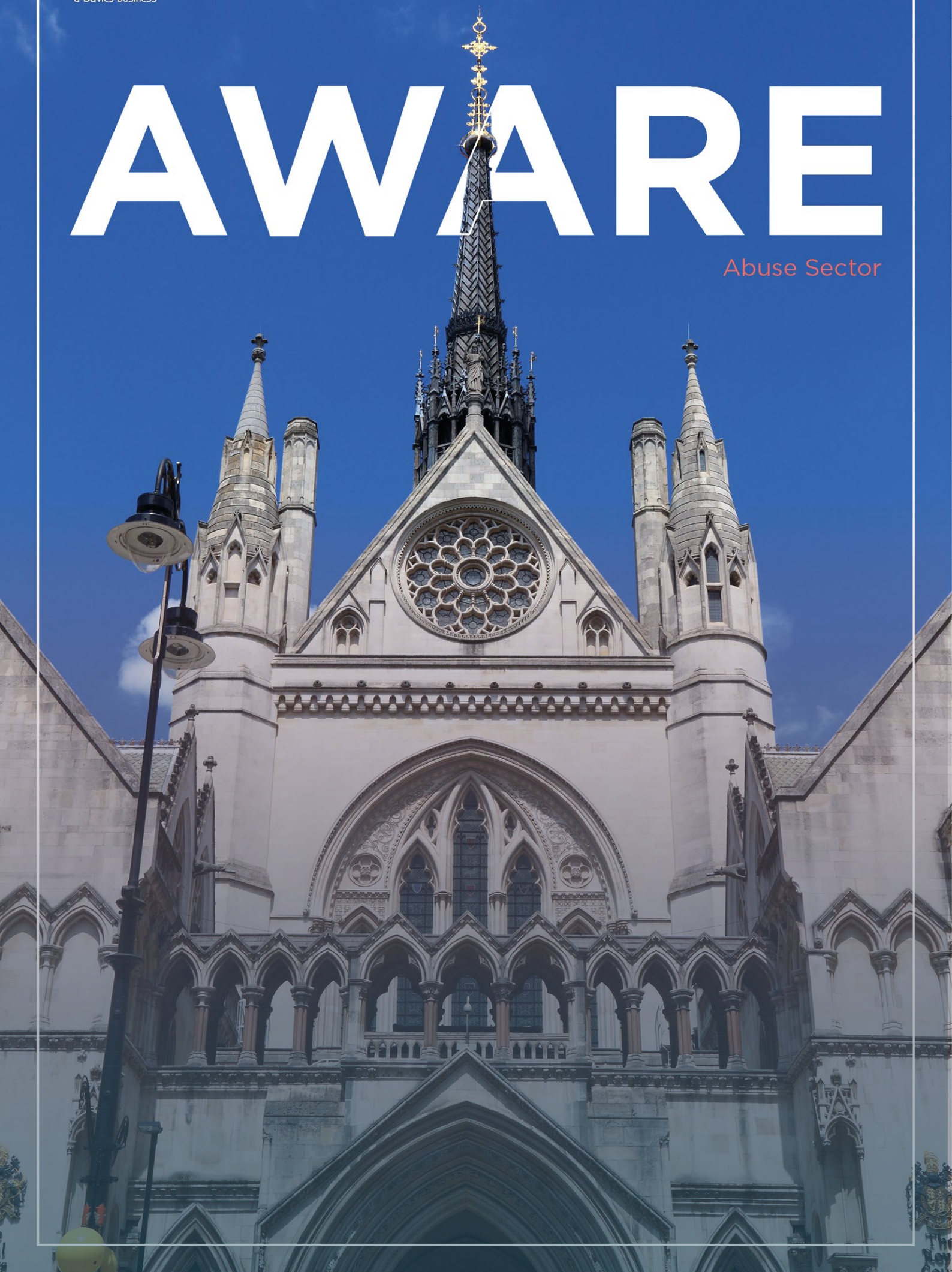

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WELCOME

Welcome to the autumn 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 consultation in respect of reforming limitation law in abuse claims and its progress following IICSA in respect of apologies in abuse claims, developments in relation to Judicial College Guidelines and assessing the value of abuse claims, and key decisions in relation to vicarious liability in respect of local authorities for the acts of a familial foster carer and vicarious liability (stage one and two) in cases of non-recent abuse in Scotland.

I am pleased to bring you the insight and expertise of several members of the 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.

The head of our abuse team, Partner Ian Carroll, considers the most recent Government update in respect of the Government's consultation to reform limitation law in abuse claims. He also discusses with Partner Sarah Swan the recent guidance from the Court of Appeal in *DJ v Barnsley Metropolitan Borough Council* [2024] EWCA Civ 841 in relation to a local authority's liability for assaults committed by a foster parent who was also the claimant's uncle.

Patrick Williams, Associate, considers the Government's recent announcement following the Independent Inquiry into Child Sexual Abuse (IICSA) that it will now review and consult upon the law of apologies in England and Wales.

Chris Wilson, Partner, considers the 17th edition of the Judicial College Guidelines and its impact on ongoing claims, not only in respect of the expectations of claimants but also in reserving strategy.

Lauranne Nolan, Associate, considers the High Court case of IMX v Peter Mark Bicknell [2024] EWHC 2183 (KB), which appears to be one of the first cases decided since the 17th edition of the Judicial College Guidelines were published.

Nicola Markie, Solicitor, considers the High Court decision of *SZR v Blackburn with Darwen Borough Council* [2024] EWHC 598 (KB) that confirmed failure to remove claims involving severe and persistent neglect might be able to be brought under Articles 3 and 8 of the Human Rights Act 1998.

Stephanie Papa, Solicitor, provides an update on Scottish abuse case law, specifically regarding the recent Scottish abuse case of *X v Sheriff Brown and the Lord Advocate* [2024] CSIH 6 that considered the issue of vicarious liability (stage one and two) in light of the Supreme Court decision in *BXB v Trustees of the Congregation of the Jehovah's Witnesses* [2023] UKSC 15.

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 in 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 Cares

Sporting Clubs and Associations

Government Consultation: Reforming Limitation Law in Abuse Claims

Earlier this year, the Government released a consultation seeking views on how limitation law can be reformed to allow more claimants to pursue civil claims for abuse.

This consultation gives effect to one of the key recommendations made by the Independent Inquiry into Child Sexual Abuse (IICSA). The Government had already accepted and acknowledged that there was a critical issue that IICSA was attempting to resolve by making its recommendation and indicated that it would publish a paper to explore the options for the reform of limitation law in child sexual abuse cases.

The consultation explored the background to the recommendation made by IICSA as well as other domestic and foreign jurisdictions that have already taken steps to reform limitation laws in cases of abuse.

As a result, the consultation invited responses concerning eight potential options for reform:

1. Complete removal of the three-year limitation period in child sexual abuse cases: This was precisely the recommendation made by IICSA. At this stage, the Government has stated that its opening position is that it does not support this option. However, "*that position is also taken on the basis of additional reforms being made to the current system to amend the law…*" as set out in the other options below.
2. Reverse the burden of proof in child sexual abuse cases: Again, this was another aspect of the recommendation made by IICSA so that the burden would be on the defendant to demonstrate that a fair trial was no longer possible. The Government's position at present is that it supports this option in view of the exceptional nature of non-recent child sexual abuse claims.
3. Codify existing judicial guidance: This would give effect to the Court of Appeal's guidance in *Chief Constable of Greater Manchester v Carroll [2017] EWCA Civ 1992* which provided a summary of the principles a court must consider when exercising its discretion under section 33 of the Limitation Act 1980. The Government's position on this option is that "*there would be merit in codifying existing judicial guidance and putting it on a statutory footing*."

4. **Allow the reopening of claims that have already been adjudicated or settled:** This was a proposal which IICSA specifically opposed. IICSA considered whether any reform should apply retrospectively to claims where the three-year limitation period had already expired and drew a clear distinction between claims which had already been either settled or dismissed by a court, and those which had not. IICSA determined that in relation to those claims which had already been adjudicated upon or settled by agreement, it should not be possible for them to benefit from any changes in the law. At present, the Government supports IICSA's views and stated: "*that it would not be appropriate to legislate to enable claims which have already been determined to be reopened.*"

5. **Extending the definition of abuse (beyond sexual abuse):** The Government acknowledges that IICSA was focused solely on the sexual abuse of children rather than other forms of abuse such as physical and/or emotional abuse. It acknowledges that other jurisdictions such as Scotland have a wider scope of abuse, and others such as Ireland and provinces in Canada limit the provisions to sexual abuse. On this basis, the Government's position is that "*the reforms should be limited to child sexual abuse claims as the case for reform has been comprehensively explored by the Inquiry in that specific group of cases.*"

6. **Adjusting the factors in section 33 of the Limitation Act in relation to child sexual abuse cases:** Section 33 of the Limitation Act 1980 contains guidance and factors to enable courts to exercise discretion in extending time limits in personal injury claims. These are the same factors which are considered in abuse claims. However, the proposal is to amend section 33 to include factors specific to sexual abuse claims, mostly around child sexual abuse being identified as a specific justification for delay and avoid the need for the courts to examine the reason for delay. One identified concern in the consultation is constraining the courts when exercising its equitable discretion. The Government offers no view either way on this proposal and welcomes views from respondents on the case for and against this reform.

7. **An extended limitation period for child sexual abuse cases:** Rather than the standard 3-year limitation period, the proposal is to apply a much longer limitation specific to child sexual abuse claims, e.g. 25 to 30 years. This would recognise the reality that victims and survivors of child sexual abuse take many years to be able to disclose the abuse they suffered. However, concern is identified about still having to apply the same factors to disapply the time limits and excluding other victims of other crimes who would not benefit from an extended limitation period. On this basis, the Government indicates that *"it is not minded to set a different fixed limitation period for child sexual abuse claims, but it welcomes views on the point."*

8. **Procedural reform:** This is in the form of a new bespoke pre-action protocol for child sexual abuse claims. Attempts had been made in the past to attempt to agree the contents of a draft pre-action protocol between claimant and defendant representatives. This resulted in differing drafts being prepared and, ultimately, these were not carried forward. This option is, therefore, an opportunity to renew these discussions in attempting to agree a pre-action protocol specific to abuse claims. However, IICSA previously dismissed the notion that changes to practice such as industry codes or pre-action protocols would be sufficient to achieve the outcomes it has proposed. The Government has stated that it "*is open minded on whether there should be a bespoke pre-action protocol for child sexual abuse claims and would welcome views.*"

The consultation provided an opportunity for all stakeholders to give serious consideration to the recommendations by IICSA on the issue of limitation and potential reform, highlighting both potential positive and negative consequences of reform. Given the potential implications, this consultation required input from all stakeholders to shape any reform in a way which is fair to all parties and achieve intended outcomes.

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Government Update on Apologies in Abuse Claims

Introduction

Earlier this year, in April 2024, the Government announced that it will review and consult upon the law of apologies in England and Wales. Patrick Williams, Associate in Keoghs Abuse team, discusses the proposals and considers the potential impact on abuse claims.

Background

In September 2019, the Independent Inquiry into Child Sexual Abuse (IICSA) 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.
The Government confirmed that it would consult on the subject of apologies through the summer of 2022 with a response before the end of the year.

Open Consultation: Reforming the law of apologies in civil proceedings

Notwithstanding the above, it was not until 8 April 2024 that the Government announced that it would review and consult upon the law of apologies in England and Wales. The Government sought views on the role of apologies in civil proceedings in England and Wales generally, and whether any alternative or additional legislative provisions to clarify or amend the current law would be useful.
The consultation ended 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 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. Accordingly, the Ministry of Justice was due to explore further whether it would be helpful to amend the Act or take action to clarify that the Act includes cases involving vicarious liability.

Consultation

In regard to the above, the consultation recognised that section 2 of the Act does not explicitly make it clear that it refers to apologies in relation to vicarious liability and, as such, there is uncertainty as to whether the courts would apply it in abuse claims.

Accordingly, for the purposes of the consultation, the issue in regard to abuse cases is simply whether the Compensation Act provision on apologies should be specifically extended to include vicarious liability cases.

The case for including vicarious liability cases in the Act has previously been set out by John Howell MP when introducing his Private Member's Bill on 1 December 2020. He considered that: "*Since parties may be reluctant to do anything that may be construed as an admission of liability, apologies have to date seemingly been sparse, except in cases of NHS clinical negligence. A culture has emerged of people and organisations not wanting to offer an apology in case it is detrimental to their legal position or deemed to be a weakness.*"

In addition, the consultation considered IICSA's emphasis on the importance for victims of abuse to receive genuine and meaningful apologies.

However, there are arguments that it should be recognised that whatever encouragement there is through legislation for an institution to provide an apology the effectiveness in practice may be limited due to litigation and an institution maintaining a degree of caution in those circumstances.

It is also argued that legislating purely for the purpose of clarifying the existing law, being without clear evidence the changes will have an impact, may not represent a worthwhile use of the legislative programme.

Comments

While a reform of apologies in abuse claims is long overdue, it may not in practice change the current position. However, it will provide much-needed legislative confirmation that an institution, if it wishes to do so, can provide an apology to a victim of abuse by their employee or an individual in a position 'akin to employment', without it being considered as evidence of an admission of liability. Accordingly, this is seen as a positive step from the Government in regard to apologies in abuse cases and it is hoped that reform will take place in order to provide much-needed clarity in the area of apologies in vicarious liability cases.

We, therefore, wait with anticipation for the Government's next update in respect of the consultation. However, this consultation was published under the previous Conservative government and therefore at present it is unclear whether it will continue.

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JC Guidelines in relation to sexual abuse claims

The 17th edition of the Judicial College Guidelines was published on 5 April 2024. For a general overview of new Guidelines and the impact of inflation, see the article by Natalie Larnder, our Head of Market Affairs, **here**. In this article, Christopher Wilson, Partner in Keoghs abuse and public sector team, takes a closer look at the new guidance in respect of awards for injuries resulting from sexual abuse.

Originally, the Judicial College provided no specific guidance in respect of psychiatric injury resulting from physical and sexual abuse. However, this changed when they published the 16th edition of their guidelines back in April 2022. The 17th edition, therefore, reflects the first substantive change to guidance in this area. Given the inflationary pressures of the last 12–18 months, it was always going to be inevitable that there would be a not insignificant increase in the value of recommended settlements in this area. However, what was not expected was: a) the introduction of a completely new bracket of damages; or b) the extent of the increase in recommended valuations for such abuse.

By way of comparison, the two most recent editions for damages in sexual and physical abuse claims are below:

	16th Edition	**17th Edition**
Less Severe	£9,730 – £20,570	£11,870 – £25,100
Moderate	£20,570 – £45,000	£25,100 – £54,920
Moderately Severe	N/A	£54,920 – £109,830
Severe	£45,000 – £120,000	£109,930 – £183,050

The most dramatic change can be found at the higher 'severe' end of the brackets, with the addition of a new 'moderately severe' bracket in place of the lower end of the 'severe' bracket. There has also been an increase in the top valuation of more than 52%. This is clearly way beyond increases linked to inflation.

The Guidelines themselves suggest that the rise is attributable to a "*small cluster of decisions concerning damages for sexual abuse, including image-based abuse … which has led to … adjustments to the brackets*". As alluded to, damages awards can be rare in this area and there are a limited number of cases that the Judicial College could be referring to. In *FGX v Gaunt* [2023], the claimant was awarded general damages of £60k after suffering from PTSD after her ex-partner shared inappropriate images of her that he had obtained during their relationship via a concealed camera. Of course, Georgia Harrison also successfully sued her ex-partner, Stephen Bear, for general damages totalling £120k after he shared sexually explicit images of her online without her consent.

Alternatively, given the 'small cluster' of cases upon which to base such dramatic increases, it is possible that the obiter comments of Mr Justice Johnson in *TVZ & Others v Manchester City FC [2022]* have been taken into consideration. Although the claimants were ultimately unsuccessful in that case, Johnson J proceeded to set out what the claimants would have been awarded had their claims succeeded. In doing so, he adopted an unusual approach of making separate awards for the abuse and pain, suffering loss of amenity, which included the psychiatric injury suffered. This approach, inevitably, resulted in larger quantum awards than had been the case in other matters. By way of an example, one claimant was provisionally awarded £65k for the abuse itself and a further £85k for the pain, suffering and loss of amenity, representing a total general damages award of £150k. To put this in context, in a case involving similarly serious allegations of abuse and a diagnosis of complex PTSD *(FZO v Adams (1) & London Borough of Haringey [2019])*, the claimant received a general damages award of £85k (albeit £113k once adjusted with inflation). This still falls a fair way short of the figures referenced by Johnson J.

The TVZ judgment was only handed down three months prior to the publication of the 16th Edition of the Guidelines and it is possible that it was too late for it to be applied to that edition of the JC's guidance. However, it is possible that it has now had an influence on the valuation of general damages in this field even though the claimants were unsuccessful, albeit Johnson J's approach of valuing the abuse and PSLA separately has not been adopted.

The Judicial College's latest guidance is inevitably going to have some impact on ongoing claims, not only in respect of the expectations of claimants but also in reserving strategy. In such circumstances, it seems sensible for all parties to undertake a process of reviewing each claim and reserves to ensure their interests are protected.

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Chris Wilson

Partner

IMX v Peter Mark Bicknell [2024] EWHC 2183 (KB)

The case of *IMX v Peter Mark Bicknell*, heard before Deputy Master Marzec, appears to be one of the first cases decided since the 17th edition of the Judicial College Guidelines (JC Guidelines) were published.

Background

The claimant alleged sexual abuse perpetrated against her by the defendant (Bicknell) when she was a child between the ages of eight and twelve. Bicknell was her stepfather at the time of the abuse and lived with the claimant, her mother and brother in their family home.

Bicknell was convicted on 11 June 2021 in respect of seven counts of indecent assault and sentenced to five years and four months imprisonment, albeit at the time of the civil proceedings he had been released from prison. On 19 July 2023, Master Davison gave judgment in default of defence against Bicknell for an amount to be assessed with costs. The defendant was unrepresented at that time and remained unrepresented throughout.

The abuse

When the claimant was eight years old, Bicknell began to sexually abuse her in the form of touching her bottom and genitals. This would take place at various times when the claimant was in bed, on his lap, carrying her and giving her a piggyback.
The abuse escalated to digital penetration on at least one occasion which caused the claimant to suffer a vaginal infection that she self-treated with TCP and Listerine.

The claimant relied on evidence from Consultant Psychiatrist Dr Nick Cooling in support of her claim who opined she suffered from the following:

- Recurrent depressive disorder of moderate severity with the onset being from childhood;
- Complex PTSD;
- Panic disorder;
- Harmful use of alcohol; and
- Obsessive-compulsive disorder and an unspecified feeding or eating disorder.

The claimant limited her claim to the number of incidents which formed the basis of the criminal indictment. As two of the seven counts were specimen accounts, Bicknell was convicted of no fewer than sixteen occasions of sexual assault by touching, as well as one count of indecent assault by digital penetration of the claimant's vagina.

Special measures

As stated above, Bicknell was unrepresented throughout and the claimant applied for special measures to be imposed pursuant to Practice Direction 1A of the Civil Procedure Rules on the basis that she was a vulnerable person, the impact on her as a result of the hearing, the relationship between her and her abuser and her psychological vulnerability.

The measures imposed were that the claimant could give her evidence from a remote location, that Bicknell would be required to submit his questions for cross-examination of the claimant two weeks before trial and that those questions that were approved would be verbalised by the judge and it would not be permitted for Bicknell to conduct the cross-examination himself.

The defendant's case

The defendant was not given permission to serve a witness statement or give evidence on the basis that it did not seem apparent what evidence he could give that was relevant to the assessment of damages. However, the defendant did serve a skeleton argument seeking for the court to take into account the "*compensation*" that, in his case, he had already paid "in all its forms" such as supporting the claimant in her adult life, including financially helping her buy two houses and day-to-day practical help such as house moves, cars, computers, as well as admitting and acknowledging the abuse to her directly and pleading guilty to the criminal charges against him.

The court found that there is no authority to support the proposition that an abuser can mitigate general damages due to the person he or she has abused by financial or emotional support or other gifts.

Judgment and Assessment of damages

General damages

The claimant sought an entitlement to general damages for pain, suffering and loss of amenity at the moderate level as set out in the 17th edition of the JC Guidelines, the bracket of that being £25,100 to £54,920 with the claimant submitting the appropriate amount being between £35,000 to £45,000. This was to include an uplift for the following aggravating factors:

1. The defendant was her stepfather;
2. He assaulted her in her family home which ought to have been a place of safety; and
3. That the abuse caused her to suffer an infection that humiliated her and she was unable to seek medical treatment or help from her family.

The judgment of Deputy Master Marzec referred to *TVZ v Manchester City Football Club* [2022] EWHC 7 where Mr Justice Johnson assessed the damages that would have been due to each claimant both for the pain, suffering and loss of amenity arising from the long-term psychiatric effects of the abuse and separately compensation for assaults and batteries themselves.

Deputy Master Marzec decided to adopt this approach and separate the two elements of an award for general damages. He also took into account the aggravating factors relied on by the claimant and considered the appropriate award for the abuse itself was £30,000. As to the longer-term psychiatric consequences, Deputy Master Marzec noted that the injuries had troubled the claimant for the whole of her life, for some 45 years, and overshadowed that life. He made, therefore, an award for the claimant's long-term psychiatric conditions of £30,000. The total figure for general damages is, therefore, £60,000.

Special damages

The claimant claimed special damages for the following heads of loss:

- Future psychological treatment to include alcohol detoxification; psychiatric treatment sessions and psychotherapy. The defendant did not challenge the claimant's entitlement to this treatment.
- Educational deficit and loss of earnings; and
- Future risk on the open labour market

Awards were made under each head of loss.

Comment

Damages awards in abuse cases can be rare with limited reported cases – as a result, the Judicial College provided no specific guidance in respect of psychiatric injury resulting from physical and sexual abuse until the 16th edition of their guidelines was published in April 2022. The 17th edition published in April 2024 was the first substantive change to guidance in this area.

As the defendant was unrepresented, it remains to be seen whether or not he has the funds to meet the judgment. However, the main issue with this judgment is the adoption of Mr Justice Johnson's unusual approach in TVZ. If the defendant had obtained legal representation, counsel is likely to have made submissions that the comments in TVZ are obiter and the claimants in that case were not awarded damages, therefore, the 'awards' made by Mr Justice Johnson were hypothetical.

In addition, while the TVZ judgment was only handed down three months prior to the publication of the 16th edition of the Guidelines and it is possible that it was too late to be applied to that edition of the JC's guidance, it would clearly have had an influence on the publication of the 17th edition, yet the guidance remains that only one award for general damages is required.

Author:

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Vicarious liability and abuse: local authority liable for family foster placement

In *DJ v Barnsley Metropolitan Borough Council* [2024] EWCA Civ 841 the Court of Appeal allowed an appeal to find a local authority vicariously liable for assaults committed by a foster parent who was also the claimant's uncle.

Background

Keoghs have previously commented on the decisions in this case throughout the judicial process. However, for clarity in January 1980 following the breakdown of the claimant's parents' marriage, the claimant was placed by Barnsley MBC in the voluntary care of a Mr and Mrs G, who were the claimant's maternal aunt and uncle. Mr and Mrs G then became the claimant's foster parents and the claimant remained with the family for many years. Prior to Christmas 1979, the claimant had never met Mr and Mrs G, and did not know of their existence. During the placement, the claimant alleged that he was sexually abused by his uncle.

In August 2021 there was a trial of the preliminary issue of whether the local authority could be vicariously liable for the abuse carried out by Mr G. The claimant's claim was initially struck out on the basis that the relationship between the defendant and Mr G was not akin to employment and, therefore, vicarious liability could not apply.

The claimant appealed to the High Court and in July 2023 it dismissed the claimant's appeal for reasons which included the following:

- While some features of the relationship suggested it was "akin to employment" (e.g. they were both interviewed for the role; were monitored and supervised; and there were regular reviews of the claimant's welfare, health, conduct, appearance and progress), other features pointed in the opposite direction, such as the fact that they were "not recruited for the role… or selected by the local authority" and that they were not "trained for the role".
- There was a sufficiently sharp line between what the foster parents were doing and the activity and business of the defendant.
- The foster parents took the claimant in because other family members were unable or unwilling to do so and there was a clear inference that they would not have done so "had he not been their nephew".
- The foster parents were engaged in an activity which was more aligned to that of parents raising their own child and that the activity was sufficiently distinct from that of the local authority exercising its statutory duty.

The claimant then appealed to the Court of Appeal

Court of Appeal

The Court of Appeal allowed the appeal to render the local authority vicariously liable for the assaults by Mr G.

In assessing whether the local authority's relationship with Mr and Mrs G was akin to employment, the Court of Appeal concluded that the claimant's residence with Mr and Mrs G fell into "three phases":

During the placement, the claimant alleges that he was sexually abused by his uncle AG. AG was also in the proceedings as the Part 20 defendant.

The claimant alleged that the defendant was vicariously liable for the actions of AG.

Phase 1:

January 1980 to July 1980: the claimant was not "in care" and the local authority had no statutory responsibility for him or rights in respect of him.

Phase 2:

1 August 1980 to 21 November 1983: the claimant was formally received into care under section 1 of the Children Act 1948. From this point he was "in care" and "boarded out" with Mr and Mrs G and the local authority paid boarding out allowances under the power provided by s.13(1) of the 1948 Act. However, although the claimant was in care, parental responsibility remained with his parents.

Phase 3:

22 November 1983 to 1988: the local authority then assumed parental rights in respect of any child in their care, thus parental responsibility was no longer with the claimant's parents. This period of residence with Mr and Mrs G continued until his 18th birthday.

In the first phase, the Court of Appeal found that the claimant was not in the care of the local authority and vicarious liability could not apply. Consequently, on balance Mr and Mrs G's care for the claimant was "not integral to the local authority's business and the relationship between the local authority and the Gs was not akin to employment."

However, in respect of the second and third phases, vicarious liability could apply for the following reasons:

- The claimant was in the care of the local authority who were under a statutory duty to care for the claimant – the care of children who had been received into its care was the local authority's "relevant activity".
- Mr and Mrs G were only recruited and selected to be foster carers for the claimant and not any child placed with them. However, they were "recruited and selected" as the claimant's foster carers to enable the local authority to discharge its statutory duty towards a child received into its care.
- The local authority had the ability to conclude that Mr and Mrs G were not suitable to be foster carers. This was an exercise undertaken by the local authority of assessment and selection, rather than a ratification of the pre-existing arrangement.
- The fact that Mr and Mrs G did not receive any specific training to become foster parents carried no material weight. The Court of Appeal pointed to the fact the claimant was visited regularly by his social worker and Mr and Mrs G's care of him was monitored and supervised by them. There were also regular reviews of his health, welfare and progress. The local authority also gave directions about his contact with his parents and other members of his family.

As a result, the Court found that after August 1980 the relationship between the local authority and Mr and Mrs G was akin to employment to render the local authority vicariously liable for any assaults committed by Mr G upon the claimant.

Lord Phillips' five incidents

The Court of Appeal did not consider it necessary to consider the five "incidents" identified by Lord Phillips in the Christian Brothers case. However, they still stated that all five incidents were satisfied, including the second incident that both the first instance and High Court had considered were not satisfied (whether the tort was committed as a result of activity being taken by the employee on behalf of the employer). In essence, once the claimant was received into care and Mr and Mrs G had been approved as his foster carers, their care of the claimant "was integral to the local authority's business of discharging its statutory duties towards him."

Motive

The Court of Appeal also commented that Mr and Mrs G's motive in caring for the claimant as their nephew was irrelevant for the purposes of assessing vicarious liability. The motive or objectives of a defendant and the individual who committed the acts are rarely aligned and there may be a number of reasons why an individual will choose to take on a role, such as a foster parent. However, whatever motive there was, this does not determine the nature of the relationship between the defendant and an alleged tortfeasor.

Focus of relationship

The Court of Appeal also commented that the first instance and High Court judge focused too heavily on the nature of the relationship between the claimant and Mr and Mrs G. The key assessments were the other two relationships:

1. Between the local authority and the claimant; and
2. Between the local authority and Mr and Mrs G

On this basis the local authority had taken the claimant into care and had statutory duties towards him; this was discharged through their relationship with Mr and Mrs G who had been approved as his foster carers.

Comment

Over the past few years courts have considered whether local authorities are vicariously liable for the acts of foster carers. Case law indicated that where a child is fostered by a member of the family this would not satisfy stage one of the test and the expansion of vicarious liability would be limited.

With the recommendations of an expansion of kinship carers and placements with family carers being encouraged, particularly following the "Stable Homes, Built on Love" Report, such placements are likely to increase. While acknowledging that vicarious liability has been on the move, the Court of Appeal in DJ v Barnsley MBC made it explicit that this was a decision reached on the specific facts of this case and that the decision does not represent "a general rule that a local authority will always be vicariously liable for torts committed by foster carers who are related to the child".

However, given the approach and analysis taken to vicarious liability in the context of this case, and even the fact that parental responsibility remained with the parents for over 3 years during the relevant period, it is difficult to envisage a set of circumstances in which a local authority would not be vicariously liable for the acts of a family foster parent. Irrespective of any familial relationship, once a child has been taken into care and foster parents have been selected and approved, a local authority will be deemed to be in a relationship akin to employment to render them vicariously liable for their acts or omissions.

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A route for failure to remove claims under the Human Rights Act 1998

Since CN v Poole Borough Council [2019] UKSC 25 (CN) and HXA v Surrey County Council [2023] UKSC 52 (HXA) common law claims for failure to remove circumstances have been restricted most notably to where an assumption of responsibility may arise. Claimants have, therefore, had to consider the Human Rights Acts 1998 to reframe their claims. However, last year AB v Worcestershire County Council & Anor [2023] EWCA Civ 529 (AB) demonstrated that not all cases of poor parenting and parental neglect will engage Articles 3 and 8.

A recent High Court decision of ZR v Blackburn with Darwen Borough Council [2024] EWHC 598 (KB) has confirmed that there is a route for failure to remove claims to be brought in cases involving severe, persistent neglect.

Facts of the case

The claimant's case was that she had suffered serious neglect as a child over a period of several years while being cared for by her mother. She contended that while the defendant's professionals were involved with her family at various points from April 2012, effective action was only taken after the adult social care team became involved after her 18th birthday in September 2017, and the defendant's failure to take earlier action violated its obligation to protect her under Articles 3 and 8 of the Human Rights Act 1998.

Her claim focused on the defendant's involvement over three key periods from 2013 until 2017. During each of these periods, it was said that there were numerous occasions on which protective action by the defendant was warranted. The picture of neglect included dirty and inadequate clothing, poor diet, limited social contact, limited access to education, poor personal hygiene, infestation with nits, an extremely dirty home environment, neglect of her emotional and behavioural development and neglect of her medical needs. The claimant pleaded that she was extremely vulnerable as she had autism, attention deficit hyperactivity disorder (ADHD), and learning difficulties and was left in squalid conditions with her needs so neglected that she remained isolated at home with no socialisation. The claimant was reported to be smelly and infested with nits to the extent that they would drop from her head. She alleged that this was inhumane and degrading treatment under Article 3. Further, the fact that the defendant has been afforded by Parliament the necessary compulsory powers to intervene and protect her generated the Article 3 operational duty.

The claimant argued that for the same reasons, the defendant owed her an operational duty under Article 8 because the harm being suffered violated her family and private life.

The defendant's application

The defendant submitted an application to strike out the claim on the grounds that there was no reasonable prospect of success on the following grounds:

Article 3

i. The treatment she experienced was of sufficient severity to cross the high threshold required for Article 3 (the threshold issue).

ii. The defendant was on notice that the claimant was at a real and immediate risk of experiencing such treatment at the relevant times (the risk issue).

iii. The defendant did not take reasonable measures to safeguard the claimant from the risk of Article 3 treatment (the breach issue); and/or

iv. But for the alleged breaches, the claimant would not have suffered the treatment said to cross the Article 3 threshold (the causation issue).

Article 8

The defendant contended that no separate claim had been pleaded in respect of a breach of Article 8 and that if the Article 3 claim failed, the Article 8 claim also failed.

The correct approach to the application

The defendant sought to take the court to a significant number of social services records to provide a fuller factual context to the treatment to which the claimant was exposed. The defendant's reasoning for this was that in *AB* the High Court and Court of Appeal had examined each of the incidents pleaded in the particulars of claim to consider whether individually they had constituted a breach under the Article 3 threshold.

The court did not consider this approach to be directly applicable in this case, which was advanced on a cumulative basis, unlike *AB* which relied around a limited and comparatively small number of incidents. The court held that rather than focus on any one date or element of the treatment, it was necessary to look at the cumulative impact of the various elements and test that against the Article 3 threshold.

Further, the evidence position was very different in this case. *AB* was based on composite chronologies agreed to represent the overall picture, whereas in this case the claimant had identified several pages on which reliance was placed but the defendant was seeking to rely upon its own chronology which did not summarise all the records and had not been agreed with the claimant. Unlike in *AB*, the claimant also served expert evidence and the defendant had expressly invited the judge to consider it. Considering this, the application was more fluid than that in *AB* and there were a number of significant live issues of fact, especially on the breach issue that rendered the claim unsuitable for strike out or summary judgment because in order to resolve these issues, a mini-trial would be required.

The threshold issue

The defendant argued that there was a spectrum of neglect cases with *Z v UK* [2002] 34 EHRR 3 *(Z)* (an application to the ECHR made by the claimants in *X v Bedfordshire* [1995] 2 AC 633 at one end and *AB* at the other. They argued that the conditions alleged by the claimant were not the same as those experienced by the children in *Z* and it was quite clear that the claimant's treatment fell at the end of the *AB* spectrum. It was argued that unless *AB* could be distinguished from this case, it is binding, and the Article 3 claim must be dismissed.

The court found a number of features in common between this case and *Z* but also noted that because of the fact-specific nature of the Article 3 threshold assessment, *AB* could only provide limited assistance. *AB* was advanced in a different way and there were very specific factual reasons why it was dismissed. These were effectively, a combination of the reported concerns being found to have been unsubstantiated, not being considered sufficiently serious or having been responded to appropriately. The defendant was, therefore, wrong to contend that the reasons in *AB* amounted to conclusive findings on the threshold issue which were binding on other cases.

However, the court acknowledged that *AB* is authority for the proposal that in the context of alleged failures to remove a child from the care of the parent *"serious and prolonged ill-treatment and neglect, giving rise to physical or psychological suffering"* is capable of amounting to treatment contrary to Article 3. The court found that test to be arguably met in this case.

The risk issue

There was a dispute between the parties as to the effect that the Article 3 obligation is to focus on a risk which exists at the time of the alleged violation and not a risk that may arise at some stage in the future. The defendant argued that its interventions periodically improved circumstances in the home

such that there was no real and immediate risk at that time, and that there was no longer-term obligation to ensure that the situation did not deteriorate in the future. The claimant argued that such an approach would render the right no longer practical or effective.

The court found that this was a novel legal issue which was only touched upon in the submissions before the court. It, therefore, remained a live issue between the parties and could only be resolved on a finding of fact, and was unsuitable for summary determination. Further, the court was not taken to material which conclusively showed lengthy periods where the threshold was not met and, in fact, there was evidence of the mother's inability to sustain improvements. It was thus arguable that the risk remained *"present and continuing"*.

The breach issue/causation issue

The defendant argued that there was no real prospect of establishing a failure to take reasonable preventative measures. The court highlighted that this rested solely on a bare assertion by its legal representative that reasonable steps were taken. This was an inadequate basis for summary judgment or strike out. Further, while there was force in points made in the defence about the effect of the defendant's intervention from time to time and of the potential harm involved in taking the claimant into care, they were not so persuasive that it could be said that the claimant's case had no real prospect of success. In particular, the claimant relied on an apparently clear and rational expert opinion identifying numerous occasions when the defendant should have initiated care proceedings.

The court was also satisfied that this report provided sufficient evidence to conclude that there was a real prospect of succeeding on the causation issue.

Article 8

The court held that there was nothing improper in the Article 8 claim having been pleaded on the same factual matrix as the Article 3 claim, but also that an Article 8 claim should not simply be treated as an alternative to an Article 3 claim simply with a lower threshold. There are cases where a person's experience has been found to be out with Article 3 but to engage Article 8. It was, therefore, not right to say that if the Article 3 claim fails the Article 8 claim also necessarily fails.

Conclusion

As the judgment concerns an application for summary judgment the case still has to be tried on its facts. However, it has provided some guidance as to how courts will apply the four-stage test set out in *AB* in relation to the type of treatment that may be considered "serious and prolonged ill-treatment and neglect" and guidance on how evidence will be considered for each strand of the four-stage test to consider which claims may be able to proceed under Article 3 and 8 of the Human Rights Act 1998. It also assists with the framing of applications for summary judgment/ strike out such as providing an agreed chronology of the events upon which the parties will rely, as was the case in *AB*. The parties cannot simply expect the court to consider expert reports and carry out fact-finding investigations, and if this is required any application will be unsuccessful.

We anticipate that claimants' solicitors will reassess any failure to remove claims they have and consider if they are similar in fact to this claim and if they can be framed under the four-stage test set out in *AB*. When presented with these claims, defendant solicitors will need to consider the four-stage test and if there is evidence to support that the test will not be met.

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Scotland Abuse Case Update: Vicarious liability in light of BXB v Trustees of the Congregation of the Jehovah's Witnesses

In X v Sheriff Brown and the Lord Advocate [2024] CSIH 6 the Inner House of the Court of Session considered the constituent elements of the test for vicarious liability following the decision of the Supreme Court in BXB v Trustees of the Congregation of the Jehovah's Witnesses.

Background

The pursuer (claimant), a legal practitioner, alleged that she was assaulted by a sheriff (the first defender) on three separate occasions at common law and a further occasion which she contends, together with the others, constituted a course of harassment in terms of s8 of the Protection from Harassment Act 1997.

In addition, the pursuer sued the Lord President as second defender, the Lord Advocate as third defender, and the Advocate General as fourth defender on the basis that they were vicariously liable.

The case was abandoned against the Lord President at an early stage.

Allegations

In brief summary, the allegations of wrongful conduct by the first defender were as follows:

1 Following a hearing before the sheriff, discharged due to technical difficulties, the pursuer encountered him in the reception area of the court building and she apologised for the technical difficulties. The sheriff is alleged to have told her not to worry and placed his hand on her face.

2 The pursuer was working in the course of her employment as a solicitor in the court building when the sheriff's bar officer was told to bring her to the sheriff's chambers. In the sheriff's chambers he is alleged to have remarked on her "pretty face", hugged her twice, lingering with his face on her shoulder the second time until she indicated her desire to leave, and then on her departure he patted her bottom twice as she went through a doorway.

3 On the train travelling to work, the sheriff sat down next to the pursuer and placed his hand on her inner thigh. She had to put her handbag on her lap as a barrier to him touching her further.

4 Following her reporting his conduct to the Judicial Office, she received a FaceTime call from the sheriff on her mobile phone. She did not answer it. A further complaint was then made to the Judicial Office.

Decision of The Outer House

The case was brought before the Lord Ordinary (Judge at First Instance) on the procedure roll (strike out hearing) in respect of three issues

i. the Crown's potential to be held vicariously liable for the wrongdoings of a sheriff;

ii. time-bar; and

iii. which defender was the appropriate entity as representative of the Crown.

i The appropriate representative of the Crown

The first issue to sort out was, of course, who was the correct entity against which to bring the claim in vicarious liability.

The Lord Ordinary's decision was that, on the basis of the Crown Suits (Scotland) Act 1857 and Crown Proceedings Act 1947: proceedings in Scotland against the monarchy, the interest of the Crown (including Scottish Administration), or any public department, should be directed to the 'appropriate Law Officer'. This would be either the

Lord Advocate where the proceeding is against any part of the Scottish Administration or the Advocate General in any other case.

The Lord Ordinary decided the vicarious liability claim was against part of the Scottish Administration. Accordingly, the entity said to be vicariously liable for the sheriff (should VL be established) is the Scottish Government, and the fourth defender was let out of the action.

(ii) Time-bar

The claim was served on the third defender more than three years after the first two alleged assaults were said to have taken place – accordingly, the Lord Ordinary was of the opinion that these were time-barred and that there was no good reason put forward for the delay in litigating them.

The third and fourth incidents were found not to be time-barred.

(iii) Vicarious liability of the Crown for a sheriff's wrongful conduct

The pursuer submitted that all that was necessary to confer vicarious liability was that the sheriff was a 'Crown servant' in terms of the Crown Proceedings Act 1947. The Lord Ordinary agreed that whether a judicial officer was a servant or agent of the Crown was a straightforward interpretation of that legislation and noted that section 2 of the 1947 Act also provided that the Crown is subject to liability in tort as if it were a private person.

It followed that the question of whether the relationship between the Crown and Crown servant was akin to that of an employer–employee (stage one). In order to answer this, evidence on the facts would have to be heard. The pursuer could not be said to be bound to fail at this stage.

In relation to stage two – was there a sufficiently close connection between the work the sheriff was authorised to do and the acts complained of, such that they could be regarded as being done in the ordinary course of his quasi-employment? The Lord Ordinary took a broad view, considering the role of a judicial office-holder and their degree of authority and control over those appearing before them and the wider profession – for example highlighting that an invitation to chambers would normally be accepted.

He drew a distinction between the first two incidents and the second two. He concluded that following evidence, as the first two alleged assaults occurred on court premises, the pursuer was not bound to fail. However, as the other two incidents which were not on court premises, the Lord Ordinary held that the pursuer was bound to fail to satisfy the stage two test on these.

The Lord Ordinary's Court Order

On the findings above, the Lord Ordinary's interlocutor ought to have dismissed the pursuer's case regarding vicarious liability for all of the common law wrongs: the first and second on the basis they were time-barred, and the third and fourth because the pursuer was bound to fail on the stage 2 test. Averments regarding the incidents forming a course of harassment in regard to the statutory-based claim could remain.

However, the interlocutor did not exclude from proof averments in terms of the third and fourth incidents in relation to vicarious liability, for either common law delicts or the statutory harassment claim.

Reclaiming (Appeal)

Both the pursuer and the third defender reclaimed (appealed).

The third defender's appeal was based on the assertion that the Lord Ordinary had erred in law in three aspects:

(i) In finding the stage one test met

The third defender argued that the Lord Ordinary erred in considering the status of the sheriff and not sufficiently considering the nature of the relationship between a judicial office-holder and the Crown. It was submitted that the Crown did not exercise control over judicial office-holders. Judicial officers were in the category of "true independent contractors".

- References in authorities such as BXB v Trustees of the Congregation of the Jehovah's Witnesses to the place of a tortfeasor in a "hierarchy" or "organisation", or to the putative party's degree of "control" had to be read in the light of the constitutional position

of judicial office-holders. The principle of judicial independence is a cornerstone of a democratic society, operated in accordance with the rule of law.

- There was no vestigial level of control by the Scottish Government over judicial office-holders.
- The work of judicial office-holders was not "in furtherance of the aims" of the Scottish Government.
- Appointment, although formally made by the monarchy was not a typical recruitment process, nor was removal from office.
- If judicial office-holders were akin to employees of the Scottish Government, they would feel beholden to it and behave accordingly, eroding judicial independence.

(ii) In holding that the stage two test was met in respect of the first two incidents

- Alleged delicts all related to personal matters and were in pursuit of the sheriff's own private ends.
- The Lord Ordinary had wrongly focused on his status and not the close connection of the delictual acts and what he was authorised to do. The pursuer had failed to plead the nature of the close connection.

(iii) In failing to uphold the time-bar plea in respect of the harassment claim

- If there was no vicarious liability for the common law delictual claims relating to the third and fourth alleged incidents, then the chain of harassment must have ended at the second incident. The common law claims against the third defender in respect of the first and second incidents were time-barred, and accordingly, the statutory harassment claim must also be time-barred.

The pursuer's appeal

The pursuer accepted that the mere fact judicial office-holders were servants of the Crown did not automatically determine there was vicarious liability. Both stages of the test set out in BXB are required to be satisfied. However, the pursuer still argued that judicial officer-holders and the Crown had a relationship akin to employment (in satisfaction of stage one) for the following reasons:

- The use of the term "servant" was a strong indicator that being a Crown servant is akin to employment.
- Judicial office-holders are appointed by the monarch, swear an oath to him and administer justice in his name.
- Judicial office-holders are paid a salary.
- They were integral in the Crown's administration of justice and "overall regulation of society" – all for the benefit of the Crown and the public at large.
- Though there was no control over the exercise of judicial functions, there was a level of administrative control by senior judges in deciding where office-holders would sit, what type of cases they would hear and how many.
- There was a defined process for their appointment, discipline and removal

The pursuer's arguments in respect that stage two was satisfied included:

- The authority conferred upon judicial office-holders extended beyond their interactions on the bench, and this was an incident of their quasi-employment.
- Deference was expected and received from legal practitioners. Even outside the courtroom, legal practitioners would be disinclined to disagree with judicial office-holders for fear of antagonising them.
- Though the third and fourth incidents occurred away from the courthouse they ought to be viewed in the context of the first two incidents which did take place in the courthouse, and they formed part of a course

of conduct which flowed from those.

- Accordingly, the pursuer could not be said to be bound to fail to establish a close connection, and a proof ought to have been allowed to proceed.

In addressing the issue of time-bar, the pursuer submitted that the Lord Ordinary ought to have exercised his discretion in terms of s19A of the Childhood and Limitation (Scotland) Act, given that there was no forensic prejudice to the Crown. There was no issue of lost evidence or stale claims. The pursuer, on the other hand, would be prejudiced by proceeding only against the sheriff as it was unknown if he had the means to meet a successful claim. At the procedure roll hearing, further information which was not available to the Lord Ordinary was also presented in support of the submission that the court should exercise discretion in respect of allowing the common law claims against the third defender to proceed in respect of the first two incidents though brought late.

Decision of The Inner House (Appeal Court)

If there is vicarious liability it could only be on the part of the Scottish Government.

The judgment of Lord Burrows JSC in *BXB v Trustees of the Barry Congregation of the Jehovah's Witnesses* sets out a helpful summary of the modern law of vicarious liability, including the two-stage test. Furthermore, the test invokes legal principles that in the vast majority of cases can be applied without considering the underlying policy implications. The same two stages apply to cases of sexual abuse as they do to other cases of vicarious liability.

The relationship between the sheriffs and the Scottish Government

They are not employees, nor are they true independent contractors. They are most aptly described as sui generis. Whether judicial office-holders are Crown servants or not is contentious. In the Outer House's opinion, because of the absence of control over them, they are not Crown servants for the purposes of the 1947 Act. They are officers of the Crown.

In any event, it is unnecessary to decide whether they are servants or agents because section 2(5) of that legislation applies to a range of persons who may or may not be judicial office holders.

The Scottish Courts and Tribunal Service (SCTS) is a body corporate independent of the Scottish Government. It is the SCTS which has the function of ensuring the provision of officers required for the purposes of the Scottish Courts and the judiciary of those courts. Sheriffs are paid by the SCTS. Levels of salary and allowances are a reserved matter for the Treasury. Pensions are governed by statute, but payable from the Scottish Consolidated Fund by the Scottish Government. These financial arrangements – carefully put in place in order to preserve judicial independence – are very different from those in a normal employer/employee relationship.

The Scottish Government has no control over how sheriffs perform their judicial functions, nor does it exercise control over the judiciary as an institution.

Various entities detached from the Scottish Government have roles in the process of recruitment and appointment of judicial office-holders and, similarly, effective control over discipline and removal from office lies with bodies independent of the Scottish Government.

Though there is a hierarchy of seniority among the judiciary (such as the Lord President being head of the Scottish judiciary and the sheriffs principal exercising control over matters such as court allocation), such control is exacted by senior members of the judiciary, and not the Scottish Government.

The absence of any effective control by the Scottish Government is deliberate and based on constitutional principles – the operation of the rule of law, judicial independence, and the separation of powers.

Judicial independence is particularly important and fundamental to our constitutional law – both the individual judge's adjudicative independence and the judiciary's independence from the legislature and the executive.

Treating judicial officer-holders as akin to employees of the Scottish Government and thus rendering the Scottish Government liable for them (where the stage two test is met) would undermine judicial independence.

The lack of control by the Scottish Government and the importance of maintaining judicial independence are factors which weigh heavily against finding that judicial officer-holders are akin to employees. These factors outweigh any which it suggested point the other way.

Resultant judgment

The case ought to have been dismissed at first instance as against the third defender, as the pursuer was bound to fail the stage one test. Vicarious liability could not have been established against the third defender.

Conclusion

This case underlines the importance of clearly defining the entity against which a claim in vicarious liability is brought so that the true nature of the relationships can be examined in terms of the stage one test.

Whether a relationship "akin to employment" can be established depends very much on the application of the various factors set out in *BXB*, and it is interesting how those are weighed in terms of more unusual relationships.

Judicial independence is fundamental to our constitutional law and the risk of eroding that by conferring liability on the Scottish Government for acts or omissions of judicial office-holders is too great.

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