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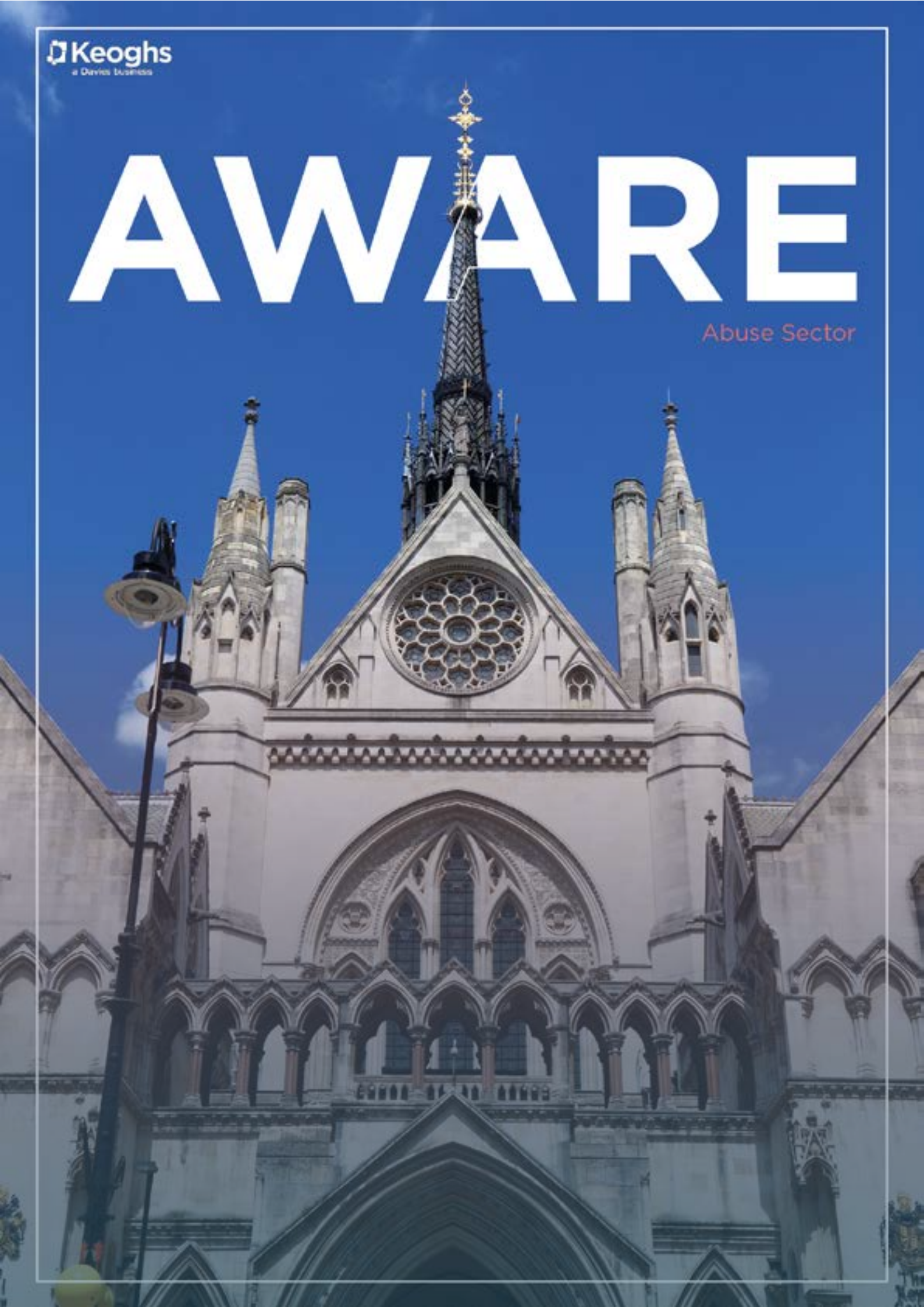
# AWARE

Abuse Sector



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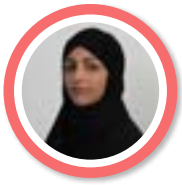

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# WELCOME

**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 12 months. This includes the Government's progress following IICSA, key decisions at all levels of the appellate courts in regards to vicarious liability (Stage 1 and 2), much needed clarity on 'failure to remove' cases, and the defence of no fair trial and substantial prejudice 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 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 most recent government update on IICSA in regard to limitation and redress. He also discusses the most recent Supreme Court guidance in regards to vicarious liability (Stage 1 and 2) and its subsequent application at first instance. Further, he provides a final update in regards to vicarious liability in which the Court of Appeal refused the claimants' application for permission to appeal in TVZ.

**Sarah Swan, Partner,** considers two recent cases in which the Supreme Court provided much needed clarity regarding 'failure to remove' cases.

**Patrick Williams, Associate,** considers two recent Court of Appeal decisions regarding vicarious liability Stage 1 and 2.

**Anna Churchill, Legal Executive, and Daniel Tyler, Associate,** discuss a High Court case which considers issues of vicarious liability in the context of a family foster placement.

**Khadija Sarwar, Solicitor, and Chris Rae, Solicitor,** provide an update on Scottish abuse case law, specifically regarding a recent case that considered the issue of limitation in Scottish abuse cases.

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 Cares

Sporting Clubs and Associations



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# Limitation and Redress

## Government's update on IICSA


**In October 2022 the Independent Inquiry into Child Sexual Abuse (IICSA) published its final report with 20 recommendations to better protect and support victims of child sexual abuse. Two of those key recommendations concerned (1) reforming limitation laws in abuse claims, and (2) a national redress scheme to compensate victims of abuse.**

**The UK Government initially responded to these recommendations in May 2023 and at that time indicated that it would explore the options on how existing judicial guidance in child sexual abuse could be strengthened, as well as setting out options for the reform of limitation law in child sexual abuse cases.**

In relation to the issue of redress, the Government also explained that while it accepted the need to introduce a redress scheme, the details of the scheme itself, including the key components of eligibility, types of redress available, the extent of any financial component and application process, would need to be considered further following extensive engagement, including with victims and survivors, third sector organisations, local authorities, insurers and lawyers.

On 10 January 2024, the Government provided a further update on its "progress in implementing commitments made in response to the recommendations" of IICSA.

## Limitation

Notwithstanding the fact the Government acknowledged in May 2023 that limitation was a critical issue that IICSA was attempting to resolve by making its recommendation, it appears no further progress has been made.

The Government had originally asserted that it would publish a consultation paper by the end of 2023 to explore the various options for reform, but no paper materialised. The Government has now simply reiterated this intention and confirmed that it will "publish a consultation paper shortly", again for the purpose of setting out options for reforming limitation law in child sexual abuse cases, as well as examining how the existing judicial guidance in child sexual abuse cases could be strengthened.

## Redress

Similar to the position on limitation, it appears progress concerning redress has been somewhat slow. The Government's update on a national redress acknowledges that any scheme "will require significant join up and collaboration across Government to work through the many complexities involved in delivering a scheme that is sensitive to victim and survivor needs and provides a non-adversarial, trauma-informed route to seeking redress."

The Government also asserts that it "has been engaging extensively with experts in this area – victim and survivor representative organisations, academics, lawyers, insurers and redress schemes operated by other national and local governments – to scope the potential options and costs of establishing a redress scheme in England and Wales."

### Summary

The Government has sought to provide reassurance that where it can act quickly they are doing so and where more time is required, they "are dedicating resources to disentangle complex issues and ensure [they] deliver what victims and survivors need." However, given the apparent lack of progress on these issues since the Government's initial response in May 2022, it remains that the real prospect of a general election this year is likely to significantly impact upon the potential appetite and timetable for any reform and implementation of IICSA's recommendations for both limitation and a national redress scheme.

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# Supreme Court allows appeal in abuse claim

## BXB and further restrictions to vicarious liability

**The Supreme Court has handed down its judgment allowing an appeal to find that the Jehovah's Witnesses could not be vicariously liable for the rape by an elder of the church.**

**This decision represents yet a further indication of the direction of travel on the scope and application of vicarious liability in which the Supreme Court acknowledged had previously been subject to an expansive redrawing of our boundaries in the 21st century.**

Ian Carroll, Partner and Head of Abuse at Keoghs and Patrick Williams, Associate, consider the Supreme Court decision and potential implications for future claims.

## Background

In 1984 the claimant and her husband first attended the Kingdom Hall in Barry, South Wales, which was the meeting place of the Barry Congregation of Jehovah's Witnesses. In 1986 the claimant was baptised as a Jehovah's Witness. As a result, the claimant and her husband became friendly with another couple, Mr Sewell and his wife. Sewell had special responsibilities within the group and later became an 'elder', which is a senior member of the congregation.

The claimant and her husband were asked by Sewell's father, who was also an elder, to act as confidants to Sewell because he was ill. There was a history of inappropriate behaviour by Sewell towards the claimant. In 1990, the claimant and her husband with Sewell and his wife had been pioneering which was the central religious duty of Jehovah's Witnesses. Afterwards, Sewell raped the claimant in a room in his house, which was an approved venue for Jehovah's Witnesses meetings to take place.

At first instance and in the Court of Appeal it was held that the relationship between Sewell and the Jehovah's Witnesses was capable of giving rise to vicarious liability for acts of sexual abuse by Sewell and on members of the congregation (stage 1).

It was also found that the rape by Sewell was closely connected to his role as an elder on the basis that his senior position played an important role in why the claimant and her husband initially began to associate with him, and because the Jehovah's Witnesses significantly enhanced the risk of Sewell sexually abusing the claimant by creating the conditions in which the two might be alone together (stage 2).

The Jehovah's Witnesses were granted permission to appeal to the Supreme Court on the grounds of vicarious liability for both stage 1 and 2.

## Supreme Court Judgment

Lord Burrows, with which the other Supreme Court judges unanimously agreed, allowed the Jehovah's Witnesses appeal and found:

1. Sewell was in a relationship "akin to employment" with the Jehovah's Witnesses to render them vicariously liable for any abuse he committed (stage 1); however

2. The rape of the claimant did not occur so closely connected with acts that Sewell was authorised to do, that it can be fairly and properly regarded as committed by him while acting in the course of his quasi-employment as an elder (stage 2).

## Stage 1 - Was the relationship between the defendant and Sewell capable of giving rise to vicarious liability?

The Supreme Court refused to allow the appeal on stage 1 of vicarious liability on the basis that there was a relationship akin to employment between Sewell and the Jehovah's Witnesses. The important features in this case which supported a finding akin to employment under stage 1 included:

- As an elder Sewell was carrying out work on behalf of, and assigned to him by, the Jehovah's Witnesses.
- He was performing duties which were in furtherance of, and integral to, the aims and objectives of the Jehovah's Witnesses.
- There was an appointments process to be made an elder and a process by which a person could be removed as an elder.
- There was a hierarchical structure into which the role of an elder fitted.

Notwithstanding that the Supreme Court agreed with the first instance and Court of Appeal's analysis on stage 1 of vicarious liability, it disagreed with their reliance on the "creation of risk" criteria as set out by Lord Reed in Cox when considering the stage 1 question.

In particular, it was "a mistake for them to drift into talking about creating the risk of rape by the elder being assigned the activities he was given."

The Supreme Court said they had incorrectly confused the criteria for satisfying the first stage test with the underlying policy justification for vicarious liability. The creation of the risk of rape should not therefore have been included within the criteria for deciding whether the relationship was akin to employment and was only relevant to stage 2.

## Stage 2 - Was there a sufficiently close connection between Sewell's actions and the defendant, to make the defendant vicariously liable for the tort?

The Supreme Court identified a number of errors which had been made at first instance and by the Court of Appeal. These included:

- The "early flowering of the friendship" between Sewell and the claimant should have had no relevance to vicarious liability except as background;
- "But for" causation should not have been afforded the prominence it was given;
- The role of Sewell's father was essentially irrelevant except as part of the background because he was not the person who committed the tort;
- The fact that, before lunch on the day of the rape, the claimant and Sewell had been on pioneering activities was again essentially irrelevant except as background;
- Sewell's distorted view, equating rape and adultery, should have had no significance.

Of particular importance was clarification on the correct test for stage 2 vicarious liability, which should have been as follows:

"Whether the wrongful conduct, the rape, was so closely connected with acts that the tortfeasor, Mark Sewell, was authorised to do, that the rape can fairly and properly be regarded as committed by him while acting in the course of his quasi employment as an elder."

In applying the above the Supreme Court found the claimant had failed to satisfy this test for the following reasons:

**1. The rape was not committed while Sewell was carrying out any activities as an elder on behalf of the Jehovah's Witnesses.**

- He was at his own home and was not at the time engaged in performing any work connected with his role as an elder.
- He was not conducting a bible class, he was not evangelising or giving pastoral care, he was not on premises of the Jehovah's Witnesses and the incident had nothing to do with any service or worship of the Jehovah's Witnesses.
- The lack of direct connection to the role assigned to him as an elder makes these facts significantly different from institutional sex abuse cases where as part of their jobs they were on institutional premises looking after children or living in the same institution as their victims.

**2. At the time of the rape, Sewell was not exercising control over the claimant because of his position as an elder.**

- It was because of her close friendship with Sewell and because she was seeking to provide emotional support to him, and not because Sewell had control over her as an elder, that the claimant went to the back room.
- The driving force behind their being together in the room at the time of the rape was their close personal friendship, not Sewell's role as an elder.
- Sewell was not abusing his position as an elder but abusing his position as a close friend of the claimant when she was trying to help him.

**3. Sewell was not wearing his "metaphorical uniform" as an elder at the time the tort was committed.**

- It was unrealistic that Sewell's metaphorical uniform was never taken off in his dealings with members of Barry Congregation such as the claimant.

**4. "But for" causation was insufficient to satisfy the close connection test**

- It was accepted that Sewell's role as an elder was a "but for" cause of the claimant's continued friendship with Sewell and hence her being with him in the back room where the rape occurred.
- However, this is not enough to find a close connection between the wrongful conduct and the acts Sewell was authorised to do.

**5. The rape was not equivalent to the gradual grooming of a child for sexual gratification by a person in authority over that child.**

- The violent and appalling rape was not an objectively obvious progression from what had gone before but rather a shocking one-off attack.
- The prior events owed more to their close friendship than to his role as an elder.
- In summary, the Supreme Court found that the close connection test was not satisfied and the rape was not so closely connected with acts that Sewell was authorised to do that it can fairly and properly be regarded as committed by him while acting in the course of his quasi-employment as an elder.

The Supreme Court's comments on the application of enterprise liability or risk are also particularly valuable in the sense that they confirmed that there was no convincing justification for the Jehovah's Witness organisation to bear the cost or risk of the rape committed by Sewell. In particular, whilst the Jehovah's Witness had deeper pockets than Sewell, they made it clear that this was not a justification for extending vicarious liability beyond its principled boundaries. This latter point helpfully eliminates one of the Lord Phillips factors in Christian Brothers which the Supreme Court in this case seems to indicate had "little, if any, force".

# Comment

This decision represents a faithful application of the corrective Supreme Court guidance in Barclays and Morrisons provided in April 2020. It represents a clear rebalancing of the tests which for some time had been "on the move" into ever expanding circumstances in which vicarious liability would apply. However, following the more restrictive approach recently taken by the Supreme Court in relation to stage 1, they have taken this opportunity to provide much needed clarity to similarly restrict the scope of the close connection test under stage 2.

It is also significant that the Supreme Court have now made it clear that there will be no special rules for sexual abuse cases when considering issues of vicarious liability. In particular, the same two stages and the same two tests apply to cases of sexual abuse as they do to other cases on vicarious liability. Indeed, they went so far as to state that it is misleading to suggest that the law still needs tailoring to deal with sexual abuse cases. In any event, given much of the case law which has been responsible for the development of vicarious liability has been sexual abuse cases, this lends weight to the fact that any necessary tailoring is already reflected in and embraced by the modern tests. As a result, and whilst previously "on the move", it does seem to suggest so far as the Supreme Court is concerned that the law on vicarious liability may now have come to a much-needed rest.

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# UKSC provides clarity on “failure to remove” cases in the Judgment of HXA & YXA

## Implications for Local Authorities

### Facts and background to the UKSC decision

HXA and YXA are both ‘failure to remove claims’, brought in negligence following the UKSC decision in CN v Poole. In both instances, the defendants applied to strike out the claims. Initially heard independently, the cases were consolidated and jointly addressed since the proceedings reached the High Court.

**HXA v Surrey CC**

In HXA, the claimant suffered physical and emotional abuse and neglect from her mother and sexual abuse from one of her mother’s partners.

The particulars of claim asserted that a duty of care arose for the council for a number of reasons, ranging from contending that the mere exercising of child protection functions was sufficient to prove an assumption of responsibility, to the council adding to the danger the claimant faced by ‘allowing’ unsuitable partners to reside with their mother.

**YXA v Wolverhampton CC**

In YXA, the claimant had severe disabilities and additional needs. While living in the locality of Wolverhampton CC, a paediatrician raised concerns that his parents may have been over-medicating him, suggesting that he should be taken into care. He was provided with some regular but very short-term respite care by the council, under s20 of the Children Act. There were concerns about the use of physical chastisement and the use by parents of a known sexual offender to babysit the claimant.

The civil claim relates to the time that the claimant was at home, when he was over-medicated and neglected by his parents. The question for the court was whether, by providing temporary respite care for him under s20, Wolverhampton CC assumed responsibility for him and thereby created a duty of care while he was in the family home in accordance with the principles outlined in CN v Poole.

### The Court of Appeal Decision

LJ Baker, providing the Court of Appeal judgment, found that each case would need to be considered on its own merits and specific facts of the case. He found that the absence of a care order was not a total bar to a duty of care being established. It was consequently inappropriate to strike out these claims summarily. Each claim should proceed to a full trial, allowing for a thorough examination of the issues involved.

The defendants appealed this decision to the UKSC.

### Judgment

The UKSC unanimously allowed the appeals of the defendants and struck the claims out. They found the particulars of claim for HXA and YXA disclosed no basis upon which a relevant assumption of responsibility by the local authorities could be made out at trial. Further, there was no arguable duty of care as alleged in either case.

Starting with HXA, the UKSC held that no assumption of responsibility arose from the council’s decisions to investigate, seek legal advice or undertake ‘keeping safe’ work, or indeed from carrying out – or failing to carry out – those decisions. These were “merely initial steps to prepare the ground for a possible later application for a care order”.

As to YXA, the UKSC accepted there was an assumption of responsibility during the period that the claimant was with the foster carers. However, it was not the relevant assumption of responsibility that the claimant needed to establish to find the alleged duty of care. It was simply an assumption of responsibility to use reasonable care to protect the child against harm during the time he was in respite care. The fact that the council had provided temporary respite care did not mean that it had assumed responsibility to use reasonable care to protect him from abuse in his home. While there was some delegation of parental responsibility for the period when he was being accommodated by the council, his parents retained parental responsibility, and the council had a duty to return him to them.

There was no significant change in the situation in his home during the respite care and so there could be no assumption of responsibility when he was returned to that same situation.

The UKSC was critical of the Court of Appeal judgment noting "the Court of Appeal has thrown the area into doubt" by "incorrectly stressing that this is an unclear developing area of the law". In fact, the earlier judgments in these cases, and the judgment in DFX v Coventry City Council [2021] EWHC 1382 (QB) showed that the law was settled and the courts were able to apply the law as set out in Poole.

It was confirmed that these cases are indistinguishable from Poole. In Poole, there was no duty to protect from abusive neighbours, and so it follows that in these cases there cannot be a duty to protect children from abuse by a parent or a parent's partner.

Although no duty of care arose on the facts of the cases to hand, the UKSC confirmed there were circumstances where an assumption of responsibility could be established, and provided two examples of where this could arise:

1. Where the local authority has obtained a care order and therefore has parental responsibility for the child – exemplified in HOL Barrett v Enfield LBC [2001] 2 AC 550.

2. Where respite care under s20 of the Children Act is arranged by a local authority, there is an assumption of responsibility during the period that the child is in respite care, including the mechanics of the return, to use reasonable care to protect the child against harm.

The judgment is also critical of the pleadings in these cases. It is stated that the particulars of claim were excessively discursive and a long chronology of all involvements with the local authority was not necessary or helpful.

## Implications for Local Authorities

The UKSC stated at paragraph 102 that "our decisions in these appeals should remove any conceivable doubt that lawyers may have had in understanding the full impact of CN v Poole".

The UKSC judgment is, therefore, extremely helpful and has returned stability to the area of 'failure to remove claims' which had been disturbed by the Court of Appeal decision. The decision as noted above provides clear guidance to all parties and Poole and DFX have been affirmed.

The judgment should prevent any arguments by claimants that actions taken by local authorities, short of obtaining a care order and/or providing respite care, constitutes an assumption of responsibility and creates a duty of care.

It is clear from the judgment that parental responsibility (PR) is key to whether a duty of care exists. In the first example provided by the UKSC, PR has been transferred to the local authority, creating the duty of care. In the second, it has been temporarily delegated to the local authority. Going forward, practitioners will need to carefully consider who held parental responsibility at specific times during a claimant's childhood.

Although the judgment has provided stability, there is scope for further litigation – for example, if there is an involvement by the local authority which falls outside the involvements listed in this case. It is clear from the UKSC that there is extremely limited scope for such claims to be successful; however, claimants may look to litigate some claims to assess whether specific involvements can create an assumption of responsibility.

There also remains to be considered by the courts the other exceptions outlined in Poole, where we anticipate further litigation in the future.

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# Update on vicarious liability

## Court of Appeal refuses permission to appeal in TVZ & Others

**The Court of Appeal has formally refused the claimants permission to appeal the decision of Johnson J in TVZ & Others v Manchester City Football Club [2022] EWHC 7 (QB) in which Keoghs acted on behalf of the defendant.**

This important High Court decision was originally handed down in January 2022 and related to the abuse committed by a former football scout and coach, Barry Bennell. The claimants alleged that the defendant had engaged Barry Bennell (Bennell) as a local scout and coach and that in the course of those duties, he also ran many different local junior 'feeder teams' for the defendant. Each of the claimants played for one or more of these feeder teams and in the course of Bennell's duties for the defendant he sexually abused each of the claimants on numerous occasions.

The High Court found in the defendant's favour and considered that the claimants' delay had affected the available evidence (particularly on the fact-sensitive issue of vicarious liability) so that it was not equitable to disapply the limitation periods. Further, it found that the relationship between the defendant and the abuser was not "akin to employment" (Stage 1) and that, even if he was employed, the abuse of the claimants did not occur in circumstances that were closely connected to any duties he may have had (Stage 2).

The claimants then stayed their applications for permission to appeal pending the outcome of the Supreme Court's determination of an application for permission to appeal in another similar case in which Keoghs acted, Blackpool Football Club Ltd v DSN [2021] EWCA Civ 1352. The Supreme Court refused the claimant permission to appeal in that case in August 2022, following which the claimants then submitted applications for permission to appeal in TVZ & Others.

## The permission to appeal

The claimants sought permission to appeal on three grounds, namely:

**1. Limitation:** The trial judge was wrong not to exercise his discretion to allow the claim to proceed;

**2. Vicarious Liability Stage 1:** The trial judge failed to apply the test in DSN and was wrong to conclude that 'Stage 1' of the test in respect of vicarious liability was not satisfied; and

**3. Vicarious Liability Stage 2:** The trial judge's approach to 'Stage 2' was wrong in law and should have found there to be an obvious close connection between the abuse and Bennell's alleged role as a coach and scout for the defendant.

Lord Justice Stuart-Smith (who had previously delivered the lead judgment of the Court of Appeal in DSN) considered the claimants' applications for permission to appeal and refused permission in respect of each ground.

Stuart-Smith LJ also helpfully provided detailed reasons why permission to appeal was refused which he accepted were much longer than normal (1) in recognition of the extreme importance of the cases to the appellants and (2) because although he was clear that an appeal would fail because of limitation, he considered it necessary to address Vicarious Liability Stage 1 in greater detail than normal "lest the appellant[s] should think that [they had] lost solely on grounds of limitation."

**Limitation**

- Stuart-Smith LJ found that Johnson J had applied the correct principles "with clarity and cogency of reasoning" and that the appellants' submissions did not "do justice to the care and thoroughness of his approach."

- He found that Johnson J's approach to the length of the delay was appropriate and correct; his approach to the reasons for delay was detailed and sympathetic and his analysis of the impact of the delay upon the issue of vicarious liability was "similarly rigorous and could not be criticised".

- It followed that Johnson J's conclusion that the court's ability to reach clear confident and reliable conclusions had been "badly compromised by the 27-year delay and the consequential impact on the available evidence" was "unimpeachable".

- In conclusion, there was "no real prospect that a Court of Appeal, properly directing itself, would allow the appeals in relation to limitation and extending time".

**Vicarious liability**

- In relation to Vicarious Liability Stage 1, Stuart-Smith LJ considered Johnson J's findings fully justified his conclusion that Bennell's coaching "enterprise" was undertaken at his own risk, not controlled by the defendant and that it did not involve a relationship with the defendant that was akin to employment.

- Interestingly, Stuart-Smith LJ then went on to comment on the legal tests and particularly the issue of control. He reiterated that the relevant law is fully set out in DSN (in which permission to appeal to the Supreme Court was refused). Further, he considered that there was nothing in the recent Supreme Court case of BXB that "casts doubt on the account in DSN". Older authorities on the question of employee/independent contractor had placed weight on whether the "employer" could direct the employee/contractor on how to carry out his work. However, Stuart-Smith LJ stated that this emphasis has now receded.

- What is now clear is that simply engaging someone to do work is not of itself likely to be determinative. But where the "employer" is not even in a position to direct what the tortfeasor shall do, as Lord Reed held in Cox, "the absence of even that vestigial degree of control would be liable to negative the imposition of vicarious liability".

- Stuart Smith LJ commented that more is required at both Stage 1 and Stage 2 than that the "employer" has engaged the tortfeasor to carry out work which gave them the opportunity to commit the tortious acts in question (as had been established as long ago by the House of Lords in Lister).

- He then commented that the question of control may, therefore, still be highly relevant and determinative of Stage 1 because "it may indicate either a level of control that is recognisable as being akin to employment, whether or not payment is involved, or that even such vestigial control is absent."

Notwithstanding that reasons given for refusing permission to appeal have no standing or binding authority, Stuart-Smith LJ's detailed comments in these cases are valuable to the wider legal industry specialising in this area. They provide some insight into the appellant courts' views and the law relating to vicarious liability, and Stage 1 in particular, in that they consider it is now becoming relatively settled and ought to be capable of being applied to the individual facts of claims with greater certainty.

This case represents a culmination of the development of the principles of vicarious liability to restrict the circumstances to which they apply. This began with the Supreme Court guidance in Barclays in April 2020 and the preservation of the independent contractor defence, to the Court of Appeal's decision in DSN which further limited the application of vicarious liability to non-employees, and now TVZ which rigorously applied this guidance and restricted the scope on stage 2 and the circumstances in which abuse committed will be deemed to have been closely connected to any duties an individual might be expected to perform.


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# Court of Appeal dismisses appeal in abuse claim

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**The Court of Appeal has determined that a school was not vicariously liable for the torts of an individual undertaking a work experience placement there.**

Patrick Williams, Associate in the specialist abuse team at Keoghs, considers the judgment.

## Background

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

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

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

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

The matter proceeded to trial before HHJ Carmel Wall in July 2022 who found in the defendant's favour on both aspects of the two-stage test for vicarious liability. Firstly, the relationship between PXM and the school was not 'akin to employment' and secondly, the actions of PXM had not occurred in close connection to his duties on behalf of the school.

## Grounds of Appeal

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

- The trial judge was wrong to find that the relationship between the defendant and PXM was not 'akin to employment' (i.e. Stage 1).
- The trial judge was wrong to find that PXM's torts were not sufficiently closely connected with his relationship with the defendant so as to give rise to vicarious liability (i.e. Stage 2).

The claimant was additionally granted permission to appeal on two other grounds relating to the period in which the entirety of the wrongdoing occurred and the finding that the conduct and mental elements of the tort of intentional infliction of injury were not made out until after the end of PXM's placement.

## Judgment of the Court of Appeal

### Stage 1

The Court of Appeal allowed the appeal on Stage 1, finding that there was in fact a relationship 'akin to employment' between PXM and the school. While the Court of Appeal accepted that the trial judge had correctly set out the law, it took issue with her factual findings concerning the relationship between PXM and the school. The important evidential features that indicated the relationship was 'akin to employment', included the following:

- PXM was given responsibility for carrying out some of the work of the PE department which was part of the National Curriculum and a part of the business of the school.
- The tasks carried out by PXM were for the benefit of the defendant as they allowed its staff to spend time on other tasks or with other pupils. These tasks were also for the benefit of the pupils.
- WEPs provide generic benefits to organisations by encouraging suitable people to enter the workplace in due course and, thereby, enabling organisations to recruit staff when necessary.
- PXM was supervised by the school's staff at all times and closely directed in any activity that he undertook with a pupil, demonstrating that he was subject to the school's close direction and control.
- The school required that PXM should understand and accept its safeguarding policy, and PXM accepted the policy.

The Court of Appeal did not accept that reference to PXM's role as "shadowing or observing" was a fair reflection of what he did during the course of the WEP. Further, the court indicated that such a role, which is akin to an individual undergoing training, is not inconsistent with status as an employee or being akin to an employee.

### Stage 2

The Court of Appeal disagreed with the trial judge's conclusions that the entirety of the wrongdoing occurred many weeks after PXM's relationship with the defendant had ceased, and her finding that the conduct and mental elements of the tort of intentional infliction of injury were not made out until after the end of PXM's placement at the school. Accordingly, the Court of Appeal approached Stage 2 on the basis that the grooming started when PXM was at the school, and that his role at the school was 'akin to employment'.

However, the Court of Appeal found that the Stage 2 close connection test was not satisfied for the following reasons:

- PXM had no caring or pastoral responsibility for the pupils, a factor to which considerable weight has been given in previous cases.
- PXM's access to the claimant at school was limited because he was, or should have been, kept under close supervision at all times.
- PXM held no position of authority over the pupils in the school.
- It was not until PXM left the school that any communication took place on Facebook and such communication was specifically prohibited by the school.

Given the limited nature of PXM's role during the course of one week, the facts did not begin to satisfy the requirements of the close connection test. Further, the grooming that led to the sexual offending was not inextricably woven with the carrying out by PXM of his work during the WEP such that it would be fair and just to hold the defendant vicariously liable for his acts.

## Commentary

The Court of Appeal's decision represents a thorough application of the relevant case law and provides further clarification and restrictions regarding Stage 2 of the test for vicarious liability.

This case effectively relates to the extent to which an organisation can continue to be vicariously liable for any torts that are committed by a work experience student after any "employment" relationship has ended. This decision follows WM Morrisons v Various Claimants [2020] UKSC 12, which addressed the question of what constituted "an unbroken sequence of events" or "a seamless episode" and found that:

1. A temporal or causal connection alone does not satisfy the close connection test; and

2. It was highly material whether the abuser was acting on his employer's business or for purely personal reasons.

However, the Court of Appeal in London Borough of Haringey v FZO [2020] EWCA Civ 180, which predates the above, found the defendant to be vicariously liable for abuse committed by a teacher on a pupil, even long after the pupil had left the school. While the difference is that the abuser was a teacher rather than a work-experience student, it will be interesting to see how the court deals with this in the future and further clarification might, therefore, be required.

While this decision will be a welcome reminder to schools and other organisations who engage work experience students or other volunteers, it is imperative that they consider the circumstances in which they engage with these individuals and the potential for vicarious liability to attach.

The position remains that merely providing the opportunity to commit abuse is insufficient for liability to follow, but where an organisation provides greater responsibility to work experience students or bestows greater authority upon them, then the potential risks of doing so must be considered, as this will inevitably increase the risk of liability attaching to that organisation.

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# GHI v TRC

## Court's application of vicarious liability post-BXB

On 3 July 2023, the court in GHI v TRC handed down one of the first decisions in an abuse claim following the Supreme Court's guidance in BXB v Trustees of the Barry Congregation of Jehovah's Witnesses (BXB), in which it found the defendant not to be vicariously liable for abuse committed by a member of a church congregation who helped out with youth work at the church.

Ian Carroll, Partner and Head of Abuse at Keoghs, considers the court's decision and its application post-BXB.

### Background

- The claimant was a member of a church (TRC) and was sexually abused by another member of the church (SAL) while attending church trips between approximately 1974 and 1978.
- While SAL was a family friend, it was alleged that SAL also carried out "youth work" on behalf of TRC and was a youth leader at the church. Accordingly, SAL was responsible for taking care of the claimant while he was away on church trips.
- The claimant disclosed the abuse to his father in 2014 who in turn contacted SAL and he admitted the abuse. The claimant also discussed the abuse with a solicitor who advised him to go to the police.
- After some delays in the criminal proceedings, SAL was eventually convicted upon his own admission of abusing the claimant and sentenced to 12 months imprisonment on 31 August 2017.
- The claimant served a letter of claim in September 2017 and formal court proceedings were issued in January 2019 alleging that TRC was vicariously liable for the abuse committed by SAL.
- The defendant did not dispute the abuse committed by SAL, but denied that it could be vicariously liable for the acts of SAL. It also raised a limitation defence.
- The matter proceeded to trial before His Honour Judge Saunders at Central London County Court.

## Judgment

While the court exercised its discretion under s33 of the Limitation Act 1980 to allow the claim to proceed, the court dismissed the claimant's claim on the basis that the church could not be vicariously liable for the abuse by SAL. Applying the two-stage test approved in BXB the court determined that SAL was:

1. Not in a relationship of employment or "akin to employment"; and

2. Even if SAL was in such a relationship, the abuse he committed upon the claimant was not within the context of any authorised role given to him by the church.

### Stage 1

HHJ Saunders analysed BXB and summarised that whether the relationship is "akin to employment" requires careful consideration of the features of the relationship and the extent to which they are "like, or different from, a contract of employment" including payment terms, control, the purpose and objective of the work, the terms of appointment and termination and where the role fits in with the hierarchy.

The court also reiterated that following BXB the court must ensure that it focuses not on the relationship between the claimant and the abuser, but on the relationship between the defendant and the abuser.

In this respect, SAL was a "tent leader" at these church trips where the abuse took place. In order for him to take on this position of responsibility it would have required a reference to be provided by the church. However, there was conflicting evidence as to whether SAL was a "youth leader" or whether he had a specific role within the church at the time of the abuse. The claimant himself described SAL as having a "prominent role", but the court acknowledged and the claimant accepted that as a child he would have seen any adult (even a young adult as SAL then was) as appearing to have some kind of authority.

In analysing the evidence the court found, therefore, that:

- While a reference was required by the church, the appointment as a "tent leader" was made by the organisation running the camp and not the church.
- There was very little (if any) evidence that SAL was authorised by the church to undertake any particular role in the activities of the church.
- There was a complete lack of any terms, purposes or responsibilities in relation to SAL's role at the church meaning there was little (if any) evidence that his activities were akin to employment.
- It was more likely than not that SAL was simply a member of the congregation who "helped out" due to the close nature of the church.

Accordingly, SAL was not in a relationship with the church capable of being described as "akin to employment" to render the church vicariously liable for the abuse he committed.

### Stage 2

Even if the court was wrong on Stage 1, in any event it found that the evidence did not meet Stage 2 of the test for vicarious liability. In particular, the abuse was committed as a result of SAL's appalling criminal conduct and not within "the context of any authorised role given to him" by the church. Further, again applying BXB and the importance of motive, it was caused by SAL's need for sexual gratification, rather than as a consequence of furthering any needs of the church. In this respect, the court pointed to the fact that abuse had also taken place outside of the context of the church trips (which were not pursued against the church) which indicated that the relationship with the church was not the causal reason for the abuse being committed.

## Comment

This court decision represents the first application of the Supreme Court guidance in BXB. The court reiterated the Supreme Court's view that there are no special rules for sexual abuse cases: the same two stages and the same two tests apply to cases of sexual abuse as they do to other cases on vicarious liability. Accordingly, this decision is reflective of the approach advocated in BXB.

This case is further endorsement of a rejection of arguments which relied upon the opportunity to abuse as being sufficient to give rise to vicarious liability. The case of Lister had made it clear that opportunity alone was insufficient, and the court in this case recognised that while SAL's membership of the church and position gave him the opportunity to carry out the abuse, the relevant factors for determining vicarious liability are to be found in analysing the actual relationship between the defendant and the tortfeasor, not the circumstances of the relationship between the claimant and the tortfeasor.

This decision is entirely reflective of the more restrictive approach advocated in BXB to the circumstances in which vicarious liability is likely to apply. However, it will be interesting to see how the Court of Appeal approaches such guidance in the recently heard appeal in MXX v A Secondary School in which the decision is currently awaited.


**Author:**

Ian Carroll

Partner & Head of Abuse

# Vicarious liability in the context of a family foster placement

## Introduction and background

On 18 July 2023, the High Court handed down its judgment in DJ v Barnsley Metropolitan Borough Council [2023] EWHC 1815 providing clarification of the position regarding claims brought in vicarious liability against family foster placements.

The case concerned Stage 1 of the two-stage test for the imposition of vicarious liability, i.e. whether the relationship between the defendant and the tortfeasor was one of employment or "akin to employment".

Since the judgment in Armes v Nottingham County Council [2017] UKSC 60, it has been established that vicarious liability extended to foster parents, despite foster parents not being employees of the local authority. However, the position was less clear-cut in the context of children placed with family.

## Facts

In January 1980, aged nine and following the breakdown of his parents' marriage, the claimant was placed by Barnsley MBC in voluntary care with Mr and Mrs G, who were the claimant's aunt and uncle, with the wife being the claimant's mother's sister. Mr and Mrs G became the claimant's foster parents and the claimant remained with the family for many years. It is relevant in this case that, prior to Christmas 1979, the claimant had never met AG or his wife, and didn't know they existed.

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.

On 13 August 2021, a trial of the preliminary issue of whether vicarious liability could apply took place. The claimant relied on Armes in support of his assertion that Barnsley MBC was vicariously liable for the tortious acts of AG. The defendant argued that Armes did not apply in these circumstances as they were relatives of the claimant. Instead, the defendant argued that similar conclusions could be drawn as those drawn when children in care are placed in the care of their own family. This circumstance was addressed at paragraph 71 of Armes. The claimant's claim was struck out by Mr Recorder Myerson KC on the basis that the relationship between the defendant and AG was not akin to employment and, therefore, vicarious liability could not apply. The claimant appealed the Order to the High Court where it was heard by Lambert J.

## Judgment

Lambert J dismissed the claimant's appeal.

Lambert J observed that in potential "akin to employment" cases such as this, the court should consider those "features of the relationship" which are similar to, or different from, a contract of employment. These may include: "whether the work is being paid for in money or in kind; how integral to the organisation was the work carried on by the tortfeasor; the extent of the defendant's control over the tortfeasor in carrying out the work; whether the work is being carried out for the defendant's benefit or in furtherance of the aims of the organisation; what the situation is with regard to appointment and termination and whether there is a hierarchy of seniority into which the relevant role fits". She added that in difficult cases it is necessary to consider the balance of the policy reasons underpinning the imposition of vicarious liability. These are the so-called incidents outlined by Lord Phillips in The Catholic Child Welfare Society and Others v Various Claimants and The Institute of the Brothers of the Christian School and others [2012] UKSC 56.

In this case, some features of the relationship suggested it was "akin to employment". These included the fact that Mr and Mrs G were both interviewed for the role, that they were monitored and supervised and that there were regular reviews of the claimant's welfare, health, conduct, appearance and progress. However, 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".

Consequently, this was one of those difficult cases where it was necessary to consider the incidents referred to in the Christian Brothers case, in particular, whether Mr and Mrs G's care for the claimant "was integral to the business of the defendant or whether it was sufficiently distinct from the activity of the defendant to avoid the imposition of vicarious liability". Like the Recorder, Lambert J considered that there was a sufficiently sharp line between what Mr and Mrs G were doing and the activity and business of the defendant. In her view, the most compelling factor was the context in which they came to be involved. Mr and Mrs G took the claimant in because other family members were unable or unwilling to do so; not only that there was a clear inference that they would not have done so "had he not been their nephew". As such, Mr and Mrs G "were intending to and, in fact, did, raise their own nephew because he was their nephew and that their purpose was to raise him as part of the family of which he was a member and in the interests of the family, including the claimant". Other evidence included the fact that Mr and Mrs G "used family photographs to remind the claimant that he was with his family and to demonstrate family links in order to settle him" and that they appeared "to be encouraging of the claimant maintaining contact with his wider family".

Although Lambert J did not accept all the Recorder's findings, none fatally undermined his conclusion "that Mr and Mrs G 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". As such the defendant could not be vicariously liable.

## Comment

Although each case turns on its facts, the judgment strongly indicates that family fostering arrangements in which a child is raised as a family member will not satisfy Stage 1 of the vicarious liability test. Consequently, the judgment further limits the expansion of vicarious liability, which at one time was said to be 'on the move'.

Of course, this does not prevent claims potentially being brought in negligence. Local authorities may, therefore, face such claims in negligence, although these will be more difficult to prove as there is no automatic liability for the tortious act, as there would be in vicarious liability. Instead, claimants will have to prove a breach of a duty of care owed to them by the local authority. This will require the claimant to prove that the local authority knew or ought to have known about the wrongful act. Although such claims may be presented, and at times may be successful, this is a welcome limitation to the expansion of vicarious liability into a family situation which is very far removed from an employment relationship.

This case is particularly relevant in the context of the 'Stable Homes, Built on Love' report which was published in February this year. This report recommends an expansion of kinship carers, and encourages placement with family members where possible, with £9 million to be invested into developing such placements. Placements with family members are, therefore, likely to increase and this judgment provides some welcome clarity as to the legal position regarding such placement.


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# JXH v The Vicar, Parochial Church Council and Churchwardens of the Parish Church of Holcombe Rogus

## Introduction

In JXH v The Vicar, Parochial Church Council and Churchwardens of the Parish Church of Holcombe Rogus, the Court has recently found for the defendant on the 'close connection' test and that it was not therefore vicariously liable for abuse committed by its incumbent vicar.

Patrick Williams, Associate Solicitor in Abuse at Keoghs, considers the court's decision and its implications on other cases involving vicarious liability Stage 2 arguments.

## Background

- The claimant was a member of the Crediton Church and part of its youth group known as "the Young Communicants" between 1969 and 1976. Reverend Vickery House ("House") was curate of the Crediton Church and involved in its youth work including leading "the Young Communicants".

- In 1976, House became the incumbent vicar of the Parish of Holcombe Rogus ("the Parish") and moved with his wife to live in the Rectory in the Parish, while retaining his family home in Hittisleigh Mill ("the Hittisleigh House").

- House was instrumental in organising for two young men to stay in a cottage ("the Cottage"), through private arrangement in the Parish, whom House knew and were members of the Crediton Church. In 1979, the claimant under a similar arrangement started living at the Cottage. The occupiers considered themselves as being in a monastic community ("the Community") and House attended there from time to time and had a role in practice as to what happened there.

- House sexually assaulted the claimant in about 1979 at the Hittisleigh House, and at some point between 1980 and 1981 at the Wellington public swimming pool located outside of the Parish.

- Some years later, House became part of another quasi-monastic community in the Chichester area and later the claimant joined. During this period, the claimant was sexually assaulted by House and at least one other senior member of the Church of England clergy.

- In 2015, House was convicted of various sexual assaults including those which took place while he was curate of the Crediton Church.

- The matter proceeded to trial before Master Dagnall at the High Court.

## Judgment

**Stage 1**

The parties had already agreed that, on the facts of this case, Stage 1 of the test for vicarious liability was satisfied. However, the defendant denied that Stage 2 was satisfied.

**Stage 2**

Master Dagnall considered the Supreme Court judgment in Trustees of the Barry Congregation of Jehovah's Witnesses (Appellant) v BXB (Respondent) 2023 UKSC 15 ("BXB"), which is now the leading authority in this area of law.

In his judgment, Master Dagnall concluded that each of the sexual assaults committed on the claimant by House were not so closely connected with his authorised activities in his quasi-employment by the defendant as Vicar of the Parish. In analysing the evidence, the court found that:

- The assaults took place outside the Parish and not on any Parish premises.
- The assaults did not take place during any occasion which could be seen ostensibly to be a "church or Parish occasion" or a "church or Parish activity".
- In the context of the assaults, House was not wearing his "metaphoric uniform".
- The assaults were linked to House's role within the Community rather than "Parish" pastoral care or religious instruction.
- House abused the claimant in and by use of his positions as director of the Community (and to a lesser extent as historical acquaintance) rather than as Vicar of the Parish.
- House's position, as effective director of the Community, was sufficiently different and separate from his role as Vicar of the Parish.
- The mere fact that House was able to create the overall situation because he was the Vicar of the Parish does not mean that his committing the wrongs was sufficiently closely connected with his "authorised activities" as Vicar of the Parish.
- The events of and surrounding the assaults were not "inextricably woven" with the carrying out of the "authorised activities" of House as Vicar of the Parish, but were "inextricably woven" with the activities of the Community.
- The surrounding contexts of the two sexual assaults (working on the Hittisleigh House away from the Parish, and learning to swim at a swimming pool outside the Parish) were not ordinary "pastoral care", such as to be or to be part of an "authorised activity" of the defendant's quasi-employment.

Accordingly, Master Dagnall's judgment is that the "closely connected" test was not satisfied and therefore the claimant's claim was not successful on Stage 2 of the test for vicarious liability. The claim was therefore dismissed.

## Comment

The court's decision follows the Supreme Court guidance in BXB and reiterates the position in regards to Stage 2 of the vicarious liability test considered in the more recent Court of Appeal case of MXX v A Secondary School [2023] EWCA 996 and the Court of Session Scottish case of C & S v Norman Shaw and Live Active Leisure [2023] CISH 36. In both of these cases, it was found that the Stage 2 close connection test was not satisfied.

The decision in this case is a welcome reinforcement in regards to Stage 2 of the vicarious liability test that it applies equally to abuse cases, as it does in other vicarious liability cases, and that the Court must be satisfied that there is a sufficiently close connection between the wrongful act and the activities the tortfeasor was authorised to do while acting in the course of his employment or quasi-employment.

Author:

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Associate

# Scottish Abuse Case Law update
# GD v Sisters of Nazareth

## Introduction

The decision of Sheriff Primrose KC in the case of GD v Sisters of Nazareth [2023] SC EDIN 27, marks the latest interpretation of the defence of no fair trial and substantial prejudice in cases of non-recent abuse.

In this case, the pursuer, 'GD', sought damages in respect of alleged abuse she claimed to have suffered while a resident in Nazareth House for a period of around three weeks between approximately 13 July 1973 and 4 August 1973. The defender was the Sisters of Nazareth, who were responsible for the overall management and control of Nazareth House.

GD alleged that she was sexually abused by a priest or other adult male at the home and physically abused by the Sisters who staffed Nazareth House.

The case called for preliminary proof on the issue of limitation.

## Key Facts and Allegations

Section 17D of the Limitation (Childhood Abuse) (Scotland) Act 2017 limits a pursuer's action from proceeding by allowing a defender to argue that it is not possible for a fair hearing to take place or that the defender would be substantially prejudiced by the action proceeding, and this prejudice outweighs the interest of the pursuer in proceeding with the action. The defender bears the burden of proving that the action cannot proceed.

At preliminary proof, the defender argued that a fair hearing was not possible and failing which there existed substantial prejudice to the defender, which outweighed the pursuer's interests, such that the action should not be allowed to proceed.

The following issues were of relevance:

- There were no childhood social work records pertaining to the pursuer.
- The pursuer could not name the priest who sexually abused her. The defender was unable to identify the male priest or other adult male whom the pursuer avers perpetrated the sexual abuse against her
- The visitors' book for the 'main house' at Nazareth House did not show any visiting priests between 13 July and 4 August 1973.
- Of the eighteen Sisters present during 1973, twelve were present during the time of the pursuer's stay between 13 July and 4 August. Of those twelve, nine are dead and three survive.
- Sister Y is alive and presently capable of giving evidence. Sister Y was named by the pursuer as one of her abusers.
- Of the other two Sisters named in the pursuer's pleadings as having witnessed the sexual abuse to which she was subjected, one is deceased and the other cannot be identified.

## Decision

Whether or not a fair hearing is possible, or whether there may be substantial prejudice, is a fact-sensitive issue.

Sheriff Primrose KC was of the view that there was considerable force in the pursuer's submission that this case can be distinguished from B and C v Sailors Society, where the absence of the specification of a wrongdoer meant that the defender could not properly prepare their defence and was, therefore, substantially prejudiced.

In the present case, Sister Y is alive. She is able to give evidence. The evidence that she would be able to provide would be able to test the evidence of the pursuer, namely that Sister Y and others, facilitated or encouraged the abuse of GD. Furthermore, the pursuer avers that on at least one occasion, Sister Y positively directed the priest or adult male abuser to wash the pursuer and that this led to serious sexual assault.

The defender argued that they were disadvantaged to a considerable degree by the passage of time and that they cannot now put the allegations to several witnesses and alleged abusers.

However, the Sheriff considered there were other sources of evidence available. The defender is able to

obtain the evidence of lay staff who worked alongside the three Sisters from the time of the pursuer's residence at Nazareth House. These witnesses may well be able to shed further light on the running of the home and the arrangements for bathing. Their evidence may cast doubt on the credibility and reliability of the pursuer's account of her abuse, or at least part of it.

Most importantly, of course, Sister Y herself is still available to provide evidence. Although she is now 80 and suffers from a heart condition, there would still be evidence about her position available.

The defender produced an affidavit that records that the pursuer's allegations have been put to Sister Y and that she had no recollection of the pursuer, denied the allegations against her, and had not witnessed the abuse of children at Nazareth House.

The sheriff considered that it is not unreasonable to observe that the defender is likely to have a considerable amount of information available from Sister Y. There would be information about the general running of the home and regarding the specific allegations against her. Although this evidence was not before the court at the preliminary proof, it is a factor which the court must weigh in the balance when considering whether any trial is bound to be unfair.

Sheriff Primrose KC considered that in the absence of a detailed statement or affidavit from Sister Y about the very particular allegations made against her, it is difficult to reach the view that it would not be possible for the defender to receive a fair trial. The court does not know the full extent of the available evidential material or its relevance or weight in advance of the proof itself. Given that Sister Y denies the allegations, she may well be able to provide the defender with useful testimony which will enable positive lines of defence to be advanced and which will allow cross-examination of the pursuer and others. Their evidence can be tested on this basis.

While it is true to say that the pursuer has been unable to identify the individual who allegedly perpetrated the acts against her in the showers, in the very particular circumstances of this case, the sheriff did not consider that this necessarily renders any trial unfair.

It was held that the defender had not demonstrated that a fair hearing is impossible. On the matter of substantial prejudice, largely for the same reasons, that while there is inevitably prejudice to the defender as a result of the long delay in bringing this case, that prejudice is not of such a degree that it would justify bringing the action to an end.

Sheriff Primrose KC held that even though there was substantial prejudice to the defender, due to the gravity of the allegations made in this case, the pursuer's interest in prosecuting this action outweighed any such prejudice.

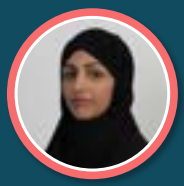
## Comment

The defences of no fair trial and substantial prejudice are fact-sensitive. The death of a witness, or a witness who cannot be traced, along with lack of records does not necessarily mean that a fair trial is not possible or that the defenders will be substantially prejudiced. Not only does the court look at what evidence is lost, but it also gives weight to what further avenues are available. Whether or not those avenues will be fruitful cannot be known until they are explored.

This decision follows that of the Inner House in B & W v The Sisters of Nazareth. Even if the pursuer cannot provide detailed allegations, provided that there is a body of information for the defenders to form a general view in all the circumstances, the court will allow the action to proceed.

The case will now proceed to a full hearing and so the burden of proof is back on the pursuer to establish the facts upon which they rely: that abuse was sustained as alleged, and that the defender is vicariously liable for the wrongdoers or that there was negligence on behalf of the defender proved on balance by reference to the standards of the day.


Authors:



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# Client testimonials

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