ISSUE
31
August 2023

MONTHLY
NEWSLETTER OF
INFORMATION
ACAL LAW REVIEW

ACAL
Association of Child Abuse Lawyers

The Government's response to recommendations made by IICSA

By Dianne Collins, Senior Associate and Solicitor at Nelsons Solicitors Ltd

Articles

The Government has now published its official response to the Final Report of the Independent Inquiry into Child Sexual abuse.

https://www.gov.uk/government/publications/response-to-the-final-report-of-the-independent-inquiry-into-child-sexual-abuse

The Home Secretary, Suella Braverman KC MP wants to assure victims and survivors that "This Government has listened". She hopes that the Government's response to the Inquiry will provide victims and survivors with "a moment of national acknowledgement'.

Ms Braverman states that the Government has accepted the need to act on all but one of the Inquiry's recommendations. She states that she is launching a twelve-week Call for Evidence, the results of which will assist the Government in deciding on how best to implement a mandatory reporting duty for those working with children.

In April 2023, the Home Secretary announced a Child Sexual Exploitation Police Taskforce which will give practical, expert on the ground support for local forces investigating child sexual abuse with a particular focus on complex and organised child sexual exploitation including 'grooming gangs'.

It remains to be seen whether the Government is going to put "its money where its mouth is" by funding more police officers, more specialised training, and greater resources for such investigations to take place.

One of my clients has been trying to get an update from the police on her abuse case which was reported over twelve months ago. She was recently told that the investigating officer had not had chance to work on her case as more important live cases were coming in all the time. She said she could give her no idea of when she would be able to finish the report needed to be able to send the case to the CPS.

b

Quite apart from making my client feel that her case is not important, she feels that her life is on hold and she has no idea how long for.

Another of my clients was approached in 2018 by police investigating allegations of abuse at Rhydd Court School in the early 1990s. He had buried his past and was living his life the best way he could. Today, in 2023, after having fully co-operated with the police, he is still waiting for his case to come to trial. The wheels of justice run very slowly.

For a child abuse survivor or victim who has managed to bury the pain of the past and forge some kind of life, that life can be turned upside down by the unsolicited approach of the police investigating historic allegations of child abuse. It rakes up all the memories and the pain again and it can do immeasurable harm to an already damaged and vulnerable person. I am not saying that historic allegations of abuse should not be investigated; of course, they should. It is, of course, vital that suspected paedophiles are taken off the streets and are prevented from doing any more harm to our children. However, if the police do not have the officers, the specialised training required, and the resources to enable them to carry out those investigations in a diligent, speedy and effective manner then one sometimes wonders whether dredging up the past does the victim more harm than good.

The Government's response acknowledges that in the past, child sexual abuse and exploitation has been under-identified, under-reported and under-recorded by police. One of its core strategic objectives is to increase reporting and to see annual increases in the volume of police recorded crime for CSA and CSE, together with an annual increase in the volume of charges for those offences. In this way, the Government believes that victims will have the confidence to report and more offenders will be brought to justice. It is an admirable goal.
However, it is only when victims and survivors are reassured that their claims will be dealt with speedily, sensitively, and professionally, that they will be encouraged to come forward, safe in the knowledge that their pain will not be made worse by a system which simply cannot cope.

The Inquiry recommended the creation of a Child Protection Authority in England and one in Wales. Whilst acknowledging the need for a stronger safeguarding system, the Government appears to have stopped short of creating a separate Authority dedicated to child protection. Similarly, the Inquiry recommended the creation of a cabinet-level Minister for Children. The Government says that this role is already fulfilled through the work of the Secretary of State for Education. Disappointingly, I think it may have missed the point.

It is also important that victims and survivors coming forward are provided with therapeutic input needed to support them through the process. The process is often re-traumatising and without the necessary services in place to mitigate that trauma, victims and survivors can find themselves adrift in dangerous waters.

The Inquiry wanted to see a guarantee of specialist therapeutic support for victims of CSA. The Government promises to allocate up to £4.5million over three years to seven organisations to support victims and survivors. I hope that this will be enough but I wonder.

The Government commits to implementing a redress scheme and it is launching an extensive engagement exercise to listen to the views and concerns of a wide range of stakeholders particularly victims and survivors.

It is to be hoped that such a scheme provides adequate and speedy compensation for victims and survivors and that it does not take on some of the characteristics of the Criminal Injuries Compensation Authority. One of my CICA abuse clients waited four years for an award to be made.

The Inquiry recommended further changes to the Criminal Injuries Compensation Scheme, to include amending the definition of a crime of violence to include other forms of CSA such as online-facilitated sexual abuse.

It recommended that the rules on unspent convictions should be amended to not automatically exclude an application where an applicant has an unspent conviction, which is likely to be linked to the circumstances of their sexual abuse as a child.

It also recommended increasing the time limit for child sexual abuse applications so that applicants have seven years to apply from i) the date the offence was reported to the police or ii) the age of 18, where the offence was reported whilst the victim was a child. The Government has accepted the need to consider changes to the scheme and will consult on whether to amend the scope and time limits.

IICSA recommended that the Government makes the necessary changes to the legislation to ensure that the personal injury limitation rules are changed. It proposed that the burden should fall on the Defendant to show that a fair trial is not possible rather than on the Claimant to explain and justify why they have delayed in bringing the claim. The Inquiry expected the UK and Welsh Governments to act upon its recommendations promptly. However, the Government will now publish a consultation paper exploring options on how the existing judicial guidance on child sexual abuse cases could be strengthened as well as setting out options for the reform of limitation law in CSA cases.

Given that the Inquiry has already carried out its investigations and made its recommendations on this issue, it is disappointing to note that the Government seems reluctant to simply implement those recommendations without further ado.

The Inquiry took seven years. The Government has good intentions which are long overdue. Let us hope that we do not have to wait too much longer for their implementation.

Dianne Collins, Senior Associate and Solicitor at Nelsons Solicitors Ltd

Sexual abuse, “nervous shock” and secondary victims

By Alan Collins, Partner, Hugh James

Practitioners will be well used to being asked by the family of a survivor of child sexual abuse or, indeed, generally whether they can claim compensation for the trauma that they too may have suffered? Invariably we will explain quite simply that the law does not see them as a victim and so cannot be compensated.

It is a question which is, perhaps, one we should give more thought to and, especially, so given that the Supreme Court is to consider it albeit in a clinical negligence setting:

Can an individual make a claim for psychiatric injury caused by witnessing the death or other horrifying event of a close relative as a result of earlier clinical negligence?

The law may be on the move or at least clarified because whilst it is understood why parent A say witnessing their child sustaining serious injuries in a road traffic accident suffers psychiatric injury should be compensated as a secondary victim, but what causes difficulty as the law stands is when parent B who was not on the scene also seeks damages having similarly suffered.

A parent who has discovered that their child has been sexual abused understandably is at best going to be very concerned if not distressed, and can too often carry a misplaced burden of guilt. It is not too great a step to take to see how they could suffer psychological damage.

Like parent B the survivor’s parent is most unlikely to have been present when the sexual abuse took place, and so where does the law currently place them as a secondary victim?

The question turns on the relevance of any time intervals between the tortious act for example the accident, or for argument’s sake the sexual abuse and the damage caused by it, and the “horrific event” that ultimately causes the psychiatric injury to the claimant.

To establish that necessary legal proximity as a secondary victim there are five elements to establish:

1. That in each case there was a marital or parental relationship between the Claimant and the primary victim;
2. that the injury for which damages were claimed arose from the sudden and unexpected shock to the Claimant's nervous system;
3. the Claimant in each case was either personally present at the scene of the accident or was in the more or less immediate vicinity and witnessed the aftermath shortly afterwards; and
4. that the injury suffered arose from witnessing the death of, extreme danger to, or injury and discomfort suffered by the primary victim.
5. In each case there was not only an element of physical proximity to the event but a close temporal connection between the event and the Claimant's perception of it combined with a close relationship of affection between the Claimant and the primary victim"

Witnessing a fatal accident is one thing, but should the law treat the parent differently if the child dies some months later from the his/her injuries? Likewise, should the parent be treated differently if their psychological injury was immediate as opposed to not developing until the child dies some months later?

As the law stands these are not easy questions to answer, and are certainly no easier when considered in the context of sexual abuse.

To explore the questions further let us take as a scenario as an example of a child having been sexually assaulted running immediately to their parent who suffers a psychiatric injury having learnt what has happened.

The five elements are arguably established:

1. Parental relationship;
2. Sudden and unexpected shock;
3. The parent was in the immediate vicinity;
4. The parent's injury arose from witnessing the injury viz the child running home having been sexually assaulted;
5. The parent who was close to hand witnessed the immediate aftermath of the sexual assault.

Turning to another scenario where the child dies of a drugs overdose having become addicted as result of the sexual abuse suffered but many months after it ceased, and the parent suffers a psychiatric injury as a consequence.

The five elements are far more challenging to establish in this scenario:

1. The parental relationship is established;
2. The parent arguably has suffered a sudden and unexpected shock as a result of their child's death;
3. Let us say for argument's sake the parent was present when the child died form the overdose;
4. The parent witnessed the child's pain and suffering viz the overdose;
5. There is however a time gap between the sexual abuse and the death.

It is because of this time gap between the sexual abuse and the death that causes the potential claim to fail. Had the parent witnessed the immediate aftermath of the sexual abuse the position would arguably be different.

In Australia statute can come to the aid of secondary victims.

The father RWQ claimed compensation for his psychiatric injury he suffered arising from the death of his son AAA who he alleged had been sexually abused by the late Archbishop George Pell. AAA had turned to drugs it is alleged because of the sexual abuse and died from an overdose.
RWQ commenced proceedings against the Catholic Archdiocese of Melbourne and Archbishop Pell claiming that having learned of the sexual abuse and his son's death he suffered nervous shock.
The court ruled that the Legal Identity of Defendants (Organisational Child Abuse) Act 2018 (Vic) (the Act) applied because RWQ's claim arose out of child abuse and the Act was not limited to claims by plaintiffs who had been subjected to child abuse ("primary victim") but applied to RWQ because whilst he did not allege that he was subjected to child abuse per se he nevertheless could because his claim arose from it ("secondary victim") .
Interestingly the Act's objective is to make is simpler to suing unincorporated associations. It is against that backdrop that RWQ is considered to be a secondary victim and one entitled to seek compensation.
Whilst the statute and the decision in RWQ has no standing in the UK the principle that a parent of a child abuse victim could claim compensation is significant and, particularly so, given the increasing understanding of intergenerational trauma. Only policy considerations could prevent the law developing along a similar path in the UK.

The thoughts and comments in this article are of course my own.

Alan Collins, Partner, Hugh James

[1] Polmear and another (Appellants) v Royal Cornwall Hospitals NHS Trust (Respondent) Case ID: 2022/0044
[2] Polmear and another v Royal Cornwall Hospitals NHS Trust [2022] EWCA Civ 12
[3] Alcock v. Chief Constable of the South Yorkshire Police [1992] 1 AC 310
[4] Taylor v A Novo (UK) Ltd [2013] EWCA Civ 194
[5] RWQ v The Catholic Archdiocese of Melbourne & Ors [2022] VSC 483 (24 August 2022)
[6] S.4.2

Is Vicarious Liability Finished After Trustees of the Barry Congregation of Jehovah's Witnesses v BXB

By Kevin Donoghue, solicitor director of Donoghue Solicitors

The recent Supreme Court judgment in Trustees of the Barry Congregation of Jehovah's Witnesses (Appellant) v BXB (Respondent) found for the organisation after considering vicarious liability in a sexual abuse compensation claim. While devastating for the victim, the wider question is what this decision means for other victims of sexual abuse, and children in particular? Here Kevin Donoghue, solicitor and ACAL member, considers the law and how it applies in practice.

On 26 April 2023, the highest court in the land, the Supreme Court, issued a landmark judgment in Trustees of the Barry Congregation of Jehovah's Witnesses (Appellant) v BXB (Respondent). Read it here: UKSC 2021/0089.

In it, Lord Burrows explained that the Court was asked to decide an appeal from the Jehovah's Witnesses, who had been found liable previously at lower courts (including the Court of Appeal) for a compensation claim under the principle of vicarious liability.

What is vicarious liability?

Many readers will be aware of vicarious liability and its importance in helping victims of child abuse seek justice. It is a long-established legal doctrine which allows a victim of a civil wrong (a tort) to hold an employer (or a principal) responsible for the wrongful acts of an employee (or agent), but only if they are done in the course of their employment (or agency).

In the judgment, Lord Burrows helpfully explained why vicarious liability is an exceptional area of law, saying that:

Vicarious liability in tort is an unusual form of liability. This is because the vicariously liable defendant is held liable (and treated as a joint tortfeasor) not because it has itself committed a tort against the claimant but because a third party has committed a tort against the claimant.

What happened in Trustees of the Barry Congregation of Jehovah's Witnesses (Appellant) v BXB (Respondent)?

The Supreme Court considered if the Trustees were vicariously liable for a rape committed by Mark Sewell. In 1990, Sewell, a former Jehovah's Witness elder, raped Mrs B, a congregant.

It considered a long-established two-stage test to find out if there was:

1. a relationship of employment or one "akin to employment"
2. a sufficiently close connection between the relationship and the wrongdoing.

Among other things, the Supreme Court considered the lower courts' analysis of the:

- degree of control exercised by the organisation over the elder, Mark Sewell
- extent to which he was "integrated" into the organisation and the nature of his role
- extent to which Sewell's activity was part of the organisation's business and carried out on its behalf
- the risk of the tort created by the organisation
- the ability of the organisation to pay compensation, and whether it was "fair, just and reasonable" to do so on public policy grounds.

Decision and reasoning

The Supreme Court unanimously allowed the organisation's appeal and held that the Trustees were not vicariously liable for the rape.

It found that:

1. the relationship between the organisation and Mark Sewell was "akin to employment", so satisfying the first test, but that,
2. the rape was not sufficiently connected to Mark Sewell's role as an elder, so the claim failed the second test.

There was a relationship "akin to employment"

In finding that the relationship was akin to employment, the Court noted that Mark Sewell was not paid, or entitled to benefits in kind or expenses. But that did not matter, because he:

- was an elder in the Jehovah's Witness organisation, which had a hierarchical structure and an appointment and removal process
- was carrying out work on behalf of, or assigned to, him
- conducted duties in furtherance of, or integral to, the aims and objectives of the organisation.

2. The claim failed the "close connection" test

Explaining the Court's reasoning for why the case failed the second test, Lord Burrows noted that:

Mark Sewell was at his own home and not the organisation's premises

- he was not carrying out any activity that was part of the organisation's business
- he was not exercising control over Mrs B, or abusing his position as an elder, when he raped her
- Sewell was not wearing his "metaphorical uniform" as an elder at the time
- although their continuing friendship gave rise to a "but for" causation test, it was not enough to satisfy the close connection test
- the rape was "a shocking, one-off attack" and not part of a progression from previous inappropriate conduct, which the court considered background information.

What does this judgment mean for vicarious liability cases involving children and other protected parties?

The Supreme Court holds an important role in our legal system. Its decisions are binding on all lower Courts, Whenever the Court gives guidance on vicarious liability, it must be taken seriously, especially in cases involving children and those who lack the capacity to conduct proceedings (known as "protected parties").

The Court in Trustees of the Barry Congregation of Jehovah's Witnesses (Appellant) v BXB (Respondent) helpfully reviewed and considered "the modern law" of vicarious liability. As Lord Burrows noted, the law has been "on the move" with respect to vicarious liability for a while, and for good reason. He pointed out that it has evolved since 2001 to "primarily deal appropriately with the many claims for sexual abuse of children."

Importantly, in this judgment, the Court stressed that the two-stage test still applied, even in cases of child sexual abuse.

But following Supreme Court guidance does not necessarily result in similar outcomes. It is vital to remember that:

1. every case is decided on its own facts
2. the Court's position evolves over time, meaning that, sometimes, its decisions can appear to contradict each other.

In Trustees of the Barry Congregation of Jehovah's Witnesses (Appellant) v BXB (Respondent) the application of these tests resulted in a finding for the defendant. **But, and I cannot stress this enough, that finding was on particular, unique facts, many of which do not apply in cases involving children or protected parties.**

For instance, this claim involved two adults (Mark Sewell and Mrs B). As Lord Burrows noted when considering the "close connection" element, "The driving force behind their being together in the room at the time of the rape was their close personal friendship not Mark Sewell's role as an elder."

The relationship between them, and the power dynamic, was different to that involving say, a child victim of sexual abuse. For example, see another Jehovah's Witness case of A v Trustees of the Watchtower Bible and Tract Society [2015] EWHC 1722. In that case, a child was groomed and abused by a "ministerial servant" (a Jehovah's Witness with congregational responsibilities at a level below elder) while "ostensibly performing his duties", leading to a finding of vicarious liability against the organisation.

Has guidance on applying public policy changed?

The Court's duty to consider the unique facts of each case means that vicarious liability will remain an important part of child sexual abuse compensation claims. But there is one more issue at play: public policy and, in particular, enterprise liability.

Anthony Gray described enterprise liability in "Vicarious Liability: Critique and Reform" [1998] as:

"The most influential idea in modern times has been that it is just that an enterprise which takes the benefit of activities carried on by a person integrated into its organisation should also bear the cost of harm wrongfully caused by that person in the course of those activities."

This public policy principle, which focuses on responsibility for the risk created, allows courts to find that employers or quasi-employers with "deeper pockets" bear the costs associated with the wrongdoing of their employees (or quasi-employees).

But the Supreme Court reminded lower court judges of how they must discharge their responsibility to "stand back and consider the policy of enterprise liability or risk that may be said to underpin vicarious liability". The court said this should happen only:

1. after considering the two-stage test
2. where it is considered "fair, just and reasonable"
3. following previous judicial guidance on vicarious liability, and not a "personal sense of justice".

Final Thoughts

Judges are required to interpret the will of Parliament and guidance in previously decided case law when considering the facts before them. How much weight the judiciary give to:

- Government policies, including a slew of recent pro-business legislation which, in my view, limits access to justice and the rights of innocent victims, and
- unfavourable judgments for claimants (as in this latest case)

will be important factors in deciding the outcome of future vicarious liability claims.

Kevin Donoghue is a solicitor and the director of Donoghue Solicitors. He specialises in child sexual abuse compensation claims.

Landmark damages award in image based abuse case (FGX v Gaunt)

By Jonathan Bridge, Partner, Farleys Solicitors

On 17 January 2023 the case of FGX v Stuart Gaunt came before the Honourable Mrs Justice Thornton DBE sitting in the High Court of Justice Kings Bench Division.

The Claimant was represented by Justin Levinson of Counsel instructed by Jonathan Bridge of Farleys Solicitors.

The case is understood to be the first claim for damages for image based abuse (commonly referred to as “revenge porn”) to come before the Courts.

FGX v Gaunt [2023] EWHC 419 (KB) (27 February 2023) (bailii.org)

Background

The Claimant was in a relationship with the Defendant and living in his home. She discovered a camera concealed in the bathroom of his house and following further investigation realised that he had filmed her whilst naked in the bathroom, showering and whilst sleeping topless. She further discovered that he had shared these images on a pornographic website alongside a photograph of her face without her knowledge or consent.

The Claimant fled their shared home and reported the matter to the Police. The Defendant was convicted in the criminal courts of voyeurism and related sexual offences, receiving a 2 year suspended sentence.

The Claimant instructed Farleys Solicitors to explore a civil claim against the Defendant.

Details of Claim

This was an interesting claim in which various aspects of the law were considered. The Court was asked to assess quantum on the basis of separate and distinct torts – the intentional infliction of injury and the misuse of private information.

The Court considered a range of very different cases. Reference was made to the ABC and WH v Willock case [2015] EWHC 2687 which involved an infant Claimant being encouraged to send texts of a sexual content and indecent images of herself to her abuser. The Court also considered the case of Reid v Price [2020] EWHC 594 (QB) which involved celebrities Alex Reid and Katie Price. This case also reached trial but differed from the FGX case in that the images had not been shared widely on the internet and assessment of damages was a theoretical exercise in the absence of any medical evidence and on the basis that the Defendant was bankrupt and that recovery of damages was unlikely.

The Court considered the “phone hacking” cases particularly MGN Limited v Representative Claimants [2015] EWCA Civ 1291 and its impact on the ‘misuse of private information’ tort.

Damages in FGX

The Claimant had understandably suffered psychiatric injury as a result of naked images being posted on the internet without her consent. Medical evidence was obtained which confirmed a permanent psychiatric injury. Dr Chahl (consultant psychiatrist) was instructed and suggested the existence of a Mixed Anxiety and Depressive Disorder together with Chronic Post Traumatic Stress Disorder. Treatment was recommended but the Claimant's position was likely to be permanent with future relapses predicted.

There were other important aspects to the claim in addition to the General Damages award. The Claimant's reaction to finding out about her partner's actions had been to flee the shared home immediately. As a result she left valuable items of furniture that were not returned. Holidays that had been booked for the couple to share together could not be kept. Evidence was obtained from an expert as to the cost of attempting to remove images from the internet.

The Court considered the various heads of claim and made an overall award of £97,041.61. This included £60,000 for Pain, Suffering and Loss of Amenity alongside the cost of hotel accommodation whilst the Claimant found somewhere else to live, the left behind items of furniture and the aborted holiday. In particular the Court awarded £21,600 as the estimated costs of removing a significant amount of content from the internet.

Significance of Case

The significance of the case is that it is the first time a claim for damages following imaged based abuse on the internet has appeared before the Courts. The award reflects the seriousness the Courts will attach to these cases. The General Damages award was not dissimilar to the types of award we would expect to achieve for a rape victim. The impact on GFX has been similar. She has a lifelong psychiatric injury that will impact on her relationships and will need ongoing treatment.

Case details

- Court - England and Wales Kings Bench Division
- Judge – Mrs Justice Thornton DBE
- Date of Judgment – 27 February 2023
- Solicitor to Claimant – Jonathan Bridge of Farleys LLP
- Counsel to Claimant – Justin Levinson of One Crown Office Row

By Jonathan Bridge, Partner, Farleys Solicitors

THE ASSOCIATION OF CHILD ABUSE LAWYERS

The Association of Child Abuse Lawyers (ACAL) provides practical support for survivors and professionals working in the field of abuse. Formed 14 years ago, ACAL maintains a telephone help line and web site presence to sign-post survivors of abuse to lawyers who have the expertise and experience to assist them in obtaining the redress to which they are entitled. ACAL also campaigns in this area, and provides training, a mentoring service for members, access to data bases and an information exchange to members to assist them in their work. ACAL's membership is made up of solicitors, barristers, psychiatrists and social work experts who are all specialists in this field.

St**udent Member**

- Cost: £40.00
- Benefits: Website, AGM, Workshop, Newsletter

Non-practicing member, e.g. Experts

- Cost: £85.00
- Benefits: Website, AGM, Workshop, Newsletter

Barrister Member

- Cost: £85.00
- Benefits: Website, AGM, Workshop, Newsletter, Database, Experts Register

Sole Practitioner Member

- Cost: £85.00
- Benefits: Website, AGM, Workshop (3 CPA Hours), Newsletter, Database, Experts Register

Small Firm (5 partners or under) Practitioner Member

- Cost: £100.00
- Benefits: Website, AGM, Workshop (3 CPA Hours), Newsletter, Database, Experts Register

Other Practitioner Members

- Cost: £150.00
- Benefits: Website, AGM, Workshop (3 CPA Hours), Newsletter, Database, Experts Register

Phone: 020 8390 4701

ACAL website: www.childabuselawyers.com

E-mail: info@childabuselawyers.com

Disclaimer

This material may not be reproduced in any form without the prior permission of ACAL. The material cannot stand on its own and is not intended to be relied upon for giving advice in specific cases.

ACAL cannot give advice on the law in relation to particular cases.

To the extent permitted by law, ACAL will not be liable by reason of breach of contract, negligence, or otherwise for any loss of consequential loss occasioned to any person acting omitting to act or refraining from acting in reliance upon the material arising from or connected with any error or omission in the material.

Consequential loss shall be deemed to include, but is not limited to, any loss of profits or anticipated profits, damage to reputation, or goodwill, loss of business or anticipated business, damages, costs, expenses incurred or payable to any third party or any other indirect or consequential losses.