

Historical child abuse and limitation – check your public liability policies

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Background

Last week the Court of Appeal handed down a decision that has significant implications for all those organisations that may face historical abuse claims. The decision was relatively unusual because of the issues of perception, consent and damages.

The Claimant, who was 53 at the time of the trial, was seriously sexually abused by his teacher between 1980 and 1982, and then for a short time again in 1983. The PE teacher was convicted of the assaults in question. It was found at trial that he had manipulated and groomed the child into sexual activities.

Unusually, however, the Claimant kept in contact with his former teacher after he left the school, engaging again in a sexual relationship in 1988; when he was in his early 20s.

After a reasonably successful career in computing, which took the Claimant all over the world, he had a major mental breakdown in 2011. He reported his experiences to the police in 2012, and in 2014 his abuser pleaded guilty to most of the sexual abuse allegations against him. The Claimant instructed solicitors and pursued a damages claim against both his abuser and the abuser's employer.

Limitation

The case was statute barred. The Judge heard the evidence of both the victim and the perpetrator at the civil trial. She also heard extensive evidence from two consultant psychiatrists on the question of causation. The employer argued, in the teeth of a very significant loss of earnings claim, that the Claimant had such a complex medical history that it was not possible for there to be a fair trial of the question of what psychiatric effect the abuse in childhood had had upon him. He did not perceive the sexual activity to be abusive for a long time. However, the trial judge found that since she had been able to hear both the evidence of the Claimant and his perpetrator, and since the medical experts had been able to come to reasonably firm views about their respective positions, it was in her judgment possible to have a fair trial of the issues. The Court of Appeal concluded she was entitled to reach this view. She allowed this case to proceed, even having accepted it was 25-30 years after the primary limitation period had expired.

Consent

The facts were unusual. There was an argument on behalf of the employer that the Claimant had consented to the sexual activity that took place after his 18th birthday. The trial judge concluded that the later assaults were simply a continuation of the behaviour that commenced while the assailant was his teacher and before the claimant perceived their abusive nature. In all the circumstances of the case, she concluded that the consent in adulthood was not genuine; it was overridden by psychological coercion, derived from grooming and abuse during the child's time at the school. The Court of Appeal accepted her conclusions and so both Defendants were liable; not only for the damage caused by the sexual activity during childhood, but for all sexual activity between the Claimant and his teacher.

Vicarious Liability

The Judge found that even though the abuse in 1988 took place after the child had stopped attending the school and when there was no connection between the abuse and the employment of the teacher the employer was vicariously liable. She found the abuse in 1988 was indivisible from that which occurred whilst the Claimant was a pupil at the school. In all the circumstances it was just for his employer to be liable for both the abuse during the Claimant's childhood and thereafter. Given her findings on consent, the Court of Appeal accepted that her conclusions of vicarious liability must also be upheld.

Causation

There was a very significant difference between the experts' views on causation of the Claimant's psychiatric problems and the Court of Appeal expressed disquiet about the trial judge's findings in relation to these. The Claimant's own expert concluded that he had complex PTSD caused by the abusive activity from his teacher, and an expert instructed by the Defendant concluded that the Claimant had a personality disorder which was exacerbated by the abuse.

The original trial judge very much preferred the Claimant's evidence, and although the Court of Appeal expressed concerns about some of her findings, since they did not hear the evidence of either of the experts, the Claimant, or the perpetrator, the Judges concluded it was not for the Appeal Court to substitute its own evaluation of evidence. In the circumstances, the trial judge's conclusions on causation stood, and the Claimant was awarded damages of over £1.1 million.

Breakdown of Damages

The award:-

- included Generals of £85,000 including aggravated damages,
- Loss of Earnings over £535,000,
- BUPA and employer KPMG's subrogated claims of nearly £227,000
- Unusually high £229,000 for future medical costs.

What lessons can be learned from this for Defendants?

1. Check your insurance history

We recommend that all organisations that have for a significant period of time been offering services to vulnerable adults, children and young people ensure they have a full picture of their public liability insurance history. In this case the events in question started 40 years ago. Local Authorities usually have the benefit of a reasonably full picture of their insurance histories, but independent schools, health organisations, private providers and charities may not. Now is the time to look to your insurance history; trying to establish not only whether there was public liability insurance in place throughout the relevant time, but at whether the wording of any policy will respond to historical abuse claims.

2. Be prepared to put the time in to get the right witness evidence – its relevant for both limitation and causation

In this case experts disagreed as to the reasons for the Claimant's many changes of post in his IT career. The absence of evidence about standard working patterns from colleagues of the Claimant, or other individuals working in the same sector, meant that the judge only had the evidence of the Claimant himself and his expert on which to base her findings about the impact of his mental state on his everyday life. Where significant loss of earnings claims are to be tried, it will be important to collect relevant evidence, either from colleagues or people working in the same sector to causation arguments. The court can only use the evidence that is put to it.

The Court only really had the Claimant's account to go on in terms of what he was like at school. No documents survived. It observed that former pupils who were educated at the same time as the Claimant were not called. If a Defendant is to complain about evidential difficulties to uphold a limitation defence then it is important to be able to demonstrate to the Court that vigorous attempts have been made to try and locate relevant evidence.

The Court of Appeal concluded that the trial judge was right to acknowledge the employer had done "little or nothing to make up the evidential deficiencies about which they then vigorously complained."

3. Don't forget recoveries

Finally, this was a case in which the perpetrator was still alive, had pleaded guilty to the offences, and was liable to indemnify his former employer.

Whether he has the resources to pay the damages, let alone the costs remains to be seen (and may never be public), but as a retired teacher he may well have owned property or shares and be in receipt of a generous pension. If your organisation finds itself in the same position as this employer you too may be able to recover. A conviction is not always necessary. Contact us for more information about this.

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