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Abuse Litigation: Recent cases

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Limitation

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FXF v Ampleforth Abbey Trustees



KEY DATES – RE: LIMITATION

DATE OF ALLEGED ABUSE: 1968-1969

DATE OF EXPIRY OF THE LIMITATION PERIOD: 1985

DATE SOLICITORS FIRST CONSUTED: MARCH 2013

DATE DEFENDANT WAS FIRST NOTIFIED: JULY 2014

LETTER OF CLAIM: 1 JULY 2016

PROCEEDINGS ISSUED: SEPTEMER 2017



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Section 33 Limitation Act 1980

Discretionary exclusion of time limit for actions in respect of personal injuries or death.(1)If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—

- (a)the provisions of section 11 [F1or 11A] or 12 of this Act prejudice the plaintiff or any person whom he represents; and
- (b)any decision of the court under this subsection would prejudice the defendant or any person whom he represents;

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which action relates



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Section 33(3) Limitation Act 1980

In acting under this section the court shall have regard to all the circumstances of the case and in particular to—

- (a) the length of, and the reasons for, the delay on the part of the plaintiff;
- (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 [F4, by section 11A] or (as the case may be) by section 12;
- (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;



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Section 33(3) Limitation Act 1980 continued...

(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.



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Application of Section 33

Headlines:

No one factor or circumstance will predominate

Balancing exercise



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PREJUDICE: THE LEGAL AND EVIDENTIAL BURDEN

CLAIMANT

Burden of establishing that the balance tips in his favour

DEFENDANT

Evidential burden of showing that the evidence adduced or likely to be adduced by the Defendant is less cogent



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Refining the test - questions and answers:

a. Length of delay

[from accrual of the action or from the limitation expiry?]

a. Reason for the delay

[subjective or objective?]



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THE EVIDENCE

CLAIMANT'S EVIDENCE:

WITNESS EVIDENCE FROM THE CLAIMANT, HER SISTER, HER FATHER AND OTHER ALLEGED VICTIMS .

INCLUSION OF COUNSELLING NOTES

REASONS FOR DELAY:

MOTHER / FAMILY POSITION

PERPETRATORS SURNAME WAS NOT KNOWN UNTIL 2012

TRIGGERING EVENT IN 2013 - RESULTED IN C SEEKING ADVICE

DELAY DUE TO THE CONCERN RE: FINANCIAL CONSEQUENCES OF BRINGING A CLAIM

TRIGGERING EVENT IN 2016

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The evidence

Defendant's evidence:

Limited – focussed on the investigation report

Both parties relied on expert evidence from forensic psychiatrists.

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THE QUESTION ON LIMITATION

‘THE QUESTION ULTIMATELY FOR ME IS WHETHER THE REASONS WHICH I HAVE FOUND FOR THE DELAY, AS A WHOLE, QUALIFY OR TEMPER THE PREJUDICIAL EFFECT OF THE DELAY ON THE DEFENDANTS’ ABILITY TO DEFEND THE CLAIM. ‘

PARA 100.

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FINDING
CLAIM DISMISSED

VARIOUS PERIPHERAL POINTS.

THE CASE TURNED ON THE EVIDENTIAL BURDEN –

‘THE DEFENDANTS HAVE UNDOUBTEDLY DISCHARGED THE EVIDENTIAL BURDEN BY REASON OF THE DEATH OF FATHER WEBB... I HAVE FOUND THAT AS A RESULT OF FATHER WEBB’S DEATH IN 1990 THE DEFENDANT HAS SUFFERED A VERY SUBSTANTIAL PREJUDICE... THEY CAN ADVANCE NO POSITIVE CASE IN RESPECT OF THE CLAIMANT’S ALLEGATIONS’



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Employer/Employee?

- The classic example ... is that between employer and employee... however, the doctrine can also apply where the relationship has certain characteristics similar to those found in employment, subject to there being a sufficient connection between that relationship and the commission of the tort in question. (Armes (54))

Two Questions (Cox)

- What sort of relationship has to exist **between an individual and a defendant** before the defendant can be made vicariously liable in tort for the conduct of that individual?
- In what manner does the **conduct** of that individual have to be **related to that relationship**, in order for vicarious liability to be imposed on the defendant?

Relationship – Test

- (i) the employer is more likely to have the means to compensate the victim / insurance;
- (ii) tort committed as the result of activity being taken by employee on behalf of employer;
- (iii) the employee's activity [*not the tort*] is likely to be part of the **business activity** of the employer;
- (iv) the employer, by engaging employee to do that activity, will have created the risk of the tort being committed;
- (v) the employee will, to a greater or lesser degree, have been under the control of the employer.”
- *Christian brothers @ [35]*

Relationship (2)

- Means to compensate
 - *“unlikely to be of independent significance in most cases”* (Cox, [20])
- Control
 - Less significant than it was (Cox [20])
 - *“the significance of control today is that the employer can direct what the employee does, not how he does it”*; (Christian Brothers, [36]).

Relationship (3)

a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question.

Cox [24]

Armes

- “the doctrine can also apply where the relationship has certain characteristics similar to those found in employment” (54).
- emphasis on lack of other source of compensation and extent of the control (para 62).
- relevant activity was the care of children committed to the local authority’s care (59).
- Foster parents were an integral part of the local authority’s organisation of its childcare services, carried on for the benefit of the LA (para 60).
- By placing the children in foster care, the local authority had created the risk of the harm being done (61).
- *“the foster parents ... cannot be regarded as carrying on an independent business of their own”* (59).

Barclays



- Dr Bates – GP
- Portfolio Practice
- Medical assessments and examinations
- Including for Barclays Bank
 - Employees sent to Dr Bates
 - Barclays provided pro forma
 - Dr Bates paid a fee for each report
- Dr B Sexually assaulted them



Barclays (2)

- Para 24
- Affirms CB, Cox and Armes
- Continued distinction between
 - employment / relationships akin or analogous to employment;
 - Relationship with an independent contractor

Barclays (3)

- Para 28
- Dr Bates was not at any time an employee of the Bank. Nor... was he anything close to an employee
- He was free to refuse an offered examination ... carried his own medical liability insurance...
- **He was in business on his own account as a medical practitioner with a portfolio of patients and clients. One of those clients was the Bank.**

Analysis

- A clear line in the sand
- Employees – Yes
- Contractors – NO
- Most ‘self employed contractors’ are easy to identify
- Still cases that fall in the middle (i.e. clergy).
- **Then** apply the test in *Christian Brothers*

Conduct

- Dubai Aluminium:
 - *the wrongful conduct must be so closely connected with acts the employee was authorised to do that, for the purposes of the liability of the employer to third parties, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment.*

Conduct (2)

- Christian Brothers:
- *“Where the tortfeasor does something that he is required or requested to do pursuant to his relationship with the Defendant in a manner that is negligent, stage 2 of the test is likely to be satisfied”*
- But [e.g.] *“sexual abuse can never be a negligent way of performing such a requirement...”* (CB, [62])

Conduct (3)

- Liability imposed where ... *“a Defendant, has [by engaging abuser] created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse.”*
- *The essential **closeness of connection** between the relationship between the Defendant and the tortfeasor and the acts of abuse thus involves a strong causative link*

Christian Brothers [86]-[87]

Conduct (4)

- In Christian Brothers [91]-[94]
 - *The relationship between the Institute and the brothers enabled the Institute to place the brothers in teaching positions*
 - *Living cloistered on the school premises were vulnerable boys*
 - *There was a very close connection between the brother teachers' employment in the school and the sexual abuse that they committed*

Conduct (5)

- *Mohamud* [2016]
- Argued that the test should be broadened to: *whether a reasonable observer would have considered the employee to be acting in the capacity of a representative of the employer.*
- UKSC court rejected that argument.
- Applying the established test (*Lister / Dubai*), found VL on the facts of the case.

VC v WM Morrison

- Skelton - access to the payroll data relating to the whole of Morrisons' workforce: around 126,000 employees
- surreptitiously copied the data from his work laptop on to a personal USB stick.
- Created a false email account, in a deliberate attempt to frame another employee
- sent CDs containing the data anonymously to three UK newspapers.

VC v Wm Morrison

- Correct test is in Dubai Aluminium (close connection) [23-25]
- abuse of children is not ‘in course of’:
 - *“courts have emphasised the importance of criteria that are particularly relevant to that form of wrongdoing, such as the employer’s conferral of authority on the employee over the victims, which he has abused [23]”*

VC v Morrisons – The test

- Authorised - collating payroll data (33)
- Could not have made the disclosure if he had not been given the task (34)
- **Mere opportunity is not sufficient (35)**
- **acts of the same kind not sufficient (35)**
- **No case where VL found “for wrongdoing which was designed specifically to harm the employer.”**
- ‘Frolic of his own’ test resurfaces

VC v Morrisons - Result

- **Hartwell:** officer abandoned his post and embarked on a vendetta of his own...
- **Warren v Henleys** – Personal Vendetta
- **Bellman:**
 - very close connection between ... authorised activities as an employee and his commission of the assault
 - it was committed while he was purporting to act in the course of his employment as the managing director by asserting his authority over his subordinates in relation to a management decision which he had taken.

VC v Morrisons – Ratio

- Key distinction is between (*Dubai*):
 - cases ... where the employee was engaged, however misguided, in furthering his employer's business, and
 - cases where the employee is engaged solely in pursuing his own interests: on a 'frolic of his own'.
- Skelton's acts fall into the latter.

Analysis

- The ‘close connection’ test is now settled.
- Clearly fact dependent
- Bookends
 - Unauthorised means of doing role vs
 - Frolic of his own
- Opportunity is not enough
- Cases in the middle (nebulous?)
 - Sufficiently close connection
 - Causative link
 - Abuses cases – conferral of authority?

BXB v Watchtower

- Stage 1 (157-164)– Yes. *Elders are the spiritual leaders of the congregation. Risk was created by assigning those tasks*
- Stage 2 (connection) – Yes
 - Met in context of the church
 - Status a factor in the relationship
 - behaviour tolerated because of his role
 - Instruction from senior elder to act as confidants
 - Rape after being out ‘pioneering’ (central duty)
 - Adultery (via rape) a means to divorce

DSN v Blackpool Football Club – Stage 1

- Abuse by Roper (a scout)
- volunteer but ...almost all the non-playing staff were in the same position...;
- [club] depended on people like Roper and ... Roper was very much doing the work of the Club.
- There was no more important task for the Club than spotting and capturing young players ...
- Was part of D's business activity

DSN – Stage 2

- Abuse on New Zealand trip
- “...it was as close to an official trip as made no difference.
- *It was a football tour that was part of Roper’s operation in building the allegiance of promising young footballers to Blackpool FC”*
- involvement with the boys on the tour, and the opportunity he took to abuse DSN in the course of it, may fairly and properly be regarded as taking place in the ordinary course of Roper’s work
- Why not a ‘frolic’?



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Consent

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Consent - Background

- Consent is a defence(?) (Clerk & Lindsell 15-93)
- *What must be established is that it was a consent freely given and applied to the conduct of which the claimant now complains”* (Clerk & Lindsell 3-104)
- Duress vitiates consent. *“an abuse of authority by the defendants could vitiate an apparent consent even without evidence of the use or threat of physical force* (Freeman).
- Mere submission is insufficient – consider whether there was ‘true’ consent.
- *“A mistaken belief as to the authority of the defendant may destroy in substance the claimant’s freedom to choose.”* (T v T 1964)

JL (2015)

- Groomed from age of 8.
- Sexual acts from 16-31. Claim in battery
- Defence - Consensual
- No authority considering “*test for consent ... in the context of sexual assault having occurred after a period of grooming or emotional manipulation.*”

JL (Manchester CC)

- Fraud / Duress invalidates consent
- C had capacity at the relevant time
- Issue - *whether the claimant in fact freely consented to the assaults... or whether any apparent consent is vitiated by... emotional manipulation.*
- ultimately that is an issue of fact... taking into account all the circumstances of the case.

JL – at age 31

- *At 31: He was intelligent, articulate and rational. He was degree educated, had qualified and worked as a solicitor, and was running his own business. He was married and had one child. He was a fully mature and fully capable able of making his own decisions and choices in life. He made the conscious decision to continue to visit Father Laundry knowing that the sexual activity would or was likely to take place. He agreed to being photographed naked on a couch.*

JL – At age 16

- *a high degree of emotional dependency had been fostered" by the actions of Father Laundry during the 8 previous years*
- remained passive ... and found certain actions painful.
- because of the [grooming] by Father Laundry he felt that he had to go along with what Father Laundry was doing...
- **I am not persuaded that the claimant can truly be said to have been consenting freely at that point**

JL - the line?

- the emotional tie and dependency cannot easily be divorced from the issue of consent.
- change in the dynamics when C went to university. Contact was infrequent and instigated by the claimant.
- Emotional Tie significantly loosened.
- *To say he had lost his ability to make a free choice at that stage of his life is unrealistic.*

JL - Appealed

- Defendant: Court applied the **wrong test** on consent (?)
- CoA – Upheld D’s appeal on limitation - didn’t consider consent.



FZO (2020)

- PE Teacher. In and out of school 1980-1984
- Sexual activity from 1980 (13) -1988 (21).
- Convicted re 1980-1982
- C – All non-consensual – *“as a result of the grooming of him at school, such grooming continuing to operate upon him when he left school in 1983/4 until 1988.”*
- D(2) – After school all consensual.

FZO (2) – Court of Appeal

- ‘Definitive review’ (EXE) at [124-128]
- Is an issue of ‘primary fact’ [124]
- ***“A person consents to sexual activity with another if they have the freedom and capacity to consent. Submission is not the same as consent.”***

FZO (3) – Criminal Cases

- C v R (2012)
 - *Once the jury were satisfied that the sexual activity ...had occurred when the complainant was a child, and that it impacted on and reflected the appellant's dominance and control over the complainant, it was open to them to conclude that the evidence of apparent consent when the complainant was no longer a child was indeed apparent, not real...*
- Olugboja (1982)
 - *every consent involves a submission, but it by no means follows that a mere submission involves consent*

FZO (4)

- “conditioned consent”, resulting from a grooming process, is not true consent [129]
- “Submission is not the same as consent”, in the criminal or civil law. [130]
- *Judge found ... the Respondent’s consent was not genuine in that it had been overridden by psychological coercion, derived from the grooming and abuse... at the School.*
- Appeal rejected

EXE (2020), QBD

- Schoolgirl - abuse by teacher
- Major factual dispute about ‘forcible rape’
- It might be argued that no child under 16 can consent, **but that is not the law. [77]**
- Followed ‘Definitive guidance’ in FZO [124-128]

EXE

- C: "passive coercion" and says "with hindsight and being older now, I can now see that he used love to manipulate me" ...
- I now realise that I was only doing what he told me to do, namely, to tell the police that it was all of my own free will
- Rejected: she knew what she was doing and genuinely wanted to do it at the time, without being groomed ... and without her free will being undermined... she took the initiative, and was if anything making the suggestions...



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Judgments Covered

- JL (unrep, 2015 Manchester CC – HHJ Platts)
- FZO [2018] EWHC 3584 (QB) / [2020] EWCA Civ 10
- BXB [2020] EWHC 156 (QB)
- Various v Morrisons [2020] UKSC 12
- Various v Barclays [2020] UKSC 13
- DSN [2020] EWHC 595 (QB)
- EXE [2020] EWHC 596 (QB)
- FXF [2020] EWHC 791 (QBD)