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ACAL

Key Articles:

Co-ordinator's Report

By Malcolm Johnson, ACAL Co-ordinator

I'm pleased to report that our new website is now up and running and despite a few initial problems with access to databases, it promises to provide our ACAL membership with an improved service. I hope that by now all members have managed to register their details successfully and have full access to the Members area.

If you are still having difficulties, email us at the office and we will get James Finlayson, our website host to sort out the problem.

The annual ACAL/APIL Child Abuse Claims Conference held earlier this year was a great success. The event was well attended with an audience of over 50 delegates.

We continue to publish the ACAL quarterly newsletter first introduced in 2010. It is widely circulated outside of ACAL membership and helps raise the ACAL profile amongst survivor groups and other organisations related to Child Abuse.

We hope to see members at the **ACAL AGM to be held this year on Friday 28th October 2011** at 2 p.m. in Manchester at the offices of Pannone solicitors. Formal notices of the AGM will be sent out shortly.

Jim Goddard of the Care Leavers Association and Duncan Craig of Survivors Manchester will be our guest speakers at what promises to be an interesting event. Please make every effort to support ACAL by attending this event and participating in discussion on our future direction.

Finally, I have now handed over as ACAL Co-ordinator to Sue Monteath who took up the role on 1st September 2011. Thank you for all your support over the years and I look forward to continuing my association with ACAL in the future as a member.

Vicarious Liability – The Future

By David Greenwood

In my student days I found the area of vicarious liability truly fascinating. Theories about an all encompassing rationale based on control or employment never quite captured the principle. It was an area of the law which was not governed by certainties of contract and drew on Denning like solutions.

That was the 1980's and to me the exciting times of change in vicarious liability are back with the as yet undecided Court of Appeal case of JGE v Diocese of Portsmouth and the case that I have been working on, Various Claimants v Catholic Child Welfare Society and The Institution of the Brothers of the Christian Schools [2010] EWCA CIV 1106 ('the St Williams litigation').

The area of historic sexual abuse has become a fertile area for the evolution of vicarious liability as operators of childrens homes, local authorities and religious institutions attempt to limit their responsibility for abusers within their organizations.

The case of Maga v Trustees of The Birmingham Arch Diocese of Roman Catholic Church [2010] EWCA CIV 256 imposed vicarious liability for acts of child abuse committed by a Roman Catholic Priest even though the abused boy was not involved with the Roman Catholic Church in any way. The Priest had 'picked the boy up' out on the street. The boy had been captivated by the Priest's clerical garb and his position. The Court was influenced by this and the high degree of moral authority used to evangelise and the Priest's responsibility for youth work and concluded that it was fair and just to impose vicarious liability of the Arch Diocese.

I believe that this is an interesting fore-taste of what is to come from the Court of Appeal and Supreme Court over the next few months. The Supreme Court is due to decide the principles involved in vicarious liability in child abuse and the Court of Appeal is currently considering the more focused issue of the relationship between the religious diocese and priest in its application to vicarious liability (the JGE case).

The JGE Case

In this case, a woman known as JGE alleges that she was abused by a Priest from the Roman Catholic Diocese of Portsmouth at the Thirsk Childrens Home. The Claimant asserts that the relationship between the Diocese and the Priest is even closer than that of employer/employee in that the Bishop was able to tell the Priest not only where and when to work but when he could retire. The Diocese argues that the relationship between the Diocese/Bishop and its Priest is entirely different to anything which we recognise in our secular laws. It will be interesting to see how the Court of Appeal approach the various principles which have emerged to date in the context of this narrow argument and how the concept of fairness fits into the equation.

The St Williams case

The St Williams case in the Supreme Court is likely to take into account much wider principles and in my view is likely to bring all the various tests which we have to date in one all-encompassing test

The St Williams Childrens Home was operated by statutory managers of the school (the Middlesbrough Defendants) and a catholic lay order (The De La Salle Brotherhood) who provided the school with teachers and headmasters. The De La Salle Brothers took vows of obedience, chastity and poverty. They lived their lives according to the Brotherhoods 'Rule' which governed all aspects of their personal lives and teaching duties. They lived on site and covenanted their salaries entirely to

the Brotherhood. The Brothers were ordered as to where they could work and were inspected by their Superiors. One Brother accused of indecent assault was removed from the School by his Superior.

The Brothers were employed by the Managers 'the Middlesbrough Defendants' and certainly appear to have had two masters.
The Court of Appeal decided on the facts of the case that although there was a high degree of control exerted on the Brothers by their Order the Brotherhood had not undertaken a duty to care for pupils and it would be unfair to impose vicarious liability on the whole Brotherhood which is scattered all over the world.

Where do we go from here ?

The Court of Appeal in the St Williams case recognised along the way that there were to date various tests for vicarious liability:

1. The Employment Test (Its absence is not conclusive) - Viasystems v Thermal Transfer [2006] QB510, Hawley v Luminar Leisure Limited [2006] Lloyds Rep

2. The Control Test - Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool Ltd) [1947] AC

3. Whether a tortfeasor is so much part of the organisation as to justify vicarious liability Denham v Midland Employers Mutual Assurance [1955] 2QB

4. There can be vicarious liability between partners - Dubai Aluminium Co Ltd v Salaam [2003] 2AC.

5. There can be vicarious liability as between members of an unincorporated trade union - Easton Transport v TGWU [1973] AC.

The Court of Appeal recognised that these situations exist but that vicarious liability is not limited to them. Pill LJ viewed vicarious liability as a mechanism to achieve 'social convenience' or 'rough justice'.

A New Test

One submission made in the Court of Appeal and to be advanced in the Supreme Court may alter our understanding of the basic principles. A new test has been suggested. I describe it as the 'inherent risk test'. The test would be encapsulated by the following paragraph:

> *Vicarious liability should apply where D2 puts D1 in a position in which the risk of a tort of the kind committed by D1 is inherent and it is fair to impose liability.*

The unwillingness of the Court of Appeal so far to define the boundaries of vicarious liability suggests to me that the Supreme Court is likely to take a lead. This new test would incorporate the objectives of social convenience, rough justice and the responsibilities of D2.

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Legal Challenges to Catholic Church Child Abuse

By David Greenwood

We are familiar with the disgraceful abuse of children by Priests. This article concerns Roman Catholic Church abuse although it has to be recognised that abuse happens in many varied organisations.

Breach of Trust

The Roman Catholic Church starts to build our trust the day that we are born. Babies are baptised and forced to attend church as children. Priests infiltrate communities. They befriend families and take children on days out. Priests tell us that you will suffer eternal damnation for disobeying the Church. They promote the notion of sin and their power to absolve us. They wear black outfits. Set themselves up as 'to be trusted'. Their priestly garb reinforces their 'specialness'.

The Vatican's approach to child abuse by Priests

The 1962 the document 'Crimen Solicitationis' was a papal dictat issued to deal with the way in which bishops and priests around the world to deal with allegations of abuse by Priests. The victim, perpetrator and anyone connected with the case must be dealt with internally (i.e. not involving the police or anyone outside the Church). Any report should be sent to Rome.

An arm of the Catholic Church called The Congregation of the Doctrine of the Faith ("CDF") takes charge of these reports. Dr Ratzinger was the head of the CDF between 1984 and 2005 Cardinals and Bishops make decisions on what action should be taken in the case of reports of abuse.

In 2001 Pope John Paul reinforced the cover up mentality with his new version of the Crimen document. In 2001 the present Pope Dr Ratzinger wrote a letter to Bishops urging them to keep reports of abuse away from the Police. In 2010 the Pope renewed his request that Bishops keep reports away from the Police.

How does this affect Justice?

Surely the Catholic Church is unable to investigate these cases and deal with them adequately without being conflicted . The evidence gathered to date is that a decision to keep allegations of abuse from the police means that abusers potentially face no penalty. The Roman Catholic Church has simply moved priests to 'naughty priests homes', moved parishes or diocese or moved priests to another country. Under the internalised regime of the Vatican abusers do not face the courts. They do not face justice and lengthy spells in prison.

Consequences for children globally

Priests essentially face no punishment for abuse. They are able to abuse in the knowledge that the worst consequence is being kicked out of the priesthood. This is a desperate situation for children in Africa and Indonesia where there is little access to civil law enforcement agencies like the Police.

How do we change the Vatican's approach?

Pressure through publicity and embarrassment generated by press reports and websites is certain to assist in getting the message across to the Vatican that their approach has to change for the good of future generations coming into contact with catholic priests. There is also potential for direct legal action against members of the Congregation of the Doctrine of the Faith (including the present Pope) arising from their decisions and

reluctance to report allegations of serious abuse by members of their organisation to the police.

Who will prosecute the cardinals and the Pope

A request to indict cardinals responsible and the Pope has been made to the International Criminal Court and to the Spanish National Court both of which have jurisdiction in this area. You are referred to the website www.popeaccountability.org for further information and details in the indictment.

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Case Reports

MS V LINCOLNSHIRE COUNTY COUNCIL [2011] EWHC 1032 (QB)

The Claimant's claim was for damages for breach of a duty of care owed to him whilst he was in the Council's care between 1985 and 1999, from when he was about 4½ to his 18th birthday in March 1999. The Claimant was serving a life sentence for murder, having been convicted in December 2000, but he maintained that he was innocent of that crime.

The Claimant obtained public funding for his claim and obtained expert reports from an expert in social work, Maria Ruegger and a psychiatrist, Dr Benions, The Council obtained reports from experts in the same disciplines. However, although reports, together with supplementary reports or letters, were prepared by the experts on both sides, no meetings of experts ever took place because the Claimant's public funding was withdrawn. Neither of his experts was prepared to continue to act as an expert unless instructed by a solicitor. The local authority had then made an application for summary judgment, which had been granted and against which the Claimant now appealed.

Mr Justice Edwards Stuart commented that the Claimant was an articulate and intelligent man. Despite his incarceration, he had taken and passed both GCSEs and A-levels, and was currently reading for a degree. Edwards Stuart J went over the state of the pleadings and the facts of the case. He summarised the main conclusions of the expert psychiatrists. The Claimant's expert, Dr Benians, said that the main cause of the Claimant's dissocial personality disorder lay in the multiple changes of his carers, the abusive carers, and other abusive individuals to whom he was exposed.

In contrast, the Council's expert, Prof Maden concluded that the Claimant had a severe degree of psychopathy and he did not believe that the Claimant's current state would be any different if the alleged failings had not happened.

Maria Ruegger, the social care expert felt that the care provided to the Claimant by the Defendant fell below the standard of care expected of competent social workers at the material time in some respects. In others the service provided, whilst not ideal, fell within the range of decisions that competent social workers may have taken at the time. The complexity of the claimant's presentation made it difficult to determine the extent to which the outcome would have significantly different had other arrangements being made for his care in the period after February 1995. In yet other aspects of the claim she had been unable to form any view on the

basis of the information currently available to her.

Edward Stuart J noted one particular example. It was accepted on all sides that when the Claimant appeared to be under threat from a known paedophile there should have been a formal Case Conference. There was no such conference but Ms Ruegger expressed the view that even if there had been one, there was very little that the Council could have done to prevent the Claimant from having his own way. He also noted that the Claimant was an exceptionally challenging, difficult, aggressive and manipulative child. It had been a feature of his life as a teenager that he was not prepared to take any responsibility for his own actions and was always looking to blame others for his problems. That theme still underpinned many of the allegations in his claim.

Edward Stuart J concluded that the judge was entitled to give summary judgment as he did save for two particular allegations, which was the failure to take up a placement, and a lack of education the placement at Beacon Lodge and the lack of education over a relatively short period of time to his 16th birthday. The allegations would be allowed to proceed together with an allegation of sexual abuse by care worker.

BIRMINGHAM CITY COUNCIL V AG, IA AND JA [2009] EWHC 3720 (Fam)

This was an application by Birmingham City Council for a care order under section 31 of the Children Act 1989 in relation to five children. The proceedings arose out of the death of a sixth child of the family shortly after her seventh birthday. This child had starved to death. Each of her siblings were malnourished and they had also been beaten.

AG was the mother of the children. IA was the father. By the time of the child's death, AG and IA had long since separated. JA was living in the former matrimonial home with AG.

Mrs Justice King considered the judgment in the case of **Re B (Children) [2008] UKHL 35** where the court said that the standard of proof in finding the facts necessary to establish the threshold under Section 31(2) or the welfare considerations in section 1 of the 1989 Act was the simple balance of probabilities. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts.

King J considered JA's history. He had been born in 1978, one of five children and had been raised in harsh and punitive circumstances. His father was convicted of the manslaughter of one of his siblings. He was suspected of stealing food at school and acquired a number of driving offences. In 1996 he converted to the Muslim faith. He had a strong belief in evil spirits.

JA met IA in the local mosque and they became friends before falling out over AG.

AG and IA had converted to the Muslim faith and they entered into an Islamic marriage in about 1995. In 2001, IA married a second wife and by 2004 his relationship with AG was over. In 2007, JA became involved with AG and moved into her house. At this point, he began to dominate her and her family.

AG had six children under ten years of age, and she was finding it increasingly difficult to control them. Her own weight had ballooned and she weighed 20 stone. She introduced a healthy eating diet which was designed to help her lose weight, and which she also imposed on her children. She also allowed them to live in squalid conditions as well as using physical chastisement and humiliating punishments against them. However

up until 2007, they had experienced good care and a contented home life. Everything changed after September 2007.

King J considered the events that occurred from January to December 2007. There were reports from the children's schools that AG's family had an unusual attitude to food and that the mother had instructed the school to cut down on the children's food. It appeared from the children's evidence given to the police that when JA moved in with their mother, he began physically abusing the children. AG began disengaging with the school, which was attended by three of her children. A meeting took place between the school and AG in December 2007, in which AG was extremely confrontational. The mother withdrew her three children from the school shortly thereafter and she withdrew another child from the school's nursery. She attempted to teach her children at home but by March 2008, these attempts had been abandoned.

From December to May 2008, AG's children continued to suffer the same harsh regime. Two of her children continued to attend school. Although AG and JA continued to eat perfectly normally, they locked the door to the kitchen and continued to starve and beat the children, as well as subjecting them to various cruel and humiliating punishments.

One of the children, K became very ill indeed but neither JA nor AG sought medical help. Eventually she contracted pneumonia as a result of malnutrition and died on the 17th May 2008.

On the 19th December 2007, the school from which the three children had been withdrawn made a referral to social services. The social worker dealing with the referral, Miss C said that it did not warrant a visit to the family and that any such visit would prejudice the good relationship between the school and the family. However the deputy head teacher of the school actually visited the family home herself and persuaded AG to come to the school for a meeting. Again social services was contacted but the social worker said that if there was a problem, the school should contact the police to do a "safe and well check".

On the 29th December 2007, the police attended the family home. The mother was angry about their presence, but called K (the child who died) to the door. She appeared well and the police did not ask to see any of the other children.

As a result of AG's announcement that she was removing her children from the school, a meeting was held on the 28th January 2008 at the school, where again the teachers expressed their concern. On that day, an educational social worker attended the family home but no-one answered the door. A telephone conversation took place on the 30th January 2008 took place between the educational social worker and the mother, as a result of which another referral was made to social services. The social worker handling the enquiry, Miss C recommended the carrying out of what is known as a Common Assessment Framework assessment. This is low scale intervention where local agencies work with families in order to resolve issues.

On the 8th February 2008, two professionals from the local education authority visited the home of AG. The children's education at home was discussed and during this meeting, it was agreed that AG would send teaching plans to the authority. They did not see the children.

No plans were forthcoming and on the 7th April 2008, the local education authority again wrote to AG. The education professionals attended the property on the 16th April 2008 but

there was no reply. This visit was not followed up.

Meanwhile on the 31st January Miss C and her manager reconsidered the referral that had been made to social services. They said that they would carry out an initial assessment on AG's family. This would involve a visit to the family.

The case was allocated to a social worker by the name of Miss G. She mistakenly thought that whilst an Initial Assessment did mark the acceptance of social services of a referral, it still required the consent of the parents before any enquiries could be made about the children from third party agencies such as the school and the health services. In fact no such consent was required although parents would be asked to cooperate with the assessment as a whole.

Miss G then went on annual leave and did not return until the 18th February 2008. On that day she then wrote to the mother, telling her that a referral had been received from educational welfare and saying that a visit would be made on the 21st February 2008 together with a new educational social worker. When they did visit, AG the mother would not allow them into the house. Crucially, Miss G the social worker thought that the reason for her visit was educational rather than related to child protection issues.

However AG did bring three of her children to the door although she refused them entry to the house. The social workers did not engage with the children. Miss G did ask the mother to sign a consent form allowing enquiries to be made of third parties, but she refused. A visit was agreed for the following day, but AG later cancelled this. Miss G discussed the matter with her manager, and they agreed not to visit again as in their view, the reason for the referral was educational rather than one of child protection.

King J said that this visit was insufficient for the purposes of even an initial assessment. She referred to The Department of Health's Framework for Assessment known as "The Lilac Book." The only mandatory enquiry was to see the children. As it was, the Initial Assessment was not completed but simply shelved without even speaking to the children's schools from where the anxieties had stemmed and the referral had been made. Instead the case was designated for closure.

King J said that the death of the child in question was preventable. Initial and core assessments should have been carried out according to the Lilac Book. Paragraph 1.23 of that guidance set out the principles which should guide inter-agency, inter disciplinary work with children in need. Further guidance at paragraph 1.51 talked about gathering information and making sense of it with other professionals.

King J said that it should have clear to social services as to what their role and that of the educational welfare services were when they received the initial referral. The appropriate course for the local authority should have been to consider a section 47 Children Act enquiry. As a result of each professional carrying out his or her own duties in isolation, information was not passed on and relevant connections were not made.

King J said that a Serious Case Review was being carried out and it was no part of the court's function to second guess what that Review might say.

K's death was caused by and was the responsibility of AG and JA.

The threshold criteria was satisfied in relation to each of the children.

ABC V CALF

Detailed assessment on the 1st December 2010 before Master Leonard in the Supre Court Costs Office

Case Report submitted by Malcolm Johnson of Malcolm Johnson & Co., Surbiton

Defendant represented by Crown Costs

The Claimant brought proceedings in October 2009 against the Defendant for sexual abuse following his conviction on four counts of indecent assault. The Defendant owned an unencumbered house in Hackney which is conservatively estimated as being worth £400,000. In order to secure this asset, the Claimant obtained a freezing order in November 2009. The matter then proceeded to trial and was listed for a two day trial commencing on the 14th April 2010.

The Defendant made no attempt to engage in the litigation until February 2010 when he instructed a firm of solicitors to represent him. He then instructed a second firm briefly and finally his present solicitors made an application to adjourn the trial. Those solicitors made it clear that they would be applying in due course to set aside the Claimant's default judgment.

On the day of the trial the Defendant was produced in person from prison and he was represented by Queen's Counsel. Negotiations took place and the Claimant accepted the sum of £117,705 for her damages with costs to be assessed. A global offer of £200,000 was made by the Defendant, but this was declined.

A bill of costs was served in May 2010 followed by Points of Dispute and Replies. The case was set down for detailed assessment on the 1st December 2010. Total costs on the bill were £206,149 including a 65% success fee for solicitors' costs and 100% success fee for counsel. Master Leonard dealt with the following points:-

Proportionality

The majority of the work on the bill had been undertaken by a Grade C fee earner. Total costs not including the success fee were around £123,000 for a case that had gone to trial, and where liability was still in dispute at the date of settlement. There had been an application for a freezing injunction (summarily assessed at £5,000), together with two further applications, one for an interim payment and the other for a non party disclosure application of the Claimant's employment records (both part of the detailed assessment). Reports had been obtained from a psychiatrist and gynaecologist and a detailed Schedule of Loss was served.

Master Leonard said that the costs were proportionate. One of the factors that he bore in mind was that the Defendant had been in contempt of the freezing order (by failing to disclose his assets) up until the time when he instructed his present solicitors.

Difference between the Claimant's costs estimate and actual costs

The Claimant had served a costs estimate in January and March 2010. In January 2010, the amended costs estimate up to and including trial was £92,862 all inclusive and in March 2010 it was £104,385 all inclusive. The Claimant had already provided in her bill a statement pursuant to PD Costs 6.5A(1). Total costs on the bill not including the costs of drawing up the bill were £123,990.

Master Leonard said that the purpose of a costs estimate was to show the Defendant his costs exposure. The actual difference was not so great. It was clear that because the Defendant

only engaged with the case relatively late in the day, he never relied on the first estimate.

Hourly rates

The Claimant's solicitors had claimed the following hourly rates.

Grade A - £275 per hour
Grade C - £195 per hour
Grade D - £150 per hour

Grade A was conceded by the Defendant (as very little time had been done by the Grade A fee earner). In relation to Grade C, Master Leonard allowed £185 per hour and in relation to Grade D, £135 per hour. He accepted that this was not a case for guideline rates. In relation to Grade D, the Master commented that he would not normally depart from the guideline rates but this was an exceptional case.

Success fee

The Claimant had signed a conditional fee agreement with a 65% success fee whilst counsel's success fee was 100%. The Claimant had not disclosed the agreements or risk assessment but had completed a PD Costs 32 Statement. At the outset of the matter the Claimant's risk assessment listed a number of matters. These included:-

- Prospects of case succeeding on limitation – 75%
- Prospects of Defendant being able to satisfy the judgment – 70% to 80%
- Prospects of being able to establish the assaults alleged – 80%
  (The Claimant alleged a series of rapes by the Defendant whereas his convictions were for indecent assaults).
- Prospects of being able to establish causation and damage – 70% to 80%

The Claimant's solicitors had set a success fee on the basis of what they thought was reasonable at the time given the above factors, and particularly given the potential difficulties in enforcement.

Master Leonard said that the correct starting point was the ready reckoner in "Cook on Costs" which comes from the Law Society's publication "Conditional Fees – A Survival Guide" (2nd edition 2001). The Claimant's solicitor tried to argue that some parts of the risk (such as limitation), represented a separate hurdle which in themselves could defeat the claim entirely. Consequently the risk in a child abuse claim (where limitation issues are frequent) would always be greater. Master Leonard rejected that argument. He said that on a 75% chance of success, the correct success fee would be 33% but he would add 10% in relation to the risks of enforcement to give a total success fee of 43%.

In relation to the costs of the assessment, the Defendant had made a formal offer shortly after the trial of £50,000 for the Claimant's costs together with VAT and the disbursements as shown on the Claimant's costs estimate, but excluding the success fee. That was followed by a second offer of £110,000 all inclusive. The Claimant offered £160,000 having served Points in Reply. On assessment, the Claimant actually recovered around £51,500 for her base profit costs, although that still left the assessment of the success fee. Total costs excluding the costs of assessment were assessed at £127,187.

In view of the closeness of the original profit costs figure to the offer made by the Defendant. Master Leonard deducted 50% from the Claimant's costs of assessment to give a figure of £7733.

One further point emerged from the detailed assessment. The Claimant claimed the cost of implementing the charge order on the Defendant's property as part of the agreed settlement order. Master Leonard allowed those costs, since they were properly part of the litigation. He referred to the case of **Bilkus v Stockler Trunton [2010] EWCA Civ 101.**

Malcolm Johnson of Malcolm Johnson & Co.

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St**udent Member**

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- Benefits: Website, AGM, Workshop, Newsletter

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- Cost: £85.00
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Full details are available on the ACAL website:
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