ISSUE
25
June
2021

MONTHLY
NEWSLETTER OF
INFORMATION
ACAL LAW REVIEW

ACAL
Association of Child Abuse Lawyers

The landscape since CN and GN v Poole Borough Council

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Articles

The UK Supreme Court decision **in Poole Borough Council v GN and Another, [2019] UKSC 25** sounded the death knell for "failure to take into care" claims, which had previously been a common feature of the child abuse compensation landscape. The UK Supreme Court decided that a local authority could not be liable to pay damages to a child whom they had failed to remove from harm, unless they had first voluntarily assumed responsibility for that child. In **GN** the Claimants were disabled children whose family was being harassed by local hooligans. There had been substantial involvement by local social services with the family, but that involvement was not sufficient to found a voluntary assumption of responsibility and so there was no common law duty of care.

Since **GN** there have been several cases that have sought to distinguish the UK Supreme Court's decision and in this article I examine four of these.

One of the first is a decision of the Supreme Court of Saint Helena – **A v Attorney General of St Helena [2019] SHSC 1**. The Claimant claimed that during the course of her childhood she was persistently subjected to serious sexual abuse by a family member, that the social services department of the St Helena Government were aware of the very real possibility that this was happening, but that they did not protect her from abuse. The Defendant applied to strike out the case on the grounds that there was no cause of action because they did not owe the Claimant a common law duty of care. Chief Justice Ekins said that the Defendant acknowledged that there were situations in which a justification commonly existed for holding that the common law imposed a duty of care, namely;

1) Where the Defendant was responsible for creating the source of danger
2) Where the Defendant had assumed a responsibility to protect the Claimant
3) Where the Defendant had done something which prevented another from protecting the Claimant
4) Where the Defendant had a special level of control over the source of the danger
5) Where the Defendant's status created an obligation to protect the Claimant from that danger.

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Ekins CJ then considered the **GN** decision. This was a case, which it seemed to him, fell squarely on all fours with **GN**. He did not consider the distinctions which the Claimant sought to draw to be persuasive. The true nature of the case advanced was that the Defendant had failed to provide a benefit to the Claimant, by failing to protect the Claimant. He could identify no area or circumstance in which it could conceivably be inferred that the Defendant had assumed a responsibility for the Claimant. Therefore, this was one of those cases, where it was appropriate to strike out the Claimant's claim.

In **HXA and SXA v Surrey County Council [2021] EWHC 250 (15th February 2021)**, the Defendant made an application to strike out the majority of the First Claimant's claim whilst the Second Claimant's claim was stayed pending the outcome of the First Claimant's claim. The Claimants were half siblings born in 1988 and 1993. Their childhoods were characterized by abuse and neglect perpetrated by their mother and one of their mother's partners. In 2009, that partner was convicted of raping the Claimant and the mother was convicted of indecently assaulting the First Claimant. The Claimant sought damages against the local authority in which they were brought up, which they alleged would have been avoided or lessened if the Defendant's social workers had exercised reasonable care.

In the High Court, Deputy Master Bagehot made reference to the caselaw, from which he drew a number of points:-

1) Public authorities are generally subject to the same principles as to tortious liability as private individuals.
2) As with private individuals, public bodies do not generally owe a duty of care to confer benefits on individuals, for example by protecting them from harm. The mere fact that they have statutory powers and duties to protect, did not mean that they owed a common law duty of care.
3) A duty of care might be owed in exceptional cases such as where the authority had created the source of the danger or had assumed a responsibility to protect the Claimant from harm.
4) In relation to an assumption of responsibility, it was usually necessary to show reliance by the Claimant on the undertaking, express or implied, that reasonable care would be taken. Two well established examples were of a hospital in relation to patients, and a local education authority towards pupils.
5) In GN there was no sufficient pleaded case which alleged an assumption of responsibility. The council did not by investigating and monitoring the Claimants' position assume a responsibility for them.
6) The existence of an assumption of responsibility was fact sensitive and a court should be cautious about striking out such a case.

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The First Claimant's counsel argued that the difference between **GN** and this case was that the local authority in **GN** could not apply for a care order, because the problem was not with the parents but rather with the hooligan neighbours who were harassing the family. Counsel had also pointed to a child protection conference and investigation in 1994 and another child protection conference in 2000, factual situations, which could give rise to an assumption of responsibility and a duty of care.

Deputy Master Bagehot decided that the inability to seek a care order was not relevant to the existence of a duty of care. In **GN**, the lack of ability to remove children from their parents was an additional reason why the claim was struck out rather than the sole reason. In relation to the child protection conferences, there had been such a conference in **GN**, but it had made no difference to the ultimate decision of the court. If the local authority gave consideration to applying for a care order, that did not amount to an assumption of responsibility. No family court proceedings were ever issued. There was no allegation here of reliance on any specific act or undertaking of the local authority and nor realistically could there be. A duty of care only arose when a care order had been made, because the local authority had parental responsibility. There was no adding to the danger to the First Claimant. The local authority could not control the actions of the wrongdoers, nor did it prevent others from protecting the Claimant.

There is an appeal in **HXA**, which is currently listed for determination on the 7th July 2021.

In **DFX v Coventry City Council [2021] EWHC 1382 (24th May 2021)**, four Claimants were taken into care in 2010. They alleged that they should have been removed in 2002 or 2003, which would have prevented the majority of the abuse that they experienced. Mrs Justice Lambert in the High Court said that this was an "omissions" or "failure to confer a benefit" case. Whilst the fact that a public authority was operating within a statutory scheme did not of itself generate a common law duty of care, it did not follow that a failure to exercise a statutory function, could never be compensable at common law. Whether a duty of care was generated by (on the facts of this case) an assumption of responsibility depended upon whether there was "something more". This would be either something intrinsic to the nature of the statutory function itself which gave rise to an obligation on the Defendant to act carefully in its exercising that function, or something about the manner in which the Defendant had conducted itself towards the Claimants which gave rise to a duty of care. This question was "fact sensitive". On the facts, no duty of care was owed. There was nothing in the nature of the statutory functions being exercised by the Defendant under sections 31 and 47 of the Children Act 1989 Act or the manner in which those functions were exercised, which generated a duty of care. The Defendant had not assumed responsibility to exercise those functions with reasonable skill and care. Having looked for "something more" the facts did not fall within any category in which the common law has recognised a duty arising.

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It is important to bear in mind that **GN** did not exclude the possibility of a claim based on human rights against the local authority. In **DFX**, there was a parallel human rights claim based on Article 3 of the European Convention on Human Rights. However, this failed because quite apart from the Claimants' failure to establish a common law duty, the court decided that there was no breach of any such duty. For that reason (failure to establish breach of duty or negligence), the parallel human rights claims failed also.

In YXA v Wolverhampton CC [2021] EWHC 1444 the question arose as whether an accommodation order taken out under Section 20 of Children Act 1989 would give rise to a duty of care. Under Section 20, a local authority can take a child into its care, but (by contrast to a care order) in order to do so, it needs the consent of the parent and the parent can object to that continuing care at any time.

Master Dagnall answered that question in the negative. The facts of the case were that the Claimant was a severely disabled child who suffered from epilepsy and autistic spectrum disorder. In 2007, he and his family moved to Wolverhampton and concerns were expressed by a paediatrician about over-medication by his parents. The paediatrician also said that the Claimant should be received into care. From April 2008, the council provided regular respite care. However, there were also concerns about the use of physical chastisement as well as the use by the parents of a known sexual offender to babysit for him. In December 2009, the Claimant was received into the care of the council on a full-time basis by agreement with the parents and a care order was made in the following year.

Master Dagnall set out the agreed principles in these cases. There was no conclusive reason of public policy or legislative provision against a local authority owing a duty of care in relation to its child care functions. Thus, it was possible for a local authority to owe a duty of care, but that had to be established by the application of ordinary common-law principles. Those common law principles provided that:

a) No duty would usually arise to simply confer a benefit including by way of protection from harm.
b) However, a duty of care could arise in four categories of case, being where (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger
c) An "assumption of responsibility" could arise from the performance of statutory functions and/or the provision of services and it could be owed to a person who did not realise that those services were being provided or that they were in any relationship with the Defendant.

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Master Dagnall concluded that there was no general duty to investigate and take out care proceedings. This case was the same as **GN**. It was a pure non-intervention case where the ability to intervene existed but there was no duty to take steps to confer a benefit by way of protecting from harm from others. The judgement in **HXA** was highly persuasive.

However, the question was more complex as to whether a duty of care might exist where the Defendant had provided respite care. Master Dagnall said that it was common ground that during the period that the Claimant was being provided with the respite care, the Defendant owed some duty of care, and that this would extend to the mechanics of the return of the Claimant to the parents.

On this question, the Master did not think that any general duty of care arose to consider care proceedings simply because the Claimant had had temporary accommodation provided under section 20 of the Children Act 1989. This was still a case where the Defendant was alleged to have failed to provide a benefit to the Claimant, by protecting them from harm. There had to be some particular reason to justify such a liability and such a duty would not arise where it would be inconsistent with the scheme of the legislation under which the public authority was acting. The scheme of section 20 was that it required and was controlled by the consent of the parents. Imposing a duty of care would be inconsistent with that scheme. Looking at the matter in terms of "assumption of responsibility", the "responsibility" which was "assumed" was in relation to the provision of accommodation and matters linked to or flowing from that, not in relation either to considering and taking out care proceedings once the provision of the accommodation had come to an end.

As in **DFX**, there was a parallel claim for breach human rights. In this case, although the common law breach of duty claims were struck out, the human rights claims remained intact to go forward.

The conclusion to be drawn thus far from the cases discussed above, is that it will be very difficult indeed to find that a case that can be distinguished from **GN**. All such claims will be vulnerable to strike-out at an early stage in the proceedings. Nonetheless, the courts have stressed that each case is “fact sensitive”, which means that **GN** cannot be applied as a blanket ban on all “failure to take into care” claims. By way of example, in **DFX** the court was prepared to accept that a duty of care might arise in a respite care case, albeit to a very limited extent. Where there are appeals, the appeal courts may well agree with the lower court’s reasoning which is based on a detailed consideration of the facts. Finally, the parallel human rights claim remains viable, although it appears from **DFX** to depend on overcoming the same test as would be applied to a negligence claim against social services.

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Child sexual abuse: issues that arise in practice

By: Kim Leslie & Jamie Gardiner, Digby Brown

The decision in JXJ v Province of Great Britain and the Institute of Brothers of the Christian Schools (De LaSalle Brothers) ("JXJ") was handed down by Chamberlain J in July 2020. The abuse took place in Scotland but the claimant, due to his domicile and that of the defendant, had elected to raise proceedings in England. JXJ deals with applicable law,limitation, designation of the defender, and vicarious liability, which we will explore in turn.

Between September 1972 (when he was 10) and September 1974 (when he was 12), JXJ attended St Ninian's School inGartmore, Stirlingshire, Scotland ("the School"). This was an "approved" or "List D" boarding school to which juvenile offenders and others who were considered to be in need of care and protection could be sent by order of a juvenile court or the Secretary of State.

Legal responsibility for the management of the School lay with a board of managers appointed by the Catholic Archbishop ofGlasgow. The headmaster, deputy headmaster and many of the teaching staff were members of the Institute of the Brothers of the Christian Schools ("the Institute"). Its members are known as the De La Salle brothers.

During his time at the School, JXJ was repeatedly subjected to sexual assaults, some involving considerable violence, by James McKinstry, a lay member of staff who worked at the School as a gardener and night watchman. McKinstry was convicted of these assaults in 2003. JXJ alleged that he was also physically assaulted by De La Salle brothers who taught at the school.These assaults were not admitted.

JXJ's claim had three elements. He claimed that the defendant was vicariously liable for:

> the sexual assaults perpetrated by McKinstry;
>
> the acts and omissions of Brother Alphonsus, the headmaster of the School, in exposing JXJ to the risk of the abuse and/or failing to protect him from that abuse; and
>
> further assaults committed by Brothers Pius and Patrick and by a group including Brothers Alphonsus, Patrick, Cuthbert, Pius and Benedict, together with McKinstry.

Applicable law

The defendant was sued in England, that being its place of domicile in terms of the Civil Jurisdiction and Judgments Act 1982 Sch.4 para.1. But the claimant wished to rely on the Limitation (Childhood Abuse) (Scotland) Act 2017.

This recent Scottishreform to the law on limitation was advantageous to pursuers/claimants. In order to enjoy this advantage, the claimant had to establish that the applicable law governing the claim was Scots law.

Choice of law

Choice of law is governed by different legislation depending on when the events giving rise to the damage took place.

For events on or after 11 January 2009, Regulation 864/2007 ("Rome (II)") determines choice of law between Member States of the EU. By virtue of the Law Applicable to Non-Contractual Obligations (Scotland) Regulation and the Law Applicableto Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations, the constituent parts of the UK apply Rome (II) to intra-UK cases. Put simply, we treat each constituent part of the UK as if it were a foreign country. The temporal scope of Rome (II) was determined in Homawoo v GMF Assurances SA. The ECJ confirmed that the Regulation applies only where events giving rise to the damage occurred on or after 11 January 2009. It is anticipated that the provisions of Rome (II) will be retained as domestic law post Brexit.

For events between 1 May 1996 and 10 January 2009, the Private International Law (Miscellaneous Provisions) Act 1995 applies. Sections 11 and 12 determine choice of law. A distinction is drawn between substantive law and procedural law.Substantive law is to be determined by the applicable law (lex causae) whereas matters of procedure are reserved for the law of the forum (lex fori). This rule was applied in Harding v Wealands and Wylie v Ominasig SA.

For events preceding 1 May 1996, the common law rules on choice of law will apply. This includes a requirement for double actionability so that the delict/tort must be actionable under both the law of the home jurisdiction and the foreign jurisdiction: see Boys v Chaplin. In cases of child abuse, this is, of course, unlikely to be an issue. Both home and foreign jurisdictions will almost certainly have an actionable right for injury caused by deliberate delictual or tortious acts. Where the choice of law is different from the home jurisdiction the foreign law must be pled as fact.

In JXJ, the harmful events given rise to the claim predated the coming into force of the Rome (II) Regulation and the Private Law (Miscellaneous Provisions) Act 1995 and therefore the applicable law was determined by the common law choice of law rules. Under both Scots and English Law, limitation is a matter of procedure and therefore is a matter for the lex fori or home jurisdiction. However, the defendant erroneously relied upon the Foreign Limitation Periods Act 1984 ("the 1984 Act") s.1(1) to displace the English common law rule and substitute Scots law.

Choice of law and limitation

The 1984 Act provides for limitation to be treated, for the purpose of cases in which effect is given to foreign law or to be determined by foreign courts, as a matter of substance rather than a matter of procedure. The effect is that, in general, when importing foreign law the relevant limitation provisions are also imported. The defendant therefore understood from this that limitation ought to be governed by Scots law.

However, in relying upon the 1984 Act, the defendant went wrong for two reasons. First, the case was to be determined both by the law of Scotland (substance) and the law of England (procedure), including the assessment of damages which was characterised as procedural and therefore to be determined under English law. Due to this dual application of Scots and English Law the 1984 Act did not apply.

Secondly, that by virtue of s.7(3) of the 1984 Act, limitation ought to have been determined under English Law in any event.The judge recognised that in order to make sense of the submissions, it was necessary to set out the material provisions of the1984 Act. Section 1 provides as follows:

> (1) "Subject to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of Private International Law applicable by any such court) to be taken into account in the determination of any matter—
>
> > (A) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings … and
> >
> > (B) except where the matter falls within subsection (2) below, the law of England and Wales relating to limitation will not so apply.
>
> (2) a matter falls within this subsection if it is a matter in the determination of which both the law of England and Wales and the law of some other country fall to be taken into account."

Section 4(1)(A) provides that references in this Act to the law of any country (including England and Wales) relating to limitation are to be construed as including the law relating to the extension of a limitation period. Section 7(3) provides as follows:

"Nothing in this Act shall—

> (A) affect any action, proceedings or arbitration commenced in England and Wales before the day appointed under
>
> subsection (2) above [1 October 1985]; or
>
> (B) apply in relation to any matter, if the limitation period which, apart from this Act, would have been applied in respect of that matter in England and Wales expired before that day."

The limitation period which, apart from the 1984 Act, would have been applied in England and Wales expired on January 1983; three years after JXJ turned 18. Therefore by operation of s.7(3), the 1984 Act did not apply and the law applicable to limitation reverted back to the common law rules. Procedural matters are for the lex fori and, since limitation under both Scots and English law is procedural, the law governing limitation ought properly to have been that of the law of England and Wales.

Plot twist
However, as the defendant had eventually conceded that limitation was to be governed by Scots Law the case proceeded on that basis. Therefore this article now outlines the applicable Scots law relative to limitation.

Limitation: Scotland the Brave
For many years, the vast majority of victims of childhood abuse who attempted to bring civil compensation claims in Scotland were met with the defence that their claims were time-barred. The age of majority in Scotland is 16. Therefore, victims of childhood abuse in Scotland were expected to have the wherewithal to have settled or raised their claims by their 19th birthday.

The limitation case law completely failed to recognise the significant silencing effect that childhood abuse inflicts on its victims.

Whilst Scottish judges did have discretion to allow cases to proceed out of time, this was very rarely exercised in favour of plaintiffs. As Lord McEwan stated in A v N:

“I have an uneasy feeling that the legislation, and the strict way the courts have interpreted it, has failed a generation of children who have been abused and where attempts to seek a fair remedy have become mired in the legal system."

The Scottish Government, recognising this almost universal bar to historic childhood abuse cases in Scotland, swept away the traditional limitation rules.

The Limitation (Childhood Abuse) (Scotland) Act 2017
The Limitation (Childhood Abuse) (Scotland) Act 2017 ("the 2017 Act") came into force in October 2017, amending thePrescription and Limitation (Scotland) Act 1973. It has created a new landscape for childhood abuse claims in Scotland.

Notwithstanding that the age of legal capacity in Scotland is 16, "Child" for the purposes of the Act means an individual under the age of 18: s.17A(2). It is immaterial whether the abuse continued beyond the age of 18. The relevant age is the age of thechild at the date the abuse began: s.17A(1)(B).

Impossibility of a fair hearing
The legislation does not remove all risk that the court will not allow the action to proceed. Section 17D of the 2017 Act sets out the circumstances in which an action may not proceed. The court may not allow an action to proceed if the defender satisfies the court that it is not possible for a fair hearing to take place: s.17D(2). It is important to note that the onus falls on the defendant to prove that a fair trial cannot take place. This provision is, of course, necessary to protect the defender’s art.6 rights to a fair trial. Prior to JXJ, it was anticipated that this must be a binary decision. A fair trial is either possible or it is not. However, in JXJ, Chamberlain J, held that some conduct perpetrated by one defendant, McKinstry, was not barred by s.17D(2) or (3) of the 1973 Act, but dismissed the claim on the grounds that the defendant was not vicariously liable for his acts as it had not employed him. In relation to the physical abuse allegedly perpetrated by the brothers, he concluded that these claims were barred and could not proceed. All of the brothers allegedly involved had died, as had the headmaster.

The defendant would be unable to lead any direct evidence to refute the plaintiff's evidence. In other words, the judge broke down the conduct and separately applied the test to each component rather than making a binary decision.

Substantial prejudice

An alternative (or more typically, additional) argument is that the defender is substantially prejudiced due to the retrospective operation of the legislation and so the action should not be allowed to proceed.

This argument was made in JXJ. Again, the onus falls on the defender. However, once the court is satisfied that the defender is substantially prejudiced, it must weigh in the balance the pursuer's interest in the action proceeding. Only after this balancing of competing interests has been undertaken can the court make a determination that the action should not proceed. The test has changed from that which applied prior to the 2017 Act.

First, it requires the defender to show that he would be substantially prejudiced, it must weigh in the balance the pursuer's interest in the action proceeding. Only after this balancing of competing interests has been undertaken can the court make a determination that the action should not proceed. The test has changed from that which applied prior to the 2017 Act. First, it requires the defender to show that he would be substantially prejudiced, not just that there is a "real possibility" of that. The prejudice now has to be "substantial", rather than merely "significant".

Given his determination that a fair trial could not proceed in relation to the conduct of others apart from McKinstry, Chamberlain J did not have to undertake the balancing exercise required by s.17D(3) of the 1973 Act but commented that, in his view, the defendants had made out substantial prejudice notwithstanding the claimant's interest in the claim proceeding. Whether the Scottish judiciary will approach the new limitation defences in the same way remains to be seen. The introduction of the new legislation was intended to underpin a change in policy where the delay on the part of the pursuer in bringing a claim ought not to be the focus. Statistically, on average it takes women 18 years to disclose and 25 years for men. There is now no requirement for the pursuer to justify the delay as it is a recognised feature of this particularly pernicious civil wrong.

Identifying the right defender

One of the challenges that faces practitioners in child abuse cases is identifying the correct legal personality to sue. Given the passage of time, the entities that were responsible for institutions may no longer exist. A similar issue arose in the context of industrial disease cases where the latency period meant that claims were pursued often decades later. Under the Companies Act, dissolved companies can be restored to the Register of Companies to be pursued for the sole purpose of triggering the defender's insurance if the claim is successful. An access to justice issue arises where insurance is identified and traced but the designation of the defender cannot be ascertained.

This is perhaps best explained by an example. In the Supreme Court case of Various Claimants v Catholic Child Welfare Society, the case proceeded against the "managers" of the school and the religious order involved in the running of the school.

The case was about physical and sexual abuse at St William's School, Market Weighton, in the Roman Catholic Diocese of Middlesbrough. Unlike Scotland, there was a transfer of liabilities from "the managers" (often respected local dignitaries) to the Archdiocese. It is for this reason that the claim could proceed against the Archdiocese. By contrast, in Scotland, no such transfer of liabilities took place and therefore, although there should by law be a record of these managers, in practice, the records may no longer exist or cannot be traced. The managers would be long dead in any event and, in order to pursue a claim, their executors would have to be traced and pursued. This is unpalatable, particularly where insurance exists to meet any claim. This applies equally to any other defunct entity which has been wound up. Recoverability (or the polluter's ability to pay) is at the forefront of practitioners' considerations. It is submitted that further legislative changes ought to be considered in relation to third parties rights against insurers where the insurer on risk has been identified.

In a recent Scottish decision of the Sheriff Appeal Court dated 6 December 2019, Sheriff McCulloch dismissed the third party notice served on the managers of a List D school because he was not satisfied that they were the correct legal personality. They were not the managers at the time of the abuse.This decision is subject to an appeal. It would appear that records identifying the managers in post during the material time cannot be traced.

Vicarious liability

In JXJ, the conduct that was not barred through the limitation defences failed on other grounds. The perpetrator, McKinstry, was a civilian worker and not part of the De La Salle Institute. It was held that the Institute were not vicariously liable for his conduct as McKinstry was employed by the managers of the school. The managers had not been included in the litigation and this may have been because of the difficulties previously discussed in identifying the correct defender.

However, recent decisions illustrate how vicarious liability can apply to some relationships beyond the classic employment contract: see, for example, Christian Brothers, Cox v Ministry of Justice 12 and Armes v Nottinghamshire CC. 13 Those representing the claimant in JXJ were clearly trying to establish that the relationship between the Institute and McKinstry was akin to employment. They highlighted that the school was effectively run by the headmaster and deputy who were members of the Institute, and that external actors such as HM Inspectors of Schools perceived the school as being run by the De La Salle brothers. By contrast, those representing the defendant emphasised that even when the headmaster and deputy headmaster gave day to day instructions to lay staff members, they did so as headmaster and deputy headmaster rather than as De La Salle brothers.

Chamberlain J concluded that there was no relationship "akin to employment" made out between the lay member of staff, McKinstry, and the Institute. He stated that:

"The law has not developed to the stage where a person who exercises de facto influence over the operation of a business is, by virtue of that influence, to be held vicariously liable for an employee of the business with whom he has no direct relationship."

Conclusion

The case of JXJ highlights that child abuse actions, particularly when pursued other than in the forum where the events took place, can be challenging. This is very much a specialist area. Private international law can be akin to three dimensional chess and, as is apparent from JXJ, it can prove a trap for the unwary. The revised statutory limitation provisions in Scotland are relatively untested and it remains to be seen whether the Scottish Judges choose to follow the approach in JXJ. As we have seen in some English cases, the death of a perpetrator, of itself, will not automatically result in the case being struck out as time-barred and each case will turn on its own facts and circumstances. For example, the failure to identify and sue the managers meant that the elements of JXJ not time-barred were dismissed on other grounds. The claimant had little choice but to try to argue that the Institute was vicariously liable—relying on ambiguity about the precise boundaries of that doctrine. But the real mischief that JXJ highlights is the practical difficulties in identifying and convening the managers to the action. If the responsible legal entity cannot be identified that will continue to be an unresolved access to justice issue.

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Child sexual abuse: causation and related issues

By: Jamie Gardiner &

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Wrongdoers are often able to chip away at child sexual abuse claims by challenging causation. Some of these challenges are valid, but many are not. Unfortunately, it can be difficult to tell the difference—discussion of causation in the context of child sexual abuse is either widely-dispersed or non-existent. This article seeks to pull the discussion together, so that causation challenges can be put through more rigorous scrutiny.

We begin by considering what claimants have to prove. Then we turn to the three main causation battlefields in these cases: (i) whether the harm should be apportioned; (ii) whether losses should be reduced to take into account separate but equivalent harm; and (iii) whether the causal link has been broken. Remoteness is briefly discussed at the end.

What the claimant has to prove?

Claimants must generally satisfy the "but for" test. In other words, they must prove harm that, but for the sexual abuse, would have been avoided. They must do so on a balance of probabilities. Either the sexual abuse caused harm or it did not—there is no room for mere possibilities.

In some circumstances, the but for test is seen as unfairly prejudicial to claimants. This is normally where there are multiple potential causes of the harm. Take a situation where A, B and C separately abused D, causing D to develop PTSD. It will be hard, if not impossible, for D to prove that the harm would not have occurred but for the contribution of each wrongdoer. Strictly applying the but for test, all the wrongdoers would escape liability. Instead, the test is modified. To establish that any of the wrongdoers is liable, D need only establish that they materially contributed to the harm.1 Any contribution more than de minimis is material.

Having established harm, claimants can go on to quantify it. Where a particular head of loss relates to the past, the claimant must prove it on a balance on probabilities. This would apply where, say, the losses are costs already incurred on medical treatment. But the approach is different for future losses, and for hypothetical losses. A hypothetical loss is one based on what would have happened in a counterfactual world where the abuse did not happen.

For both these types of loss, courts do not insist on proof on a balance of probabilities—they will take into account mere possibilities or chances. For example, courts can take into account the hypothetical possibility that, but for the abuse, a claimant might have been promoted. With regards to future losses, courts can take into account a chance that a psychiatric condition could worsen or recur. Similarly, they may make an award for future loss of employability where there is only a chance—or "real risk"—that the claimant will find themselves looking for work.

Apportionment

Where wrongdoers have made a material contribution to harm but are not wholly responsible, they can still argue for apportionment. In other words, for dividing up the harm so that they are only liable to the extent of their contribution. But there are two initial obstacles in their way

First, the wrongdoer must prove, on a balance of probabilities, that there actually was another contributory cause. In the context of child sexual abuse, if the other contributory cause is bullying then they must prove that the bullying actually took place. Otherwise there will be no factual basis for apportionment.

Secondly, the wrongdoer must not be responsible for the other contributory cause. Returning to the bullying example, if the wrongdoer is a children's home they may have owed the claimant a duty to prevent the bullying. Even where the wrongdoer did not owe a separate duty, it is sometimes possible to show that the other contributory cause was itself the result of the abuse. For example, the abuse may have reduced the claimant's confidence and so made them susceptible to bullying. Or, it may have undermined the claimant's trust in authority figures so that they were unwilling to report it.

Rational basis for apportionment

Even if the wrongdoer gets through the two initial obstacles, they still face the task of persuading the court that there is a rational basis for apportionment. This is particularly difficult in child sexual abuse cases, where harm is typically psychiatric. In Hatton v Sutherland, Hale LJ, obiter, said that while some harm is "truly indivisible", the court should make a "sensible attempt" to apportion liability. But, in Dickins v O2 Plc, Smith LJ observed, also obiter, that such an apportionment was "illogical":

"Psychiatry does not lend itself to the kind of statistical analysis which orthopaedic surgeons and oncologists can provide. So the judge is likely to be left with evidence that the claimant had a vulnerable personality and that there was more than one factor in play when he had the breakdown.

If that is the state of the evidence, it seems to me that the claimant should succeed in full provided that the negligent factor was of more than minimal effect. It seems to me that, if in one breath the judge holds that all that can be said about the effect of the tort is that it made an unspecified material contribution, it is illogical for him, in the next breath, to attempt to assess the percentage effect of the tort as a basis for apportionment of the whole of the damages."

The door on apportionment of psychiatric harm was closed —until it was reopened in BAE Systems (Operations) Ltd v Konczak. As things stand, judges have to try to find a "rational basis … however broadly" for apportionment.

These twists and turns have produced some questionable reasoning. In WCC v Steer, for example, there had been prior abuse for which the defender was not responsible. The judge referred to BAE Systems (Operations) Ltd, noting that it was "necessary to make a division to take into account non-tortious aspects of an injury". He apportioned 40% of the general psychiatric harm away from the wrongdoer. Use of the word "necessary" suggests a misreading of BAE Systems (Operations) Ltd. The Court of Appeal was clear that apportionment should only be attempted where a rational basis can be found for it.

Whether there is a rational basis for apportionment will depend on the type of situation. BAE Systems (Operations) Ltd discussed two types. The first, and more straightforward, situation is where existing harm is aggravated by the wrongdoer's abuse. It is questionable whether that situation actually engages apportionment at all, since the wrongdoer would not be responsible for the existing harm even under the conventional but for test. The second, and far harder, situation is where a claimant has gone "over the edge" quite suddenly, tipping from stress into psychiatric injury. It is hard to imagine any rational basis for apportioning parts of the injury to different causes. Unlike in industrial disease cases, it will rarely be appropriate to apportion on the basis of time spent exposed to the different causes.

Courts are less likely to entertain apportionment where the wrongdoer was aware of the other contributory cause. In those circumstances, any uncertainty regarding apportionment should generally be resolved in the claimant's favour. This follows the ratio of Buxton LJ in C v Flintshire CC:

"[The judge] was also entitled to have well in mind, when attributing the loss between the various conflicting causes involved, that [the claimant] was in the hands of the defendants precisely because of her initial vulnerability, in circumstances where they well knew of that vulnerability … the effect of mistreatment by carers would, or at the very least might, have a multiplying or compounding effect on [the claimant's] initial vulnerability … this is a case where the usual process of attributing responsibility between various causes to a large extent breaks down, because the initial cause of [the claimant's] vulnerability is the context in which the defendants have to take particular care. If they did not take that care, in circumstances where it was known and foreseeable what could be the outcome of abuse by persons of trust and in positions of responsibility, then they cannot complain if less weight than otherwise might be the case is given to that original cause. Those considerations therefore entitle—indeed oblige—the judge not to weigh too nicely arguments based on the respective causal effect of the various facts in the history."

Doubtless conscious of all the above difficulties, wrongdoers sometimes take the 'shortcut' of leading evidence from psychiatric experts proposing a precise percentage apportionment of the harm. This evidence should be treated with some scepticism. With reference to Kennedy v Cordia (Services) LLP, the expert will have to: (i) explain their methodology; and (ii) demonstrate a substantial body of academic writing supporting the methodology. With regards to psychiatric harm, they will often struggle to defend their percentage apportionment under sustained cross-examination. The judgment in C v Flintshire CC, for example, contains an example of an expert retreating from their own percentage apportionment.

Levels of apportionment

In many cases, the judge "takes into account" other causes of the harm without precisely quantifying them. The cases with an express percentage apportionment may well be those where the other causes are more significant. In KD v Philip Gaisford, 20% of the harm was apportioned to pre-existing anxiety and depression. In WCC v Steer, discussed above, 40% of the general psychiatric harm (but not the PTSD) was apportioned to separate abuse. Perhaps the most extreme example is ABC v WH. 14 70% of the harm was apportioned to ABC's pre-existing severe epilepsy for which a lobotomy had been performed, together with emotional and physical abuse by her family.

Equivalent harm Even after a wrongdoer's responsibility for harm is established, they can still argue that the claimant would have suffered separate but equivalent harm in any event. Strictly speaking, this is a matter of quantification arising where causation has already been proved. Take a situation where sexual abuse causes anxiety. If the wrongdoer establishes that the claimant would inevitably have suffered separate but equivalent anxiety (i.e. at roughly the same level and at roughly the same time) then there is no loss.

Once again, there is an important distinction between past events and those which are future or hypothetical. Where the separate but equivalent harm depends on past events, the wrongdoer must prove those events on a balance of probabilities. Otherwise there will be no factual basis for taking them into account. In C v Flintshire CC at first instance, Scott Baker J explained:

"I accept that it would be the wrong approach to discount any claimant's damage simply because there was a chance that he or she would have suffered from similar problems in later life even if not abused in the Defendants' children's homes. In each case I have paused to consider the question whether it has been proved to the ordinary civil standard that matters other than the abuse have caused or contributed to the claimant's problems in later life [the abuse was historic]."

But, where the events are future or hypothetical, courts can take into account a mere chance of harm. In DE v Wilson, for example, it was only "conceivable" that, even without the childhood abuse, the claimant could still have ended up in an abusive relationship disrupting her earnings. Being a hypothetical event, the fact that it was conceivable was enough for it to be taken into account.

Genetic factors

Wrongdoers sometimes argue that the claimant's genes would have caused separate but equivalent harm. This argument is usually deployed where there is a family history of alcohol or substance abuse, depression, or general low-achievement. In LXA v Willcox, for example, the psychiatric expert took the view that 25% of the dysthymia (depression) was due to "constitutional factors". In FKB v Lampitt, 18 the judge appears to have taken into account the low achievement of the claimant's older and non-abused siblings.

As a prerequisite for making the argument, wrongdoers have to actually prove the genetic inheritance. They may draw an inference from a family history of, say, alcoholism or depression. The higher the proportion of family members displaying the same traits, the stronger the inference will be. On the other hand, the less that is known about the family members and their background, the more speculative the inference. Where little is known, claimants can point to other potential explanations including environmental factors and random chance.

Even where the fact of a relevant genetic inheritance is proved, the wrongdoer still has to establish the link between it and the outcome that would supposedly have resulted. One difficulty with this argument is the better modern understanding of mental health and addiction. A genetic inheritance that caused problems for the claimant's parents may not cause problems for the claimant. Another difficulty for wrongdoers is scientific uncertainty. This can be seen in AB v Nugent Care Society, where the wrongdoer's psychiatric expert emphasised the genetic influence in the inheritance of alcoholism and criminality. The judge noted that these were, "extremely difficult waters". He accepted that genetic inheritance could have a "major effect", but it would vary depending on the individual. He also noted that it was difficult to draw conclusions from the scientific literature.

Early life

An alternative to the genetics argument is for the wrongdoer to argue that, as the judge at first instance put it in C v Flintshire CC: "[t]he writing was already on the wall when [the claimant] went into care." Although the argument is not restricted to residential care cases, those cases usually involve the most serious early life problems.

While the wrongdoer must prove the early life difficulties as a matter of fact, good records from around the time of the care decision are often available. The bigger challenge is usually establishing that the early life problems were—but for the abuse —sufficient to cause separate but equivalent harm. Vulnerability is not enough. With reference to the words of Buxton LJ in C v Flintshire CC, quoted above in relation to apportionment, where the wrongdoer was aware of the early life difficulties —and vulnerability—any ambiguity should generally be resolved in the claimant's favour.

This all makes for a test that wrongdoers struggle to meet. In GLB v TH, the claimant had experienced problems when her parents had broken up. The judge accepted expert evidence that this "rendered [her] vulnerable" but "would probably have been transient but for the abuse which followed". In A & B v C, A had been very upset by the death of her father. This contributed to "temporary deteriorations", but was not the source of her psychiatric problems and does not appear to have factored into the award. In Raggett v Society of Jesus Trust 1929 for Roman Catholic Purposes, the court found that the emphasis which the defender sought to put upon the claimant's early years was, "grossly overstated".

Interruptions

Where a wrongdoer's responsibility for harm is established, their other option is to argue that there has been a novus actus interveniens. This is an event breaking the causal link. In historic child sexual abuse cases, of course, there are a lifetime of events to choose from. The wrongdoer will have to prove the event itself on a balance of probabilities. Once proved, the factors that a court will consider when assessing whether an act constitutes an interruption depends on whether the potentially intervening act was by: (i) a third party; or (ii) the claimant themselves. In the case of an act by a third party, the court will consider how important, deliberate and unforeseeable it was, as well as any connection to the abuse. In the case of an act by the claimant, the remark by Hamblin LJ in Clay v TUI UK Ltd is particularly relevant in child sexual abuse cases:

"The extent to which it was voluntary and independent conduct in general, the more deliberate the act, the more informed it is and the greater the free choice involved, the more likely it is to be a novus actus interveniens."

Alcohol/substance over-consumption

Abuse victims are susceptible to alcohol or substance over-consumption. Wrongdoers often argue that they are not responsible for loss flowing from over-consumption. This is of greatest financial significance where the over-consumption has led to loss of earnings. But some claims have been made for the money spent paying for the alcohol or substances. Over-consumption being an act of the claimant, Hamblin LJ's remarks as quoted above apply. This is reflected in the ratio in Eagle v Chambers (No.2). The claimant's injuries caused her to discard cigarettes soon after starting them, and she claimed for the cost of all that waste. Waller LJ stated that:

"There is something deeply unattractive about the notion that a claimant should recover damages to cover her increase in cigarette consumption either for the past and a fortiori for the future. Only if the medical evidence were to convince the court that the accident had caused such injury to the brain that the victim had no real choice but to increase her consumption of cigarettes, could the extra consumption be a head of damage."

As is suggested by the tone of Waller LJ's remarks, courts will require persuasion that there really was no free choice. In BJM v Eyre, the court took BJL's ability to cut back from time to time as evidence that he retained control. In Raggett v Society of Jesus Trust 1929 for Roman Catholic Purposes, this part of the claim was rejected since the drinking was in a social and sporting context and diary entries made clear that the claimant was enjoying himself. In KD v Philip Gaisford, over-consumption of alcohol and tobacco was found to be due to unconnected criminal litigation rather than the abuse.

The best way to overcome judicial distaste is to lead evidence of alcohol dependency disorder caused by the abuse. This was the case in DE v Wilson, where it was a manifestation of the claimant's behavioural disorder. When things were particularly bad, she would drink six bottles of wine an evening plus spirits. 50% of the over-consumption was due to the abuse, and the court made a lump-sum award of £15,000. In RAR v GGC and KR v Bryn Alyn Community (Holdings) Ltd (In Liquidation) (the claim of CGE), over-consumption was taken into account for the purposes of general damages but no specific award was made.

Although the focus is usually on historic over-consumption, there is no reason, in principle, why dependent claimants should not receive compensation for future over-consumption. But one can understand why, in Eagle v Chambers (No.2), Waller LJ stated that this would be even more distasteful than an award in respect of past over-consumption. It may be more realistic for claimants who remain dependent to explore the cost of an alcohol or substance treatment programme. For a residential programme, the cost may be even greater than the alcohol or substances, but the effect on the claimant's life should be considerably more positive.

Criminality

Sometimes claimants turn to criminality in the aftermath of abuse, so that their earnings are affected by a criminal record and, in some cases, time spent in prison. There may be an ex turpi causa defence, as well as a potential interruption. The success of both generally turns on whether the abuse deprived the claimant of a meaningful free choice. If so, Auld LJ made clear in KR v Bryn Alyn Community (Holdings) Ltd (In Liquidation) that:

"… an argument may survive that damages are recoverable in respect of tortious acts that have resulted in a law-abiding citizen becoming a criminal."

In the reported cases to-date, though, the few claims based on illegality have failed on their facts. In CD v Catholic Child Welfare Society, the claimant had a prolific offending history from a young age and predating the abuse. His counsel chose not to insist on the loss of earnings claim, which the judge described as a "realistic decision". In KCR v Scout Assoc, the claimant was held to have positively chosen crime over legitimate employment. Accordingly, he was not entitled to an award for any earnings handicap.

Self-harm
Self-harm will not break the causal link provided, again, that the claimant was denied a meaningful free choice by the abuse. That principle applies even where there is a completed suicide. In Corr v IBC Vehicles Ltd, the perpetrator of an accident was responsible for the victim's suicide six years later. The suicide was:

"not a voluntary, informed decision taken by him as an adult of sound mind making and giving effect to a personal decision about his future …"

The principle was applied in RAR v GGC. In that case, the claimant was awarded £10,000 in general damages for scarring caused by self-harm resulting from the abuse. She was awarded a further £23,942 to cover the costs of camouflaging it.

Abusive relationships
It is not uncommon for claimants to get into further abusive relationships. This is an example of a potential interrupting act by a third party. One option for claimants in child sexual abuse cases is to establish that the abuse made them more susceptible to later abusive relationships.This approach has met with some success. In C v Flintshire CC, the court observed that "entirely predictably [the claimant] had chosen a man who began to abuse her". In DE v Wilson, the earlier abuse, "made it much more likely that she would find herself adopting a submissive role in a violent relationship".

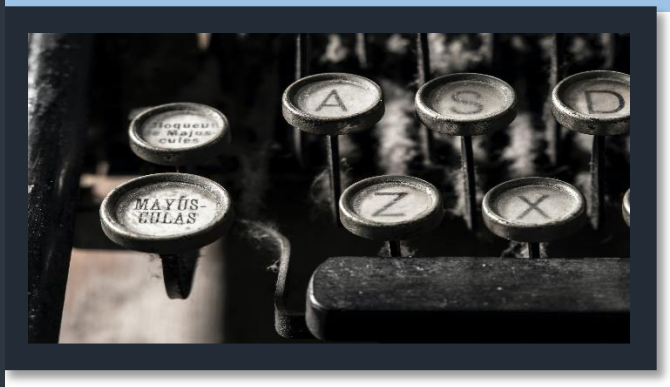
Loss of support
Abuse can put a strain on family relationships. There can be a tendency to take sides, with some family members standing by even convicted wrongdoers. As a result, claimants can lose financial support. Again, this is a potential interrupting act by a third party.The claimant successfully established a loss of support in C v D, where there was a breakdown in relations between him and his parents due to the abuse. They had supported his sister through university, but did not support him. He was awarded £5,000. In other cases, claimants have found it difficult to prove that there would have been support but for the abuse. In GLB v TH, the claimant was unable to establish that her parents would have had the will or the means to leave her an inheritance. The court also noted the possibility of reconciliation.

Remoteness
Remoteness is raised only to say that the issue rarely, if ever, arises in child sexual abuse cases. Where harm is done intentionally, it is unattractive for a wrongdoer to argue that they should escape liability because it was not quite what they expected.

Conclusion
What emerges most strikingly from this discussion is how difficult it is for wrongdoers to escape liability for harm which they have contributed to, and all the losses flowing from it. Yet many claims continue to be met with a barrage of causation challenges. Subjecting these challenges to proper analysis should see many of them fall away.

Jamie Gardiner

Kim Leslie



Child sexual abuse: valuation

By: Jamie Gardiner &

Kim Leslie, Digy Brown

Child sexual abuse claims are notoriously hard to value. Part of the problem is the breadth of awards and the number of factors at play. Last year, in CMK v Darby, a woman who was sexually abused for five years from age seven was awarded £20,021. Three weeks later, in FZO v Adams, a man sexually abused for four years from age 13 was awarded £1,112,390. Even experienced practitioners struggle to predict where along the range their claims fall.

This article seeks to explain what determines a claim's value. We do that by analysing the awards made in historic child sex abuse cases. At the outset, we briefly discuss the claims used in the analysis and the adjustments made to them. This is followed by a substantive discussion in three parts:

> First, we review the level and range of awards as a whole. This gives a sense of lower and upper boundaries, as well as recent trends.
>
> Then we look in more detail at three aspects of child sexual abuse ("Aspects"), and the features of each Aspect associated with high awards. The Aspects are: (i) the Nature of the abuse ("Nature"); (ii) the Circumstances of the abuse ("Circumstances"); and (iii) its consequences ("Consequences").
>
> Finally, we bring all of this together into a Valuation Framework that suggests the likely level of award for new claims.

Claims and adjustments

A Westlaw search was run using the words "child", "sex" and "abuse". This returned 3,837 results. Claims were then sifted out unless they:

> Quantified damages for personal injury resulting, at least in part, from sexual abuse of a child under 18. Included information on all heads of loss awarded. Were decided in England and Wales or Scotland. Dated from 2001 or later.

This left 43 relevant claims in 27 cases (some cases involved more than one claim).

For each claim, the various types of awards are combined into three standard categories. This makes it easier to compare awards between claims. The categories are:

General, aggravated and exemplary damages in England, and solatium in Scotland ("General Award").

Damages for past and future loss of earnings, loss of congenial employment, and loss of employability ("Employment Award").

Damages for past and future treatment costs, and similar expenses like for transport to appointments ("Treatment Award").

Two adjustments then had to be made so that awards from different years can be compared on a like-for-like basis:

All awards were adjusted for inflation, calculated from the Official Retail Price Index figures. Unless otherwise stated, awards are given in their 2019 values.

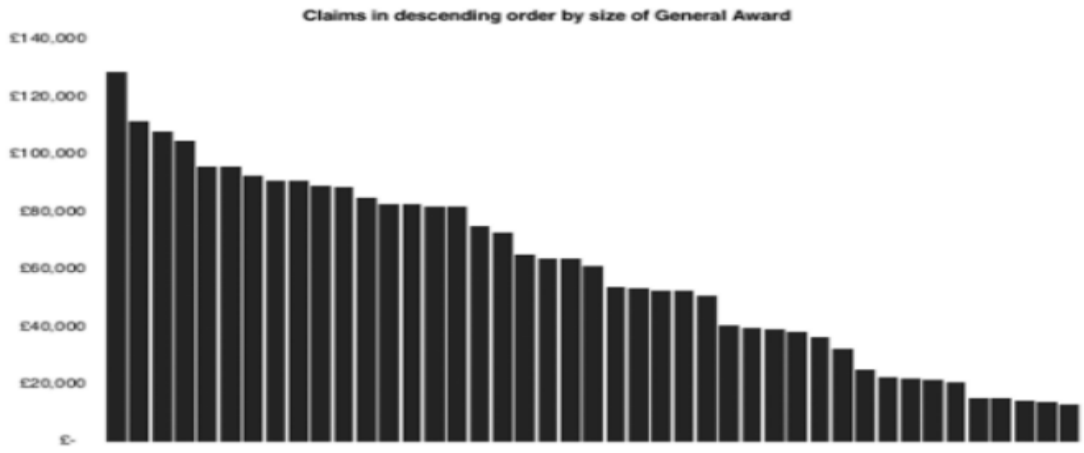
General Awards made before 1 April 2013 were increased by 10% to reflect the general rise mandated in Simmons v Castle.

Once these adjustments were made, awards were rounded to the nearest thousand.

Finally, it is important to remember that awards do not include interest. Interest should, of course, be factored into the assessment of any settlement offer.

Level and range of awards as a whole

General Award



Lining the General Awards up in descending order illustrates their sheer breadth, from £129,000 on the far left to just £13,000 on the far right. The average General Award lies almost exactly between these extremes, at £60,000.

In most claims, no separate award of aggravated damages was made. The usual practice is to roll up aggravated damages into general damages. However, there were eight claims where a separate award was made, 19% of the total. When made, the average level of aggravated damages was £17,000. The highest such award was £28,000, in JXL v Britton.

Judicial College Guidelines

The natural place to start any analysis of General Awards is with reference to the Judicial Guidelines. In cases of child sexual abuse, this is not so straightforward. The fundamental problem is that the Guidelines take account of the injuries, but not the experience of abuse itself.

Courts tend to approach the Guidelines with caution. In C v Flintshire CC, Ward LJ said in the context of the Guidelines that child sexual abuse cases, "fall into a wholly different category from psychiatric damage that follows other personal injuries". This year, the Guidelines were described in FZO v Adams as providing, "some, but in reality very little, real assistance". They certainly fail to fully explain General Awards in child sexual abuse cases. The £101,470 maximum for the highest subcategory of General Psychiatric Harm has been exceeded by four General Awards. The £88,270 maximum for the highest subcategory of PTSD has been exceeded by 11 General Awards.

The Guidelines should not be dismissed altogether, though. In KKR v Bryn Alyn Community (Holdings) Ltd (In Liquidation), Auld LJ accepted that they are not capable of "rigid application", but they still "provide some sort of signpost". More recently, they were described in KD v Gaisford as, "the invariable starting point".

Upper limit?

Where awards are at the top end of or exceeding the Guidelines, it is easy to see why this was thought appropriate. In BJM v Eyre (£129,000), the claimant was pimped out from age 12 to age 14 before being "sold" to another pimp. In J v Fife Council (£111,000), J was subjected to anal rape and extreme physical abuse—akin to torture—at a children's home. In GLB v TH (£108,000), the claimant's grandfather would euphemistically say, "let's go and make a cup of tea". Forced sex acts, attempted rape, and explicit photography, would follow. RAR v GGC (£105,000) was another familial abuse claim, where abuse by the claimant's stepfather started just three months after he married her mother. There was then five years of prolific sexual abuse that had a "devastating effect" on her life.

Shocking as these claims are, though, significantly higher General Awards are possible:

> In J v Fife Council, the pursuer had been able to live a successful and fulfilling life. He had, amongst other achievements, sat as a lay magistrate.

> The Lord Ordinary said that if the pursuer had not coped so well the award could have been £100,000 (in its 2009 value). Adjusting that potential figure for inflation and the 2013 10% uplift in general damages, it is the equivalent of around £143,000 today.
>
> In C v Flintshire CC, Ward LJ refers to the unreported 1996 case of L v Leicestershire CC. L, who suffered abuse in a children's home that was "not far short of torture", was awarded £80,000. Adjusting for inflation and applying the 10% uplift, this is the equivalent of £165,000 today.

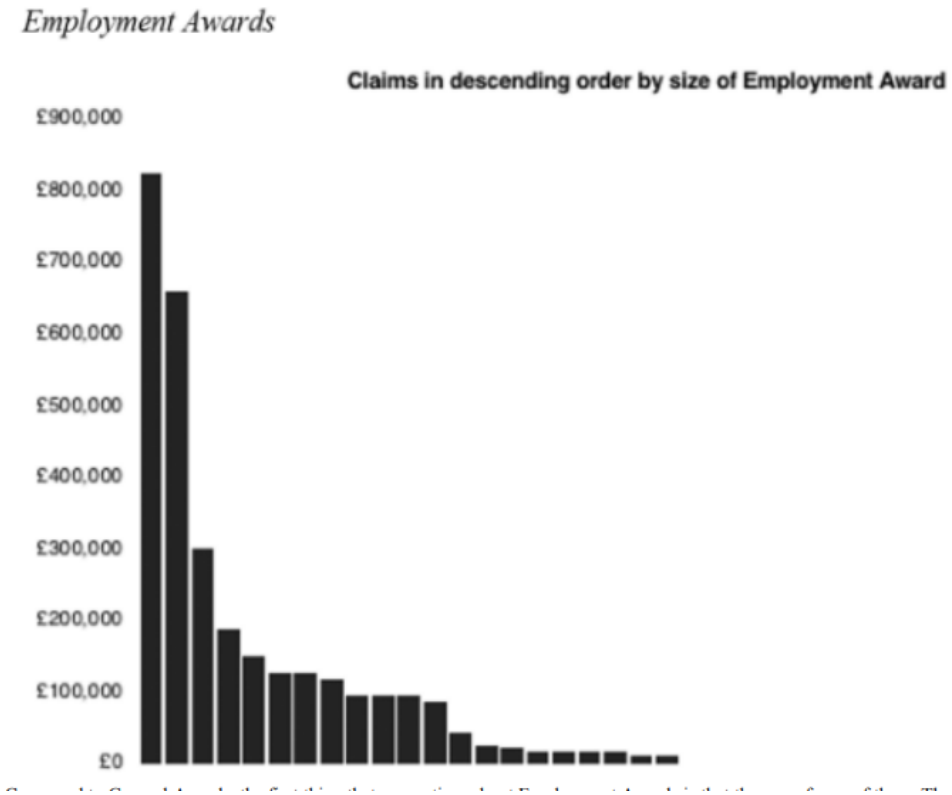
What these examples demonstrate is that practitioners should not see recent General Awards as setting some kind of upper limit. Albeit needing the most extreme facts, there is no reason why a particularly horrific claim could not justify a General Award well above £150,000.

Trends

For all this potential, in recent years the average value of General Awards has fallen. General Awards made before 2013 had an average value of £63,000. Those made from 2013 had an average value of just £55,000—a fall of around 13%. It is important to note that this is not a fall in pounds and pence. It is a fall in like-for-like value against earlier awards, after adjusting for inflation and the Simmons v Castle 10% uplift. Interestingly, these adjustments also come to 13%.

Could this be more than a coincidence? It would be easy for the adjustments to be left out of account. The Guidelines take account of them, but we have seen that these are just a starting point in child sexual abuse claims. Judges are more likely to turn to historic awards. The likes of Kemp & Kemp adjust for inflation but not for the uplift in Simmons v Castle. This is reflected in the authorities, where judges often refer to inflation but have—to the best of our knowledge—never adjusted historic awards for the 10% uplift. It is hard to see any justification for this omission, which understates pre-uplift awards in a comparison with more recent awards. Those acting for claimants would be well-advised to pass up a schedule containing any relevant historic awards after all the relevant adjustments have been made.

Compared to General Awards, the first thing that one notices about Employment Awards is that there are fewer of them. They have only been made in 49% of claims. When an Employment Award has been made, its average value is £144,000. The other main difference between Employment Awards and General Awards is that the range of Employment Awards is far wider. The highest Employment Award, on the far left, was £824,000. This was over 80 times greater than the lowest, £10,000.



Uncertainty

Wrongdoers often argue that any claim for an Employment Award is too speculative. But an element of speculation is inevitable —claims necessarily involve at least two uncertainties. There is counterfactual uncertainty: how much the claimant would have earned but for the abuse? Then there is future uncertainty: how much the claimant will earn notwithstanding the abuse?

Even where a situation contains what seems like profound uncertainty, courts have still been prepared to make Employment Awards. This includes situations where a claimant:

Has little or no employment history. In BJM v Eyre (£150,000), the court nonetheless found that but for the abuse BJM would have done vocational training and become a chef or cook.

Dropped out of work. In A v Archbishop of Birmingham (£824,000), the claimant had previously been a fibrous plasterer. In FZO v Adams (£659,000), he had been in the IT sector.

Has fallen short of their potential. In RAR v GGC (£301,000), RAR underachieved at school and ended up in a series of low-skill jobs.

Was delayed in reaching their chosen career. In JXL v Britton (£187,000), JXL fulfilled her ambition to be a nurse some years later than she would have but for the abuse.

Approach

As a fall-back position, wrongdoers usually argue that even if an Employment Award is to be made then there is too much uncertainty to adopt an "actuarial" multiplier and multiplicand approach. Instead, they tend to argue for a lump-sum "Blamire" award, named after Blamire v South Cumbria AHA. Pure Blamire awards are rarely above the low tens of thousands. KR v Bryn Alyn Community (Holdings) Ltd (In Liquidation) is an example. The three child sexual abuse claimants each received an identical Employment Award of £17,000. These are amongst the lowest Employment Awards made in a child sexual abuse claim.

In reality, a pure Blamire approach is rarely, if ever, strictly necessary. BJM v Eyre demonstrates that elements of an actuarial approach can be used even where a claimant has not been in settled employment. Any claimant will be able to use: (i) historic and current Annual Survey of Hours and Earnings figures for median net earnings in the most appropriate occupation; (ii) Ogden table projections for the length of the claimant's working life; (iii) the appropriate Ogden table discount for contingencies other than mortality; and (iv) manual adjustments for factors specific to the claimant, such as time when they would have been unable to work due to illness or children. If the above sounds complex, it should be remembered that judges will probably have the benefit of employment experts and their reports.These experts are now so common that their absence in the recent case of FZO v Adams attracted judicial comment. The lack of expert evidence did not, however, prevent the judge from making an Employment Award of £659,000. The judge's description of his method, at [21]–[29] and [34]–[42], is a useful example of a pragmatic approach. A v Archbishop of Birmingham, at [7]–[32], contains another, more detailed, example.

Upper limit?

To an even greater extent than for General Awards, there is no reason why practitioners should feel bound by the level of past Employment Awards. Everything depends on the earnings potential of the claimant. In Raggett v Society of Jesus Trust 1929 for Roman Catholic Purposes, the claimant was a former solicitor. He sued for over £4,000,000 on the basis that but for the abuse he would have become an equity partner in his firm. The claim failed on the facts, but there is no reason, in principle, why a claimant could not be compensated for a lost professional career.

Treatment Awards

Most Treatment Awards are based on the recommendation of the psychiatric expert and are often uncontroversial. They are made in 63% of claims and, excluding the outlier discussed below, have an average value of £9,000.

Of course, what jumps out is the Treatment Award shown on the far left of the chart, for £366,000. This was made in FZO v Adams, where the claimant had complex PTSD. The Treatment Award included a subrogated claim by BUPA for £120,860.86 of psychiatric care.

It also included £228,934 in future medical costs, including 10–12 months of residential treatment in a private facility offering "the best chance of improving his health in the shortest possible time period". An example of an even bigger Treatment Award, made in a CICA application, is Re XY. The applicant had been seriously abused as a baby and needed residential care. He was awarded future medical costs of £2,539,905. The applicant gave an undertaking to pay for the care privately rather than turning to his Local Authority.

Given the severe psychiatric and dependency problems faced by many claimants, it is perhaps surprising that the vast majority of Treatment Awards remain relatively modest. It may be that psychiatric experts should be asked for their views on more intensive (and expensive) interventions, including stays at private residential facilities.

Three Aspects of child sexual abuse The next part of this article focusses on the three Aspects of child sexual abuse claims: Nature, Circumstances and Consequences. The aim is to identify the features of each Aspect that are associated with high awards.

Nature

The Nature of the abuse covers the type of sexual acts performed, as well as accompanying acts such as violence or photographing.

General Award

Feature	# of claims with feature	Average General Award
Abuse involved anal sex	12	£83,000
Abuse involved violence	11	£75,000
Abuse involved photographing of claimant	6	£67,000
Abuse involved vaginal sex	11	£63,000
Abuse did not involve penetrative sex	20	£45,000
All claims	**43**	**£60,000**

Unsurprisingly, General Awards are well above average in claims featuring penetrative sex—particularly anal sex. Penetrative sex is not determinative, though. Neither GLB v TH or RAR v GGC involved penetrative sex, but the descriptions in the case reports make clear that the abuse was harrowing. The Nature and the Consequences were of the utmost gravity too. It is easy to understand why the General Award in both claims was over £100,000. In CD v Catholic Child Welfare Society, on the other hand, there was both anal sex and violence. But neither the Circumstances nor the Consequences were especially serious, and the experience had just a transient effect. The award was only £15,000.

Employment Award

Feature	% of claims where Employment Award made	Average Employment Award (where made)
Abuse involved anal sex	58%	£254,000
Abuse involved photographing of claimant	50%	£146,000
Abuse involved vaginal sex	55%	£105,000
Abuse involved violence	55%	£103,000
Abuse did not involve penetrative sex	40%	£78,000
All	**49%**	**£144,000** **J.P.I. Law 42*

The order is not dramatically different for Employment Awards, but there is a greater premium for claims featuring anal sex. Again, though, the type of sexual act is not determinative. In RAR v GGC, discussed above, there was no anal sex nor penetrative sex of any description. But the Employment Award was £301,000.

Circumstances

Circumstances covers factors surrounding the abuse, including its duration and frequency, the age of the claimant when it started, their sex, and the type of perpetrator.

General Award

Feature	# of claims with feature	Average General Award
Started when claimant under 12	21	£70,000
Perpetrated by close relative	16	£68,000
Duration three or more years	28	£66,000
Claimant male	22	£60,000
Claimant female	21	£60,000
Started when claimant at least 12	22	£50,000
Duration fewer than three years	15	£49,000
All	**43**	**£60,000**

General Awards tend to be significantly above average where the abuse features a particularly young claimant, a particularly close perpetrator, or is over a particularly long duration. But none of these things should be seen as a necessary condition for a high General Award. The highest General Award of all, BJM v Eyre (£128,000), featured a claimant over 12, abuse in a children's home rather than by a family member, and a duration of under three years.

Employment Award

Type of claim	% of claims where Employment Award made	Average Employment Award (where made)
Claimant male	50%	£170,000
Duration at least three years	61%	£160,000
Started when claimant under 12	57%	£159,000
Started when claimant at least 12	41%	£125,000
Claimant female	48%	£116,000
Perpetrated by close relative	41%	£106,000
Duration less than three years	27%	£77,000
All	**49%**	**£144,000** **J.P.I. Law 43*

The order is similar to that for General Awards, with one exception: Employment Awards for men are £54,000 higher than those for women. This reflects a different pattern. Male Employment Awards tend to be either very high or very low. Of the 11 Employment Awards featuring male claimants, 6 are below £25,000, 2 are above £500,000, and only 3 are somewhere in the middle. In stark contrast, of the 10 awards featuring female claimants 8 are in the middle. What could explain these differences? Lower female earnings and labour force participation rates could perhaps explain why Employment Awards are lower. But the reasons for the differences in pattern are not at all obvious, and would need further investigation.

Consequences

The Consequences of the abuse covers the results of the abuse, including any psychiatric injury, attempts at self-harm, and prognosis.

General Award

Feature	# of claims with feature	Average General Award
PTSD	17	£70,000
Self-harm	9	£69,000
Psychiatric injury but not PTSD	15	£59,000
No psychiatric injury established	11	£48,000
All	**43**	**£60,000**

Unsurprisingly, abuse causing more serious psychiatric injuries tends to result in higher General Awards. The most important feature is PTSD. More than half the General Awards in claims featuring PTSD are over £80,000, and none have been less than £38,000. Serious Consequences are not a necessary condition for a high General Award, though. In J v Fife Council, no psychiatric expert evidence was led. But the General Award of £111,000 reflected the Nature and Circumstances of the abuse, as well as the non-clinical Consequences.

Employment Award

Feature	% of claims where Employment Award made	Average Employment Award (where made)
PTSD	56%	£233,500
Self-harm	56%	£134,018
Psychiatric injury but not PTSD	67%	£68,000
No psychiatric injury established	10%	£22,000
All	**49%**	**£144,402**

The ranking is exactly the same for Employment Awards as it is for General Awards. But PTSD has a more dramatic effect on Employment Awards, which are over three times the size of awards where another form of psychiatric injury is established. Of course, not everything turns on the precise diagnosis. Three Employment Awards of over £100,000 have been in abuse claims featuring psychiatric injuries other than PTSD.

Valuation

The Framework No single Aspect—Nature, Circumstances, or Consequences—is a reliable guide to the overall value of a claim. To arrive at a meaningful valuation figure, an assessment of all three Aspects is needed. We do this by assessing how many Aspects are "Extremely Serious". In order to do this consistently, guidance on when an Aspect is Extremely Serious is set out in the table below.

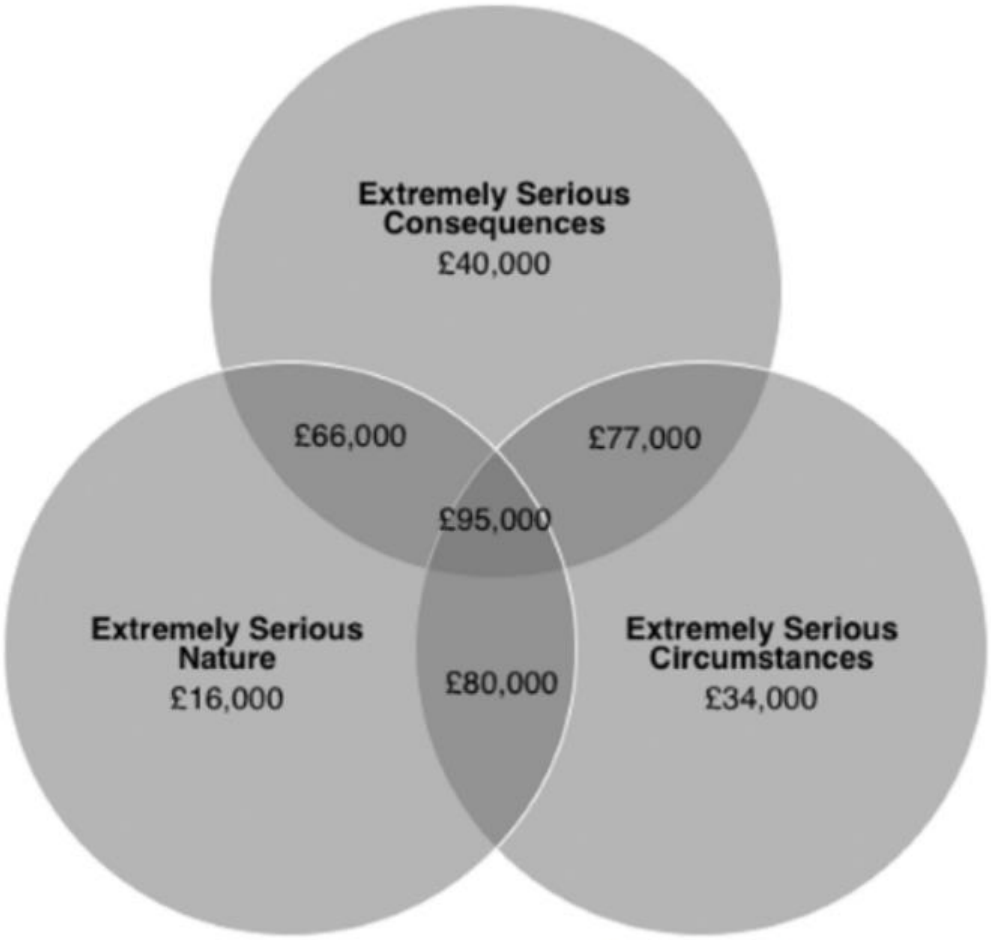
"Extremely Serious". In order to do this consistently, guidance on when an Aspect is Extremely Serious is set out in the table below.

Aspect	Circumstances where Aspect is Extremely Serious by default	Other circumstances where Aspect may still be Extremely Serious
Nature	Penetrative sex (vaginal or anal)	Where less serious sexual acts are accompanied by violence or photography
Circumstances	The claimant was under 12 at the time of the abuse, and it lasted for three years or more	Where the abuse is particularly frequent, the claimant is particularly vulnerable, or there is a particularly serious breach of trust (e.g. parental abuse)
Consequences	The patient has PTSD or another serious psychiatric injury	Where there has been serious self-harm or the prognosis is particularly poor

Each of the 43 claims has been assessed using this Valuation Framework. For each claim, there are between 0 and 3 Extremely Serious Aspects.

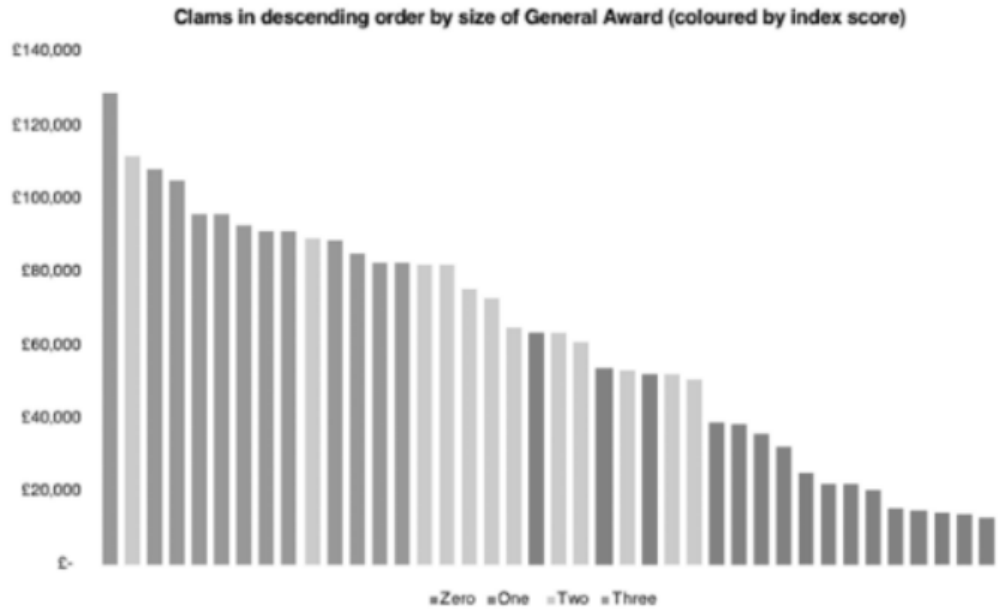
General Awards

The Venn diagram below shows the average General Awards where there is one Extremely Serious Aspect (£16,000–£40,000, depending on which Aspect is Extremely Serious), two (£66,000–£80,000), or three (£95,000). The more Extremely Serious Aspects there are, the higher the average General Award is.



Venn Diagram showing average General Awards where there is one or more Extremely Serious Aspect

Next, the claims are lined up in descending order and colour-coded according to the number of Extremely Serious Aspects. This tests how good the Valuation Framework is at predicting the value of a case. Ideally, we would like to see the different colours neatly grouped together.



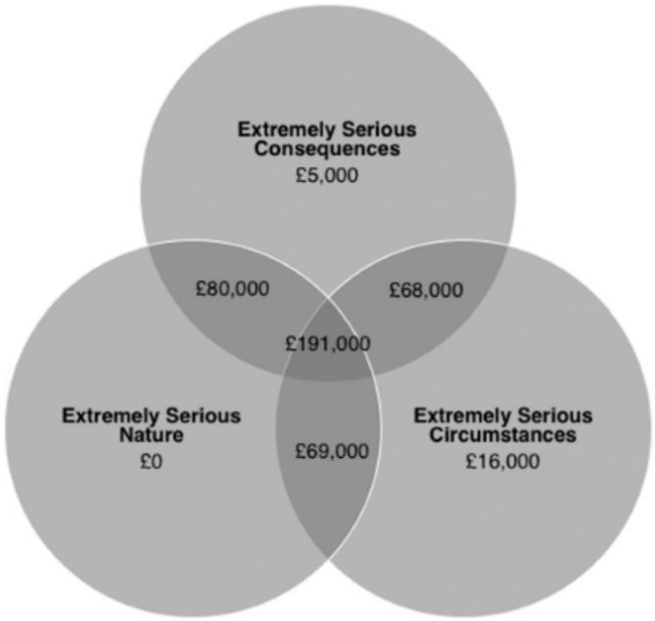
Venn Diagram showing average General Awards where there is one or more Extremely Serious Aspect

These results are as robust as could be expected from real world data. Every claim with three Extremely Serious Aspects has a General Award of over £80,000. Almost all of those with two Extremely Serious Aspects has a General Award of between £50,000–£90,000. The sole exception is J v Fife Council, which was exceptional for having some of the worst abuse but only transient effects. All the claims with only one Extremely Serious Aspect had a General Award below £65,000, with most under £40,000. There were only two claims with no Extremely Serious Aspects, but they both had a General Award below £25,000.

Number of Extremely Serious Aspects	Approximate band of General Awards
0	£0–25,000
1	£10,000–65,000
2	£50,000–90,000
3	£80,000+

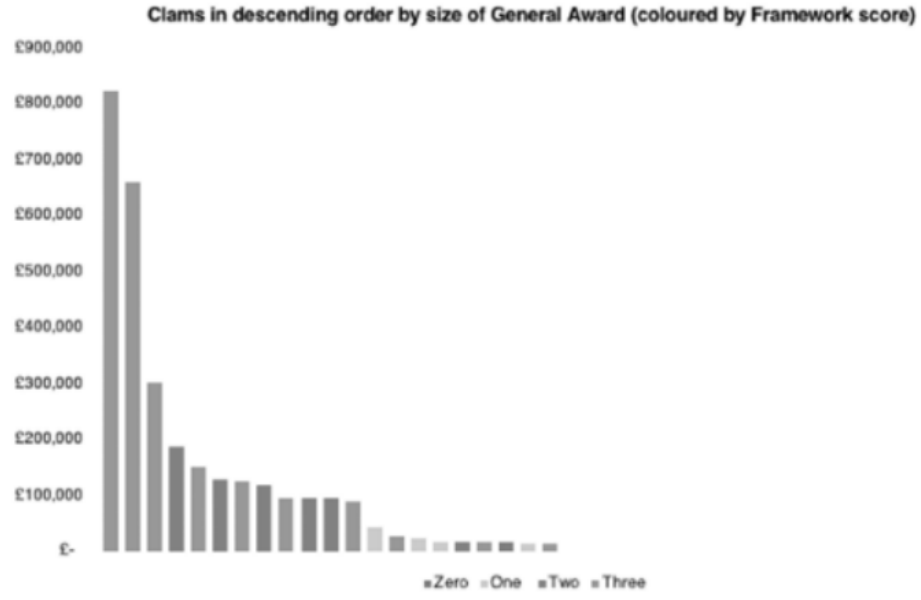
Employment Award

As with General Awards, average Employment Awards increase with the number of Extremely Serious Aspects. The Venn diagram shows average Employment Awards where there are Extremely Serious Aspects in one Aspect (£5,000–£16,000, depending on the Extremely Serious Aspect), two Aspects (£68,000–£80,000), or all three Aspects (£191,000).



Venn Diagram showing average Employment Awards where one or more aspects are Extremely Serious

We then line up and colour-code the Employment Awards in the same way as with the General Awards.



Venn Diagram showing average Employment Awards where one or more aspects are Extremely Serious

The Valuation Framework is somewhat successful at predicting the value of cases. The top three Employment Awards were made in claims with three Extremely Serious Aspects. Of the top 12 Employment Awards, all have 2 or more Extremely Serious Aspects. However, the results are far less neat than for General Awards. This is probably unavoidable. The level of Employment Award depends on individual circumstances that are difficult to capture, like the value of the claimant's skills.

Number of Extremely Serious Aspects	Number of claims	% of claims where Employment Award made	Average Employment Award (where made)
0	2	50%	£8,000
1	14	29%	£13,000
2	12	50%	£53,000
3	12	83%	£191,000

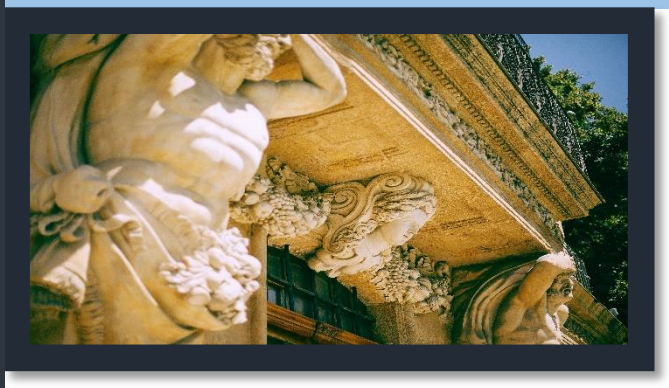
Conclusion

By predicting the range of likely General Awards and, albeit less robustly, Employment Awards, the Valuation Framework will hopefully make it easier to value child sexual abuse claims. Where used, it can make valuations more evidence-based and more consistent. This, in turn, should encourage earlier and fairer resolution of these sensitive cases.

Jamie Gardiner &

Kim Leslie,

Digby Brown



What's in a memorial?

By: Alan Collins,

Hugh James Solicitors

Memorials to survivors of childhood sexual abuse are very much in the news.

The Australian Commonwealth government announced in its recent budget that it will invest A$6.7 million from 2020-21 to establish a National Memorial for Victims and Survivors of Institutional Child Sexual Abuse (the National Memorial) in Canberra .

The establishment of the National Memorial was a recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse .

In Jersey there has been a protest against a memorial to survivors.

The proposed memorial is part of a project is part of the Jersey Government's response to the Independent Jersey Care Inquiry .

A total of £200,000 will be used from the care inquiry budget to fund the memorial.

The government said it would acknowledge the children "failed and harmed" by the care system.

A citizen's panel, partially made up of abuse survivors, recommended the idea in 2018.

The objection to the proposed memorial begs the question what is the objective in a CSA context?

Staying with Jersey for the citizens panel it has said that: "We agreed unanimously that in order to move forward we must look back. Our recommendation for a memorial we believe helps us to look back, whilst our other recommendations help us to move forward" .

Further:

"We are the lucky ones, we survived, we will carry the physical and mental scars with us for the rest of our lives, but we survived. This memorial will help us in part to remember those who didn't, those for whom the pain was too much and took their own lives" .

The objective is a cathartic one, but the criticisms revolve around the concern that a memorial is a visible and painful reminder of abuse, and so would act as trigger. Surely this must mean that that the objective cannot be met?

Memorials to survivors already exist and so the concept is not new, albeit there is, perhaps, a lack of awareness.

What's in a memorial?- continued

The St Peter's Sacred Space at Mintaro in South Australia's Clare Valley is a church that has been restored especially for those who have been betrayed by crimes in religious institutions. The interior has been altered so that it does not look like a church, to support people who might otherwise be triggered by a religious setting. Its only cross has arms of equal length painted with First Nations artwork. Its vision is to support people who have suffered church abuse so they can re-establish direct communication with God.

Again, in Australia there is the Marist Hamilton memorial for those who were sexually abused at the Marist Brothers school at Hamilton in NSW. The memorial includes an inscribed circular wall, garden and private area of reflection 'dedicated by survivors, their families, their friends and those who stand in solidarity with the survivors, silently placing their hands on the memorial stone – thereby investing the memorial stone with their stories and their love'. When its was dedicated it was said: "…this is a place of memory and a place that will keep the memory alive of things that happened here as a warning and as a rebuke to anyone who does not take the protection of children seriously".

What can be learned from these two memorials is that their objective is both cathartic and powerful. There is the desire to remember and for society to learn from the past to not to repeat the errors of the past.

These very visible reminders of the tragedy of child sexual abuse demonstrate by their example that memorials need not be confrontational. Considerable thought and effort have been deployed to minimise triggering of painful memories. Indeed, attention has been given to how to maximise reflection and thought.

It could be argued that the absence of memorials would generate silence which has been the hand maiden of child sexual abuse. Silence sadly just reinforces the pain and isolation and for many is a trigger.

Alan Collins

Partner Hugh James Solicitors

Alan sits on the oversight committee that oversees the work of the Jersey Citizens Panel

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.

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