



## **Novel approaches to Abuse Claims**

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APIL SIG meeting – 23 April 2019

An update on *CN*



## Novel arguments in Abuse Claims



## Vicarious Liability – a friend

“The law of vicarious liability is on the move”

Lord Phillips in *Various Claimants v Catholic  
Child Welfare Society* [2013] 2 AC 1 [19]

*...but so is the law in terms of establishing a duty of care*

## Duty of Care/Non-delegable duties in the context of *CN v Poole DC*

- *Woodland v Essex County Council* [2013] UKSC 66
  - Non-delegable duty established
- *Armes v Nottinghamshire County Council* [2017] UKSC 60
  - Non-delegable duty not established
  - But liability established on the basis of vicarious liability for foster carers (who owed the children a duty of care)
- *CN v Poole District Council* [2018] 2 W.L.R. 1693
  - No duty of care at all;
    - (Although exceptions *possibly* defined)
  - *Ergo* no vicarious liability

## Non delegable duty – Applying *Woodland* to *CN*

### Five features identified by Lord Sumption:

1. Claimant (“C”) is especially vulnerable or dependent on the protection of Defendant (“D”)
2. Antecedent relationship between parties:
  1. which puts the claimant in the actual custody, charge or care of the defendant; and;
  2. from which it is possible to impute to the defendant **the assumption of a positive duty** to protect the claimant from harm in the performance of obligations
3. Exercise of care can be said to involve an element of control over C
4. C has no control over way D carries out its obligations
5. **D had delegated** a key function to someone to exercise D’s custody or care and the element of control which goes with it

## Non delegable duty - *Armes*

- Non-delegable duty would be is broad, and would fix local authorities with too demanding a responsibility:
  - Policy reasons – *inter alia* – LA responsible if placed with relatives rather than foster parents;
  - Duty discharged by placing and monitoring (cf if **monitoring is substandard???**)
- Policy ‘workaround’ – imposition of vicarious liability:
  - Mainstream analysis;
  - End result akin to having non-delegable duty of care.
- But does give SC in *CN* scope to say that there should be no duty of care *per se* on the part of the local authority

*CN v Poole* in the context of *Armes* and *Woodland*

- No duty of care;
  - *Armes*:
    - Clear message – wrong to impose duty of care generally for breaches associated with Child Care Act 1980
- Nor vicarious liability for the perpetrators of harm
  - *Woodland*:
    - No power ‘delegated’ to the harm doer;
    - Q must be one of assumption of responsibility
- 3 authorities consistent in message:
  - End result = focus on assumption of responsibility



## Comparative Table

	Non-delegable duty/Duty of care?	Vicarious Liability?	Assumption of responsibility required?
<i>Woodland</i>	✓	✓	✓
<i>Armes</i>	✗	✓	?
<i>CN v Poole</i>	✗	✗	✓

## The CN exceptions (CA, at para 30)

- (1) cases **where the third party is under the defendants control** and damage was foreseeable;
- (2) cases where the defendant **creates a new risk** that injury might be inflicted by the third party (see *Mitchell v Glasgow City Council* [2009] AC 874, paras 23, 82), and;
- (3) cases where the defendant **assumes a positive responsibility** to safeguard the claimant.
- And additionally:
  - HRA – *“In the context of suspected child abuse, breach of a duty of care in negligence will frequently also amount to a violation of [article 3](#) or [article 8](#)”* – *D v East Berkshire* at para 83.

## Defence by omission?

- Child Protection Register:
  - 3<sup>rd</sup> party under 'D's control'?
  - Creating risk if failing to take adequate steps to safeguard C?
- Policy driven results:
  - 'Assumption of responsibility'
    - More than mere knowledge? – *CN* at para 9 *op.cit. Darby v Richmond upon Thames* [2015] EWHC 909 (QB)
    - Cases turning upon threshold of intervention?
    - In the context of a likely HRA breach?

Our new friend?

*The law of assumption of responsibility is on the move?*

Consent in adult claims

and

Alternatives to assault claims

James Counsell, QC

## Consent in adult abuse claims

### Under 16?

Generally, age of consent to sexual activity is 16 although still necessary to prove lack of consent e.g. to rape in prosecutions for rape of those over 13.

### What if 16 or over?

Not necessarily the case that over 16 year old is consenting, even if claimant appears to demonstrate outward signs of consent to sexual activity

### Sexual Offences Act 2003 s 74:

- Consent if a person “agrees by choice and has the freedom and capacity to make that choice”

### Cases of grooming before 16, with sexual activity only after?

## Consent in grooming cases

Example 1: *BDA v Domenico Quirino* [2015] EWHC 2974 (QB)

Note the judgment was on quantum only – liability conceded:

- BDA took karate lessons from aged 10 and met D, then a senior grade;
- When C aged 14, D became her instructor and head trainer – soon she began to attend evening classes
- Training became private lessons and then personal texting
- When 15, D stated to make comments about C's body and brought conversation round to sex and kissing and then inappropriate touching of breasts and genital area over and then under clothing
- Aged 16, sexual intercourse took place about 6 times.

## Consent in grooming cases

### Example 2: *JL v Archbishop Bowen and the Scout Association* (*HHJ Platts – Manchester CC*)

Case No IIR72777 2015 WL 3630347

#### Facts:

- sexual abuse by a Roman Catholic priest who worked as a scout chaplain;
- Claimant first came into contact with the priest when he was an eight-year-old cub;
- C was groomed from that age, even though sexual activity did not take place until he was 16 (and continued until the age of 31).



*JL v Bowen* – HHJ Platts

71. What is consent for these purposes? Despite the industry and experience of all counsel in this case they have not found any authority where the test for consent has been considered in the context of sexual assault having occurred after a period of grooming or emotional manipulation. The learned editors of Clerk & Lindsell on Torts (21<sup>st</sup> edition”) write at paragraph 3-92:

- “The interest protected in many of the intentional torts consists of a right of control, of an individual's person, liberty, goods or land. If the claimant invites a kiss or steps into a helicopter he cannot complain of battery or false imprisonment .... Consent, if present, negatives liability. What must be established is that it was a consent freely given and applied to the conduct of which the claimant now complains. ([the Court’s] emphasis).”

## Adult claims - consent

### *Example 3: FZO v Adams and L.B. Haringey* [2018] EWHC 3584 (QB)

- C raped by a non defendant - confided in D1, a teacher at D2's school;
- D1 groomed C by telling him that, if he disclosed abuse, he would be thrown out of family etc;
- D1 raped C – years old abuse from aged 13 to 21, well after C had left school

### Cutts J [213]:

“A person consents to sexual activity with another if they have the freedom and capacity to consent. Submission is not the same as consent. There is no suggestion that the claimant lacked capacity to consent once he reached the age of 16 years. Mr Seabrook argues however that he did not have the freedom to do so, that his freedom was impaired by the grooming and manipulation process. The first defendant had engineered the claimant's dependency upon him and the claimant was required to be used sexually by the first defendant for the dependency to be met.”

*FZO v Adams & L. B. Haringey*

“I have already found that the first defendant groomed the claimant from the age of 13 years into believing that he was the only person who, knowing what he was following the rape by Monteil, would be his friend. He isolated him from his peers and family and created a dependency upon him. This dependency explains why the claimant went repeatedly to visit the first defendant in his house and his car and did not seek to distance himself from him. It caused the claimant to feel grateful to the first defendant and willing to do what the first defendant wanted in order to maintain that relationship. With respect to Mr Kent the lack of violence or aggression in the sexual activity is far from determinative of the issue of consent in this case. It is widely recognised that the grooming process obviates the need for either as the child is manipulated by such into submitting to it. That is what I find happened in this case. In those circumstances I consider that the claimant submitted to the sexual activity rather than giving true consent.”

*FZO v Adams & L. B. Haringey*

Note also that Court dismissed an argument that school could not be vicariously liable for any abuse after C had left school.

Para 219:

“The later assaults, as I have found them to be, were simply a continuation of the behaviour that commenced while and because the first defendant was a teacher. This conduct is thus indivisible from that which occurred while the claimant was a pupil at the school. I consider it just in those circumstances for the second defendant to be held liable for it.”

## Alternatives to assault

### Other potential causes of action

#### 1. Negligence:

- Failing to safeguard;
- Failing to vet before recruiting;
- Failing properly to investigate previous complaints;
- Failing to act on rumours;
- Failing to provide appropriate training/instruction;

Temptation to add this as additional ground when no real evidence  
– best resisted

## Alternatives

### 2. Intentional infliction of harm

*Wilkinson v Downton* [1897] 2 QB 57; [1897] EWHC 1 (QB)

#### 3 ingredients:

1. Words or conduct for which no justification
2. Intention to cause physical or emotional harm
3. Harm amounts to a recognised psychiatric illness

## Intentional infliction of harm

### Intention to cause physical or emotional harm?

*C v H* [2015] EWHC 2687 (QB); [2016] PIQR Q2

Abuser groomed a 16 year old pupil with special educational needs from a dysfunctional home and encouraged the exchange of indecent images and texts.

The court had no difficulty in finding the consequences to her (an adjustment disorder and increased anxiety) were so obvious that the abuser could not realistically say that they were unintended.

## Intentional infliction of harm

### Intention to cause physical or emotional harm?

*O v Rhodes* [2015] UKSC 32; [2016] AC 219.

Supreme Court: more stringent test:

The mental element is made out if it can be established that the abuser intended to cause physical harm or at least severe mental or emotional stress

...but recklessness is not sufficient



## Alternatives

### 3. Harassment

#### Protection from Harassment Act 1997

- Section 1 - a person must not pursue a course of conduct which amounts to harassment
- Section 2 – criminal offence
- Section 2A – creates offence of stalking
- Section 3 – a civil claim for breach of section 1 can be brought by victim of harassment
- Section 3A – power of court to grant an injunction to prevent
- Section 7 – course of conduct must be conduct on at least two occasions

Note – only applies to conduct after 16 June 1997



**Abuse claims: hurdles and how to overcome them**

**Discussion**

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