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## **DSN v Blackpool Football Club Ltd**

[2020] EWHC 595 (QB)

**Queen's Bench Division**

**Griffiths J**

**13 March 2020**

*Personal injuries – Sexual abuse – Vicarious liability*

### **Abstract**

*The claimant brought a claim for damages against the defendant football club, alleging that it was vicariously liable for the sexual abuse committed against him by its former scout (FR) in 1987. FR was currently deceased. The Queen's Bench Division held that, applying settled law to the facts, it was equitable to allow the limitation period to be extended under the discretion provided by s 33 of the Limitation Act 1980. The court accepted the claimant's evidence of the abuse and held that it was just to hold the defendant vicariously liable for it. Further, the court considered the expert evidence that the claimant suffered excessive anxiety with a strong phobic element, and that his prognosis was good, once the trial was behind him. It awarded him general damages for pain, suffering and loss of amenity case, to include aggravated damages, of £17,000. Special damages for past losses and general damages for future pecuniary losses had been agreed (subject to liability) at a figure of £2,071.98.*

### **Digest**

The judgment is available at: [2020] EWHC 595 (QB)

### **Background**

The claimant brought a claim for damages for alleged sexual abuse by FR, who was a convicted sexual abuser, during a youth football trip to New Zealand in 1987. That abuse had had an effect on the claimant in later life. FR, who was currently deceased, had been a scout for, and had been associated with, the defendant football club (Blackpool FC). The claimant alleged that Blackpool FC was vicariously liable for the damages, arising out of the sexual abuse by FR.

## Issues and decisions

(1) Whether the limitation period should be extended under the discretion provided by s 33 of the Limitation Act 1980 (LA 1980).

The alleged sexual abuse had allegedly occurred in June 1987, when the claimant had been aged 13. The primary limitation period (ending 2 years after the claimant's 18th birthday) had expired in 1995. Proceedings had been issued 22 years later (in January 2018).

Although s 33(3)(b) particularly required consideration of the effect on the cogency of the evidence arising from the delay on the part of the claimant after expiry of the primary limitation period, consideration of the effect of the lapse of the whole period of time since the accrual of the cause of action was required in order to assess all the circumstances of the case (see [25] of the judgment).

The court had to weigh many factors and approach them in a principled fashion, notwithstanding the breadth of the question posed at the beginning of s 33, as to whether it appeared to the court that it would be 'equitable' to allow the action to proceed after a long delay. The court had to bear in mind the prejudice to the claimant if the primary limitation period was not extended, the prejudice to the defendant if it was, and all the circumstances of the case under s 33(1)(a) and (b), and (3), including, but not limited to, the statutory factors in s 33(3)(a)-(f). Of those, factors (a) and (b) were of particular importance in the present case: namely, the length of the delay, the reasons given for the delay by the claimant, and the extent to which, having regard to the delay, the evidence adduced or likely to be adduced (by the claimant or the defendant) was or was likely to be less cogent than if the action had been brought within the primary limitation period. Although not part of the statutory language, a number of the authorities confirmed that the question of whether there was a real possibility of significant prejudice by reason of the delay was of critical importance, as was whether it was possible to have a fair trial (see [29] of the judgment).

The case law should not be read as allowing defendants to play as a trump card the fact that the money value of a claim was relatively small. The money value of the claim was not one of the factors identified in s 33(3)(a) to (f) and proportionality was not expressly referred to in s 33 either. The ultimate question was what was 'equitable' (see [66] of the judgment).

In the present case, on the evidence, it had, for practical purposes, been impossible for the claimant to have disclosed the abuse before he had, or to raise a legal claim before he had, particularly having regard to the effect of the abuse on him, the shame he felt, the steps taken to keep him quiet, his concern about what his mother might have felt before she had died in 2010, his coping strategy of ignoring what had happened, the change in the climate of opinion about the credibility of allegations of sexual abuse against vulnerable children which was relatively recent, and the increased difficulty of acting caused by the severe distress and mental health deterioration he had suffered after bringing the memory back to the surface on disclosure to his wife. Applying settled law, he had, for practical purposes, been disabled from commencing proceedings, initially by the trauma of what he had suffered and his reaction to it, and then by the mental health challenges he had faced when disclosing even to his wife and no-one else. In relation to some of the particular considerations in s 33, therefore, both the reasons for delay and the extent to which the claimant had acted 'promptly and reasonably' once he had known that he might have an action for damages, were in the claimant's favour (see [42] of the judgment).

It was particularly important to consider the extent to which, having regard to the delay, the evidence to be adduced by the plaintiff or the defendant was or was likely to be less cogent than if the action had been brought within the time allowed by LA 1980 s 11, and whether there was a real possibility of significant

prejudice to Blackpool FC by reason of the delay. On the facts, because of the cogency and abundance of the evidence on both sides, and the nature of the issues in the case, and the narrow scope of factual dispute, at least so far as primary facts were concerned, no real risk of substantial prejudice had been caused by the delay in Blackpool FC receiving notice of the claimant's claim, or in the issue of proceedings so long after the primary limitation period (see [45]-[60] of the judgment).

Paying careful regard to the considerations in the authorities cited, and applying the criteria in LA 1980 s 33, it would be equitable to allow the action to proceed (see [68] of the judgment).

*Cain v Francis; McKay v Hamrani* [2008] EWCA Civ 1451 applied; *JL v Bowen* [2017] EWCA Civ 82 applied; *A v Hoare and other appeals* [2008] UKHL 6 adopted; *Robinson v St Helen's Metropolitan Borough Council* [2003] PIQR P128 distinguished; *Adams v Bracknell Forest Borough Council* [2004] UKHL 29 distinguished; *Dobbie v Medway Health Authority* [1994] 4 All ER 450 considered; *KR v Bryn Alyn Community (Holdings) Ltd (in liq)* [2003] EWCA Civ 85 considered; *AB v Nugent Care Society; R v Wirral Metropolitan Borough Council* [2009] EWCA Civ 827 considered; *E v E* [2015] EWCA Civ 287 considered; *Murray v Devenish (Provincial Superior of the London Province of the Sons of the Sacred Heart of Jesus sued on his own behalf and as a representative of all other members of the unincorporated association known as the Sons of the Sacred Heart of Jesus)* [2018] EWHC 1895 (QB) considered; *Catholic Child Welfare Society (Diocese of Middlesbrough) and others v CD* [2018] EWCA Civ 2342 considered; *London Borough of Haringey v FZO* [2020] EWCA Civ 180 considered.

(2) Whether FR had sexually abused the claimant and, if so, the extent of the assault.

The claimant's evidence of the abuse was accepted without qualification or reservation (see [74], [77] of the judgment).

(3) Whether Blackpool FC was vicariously liable.

It was settled law that D2 might be vicariously liable for the tortious act of D1, even though the act in question constituted a violation of the duty owed to D2 by D1, and even if the act in question was a criminal offence. It was further settled law that vicarious liability could extend to liability for a criminal act of sexual assault. The (two-stage) test was to consider: (i) what functions or 'field of activities' had been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job (that question had to be addressed broadly); and (ii) whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice (see [78]-[90] of the judgment).

Reviewing the evidence, and in the light of the authorities on vicarious liability, the relationship between FR and Blackpool FC had been one capable of giving rise to vicarious liability. It was just and reasonable on the facts that that should be so. FR had been an unpaid volunteer. However, the club's dire financial state had meant that almost all the non-playing staff had been in the same position, the manager and the youth manager being the exceptions. FR had been very much doing the work of the club, for which there had been no more important task than spotting and capturing young players and bringing them into a position when they were willing to sign up for a lower division side with limited resources. Blackpool FC had given FR credibility by lavishing tickets and access on him and his protégés. His activity had been part of its business activity (see [159], [160] of the judgment).

It followed that FR had been so much a part of the work, business and organisation of Blackpool FC that it was just to make it liable for his torts within the first limb of the two-stage test, subject to the second limb (see [162] of the judgment).

Concerning the second limb, FR's abuse of the claimant on the New Zealand tour, and the New Zealand tour itself, had been so closely connected with FR's relationship with Blackpool FC that it was just to hold it vicariously liable for it (see [175] of the judgment).

*Catholic Child Welfare Society v Various Claimants (FC)* [2012] UKSC 56 applied; *E v English Province of Our Lady of Charity* [2013] QB 722 applied; *JGE v English Province of Our Lady of Charity* [2011] EWHC 2871 (QB) considered; *Cox v Ministry of Justice* [2017] 1 All ER 1 considered; *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11 considered; *Lister v Hesley Hall Ltd* [2001] UKHL 22 considered.

(4) Consideration was given to the causation and effect of the claimant's psychiatric diagnoses.

On the evidence, the claimant had suffered from a heightened state of anxiety for roughly six months after FR's assault. He had then buried the memory and had made the best of things. In the years between the abuse and the claimant's initial disclosure to his wife in 2013, he had graduated, married, had children, built a stable home life, and achieved stable employment with promotion. However, that had changed when he had made the disclosure to his wife and, subsequently, reported to the NSPCC and the police, and embarked on the present litigation. The experts agreed that the abuse had been a significant material factor in the claimant's mental health problems following the disclosure to his wife in around 2012, the disclosure of the abuse to the NSPCC and police in 2016 and subsequent involvement in the litigation. The experts further agreed that his main problem on examination was excessive anxiety with a strong phobic element consisting mainly of a fear of heights and driving. They also agreed that the symptoms had got worse, but that the prognosis was good, once the trial was behind him (see [181]-[187] of the judgment).

On the evidence, Blackpool FC's conduct since being notified of the claim, up to and including the trial itself, had made things worse than they might have been. By never accepting any responsibility and never even accepting that the abuse had taken place at all, Blackpool FC had maximised the suffering caused to the claimant (see [188] of the judgment).

To the extent that (as the experts agreed) the period of the litigation had been worse for the claimant than the 25 years after the assault, Blackpool FC shared a responsibility for that. They had conceded nothing at all at any point and had made no effort to sympathise or to reach out in ways that might have mitigated the difficulties faced by the claimant in the years since disclosure (see [189] of the judgment).

(5) Consideration was given to the amount of damages to which the claimant was entitled.

The claimant submitted that the case fell within category 4(A)(b) of the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases (15th edition, 2019) (the guidelines) (moderately severe, range £17,900 to £51,460). Blackpool FC argued that the case fell within category 4(A)(c) (moderate, range £5,500 to £17,900).

Special damages for past losses and general damages for future pecuniary losses had been agreed at a figure of £2,071.98, subject to liability. They covered the cost of the cognitive behavioural therapy, which was an agreed recommendation of the experts, and some travel expenses (see [191] of the judgment).

Concerning general damages for pain, suffering and loss of amenity, the present case was within Ch 4 of the guidelines. It was not a case in which there was or was post traumatic stress disorder (according to the experts). It was, however, a case arising out of sexual abuse in breach of trust, involving a victim who had been young and, therefore, vulnerable. Accordingly, it was a case within category 4(A) – Psychiatric

Damage. Account had to be taken of the factors in 4(A)(i) to (vii) when valuing the claim. The claimant's ability to cope with life had not been compromised until after disclosure, and not immediately then, but had become seriously affected more recently. Looking at the broader considerations outlined in 4(A)(vii), it was a case of sexual abuse and abuse of trust, which was relevant to the award of damages. Account had to be taken of the claimant's feelings of terror at the time of the abuse, as well as the longer term effects. Although aggravated damages were appropriate, they were compensatory and not punitive, reflecting the aggravation of harm caused by the offence itself and its circumstances. Accordingly, the court did not propose to allocate a separate figure for aggravated damages, but it would assess the proper figure for compensation within the guidelines with the aggravating features in mind, which were FR's position of power and authority, his abuse of trust, and the false allegations of theft used to silence the claimant after the event. Blackpool FC's stance in the litigation were not regarded as aggravating the damages, although it had not mitigated them (see [193] of the judgment).

Because the court did not find 'significant' problems 'associated with factors (i) to (iv), taken as a whole (which would indicate the higher bracket), the case would be placed in category 4(A)(c) but, because of the elements identified under issue (4), and the presence of elements identified in guideline 4(A)(vii), including notably breach of trust and significant psychiatric damage (but with a good prognosis, which was built into this category), it would be placed nearer the top, than the bottom, of the range (see [194] of the judgment).

The appropriate award of general damages for pain, suffering and loss of amenity case, to include aggravated damages, was £17,000 (see [195] of the judgment).

*Allen v British Rail Engineering Ltd* [2001] EWCA Civ 242 considered; *Hatton v Sutherland*; *Barber v Somerset County Council*; *Jones v Sandwell Metropolitan Borough Council*; *Bishop v Baker Refractories Ltd* [2002] EWCA Civ 76 considered; *BAE Systems (Operations) Ltd v Konczak* [2017] EWCA Civ 1188 considered.

James Counsell QC (instructed by Bolt Burdon Kemp) for the claimant.

Michael Kent QC and Nicholas Fewtrell (instructed by Keoghs LLP) for Blackpool FC.

Carla Dougan-Bacchus Barrister.