

Written submission to the Independent Inquiry into Child Sexual Abuse from Bolt Burdon Kemp

Introduction

Following a meeting with counsel to the inquiry Ben Emerson QC and Hugh Davies QC, and Jonathan Wheeler, David McClenaghan and Dino Nocivelli from Bolt Burdon Kemp on the 8th September 2015, we were invited to send in written submissions.

About Bolt Burdon Kemp

Bolt Burdon Kemp¹ has been representing claimants in civil litigation for 30 years. We were first instructed in compensation claims for child abuse in the late 1990's. Being based in Islington, we appeared to be well placed to deal with claims arising out of the scandal which hit the local council (the subject of the White report in 1995)².

We are members of ACAL, the Association of Child Abuse Lawyers³ (Jonathan is Treasurer) and APIL, the Association of Personal Injury Lawyers⁴ (Jonathan is their current President, David is Secretary to its Child Abuse Special Interest Group). We have a department of twelve solicitors plus support staff all specialising in claims for survivors, and this work now accounts for about 25% of the firm's turnover. We have experienced big growth in recent years.

We work with charities - Our solicitors are trustees of Survivors UK, Survivors Trust Wales, 28 Too Many, and One in Four. We are supporters of campaigns by others too – such as NAPAC, the National Association for People Abused in Childhood and the Care Leavers' Association. We have produced our own film by survivors for survivors, called "All Together We'll Be Heard" which explains the process of disclosing abuse, engaging with the criminal authorities and pursuing a civil claim for damages⁵.

In the last 12 months (to end of August 2015), we took on 204 new cases, and secured over £3.3 million in compensation for our clients. We have dealt with 625 enquiries from survivors so far this year.

Types of claim we deal with, relevant to the Inquiry's workstreams

Allegations of abuse by people of prominence in public life – against individuals.

Education and religion: Claims arising out of abuse at fee paying and state schools, claims against churches and religious orders. As discussed, the Catholic Church and Church of England feature prominently but we have also been successful in one case against an African evangelical church and also cases against the Salvation Army. We would point to a recent case (not ours) the first against the Jehovah's Witnesses in this country⁶. From enquiries we have received, we would anticipate future claims arising from abuse in the Jewish and Muslim communities, and other denominations which operate very much in a 'closed' setting.

¹ <http://www.boltburdonkemp.co.uk/>

² A redacted copy of the White report can be found here:

<https://www.whatdotheyknow.com/request/158173/response/382362/attach/4/The%20White%20Report%20redacted.pdf>

³ www.childabuselawyers.com

⁴ <http://www.apil.org.uk/>

⁵ <http://www.boltburdonkemp.co.uk/child-abuse/child-abuse-survivors-film/>

⁶ A v Trustees of the Watchtower Bible & Tract Society [2015] EWHC 1722

Criminal justice and law enforcement: Claims against the police.

Local authorities and voluntary organisations: Claims against social services (children's homes and in foster care settings, and for failure to remove children from an abusive home environment), the Scout Association and Boys Brigade, sports and youth clubs.

National and private service organisations: Hospitals and medical settings, and the military (against children who are members of cadet forces, and sexual bullying/ suspect initiation ceremonies in the armed forces). Allegations of a similar nature are particularly prevalent in Australia we understand⁷, and a compensation scheme established. It is thought that further claims will arise here.

(We also deal with claims against abusive individuals for abuse, harassment and sexual bullying, cases involving the procurement of indecent images, grooming, trafficking & forced prostitution).

Litigating child abuse compensation claims

We point to the strides made in this area to date from claims we have brought – for example on limitation (*A v Hoare & related appeals*⁸), failure to remove (*Pierce v Doncaster*⁹), vicarious liability (*Y v Wandsworth*¹⁰), quantum (*GLB v TH*¹¹/ *BJM v Eyre*¹²) and pushing for damages to truly reflect the impact of the abuse suffered - for example for couples counselling, loss of faith, plastic surgery costs, refunds of tuition fees (exemplary damages), and aggravated damages. In recent years, the law of vicarious liability has been reformed for the benefit of child abuse survivors, especially in claims against the church.¹³

Emerging issues: We point to claims based on a breach of a non delegable duty of care (*Woodland v Essex*¹⁴), in particular the judgment's impact on claims arising out of abuse by foster carers, and claims on behalf of secondary victims.

Funding issues: Legal aid is now rarely available for these cases. Most are dealt with under 'no win, no fee' (conditional fee) arrangements in which the solicitor takes on the risk of fighting and funding the claim, in return for an additional success fee if the case is successful. Post April 2013, success fees are deducted from a claimant's damages, in effect representing the 'cost' to them of taking the case, not having to pay if they lose, and not having to fund the litigation as it progresses¹⁵. Further, since April 2013, the idea of legal fees having to be proportionate to the

⁷ Meeting between Jonathan Wheeler and Adair Donaldson, Partner and head of child abuse claims at Shine Lawyers, Australia (Bolt Burdon Kemp offices, 26th February 2015).

⁸ [2008] 1 AC 844

⁹ [2009] 1 FLR 1189

¹⁰ [2006] 1 WLR 2320

¹¹ [2012] All ER D 329

¹² [2010] All ER (D) 139 (Nov)

¹³ See *Maga v Archbishop of Birmingham* [2010] EWCA Civ 256, *Various Claimants v The Catholic Children's Welfare Society & another* [2012] UKSC 56, *E v The English Province of Our Lady of Charity & another* [2013] QB 722, *A v Trustees of the Watchtower Bible & Tract Society* [2015] EWHC 1722.

¹⁴ [2013] UKSC 66

¹⁵ As a result of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, success fees could no longer be claimed from an unsuccessful defendant after April 2013. The Government felt that claimants should always have a

issues in dispute has been re-cast in a way which seems to focus more on the amount of damages awarded. It is important for the courts to realise that the value of a claim is not the only measure of the importance of the case to the client. In particular cases against local authorities for failure to remove a child from an abusive family environment are expensive to run, often requiring a lengthy detailed analysis of social services records, and an expert's view on negligence, but the value of such claims may not be significant, due to causation issues. In our view, the importance of bringing the issues in such cases before a court, cannot be judged purely on the amount of damages awarded.

Why compensation is key

We are clear about the importance of compensation: Its award acknowledges that fault lies elsewhere. It saves tax payers' money – money which otherwise would be spent on NHS treatment and welfare benefits – because the 'polluter pays'. It allows successful claimants to re-build their lives and become valuable members of society again, possibly funding a return to education and opportunities for employment. But it is a game of chance – some cases win whereas others fail or have insufficient prospects perhaps because the abuser has died, or has no assets, or limitation would be an insurmountable problem. In the eyes of clients, these are arbitrary distinctions.

Claimants' concerns

The system we must use to litigate claims remains adversarial and – at times - abusive. David and Jonathan recently completed work on the Civil Disputes Toolkit for Advocates under the auspices of The Advocates' Gateway. This gives guidance to advocates, judges and other court users as to measures which should be put in place to allow vulnerable witnesses to give their best evidence in court¹⁶. There are continual issues with delay endemic in the court system, and cases being fought on limitation (thus denying interim payments) even where liability is otherwise admitted. A recent development is the issue of consent being raised (we have furnished counsel with some recent examples and cases) and the use of the Compensation Act 2006 to avoid liability.

Clients are generally concerned with reports of insurers suppressing information from public scrutiny, threatening their insured that they will avoid paying out under their policies if information is publicly shared.¹⁷ We are concerned too from anecdotal reports, that there is a lack of support for victims/witnesses in the criminal process. No headway has been made on introducing a law to make reporting of abuse mandatory – the Government promised a consultation in October 2014 following debates in the House of Lords during the passage of the Serious Crime Bill, but this is still awaited. There is further concern at insurance companies

financial interest in their damages claim – what the Secretary of State Jonathan Djanogly called having “skin in the game”.

¹⁶ See <http://www.theadvocatesgateway.org/>. Toolkit 17 “Vulnerable Witnesses and Parties in the Civil Courts” out of which Toolkit 18 “Working with Traumatized Witnesses, Defendants and Parties” was developed.

¹⁷ See for example the controversy around Operation Pallial and the suppression of the Jillings report by the insurers of Clwyd Council. Wikipedia has a good summary of the issues: https://en.wikipedia.org/wiki/North_Wales_child_abuse_scandal. There has been a recent investigation on BBC's File on Four programme as to Rochdale Council's insurers' conduct in attempting to suppress or limit information coming into the public domain over an abuse scandal in the town. (Programme aired 10th May 2015, “Targeting the Vulnerable”, <http://www.bbc.co.uk/programmes/b05stkrm>). We understand that the Association of British Insurers is working on producing some 'best practice' guidance.

limiting liability and refusing to cover intentional acts and restricting the application of policies in the small print.¹⁸

Claimants are also concerned at their treatment by the Criminal Injuries Compensation Authority or CICA, a Government funded scheme set up to compensate the victims of violent and sexual crime. Sometimes this may be the only course open to clients who are entitled to compensation for the abuse they have suffered, if a civil claim is not feasible. The CICA is unyielding on time limits although we have a 100% success rate in appealing such decisions to the First Tier Tribunal. The CICA often raises consent in fact as a reason not to pay out, again forcing clients to the expense of appealing to the First Tier Tribunal. Applicants do not obtain any help for payment of their legal fees and we fear that many – when faced with a refusal from a case worker – do not pursue their application further. As a result the Government is saving much needed funds, but at the expense of victims' rights to compensation.¹⁹

Defendants' approaches

These differ widely – from the pragmatic and supportive to the adversarial and vindictive. We have tried on occasion to agree protocols with defendant firms to step back from the adversarial approach and cut down delay but ultimately without success²⁰. We advocate the use of settlement meetings but increasingly we have found that some defendants are not entering into the spirit of true negotiation, often using them as a way to intimidate the claimant or as a surreptitious way of testing the evidence before a trial. We are concerned too at the use of partisan experts who have – on occasion - caused the claimant to be re- traumatised, and pleading limitation defences even when a defendant otherwise accepts liability, which acts as a bar to the court awarding early interim payments. On some occasions, defendants fail to narrow issues and 'fight on all fronts'²¹, or they bring in third parties and further allegations at the last minute²².

Claimants' responses to the news of an Inquiry into child abuse

Claimants are wary as to whether the Inquiry will deliver what they want (perhaps many do not really know what they want). Will it be a panacea? It is unlikely to satisfy everyone. Will there be sufficient support networks for witnesses? What about cases currently being investigated by the police – will the Inquiry hear evidence (is it not sub judice? Or will it prejudice criminal

¹⁸ See for example AXN v Worboys and another [2012] EWHC 1730 where the court refused an attempt by victims of the infamous 'black cab rapist' to force his motor insurers to pay out the compensation they would have received had they sued him for damages. In the Scottish case of Campbell v Peter Gordon Joiners Ltd (in liquidation) and another [2015] CSIH 11, an insurer avoided paying out damages to an injured employee of the joinery company. Whilst it was mandatory for the employer to have an employer's liability policy, the policy excluded injuries arising out of working with wood!

¹⁹ See for example <http://www.boltburdonkemp.co.uk/news-blogs/child-abuse-blog/bolt-burdon-kemp-wins-cica-test-case-behalf-child-abuse-survivor/>, <http://www.boltburdonkemp.co.uk/news-blogs/child-abuse-blog/governments-cica-scheme-failing-help-sexual-abuse-survivors/>,

²⁰ Jonathan was involved on behalf of ACAL to attempt to agree a protocol to cover the disclosure of social services records required in compensation claims with Browne Jacobson Solicitors, who routinely act for local authorities. The negotiations broke down but the law has now been clarified in Dunn v Durham County Council [2012] EWCA Civ 1654. More recently we tried to agree a protocol to deal with a large number of cases against the Scout Association on which we were instructed. Kennedys Solicitors represented the Scouts but no agreement was reached because of their failure to engage following an initial meeting in May 2015.

²¹ See A v Trustees of the Watchtower Bible & Tract Society [2015] EWHC 1722.

²² See ABC v West Heath 2000 Ltd & another, 2015 – judgment to be handed down shortly and can then be made available on request.

enquiries?) Police are being investigated too by the enquiry of course. Does this create a conflict?

Law reform

Some statutory form of redress for those who cannot – for whatever reason – successfully bring a compensation claim through the courts, would be a good idea. Note that the Scottish Government is currently consulting on doing away with limitation in ‘historic’ abuse cases²³ – could this happen in England and Wales too? Apologies are very important for our clients but the court has no power to order them to be given, and they are only offered by the more enlightened of the defendants’ representatives. We feel they should have formal role in litigation: Bolt Burdon Kemp are launching their “You owe me an apology” campaign shortly²⁴. APIL is campaigning for support for vulnerable witnesses in civil litigation and for compulsory public liability insurance: We acted in a case against a former private school which had closed down and did not have such insurance in place, which meant our client was unable to recover compensation, even though his abuser (employed by the school as a chef) had admitted his guilt. If such insurance was compulsory, and could be identified from a central register even for organisations which have since closed down, justice would have been done in that case.

How we can help the Inquiry

Naturally we would be very happy to assist the Inquiry in any way we can. We look forward to discussing this at a further meeting.

Taking this forward

We understand that counsel to the Inquiry is interested in holding round table discussions with ‘key players’ from both sides, and in meeting us again to discuss some of these issues. We would of course be very happy to do so.

25th September 2015

**JONATHAN WHEELER
BOLT BURDON KEMP**

²³ See <http://www.gov.scot/Resource/0048/00480345.pdf>. APIL’s response to the consultation which Jonathan helped to draft can be found here: <http://www.apil.org.uk/files/pdf/ConsultationDocuments/3162.pdf>

²⁴ See our colleague Zahra Awaiz- Bilal’s article on the subject <http://www.boltburdonkemp.co.uk/articles/zahra-awaiz-bilal-discusses-apologies-child-abuse-claims/>