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CHARITIES AND CHILD ABUSE: A LITTLE MINEFIELD

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Introduction

Since the high profile Cleveland child abuse inquiry conducted by Lady Justice Butler-Sloss in the 1980s, awareness of the physical and sexual abuse suffered by some children in their own homes, or in schools or other institutions, has greatly increased: prosecutions have become common, previously respected individuals have been disgraced and a number of organisations, some of them charitable, have had their reputations destroyed. (In addition, of course, newspaper proprietors and lawyers have become fat.) There has also been some significant legislation, notably the Children Act 1989 and the Children's Homes Regulations 1991 and of course, more recently, the Human Rights Act 1998.

Some claims are valid whereas others may be mischievous, misconceived, unprovable or statute-barred. What are the specific civil claims which may be faced by the charities and charity trustees affected?

Types of Claim

Where the charity runs a school or children's home in which the alleged abuse has taken place, the charity itself (if incorporated) or the trustees (if not) are vulnerable to civil claims of four kinds, which may be combined: a direct claim for trespass to the person against a trustee who is said to be personally responsible for the assault in question; a claim for trespass on the basis that the perpetrator of the abuse was an employee for whose actions the charity or the trustees are subject to vicarious liability; a direct claim in negligence for the charity's or trustees' failure to set up recruitment or operating procedures which would have prevented the alleged abuse; or a claim in negligence on the basis that the charity or the trustees are vicariously liable for the acts and omissions of

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employees, being the managers of the institution, on the basis that they failed to supervise other staff or volunteers.

Individual Trustees

The situation in which an individual trustee is alleged to be personally involved in the assault is likely to be very rare. Whether or not the charity is incorporated, any claim in trespass is against the individual rather than the organisation. The charity cannot be made directly liable in damages for a tort, which incidentally may well be a breach of trust and/or a crime, committed by one of its trustees. But there may well be circumstances in which, if the assault allegedly took place on the charity's premises or in the course of an activity of the trustee which was connected with the running of the charity or the care of its beneficiaries, the trustee may be able to recover from the charity's funds the cost of a successful defence to the claim. If, for example, one of the trustees of a school charity was wrongly accused of ill-treating a pupil during an official visit to the school by the trustee and the pupil's claim for damages failed, the trustee could normally claim an indemnity from the charity in respect of any of the defence costs which were not recoverable from the claimant (who might well be publicly funded). It should be noted, however, that if the trustee had brought the proceedings on himself by his own unwise or unreasonable conduct, or was already liable to the charity for some unconnected loss which he had caused to the charity (e.g. by negligently damaging charity property) he would only be able to recover his defence costs after taking full account of his separate liability to the charity, and if indeed the liability for the loss outweighed the costs claim he would be unable to recover anything for his costs. In other words, a charity trustee's right of indemnity depends on 'the state of his account' with the charity: *Re Johnson, Shearman v Robinson* (1880) 15 Ch D 199.

A similar situation may obtain where it is claimed that the charity trustees have been negligent in failing to take precautions to prevent the occurrence of abuse of which there is a recognisable risk. If the object of the charity is to provide a residential home for children with learning difficulties, for example, the trustees are responsible for the way in which the home is organised, and for ensuring that safeguards are provided not only to look after the children's basic health and safety by ensuring that buildings and equipment meet statutory standards but also by taking such measures as are officially recommended by the local authority to minimise the risk of deliberate injury by staff or voluntary helpers. Such measures may include the careful vetting of prospective members of staff or volunteers, effective arrangements for supervision and reporting and rules which prevent unnecessary risks: for example there might be a rule preventing employees from bathing children except in pairs.

Incorporated Charities

In such cases where negligence is alleged against the charity trustees of an unincorporated charity, the primary liability will fall upon the charity trustees individually. If they are successful in defending the claim, they should be able to recover their net costs unless they have acted unreasonably in relation to their duties as trustees or are subject to some other unconnected liability towards the charity. If the claimant is successful in proving negligence on the part of one or more trustees, the trustees concerned will not be entitled to an indemnity from the charity's funds if the negligence towards the claimant (typically one of the charity's class of beneficiaries) also constitutes a negligent breach of trust. There is implicit authority (see *Re Raybould* [1900] 1 Ch 1999) to the effect that if negligence is proved against one or more of the trustees, it does not necessarily constitute a breach of trust. It is submitted, however, that this should be confined to the situation where the duty of care, which the trustee has breached in the course of administering the charity, was owed to a person who is not an object of the charity, or who or whose activities are not relevant to the administration of the trust. This might be the situation where, whilst conducting old people to the theatre on behalf of a charity for the relief of old age, the trustee concerned negligently injures a fellow theatre-goer with a walking frame belonging to one of his charges. In such a case the trustee may well be entitled to an indemnity from the charity's funds.

Where the charity is incorporated, the claim will be brought against the charity itself. It will have to defend itself at its own expense. If the claimant is successful, the charity may then have a claim for an indemnity in respect of both damages and costs against one or more of the charity trustees on the basis that he or she was personally at fault and in breach of his/her fiduciary duty towards the charity. It would seem reasonable to assume that the charity would not be in a position to recover from the charity trustee in circumstances where, had the charity been unincorporated, the trustee bearing the primary liability would normally be entitled to an indemnity from the funds of the charity, on the basis that in such a case the trustee's breach of duty would not be in the nature of a breach of trust.

Where it is alleged that the charity trustees of an unincorporated charity are vicariously liable, whether for trespass or negligence, there is no claim that the defendant trustee is thereby at fault. The fault alleged is on the part of the employee or volunteer, who may not have the funds to meet a claim for substantial damages. Unless, therefore, the trustees have unconnected liabilities towards the charity, the chances are that they will be entitled to indemnify themselves from the charity's funds if they are found vicariously liable in damages towards the claimant.

Recent Developments in Vicarious Liability

The law in this respect has recently been altered by a decision of the House of Lords delivered on 3 May 2001. Previously it had been held by the Court of Appeal in *Trotman v North Yorkshire District Council* [1999] LGR 584, following the classic principles of vicarious liability, that a deputy headmaster whose responsibility was the care of children in a special needs school who were on holiday in Spain had been guilty of sexual abuse against one of the pupils, the employing local authority was not vicariously liable on the ground that the criminal act complained of was not a method of carrying out the employee's duties but the very negation of them. The fact that the deputy head's job gave him the opportunity to commit the offences was not enough. The principle that an agent 'on a frolic of his own' could not render his principal vicariously liable applied. The *Trotman* case was followed in *Lister & Others v Helsey Hall Ltd* (1999) *The Times* September 10.

The claimants in *Lister* were sexually abused by the warden of a boarding house attached to a commercially-run boarding school between 1979 and 1982 when they were aged between 12 and 15. They sued the school company for damages for personal injury on the basis (i) that it was negligent in its care of the claimants and its selection and supervision of the warden, and (ii) that it was vicariously liable for the alleged abuse by the warden or his failure to report it. The trial judge found that the defendant had not been negligent, and this was not appealed. The only question in the Court of Appeal and above related to the claim for vicarious liability. The House of Lords in its decision reported at [2001] 2 All ER 769, noted two Canadian decisions which had been reported after the decision in the *Trotman* case: *Bazley v Curry* [1999] 174 DLR (4th) 45 and *Jacobs v Griffiths* [1999] 174 DLR (4th) 71. The Supreme Court of Canada had developed the principle of 'close connection' under which an employer could be held vicariously liable for the acts of an employee if those acts were so closely connected with his duties that, although the employer was not at fault, it would still be fair for him to bear responsibility. The House of Lords criticised the Court of Appeal's general approach to the question, and found that in this case the defendant was vicariously liable for the abuse committed by the warden and did not find it necessary to consider the alternative claim of vicarious liability for the warden's failure to report his own misconduct.

The European Dimension

There are other indications that the courts are likely to be sympathetic to claims of child abuse. In *S v Gloucestershire County Council; L v Tower Hamlets London Borough Council* (2000) *The Independent*, March 24, a differently-constituted Court of Appeal allowed the appeal of one of the claimants against an

order striking out his statement of case against a local authority in respect of sexual abuse by a foster parent despite the decision of the House of Lords in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 in which Lord Browne-Wilkinson had held that, as a matter of public policy, local authorities should not be held liable in negligence in the exercise of their statutory duties in safeguarding the welfare of children in their care. 14 months later, in *Z & Others v United Kingdom* (2001) *The Times*, May 3, 2001 the European Court of Human Rights decided a case involving serious neglect of four children who were being monitored in their own home by the social services department of a local authority. It held that the UK was in breach of Article 3 of the Convention (the right not to be subjected to torture or inhuman or degrading treatment) in failing to provide children with 'appropriate protection' against serious long-term neglect and abuse. There has also been a noticeable softening of the hard line previously taken by the ECHR in relation to corporal punishment.

Limitation

Lister was a case in which the abuse in question had occurred around 20 years before the final judgment. This is to be expected where the victim was a child at the time and may not be in a sufficiently independent position to obtain advice or contemplate legal proceedings until after he has reached his majority. There are other current cases in which it is alleged that abuse occurred 30 or 40 years before the commencement of the proceedings, which were delayed pending the outcome of criminal proceedings. An extreme example of a late claim is provided by the case of *McDonnell v Congregation of Christian Brothers Trustees & Another* briefly reported at (2001) *The Daily Telegraph*, March 13, 2001 the 65 year-old claimant alleged that between 1941 and 1951 he was abused while a pupil at schools run by two religious Orders, and that this caused psychological damage leading to a diminished life. Mackay J in the Queen's Bench Division decided for the defendants on a preliminary issue whether the claims were statute-barred. The decision depended on the interpretation of the combination of the Limitation Act 1939, the Law Reform (Limitation of Actions) Act 1954 and the Limitation Act 1963, as explained by the House of Lords in *Arnold v CEGB* [1988] 1 AC 228. The judge held that the relevant limitation period was 6 years from the date when the claimant turned 21, i.e. 6th January 1963, just months before the 1963 Act was passed on 31st July. Leave to appeal was granted because of the importance of the matter to the claimant and other prospective claimants, and the case is due to come before the Court of Appeal in October or November 2001.

The 'Charity' Point

One of the defendants in the *McDonnell* case reserved the right to put forward a further argument on which they will rely if the appeal (and any further appeal) is decided against them. That argument related to the manner in which the proceedings were constituted. That defendant is a trustee body which was incorporated in 1984 by certificate of the Charity Commission under the Charitable Trustees (Incorporation) Act 1872 (now replaced by Part VII of the Charities Act 1993). The trustees were previously an unincorporated body, and therefore the claim ought strictly to have been brought against the trustees who were in office at the time of the alleged abuse or their personal representatives.

Some argue that in such cases the claimant can nevertheless sue the present trustees on the basis that he may stand in the shoes of the original trustees and seek to avail himself of the indemnity to which they would be entitled in the event of judgment being made against them personally. The principle of subrogation is well known in relation to claims in debt or contract, but less developed in relation to claims in tort. In this connection it is interesting to note the summary in the Trust Law Committee's Report on the Rights of Creditors Against Trustees and Trust Funds (June 1999) at pages 4-5 (contract) and 12 (tort). There is a line of 19th century cases starting with *Benett v Wyndham* (1858) 4 De G F & J 259, in which the plaintiff was able to sue the current trustees of a private trust for the indemnity to which a trustee (or former trustee) was entitled after judgment for damages in tort had been awarded against him. In other words, the claim was for a quantified amount consisting of or equivalent to a judgment debt. There is no reported case, however, in which the plaintiff initially sued the present trustees and thus forced them to defend the factual allegations contained in a claim which would properly have been brought against the former trustee. It is also worth noting that in none of the cases was the claim in tort made by a beneficiary of the trust.

If any such proceedings are to be brought an essential step in the argument will be the assertion that the damages claimed can properly be met from the assets of the charity. It is accepted by the Attorney General and the Charity Commission that any such proceedings are 'charity proceedings' within the meaning of s.33 of the Charities Act 1993, being brought under the court's jurisdiction relating to trusts, with respect to a charitable trust. The claimant therefore requires permission under that section. There is also the consideration that charity proceedings should be brought in the Chancery Division of the High Court. Where proceedings are commenced without the necessary permission, the court will normally grant a stay to enable the claimant to seek such permission and otherwise put his proceedings into proper order.

Conclusion

As always, lawyers who advise charities have to be prepared to grapple with completely different areas of law. Considerable care is needed in either bringing or defending child abuse claims involving charities, and the outcomes of the cases already in the system will be of considerable interest to charity law practitioners as well as to those who practise in personal injuries and in tort generally.