

The Jimmy Savile scandal: What legal redress do the victims of his abuse have?

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It is believed that Jimmy Savile carried out at least 214 sexual offences over a 54 year period including 34 rapes. Savile committed the abuse at a number of venues, including BBC premises, local authorities, children's homes and hospitals. Savile died in October 2011. The first question is why was it not possible to prosecute Savile for rape and sexual assault when he was alive? Allegations were reported to the police several times while he was alive but no action was taken. This was because many of the victims had a distrust of authority and alcohol issues which made them vulnerable and put their credibility in doubt. It also appears that because of Savile's celebrity status the police and the Crown Prosecution Service were too cautious. As Savile is now dead the victims of his abuse will have to look to the civil law for redress in the form of damages. Such cases are classified as personal injury claims and normally the victim has three years from the date of the event to bring such a claim. However, in sexual abuse cases if there is reliable evidence that the victim did not bring a claim because the abuse had been buried or because the abuser had power over the victims so they did not come forward, the three year period will be waived. It is expected that this will apply to Savile's victims.

The question is what causes of action are available to the victims in the law of tort? The first tort to consider is the tort of negligence. First, are the police liable in negligence to the victims for not catching Savile? The answer is no because the police do not owe a common law duty of care to apprehend both unknown and known criminals unless they have assumed responsibility for protecting someone: *Hill v Chief Constable of West Yorkshire* [1989] AC 53 HL and *Smith (FC) v Chief Constable of Sussex Police* [2008] UKHL 50. This has been considered by the European Court of Human Rights and there are conflicting decisions. In *Osman v UK* (2009) 29 EHRR 245 the inability to sue the police was taken to be a procedural barrier preventing access to a court and therefore a violation of article 6(1) of the European Convention on Human Rights-the right to a fair trial. Contrast *Z v UK* (2002) 34 EHRR 3 where it was held that the non-existence of a duty of care is a matter of substantive law and therefore article 6(1) was not engaged. Second, could the victims sue the hospitals, local authorities and the BBC, with which Savile associated, for negligently allowing him to abuse the victims on their premises? The answer is no because no common law duty of care is owed by the organisations to the victims unless there is evidence that they knew about the risk posed by Savile: *X and Others v Bedfordshire County Council* [1995] 2 AC 633 HL. The policy behind these decisions is that to impose a duty of care would lead to defensive decision-making so that, for example, the police would be forced to defend past decisions and not concentrate on their primary role of preventing and dealing with crime. Third, the victims could sue Savile's estate, which has a net

worth of about four million pounds although it is unclear what the cause of action could be.

The best option for the victims is to sue the organisations on the basis that they were vicariously liable for the Savile's acts of abuse which amount to the tort of trespass to the person which covers battery, assault and false imprisonment. Although even here there is a real problem for the victims. The law of vicarious liability renders an employer strictly liable for the tortious act of its employee provided the act in question was committed in the course of the employee's employment. This is form of strict liability traditionally arising from the employer-employee relationship, without reference to any fault of the employer. The policy objective which underlies vicarious liability is to ensure, insofar as it is fair, just and reasonable, that liability for a tort is borne by a defendant (usually a corporate entity) that has the means to compensate the victim. Such employers usually have insurance to cover the risk.

The obvious response from the organisations will be that Savile was not an employee so that there cannot be vicarious liability for his torts. But the law of vicarious liability has recently been developed by the Supreme Court in *The Catholic Welfare Society v The Institute of the Brothers of the Christian Schools* [2012] UKSC56. This concerned a group action brought by 170 men in respect of acts of sexual and physical abuse they suffered at a residential school for boys in Market Weighton called St William's. The abuse was committed between 1958 and 1992 by members of the Institute who were lay brothers of the Catholic Church. The Catholic Welfare Society managed the School and it entered into contracts of employment with the brothers for them to be teachers and the headmaster at the school. The Society was held at first instance to be vicariously liable for the acts of abuse by the brothers and it did not challenge that liability. What the Society did challenge was the first instance judge's finding, confirmed by the Court of Appeal, that the Institute was not also vicariously liable for the acts of sexual abuse of children at the school committed by its members. The Court of Appeal held that the brothers did not act on behalf of the Institute as they were only in the position of any member of professional organisation who accepts employment with that status.

The Supreme Court disagreed with that analysis. Lord Phillips held that where the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same characteristics, that relationship can rightly give rise to vicarious liability on the ground that it was 'akin to that between an employer and an employee'. The relationship between the Institute and the teaching brothers had all the essential elements of the relationship between employer and employees. First, the teaching activity of the brothers was undertaken because the Institute directed the brothers to undertake it. Whilst the brothers entered into a contract of employment with the Society they only did so

because the Institute required them to do so. Second, the teaching activity undertaken by the brothers was in furtherance of the Institute's mission to teach children, especially poor children. Third, the manner in which the brother teachers were obliged to conduct themselves as teachers was dictated by the Institute's rules which required the brothers to take vows of chastity, poverty and obedience and which included detailed and very strict rules of conduct. So the relationship between the Institute and the brothers was akin to that between an employer and an employee. Thus the first stage for vicarious liability was made out.

It was then necessary to move on to the second stage of vicarious liability. Where an employee commits a tortious act the employer will be vicariously liable if that act was done 'in the course of the employment' of the employee. The question is when can an act of sexual abuse be in the course of the employment? Lord Philips states that will occur where the employer's relationship with abuser employee put the employer into a position to use the abuser to carry on its business and in doing so had created the risk that the victim or victims would suffer the relevant abuse. Thus there is a strong causative link between relationship of employer and employee and the acts of abuse. Lord Philips concluded that the two requirements for vicarious liability had been made out namely that the relationship between the brothers and the Institute was akin to employer and employee and that there was a close connection between that relationship and the abuse committed at the school. Thus both the Society and the Institute were vicariously liable for the torts committed at St William's. The damages due to the victims will have to be apportioned between the Society and the Institute.

The next question is will this Supreme Court decision help the Savile victims obtain damages for his abuse, on the basis that organisations where the abuse took place are vicariously liable for his torts? It is the first stage of vicarious liability that presents difficulties for the claimants. Although Jimmy Savile was not formally employed as a member of staff at the various organisations was there a relationship akin to that between an employer and an employee? The three requirements laid down in the Supreme Court decision indicate that it will be necessary to show that the organisations where Savile worked had significant control over what he did and how he did it. Also the formal relationship between the Institute and the brothers lasted for many years and that may be lacking in Savile's case as he tended to be engaged for short periods, for example, when he worked a Broadmoor Hospital in the early 1990's.

However, if the first stage hurdle can be overcome and a relationship akin to that between an employer and an employee is found, the second stage of vicarious liability ought to be easier to establish as it should be possible to prove that the organisations, in pursuance of their own interests, caused Savile to have access to children and vulnerable adults in circumstances where the abuse was facilitated. If vicarious liability is established then it will be matter of quantum of

damages. The level of compensation awarded to each claimant will depend on a psychiatric assessment about how the alleged abuse has affected their lives.