



Neutral Citation Number: [2023] EWHC 1726 (KB)

Case No: KB-2022-002841

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 July 2023

Before:

DEXTER DIAS KC
(Sitting as a Deputy High Court Judge)

Between:

ERS
(a protected party by MRS, her mother
and Litigation Friend)

Claimant

- and -

KIDS
(Charity No. 275936)

Defendant

James Counsell KC (instructed by **Bolt Burdon Kemp**) for the **Claimant**
Lisa Dobie (instructed by **Kennedys Law**) for the **Defendant**

Hearing date: 5 July 2023

Approved Judgment

.....

DEXTER DIAS KC

Dexter Dias KC:

(Sitting as a Deputy High Court Judge)

1. This is the judgment of the court.
2. In this personal injury claim, the court must rule upon whether damages agreed in the compromised claim in respect of a protected party should be approved by the court.
3. This is a claim for damages resulting from the systematic and repeated sexual abuse of a child living with profound physical and learning difficulties by a member of staff at an adventure playground operated by the defendant, whose duty it was to protect her. Prior to the sexual abuse, the claimant was living with Trisomy 21 (Down's syndrome), learning difficulties, speech impediment, visual impairment, ADHD and thyroid problems. Her vulnerability was thus severe. As such, this case is one of the utmost seriousness. This judgment documents how the abuse, suffered while the claimant was a child, has deeply damaged many aspects of her life.
4. The claimant is a protected party as she lacks mental capacity to conduct litigation on her own behalf (CPR 21.2(1); PD21). There is an anonymity order in place. Therefore, the claimant will be known as ERS. She is now 22 years old. She appears by her litigation friend, who is her mother, and who shall be known as MRS. Her older sister also accompanies her to court today. The claimant is represented by Mr Counsell KC.
5. The defendant is KIDS, a registered charity (No. 275936). The defendant is represented by Ms Dobie of counsel.
6. I recognise that anonymity orders have a dehumanising effect and risk reducing the living, breathing human beings at the heart of this sad case, some of whom are present at court before me today, to ciphers. While acknowledging the vital importance of the open justice principle and the "public watchdog" function of the press (*Thoma v Luxembourg* [2001] ECHR 240 at [5]), I judge that the Article 8 ECHR right to privacy and private life imperatives here significantly outweigh the Article 10 ECHR freedom of expression rights of the press and public.

Background

7. Between about May and November 2017, an employee of the defendant called Matthew Fennell systematically sexually abused the claimant, then a child. The defendant, a charity, ran an after-school activity centre and adventure playground called Hayward's Adventure Playground ("Hayward's") for children with disabilities and learning difficulties in Islington. It employed Mr Fennell as an adult worker.
8. On numerous occasions in the office at Hayward's, in the soft play area, the toilets and behind the trees in the grounds, he engaged in gross physical and sexual violation. The abuse consisted of vaginal and anal rape (without protection or lubrication), digital penetration of her vagina, kissing and intimate touching of her breasts and by making her touch his penis. If she did not comply with his requests, Matthew Fennell

would punch and smack her in the face until she did. She was a child while all this was happening.

9. It appears that, as conceded in the Defence pleaded in these proceedings, during the course of 2017, the claimant told a member of Hayward's staff that Matthew Fennell was kissing her and touching her inappropriately, but no action was taken. On 1 November 2017, the claimant made another report. It was acted upon and reported to the police. The claimant's case is that by the defendant informing Matthew Fennell that the police wished to speak to him, he was able to wash his clothing to remove incriminating trace evidence. However, his semen was ultimately identified on the claimant's clothing and he was charged with criminal offences. He pleaded not guilty at his criminal trial, and thus forced the claimant to give evidence and relive her abuse in a public forum. It was a deeply retraumatising experience. However, she had the courage to stand her ground and tell the court about the abuse she had suffered. Matthew Fennell was convicted of offences of sexual activity with a person with a mental disorder impeding choice, contrary to s.30 and s.31 of the Sexual Offences Act 2003.
10. In May 2021, he was imprisoned for 13 years. But that was not the end of it for the claimant. She has continued to live with the devastating consequences of this man's abuse.
11. While the defendant admitted liability in respect of the vicarious liability for Matthew Fennell's criminal conduct, it disputed liability with respect to breaches of safeguarding. This approach was accepted by the claimant's legal team to be sufficient to reflect the substance of what the claimant had suffered. The case thus resolved into a question of quantum of damages.
12. To assist with that exercise, an expert report was obtained from Dr Michael Shaw, who is a consultant psychiatrist. This was to evidence the impact on the claimant. The report is dated 6 June 2022.
13. The claimant was previously a bubbly, lively personality, someone liked by everyone and said to be relatively independent in terms of mobility, hygiene and self-care. Since the abuse, her behaviour has declined markedly and she needs a very significantly greater level of care and attention from her family, primarily from her mother and her older sister.
14. Dr Shaw's view is that the claimant has suffered from and continues to suffer from post-traumatic stress disorder ("PTSD") (ICD11: 6B40) and severe, single episode depressive disorder, without psychotic symptoms (ICD11: 6A70.3). Her conditions are characterised by the following typical and highly characteristic symptoms of those psychiatric conditions:
 - (1) Re-experiencing of the abuse, including recurrent, frequent nightmares of the abuse itself;
 - (2) Emotional volatility. She displays widely differing emotions over short periods of time, even during her interview with Dr Shaw;

- (3) Avoidance behaviour, such as attempting to avoid reminders of the abuse, for example, not going near Hayward's and being reluctant even to attend psychotherapy sessions;
 - (4) Hypervigilance. She imagines intruders in the house and that other college students are talking about her when they are not;
 - (5) Periods of depression, social withdrawal and clinginess. She spends most of her day in her room and then comes into her mother's room at night;
 - (6) Low self-esteem to the extent that she has now lost interest in all the activities which she used to enjoy, such as shopping, social media, nail and hair salons;
 - (7) Loss of her independence and neglect of self-care and hygiene;
 - (8) Episodes of self-harm: she picks at her skin and scratches herself so badly that she has caused scarring on her legs and chest and she bangs her head against hard surfaces, causing bruising and marks;
 - (9) Abnormal sexual expectations and sexualised behaviour.
15. I emphasise that none of this is her fault. Dr Shaw's opinion is that the prospects of a recovery would be very poor without extensive treatment, because otherwise she would remain highly dependent on others indefinitely.

Approval

16. Turning to the question of approval, I am grateful to both legal teams for the great care with which they have prepared this case and the obvious sensitivity with which they have presented it. I must also mark out Ms Siobhán Crawford from the claimant's solicitors for her support of the claimant and her family in these highly sensitive and troubling proceedings.
17. The purpose of today's hearing is for the court to consider whether the proposed settlement of damages agreed between parties is in the best interests of the claimant. The court is required to approve the terms of settlement in this particular case as the claimant is a protected party. It is an elementary proposition that court approval engages questions of judgment. It must act in the interests of justice and the best interests of the protected person and have regard to the overriding objective. As stated by Lady Hale in *Dunhill v Burgin* [2014] UKSC 18, the purpose of approval hearings in accordance with CPR 21.10(1) is
- “to impose an external check on the propriety of the settlement.”
18. Part 21 of the CPR includes rule 21.10. Its subheading is “Compromise etc. by or on behalf of a child or protected party”. The rule provides insofar as it is material:

21.10

- (1) Where a claim is made –

(a) by or on behalf of a child or protected party;

no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court.

19. Mr Counsell’s confidential advice is dated 14 March 2023 and is a careful and comprehensive document. It sets out with great clarity and precision why the settlement is considered by the claimant’s legal team to be appropriate. This is achieved by reference to an assessment of the quantum of recoverable loss, weighing the risks and uncertainties of litigation, the strengths and weaknesses of the evidence and the possible adverse costs consequences if the final awarded sum does not exceed the offered amount.
20. The latest edition of the Judicial College Guidelines (16th edition) contains, for the first time, a separate section providing guidelines for appropriate awards for claimants who have suffered sexual and/or physical abuse. Chapter 4 (C) sets out three separate award brackets, ranging from ‘*less severe*’ cases (£9,730 to £20,570) up to ‘*severe*’ cases (£45,000 to £120,000) with ‘*moderate*’ in between those two ranges. The description given of cases where an award in the ‘*severe*’ category should be made is where:
- “...the injured person will have suffered serious abuse and/or severe and prolonged psychiatric injury. At the upper end, the abuse would have had serious effects on their ability to cope with education, work, and sustain personal and sexual relations. There may be elements of false imprisonment. Where, despite the seriousness of the abuse and problems caused, the prognosis is good, the lower end of the bracket is appropriate. The majority of cases in this bracket fall within the range of £55,000 to £90,000.”
21. I find that the abuse suffered by the claimant was very serious. It lasted for months, and included both sexual and physical violence. The psychological and psychiatric consequences are also very serious. They remain with her. She has a grave psychiatric condition. However, with effective treatment and appropriate support, she is likely to recover.
22. I concur with Mr Counsell’s assessment that this case, involving the sustained abuse of a highly vulnerable child living with disabilities, falls within the severe category.
23. The structure of the settlement is as follows:

Gross lump sum		£150,000
Total:		£150,000

24. The litigation friend consents to the success fee under the CFA being deducted from the claimant's damages. I have reviewed the figures and approve the proposal as submitted to the court by Ms Crawford yesterday. The figure will be reflected in the order that will mark the end of this case. To deal with this particular item summarily today is, I judge, far better than sending it unnecessarily for detailed assessment with the additional costs and delay that entails.
25. Stepping back, I consider that Mr Counsell's approach is measured and prudent, striking the right balance to safeguard the claimant against litigation risk. I find that this settlement is in the claimant's best interests. On that basis I approve the settlement under CPR 21.10.
26. The claimant makes an application for costs on account. CPR 44.2 (8) states:

“Where the Court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is a good reason not to do so.”
27. The purpose of this provision is to ensure cash flow and reduce the prospect that very experienced solicitors' firms, such as this one, decline to take on this kind of work due to the very substantial delay in receiving the costs they have properly expended in its necessary preparation. I note the emphasis of the rule: the court will order costs on account unless there is a good reason not to. In this case, no evidence or credible suggestion of any good reason has been put before the court. Therefore, I grant the application in principle. The question becomes one of the extent of the interim award.
28. I have received the claimant's breakdown of costs up to 28 June 2023 in the approval bundle (B3-10). The approach of the court is to make a broad overall assessment of the costs that the claimant is likely to recover on detailed assessment and then make an award that the court can be confident will be paid to the claimant's solicitors.
29. In this case, I assess the appropriate figure to be £100,000. Independently, counsel arrived at the same figure. This is significantly less than the total sum in the current breakdown and represents a figure which the court has confidence that, at a very minimum, will be recovered. It should be noted that, very responsibly, the defendant has already paid £50,000 on account. This, too, will be reflected in the final order.
30. To conclude, I would like to say something about what the claimant is like. She likes drama and has been involved in making films to help other people with disabilities cope with their lives. She powerfully shows what someone can do despite the terrible wrongs they have suffered. Besides that, she loves doing her nails. She is very enthusiastic about that and wanted to show them to the court.
31. Dr Shaw states that the prognosis has been poor because the effect on the claimant has been “devastating” (§144). She has been unable to mentally process the abuse. It continues to replay in her mind, particularly when she is trying to get off to sleep. She relives the abuse, which is a very real mental re-experiencing of it. This affects her life in virtually every aspect. She is emotionally volatile and her self-esteem has been

badly damaged. She self-harms, an impact that often accompanies PTSD and Major Depressive Disorder. She is fragile. It is like “walking on eggshells” every day.

32. Aside from the claimant, her mother and her sister have borne the brunt of this appalling history. Her mother has at times become depressed herself. Both the mother and the sister feel a deep and burning sense of frustration, anger and injustice in the way the police handled the case and how long it took for Matthew Fennell to be brought to justice.
33. The court conveys to the claimant and her family that it appreciates that no amount of money can turn back the clock and put their family in the position they would have been had the abuse and injury to the claimant not occurred. She should have been safe at the playgroup as a vulnerable child; instead, she was for months sexually abused and beaten when she tried to protect herself and refuse to engage in unwanted sexually activity with an adult male who was there to support and protect her. The case starkly reminds us of the severe limitations of money in situations such as this.
34. However, at this point in time, it is simply the best we can do. A proxy for the quantification of the pain and suffering, heartbreak and anxiety that they all continue to experience constantly in many different ways. But I do hope that the end of these proceedings will be a relief and this long-awaited financial settlement will make life a little easier.
35. I have emphasised to the claimant’s mother that this judgment will be published to the National Archives so that a copy will always be available to her daughter - this is her case. I wish all her family, and the claimant especially, the very best for the future.
36. That is my judgment.