

### Justice for historic sexual abuse

Felicity Gerry: high-profile cases are the tip of an enormous problem



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Published 1 minute ago

Victims of abuse may seek criminal justice, but the truth is that many will have to look to the civil courts instead

Men like Jimmy Savile offended with impunity as law-makers took a long time to react to sexual offending. It is common for complaints to be delayed through fear, trauma and an old-fashioned belief that victims will be ignored. The high-profile cases are the tip of an enormous problem.

However, while victims of historic sexual abuse want criminal justice, the truth is that many will be disappointed and may have to look to the civil courts instead. In any criminal trial for past offending, the law at the time applies.

Victims are encouraged to complain but sometimes the CPS has to tell them it is too late.

After a delay of 30 years, it is very hard to get a criminal case off the ground. In England and Wales, for many years, the maximum sentence for indecently assaulting a female was two years, unlawful sexual intercourse was time barred after a year and violence was condoned by giving abusers the excuse of “lawful chastisement”. Weak laws effectively allowed sexual offences to be committed behind closed doors with no proper police intervention.

Now, perpetrators are dead or too old and infirm to be tried or relevant records have been destroyed so cases cannot go ahead. This perhaps explains why Operation Yewtree has been such a vast investigation with so few suspects charged.

This year in Australia a Royal Commission into institutional responses to child sexual abuse was launched. Ironically, the terms were published on the same day as the report into abuse by Jimmy Savile and in the same week as a study by the UK Ministry of Justice, Home Office and Office for National Statistics found that in the UK up to 500,000 people are victims of sex crimes every year.

This is not to underestimate the trauma for someone falsely accused, but from any perspective, sexual abuse has become big news.

In the absence of criminal proceedings, many are looking to institutions for civil justice as a way of recognising that abuse was effectively condoned. Will media organisations, prisons or hospitals be liable for the acts of Jimmy Savile? Who might be liable for the acts of Cyril Smith? Can modern schools and religious trusts be made vicariously liable for the acts of past members?

Recent cases are making a number of institutions very nervous: Where there are compelling reasons, a civil court can exercise its discretion for civil claims for historic sexual abuse to proceed outside of limitation periods.

It is settled law that an employer can be vicariously liable for acts of employees and that vicarious liability can extend to liability for a criminal act of sexual assault.

However, the law on the liability of other organisations is rapidly developing.

In November 2012 the Supreme court held that an unincorporated association of religious brothers could be vicariously liable for sexual abuse between 1958 and 1992 by some members at a residential school for boys in need of care on the ground that there was a sufficiently close link even though they were not employees and even though the Institute had not managed the school. Their Rules, approved by Papal Bull in 1724, provided that “they

should make it their chief care to teach children, especially poor children, those things which pertain to a good and Christian life”.

Those rules were flouted by “acts of physical and sexual abuse committed, or alleged to have been committed, by brothers who were, or should have been, pursuing that mission at the school”.

In essence, the Supreme Court held that vicarious liability depends on there being a “strong causative link” between the Institution and the abuser and the acts of abuse.

It’s not hard to see where this is going. In an earlier case, which concerned liability of a Roman Catholic diocese for the wrongful acts of one of its priests, the test was set out as whether the relationship of the bishop and the abuser was “so close in character to one of employer/ employee that it is just and fair to hold the employer vicariously liable”.

It will be interesting to analyse whether or not the principal features of the relationship between Savile and the various organisations he was associated with dictate that those bodies should be held responsible for his actions.

It is the nature and closeness of the relationship that is the test. A court will look carefully at the evidence and circumstances.

As headline after headline accrues, given the inevitability that abusers gravitate to institutions, it is not just the BBC that may be seeking advice on this particular issue.

Published 23.03 on the 1<sup>st</sup> May 2013