Association of Child Abuse Lawyers

"Practical support for lawyers and other professionals working with abuse"

Issue 12 **October 2006**

In this Edition

- Lizanne Gumbel QC & Henry Witcomb comment on Limitation Periods in Sexual Assault Cases
- Peter Garsden asks "How does a Survivor of abuse cope with Life?" and also "Psychiatric Injury - common sense or legal fiction?
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NOTE
The views of the contributors to this Newsletter do not necessarily represent the view of ACAL

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From the Co-ordinator

by Malcolm Johnson

Malcolm Johnson
ACAL Co-ordinator

Once again we have had a positive year at ACAL. At our meeting on 12th May 2006, we had Gillian Finch of CIS'ters, Yvonne Traynor of Rape Crisis Croydon and David Skidmore, Consultant Oncologist. We also had Christopher Gore of the Legal Services Commission along to talk about his work, and the way in which the Commission is dealing with our applications.

Our training programmes will be taking place on 13th and 20th September 2006 in London and Manchester. Our Annual General Meeting is fixed for 13th October 2006.

Regrettably we have had to postpone our ACAL Conference Autumn Summit – "Child Abuse - the Professional Pitfalls", which was due to take place on the 3rd October 2006 at Highgate House, Northampton, due to lack of demand. The new conference date will be 13th February 2007. Obviously we need all the support we can get.

The Conference topics and speakers will be:

- The challenges facing professionals involved in Child Protection
- Shy Keenan - the survivor's perspective
- Dr Hobbs - the view from the medical profession
- Sarah Erwin - the view from the insurance industry
- Joe Cocker from NSPCC - the view from Social Services
- Howard Webber from CICA
- Round Table discussions on abuse of the disabled and ethnic minorities.

In the meantime, enquiries continue to come in and our membership remains steady. The homes, expert and counsel database is now fully operational and we hope that all our members find these resources useful. Thank you for sending in your recommendations and information.

In May 2006, I resigned as President of ACAL and Nicola Harney was co-opted by the Executive Committee to take over until a new President can be elected. My contract as ACAL's Co-ordinator expires at the end of 2006, but I will be offering to continue in that post for a further year.

The other change is that the Executive Committee is proposing to publish just one newsletter per year as opposed to two from 2007 onwards. We will discuss this at the forthcoming Annual General Meeting.

Thank you all for your support this year.

Malcolm Johnson

President and
Co-ordinator of ACAL

"Failure to Take into Care" Cases and the Legal Services Commission

by Tracey Storey

Tracey Storey

Over the past few years I have been instructed in a number of claims which have been labelled "failure to take into care" cases. These are cases usually involving children against local authorities in negligence. The claims are usually brought in both breach of the direct duty of care that a local authority has to protect children in its area and for the vicarious liability of the social workers employed by the local authority.

Cases of this nature started with X (Minors) v Bedfordshire County Council [1995] 2 A C 633. In this case, the House of Lords found that there was no duty of care owed to the five children who were not removed from home when their plight should have been recognised earlier. The claims were pursued in Strasburg and in Z v UK (2001) it was found that there had been a breach of Article 3 and Article 13 in that the children had been subjected to inhuman and degrading treatment and that English law had not provided them with a remedy. In Europe, submissions were heard on the quantum of damages based on what would have been recovered in English Law. The Court awarded £32,000 for each child for non-pecuniary loss (equivalent to general damages) and sums varying from £4,000 to £100,000 for loss of earnings and pecuniary losses. It should be noted that these cases involved neglect and failure to thrive rather than sexual abuse.

Many of the cases in which I am now instructed involve serious sexual abuse by a parent or a relative or visitor to the family home. An example would be where the local authority were aware that a Schedule 1 offender was living in the household and still failed to remove the children who were being abused by that offender. Where the sexual abuse could have been avoided by prompt intervention, then we are claiming damages for the sexual abuse. In such cases, one would expect general damages to be in excess of £50,000.

Following the case of J D and Others v East Berkshire Community Health NHS Trust and Others [2003] EWCA civ 1151, there is now good authority for the existence of a duty of care between a local authority and a child in the area of the local authority who was suffering abuse and whose plight is brought to the attention of the local authority. The duty is to protect the child from injury and the value of the claim will be assessed in accordance with the extent of the injury suffered by the child during the period that they were not removed but should have been. In some cases, this will be for a short period but in other cases this could encompass all the abuse the child has suffered. It should also be remembered that in a family home there will be no one to report to and abuse in a family home is far more often a daily occurrence in a child's life than abuse in a care home where a child is only targeted from time to time as there will be many other potential victims in the home who share the burden of the abuse. Abuse suffered by children left in their own homes when they should

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have been removed can constitute some of the more serious cases.

In the cases in which I am instructed, it is often the case that a Family Proceedings Judge, who has heard the care proceedings, has commented on the actions of the local authority and has been critical of the local authority. Additionally, there is often evidence from a Guardian Ad Litem in the care proceedings who has reviewed the actions of the local authority and has drawn attention to the local authority's breaches. Most of the cases do not involve limitation issues and indeed, there are often convictions of the abusers so that it cannot be disputed that the abuse occurred. Additionally, the local authority itself will usually not be in a position to dispute the abuse which took place because this will be the basis upon which they belatedly seek a Care Order. Often, there will be a number of siblings involved in one family so that there are several claims and overlapping features.

Social work evidence is required for these cases. However, the documents required will usually be restricted to the Social Services' files for the particular family and the statements and reports already prepared in care proceedings. This is in contrast to abuse in institutions where disclosure itself can be fairly onerous. Additionally, psychiatric evidence is usually prepared for the care proceedings so it is easy to provide a preliminary view on the value of the claim.

The cases themselves raise important points of public interest and are extremely important to the individual Claimants involved. The abuse in many cases is persistent and longstanding and there is public interest in such claims being properly pursued. Clearly they cannot be pursued without public funding as the children themselves will not have access to independent funding and the Official Solicitor is typically the litigation friend.

I have recently been awarded Public Funding in a number of these cases but thirteen of my cases were refused and came before the Funding Review Committee on 22nd May 2006. The Legal Services Commission's approach to these cases was as follows:

1. Whilst it accepted that children in the community were owed a duty of care by social workers, the claims represented a novel application of the principle established by the case of JD, which has yet to be tested in the English Courts.

2. Quantum is likewise difficult to assess because although there is anecdotal evidence of settlement of one or two cases, the issue to date has only been considered in the ECHR.

3. It was accepted by the Legal Services Commission that these cases were within scope.

4. The Legal Services Commission distinguished these cases from the more common abuse in care home cases on the basis that the alleged abuse or neglect is perpetrated not by a carer or employee of the local authority but by a third party, usually but not always, a parent.

5. These cases were characterised by the Legal Services Commission as professional negligence claims falling within the General Funding Code so that the general cost benefit criteria would

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apply.

6. The Legal Services Commission considers it likely that these claims will fall to be assessed under Bolam principles. This being the case, the Court will need to consider expert social care evidence from both sides as to the extent to which acceptable standards have been met.

7. The Legal Services Commission point out that once breach of duty has been established, a causal relationship between the breach and the alleged injury has to be established. The Legal Services Commission will be considering temperamental and environmental factors and other events pre and post-dating the breaches.

8. In contrast to my own thinking on quantum, the Legal Services Commission took the view that Z v UK involved very serious abuse and that the awards in Bryn Alyn were a more useful benchmark of likely damages at trial. This is notwithstanding the fact that the cases in Bryn Alyn involved historic abuse.

9. In relation to cost benefit, it is the Legal Services Commission's view that taking into consideration the number of experts, the cases are likely to cost between £30,000 and £70,000 to take to trial.

10. The Legal Services Commission takes the view that the cost benefit ratio applicable to most cases where the prospects of success are moderate should be 4:1. It is the Legal Services Commission's view that it would be unreasonable to describe prospects of success for this type of case as better than moderate unless or until liability has been conceded.

11. The Legal Services Commission does not believe that claims by sibling groups would involve any costs savings.

My thirteen cases which were heard by the Funding Review Committee on 22nd May 2006, involved two sibling groups of five children each and three individual Claimants. Public Funding was granted for the two large sibling groups but refused for the three individuals on cost benefit grounds. My submissions included the following:

1. The cases were not necessarily a novel application of principle. They were quasi professional negligence cases against social workers.

2. It was accepted that the General Funding Code applied but it was not reasonable to describe the prospects of success for these cases as moderate until liability was conceded. These were cases where we had judicial criticism and also expert social work criticism in the form of the Guardian's report.

3. Causation as always is an issue in negligence claims but in the majority of cases, there was sufficient prior to the child's birth to suggest that the child should have been removed at birth.

4. In relation to quantum, Z v UK was not the last word on quantum and in cases involving serious sexual assault, which could have been avoided, then quantum could be well into six figures.

5. The prospects of success

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in the cases before the Funding Review Committee were found to be good so that the relevant cost benefit test was 2:1 rather than 4:1.

6. There would be significant cost savings with sibling groups, not least the issue fee, the social work evidence, identifying common issues for each case and so forth.

7. The Funding Review Committee agreed that the prospects of establishing breach of duty were good in these cases. Additionally, quantum estimates of over £75,000 were accepted. However, the Funding Review Committee concluded that £50,000 was an appropriate figure when assessing costs to trial. Whilst I made representations that the Funding Review Committee should be considering costs to disposal, they had clear guidance from the Legal Services Commission that the appropriate test was costs to trial. Again, this was because the Legal Services Commission considered these cases to be novel. The Funding Review Committee took the view that it should use an assessment of costs to trial unless and until there was a clear indication that one or more issue is conceded or that disposal earlier that trial was a probability.

In my opinion, assessing the cost benefit using costs to trial rather than costs to disposal is an error in law. Each case has to be judged on its own facts. The test in the Funding Code is clearly costs to disposal, not costs to trial. Full reasons should be given for departing from such guidance and I am yet to see a full explanation as to why costs to trial, in these particular cases was, a relevant consideration.

Furthermore, there seems to be an element of irrationality in refusing cover for individual children when cover for multiple children in the same family is being granted.

Unfortunately, we are now at the stage where if the children who have been failed amount to a large sibling group, they will satisfy the costs benefit test. This is because of the significant cost sharing between the cases. It seems to me to be basically unfair that children who have a number of siblings will get Public Funding whereas one child, who is left at home and not removed when they should have been, will not get funding.

I should be grateful if any ACAL members who have successfully litigated and/or settled "failure to take into care" cases would advise me of the quantum achieved in these cases. At Irwin Mitchell, Luke Daniels in our Birmingham office has recently settled two cases for £80,000 each for a delay of four years. Unfortunately, given the dispute with the Legal Services Commission on cost benefit in these cases, it seems likely that the successful settlement of what are ultimately winnable cases will be delayed.

Tracey Storey is a Partner at Irwin Mitchell working in their London office. Tracey is also on the Executive Committee of the Association of Child Abuse Lawyers and has been working in the field of child abuse litigation since 1996.

Limitation Campaign Update

by Peter Garsden

This article updates Jonathan Wheeler's article from the last newsletter, and puts a little more meat onto the bones. For those that have not been following progress, in the middle of 2005 we started a campaign to force the Government to implement the necessary legislation to change the law of limitation in order to bring it in line with the Law Commission recommendations published in 2001. The Law Commission were asked to report due to criticisms of UK statute law expressed by the European Court in Stubbins v Webb.

The following lobbying actions have been taken:

1. On the website we have created an online petition. **If you have not signed it do so immediately.** Go to www.childabuselawyers.com and follow the links. Currently we have nearly 300 signatures, but we need many more.

2. I wrote to all the survivor groups we list on the website and encouraged them to write to their MP's giving them a proforma letter. Many of them did so.

3. I posted a proforma letter on the website. You can download it and send it to your local MP. Do so, and visit him at his surgery, which is usually held on Fridays or Saturdays each week. If you don't know who your local MP is there is a link to a locator you can use on the page. I have been to see my local MP Mark Hughes, Liberal Democrat. He is interested and has written to the Department of Constitutional Affairs (see below). Even if your local MP is not enthusiastic you will have made a good contact, who may be able to refer work to your firm. An interest in the rights of child abuse survivors usually invokes nothing but respect. For more details go to www.childabuselawyers.com/timelimitcampaign.htm

4. I wrote to all the clients we have on our office database (about 1000) and asked them to send off letters. This was quite effective, and led to interest in parliament. Several MP's have asked questions in the house. The Department of Constitutional Affairs are always the respondents.

5. Linda Gilroy MP for Plymouth is interested as she has the survivors of William Goad on her patch. She is actively lobbying, and I have been in touch with her. Some of you may have seen the TV program about William Goad. He is the millionaire who allegedly has abused as many as 3,500 males, all of whom cannot bring civil proceedings in assault due to the limitation rules. Negligence is out of the question because he was not employed by anyone, and used to abuse boys by networking. If all the survivors go to the CICA and make successful claims, it will cost the Government, and thus the taxpayer, millions.

6. I have pestered the Department of Constitutional Affairs. They are apparently working on the new Statute (you can view the draft bill contemplated on the Law Commission website – there are links on the ACAL website time limit page (see above). I was told in August 2005 that the work would be finished in November

Limitation Campaign Update

by Peter Garsden

2005. I have recently heard via a letter from my MP that the work still isn't finished; so more pressure must be brought to bear through MP's. Apparently they are still dealing with queries. Baroness Ashton said in October 2005:

"Since 2002 we have been considering questions raised by stakeholders in relation to a number of issues, these include vaccine damage, defamation, insolvency, corruption, national insurance, foreign taxes, compulsory purchase, adverse possession, extending the period, and the minimum wage. This work is now well advanced".

Apparently the work still isn't finished and is due to be completed "in the first quarter of this year". This article is being written near the end of March so an end must be in sight.

I have been told that the goal is to get the legislation into the Queen's Speech for the Autumn of 2006. There is no guarantee that this will happen, as there is obviously much competition from other proposed legislation in a busy schedule. MP lobbying is thus vital, and I encourage you to get busy.

If the legislation is introduced, it will not be retrospective (unsurprisingly), but what the transitional provisions will be is not clear at this stage.

The changes bring the tort of assault into line with negligence by creating the same discretion to extend the time limit for bringing proceedings based on date of knowledge (S.14) and the other discretionary powers of Section 33 Limitation Act 1980. Also, importantly, it allows the court to take into account a more generous test of incapacity to extend the limitation date. In other words it will be possible to argue that mental problems short of complete lack of understanding can be taken into account. In the Law Commission report specific mention is made of contributions by Lee Moore and Richard Scorer, and the inability of child abuse survivors to make disclosure for reasons associated with dissociation and repression of memory, commonly known symptoms in the field of abuse.

It will have the effect of bringing into force the major changes brought about by *Lister v Hesley Hall Limited*. Assault, and the circumstances in which employers can be vicariously liable, will be potentially actionable once the unextendable 6 year time limit disappears. Assault, more importantly does not have to pass the same remoteness of damage and forseeability tests that negligence does. It will also mean that the neglected concepts of aggravated, punitive, and exemplary damages will be capable of exploration. There may also be scope for arguing for the use of juries. The law will be brought more into line with police assault cases.

The newspapers have been awakened to the injustice caused by the problem by the case of Ioworth Hoare, the convicted rapist who won the lottery whilst he was in prison. He was sued by his victim out of time. She lost because the Limitation Act creates the 6 year unextendable time limit. She has appealed to

Child Abuse Work and Conditional Fee Agreements

By Annette Livingstone

There have recently been a number of important decisions in respect of costs which affect Conditional Fee Agreements. The decisions I would recommend you consider in respect of Child Abuse work and CFAs are:

1. ***Deborah Garrett v Holton Borough Council; David Myatt and others v The National Coal Board (2006) EWCA C iv 1017CA (C iv D iv).***

2. ***Stephen Pask v McNicholas Construction Services (2006) SCCO.***

3. ***Owen John Oyston v Royal Bank of Scotland PLC (2006) SCCO.***

1. All these decisions have a major impact on the CFAs in Child Abuse cases. However *Garrett and Myatt* are probably the most well known.

Myatt concerned Reg. 4(2)(c) of the CFA Regulations 2000 which requires the solicitor to inform the client whether he considers that the client's costs risk is insured under an existing contract of insurance. Solicitors had agreed to act for four ex-miners with potential for damages for noise–induced hearing loss against their former employer. They had made certain inquiries of their clients over the telephone designed to elicit whether BTE cover was available, but in each case they had been told that it was not. They had not asked to see any policy documents, and there was an issue as to the effect of the questions which they had asked.

Garrett turned on Reg. 4(2)(e)(ii), which requires the solicitor who recommends a particular policy of insurance to declare any interest he may have in doing so. In this case the case had been referred to the solicitor by a claims management company and it was found to have been a term of the solicitor's panel membership that he should recommend the policy of insurance promoted by the claims management company, with exclusion from the panel as a sanction for failure to comply.

The decision in respect of Garrett and the insurance provisions should not make too much impact on Child Abuse matters but Myatt will. These were personal injury matters in which, in respect of Myatt, the Defendant raised issues in relation to complying with the Part 4 enquiries and in Garrett the Defendant objected to the lack of advice to the client in respect of arrangements with Legal Expense Insurers. The Court found that when determining whether a solicitor had failed to satisfy a condition referred to in the Courts and Legal Services Act 1990 Section 58 (3) it was not necessary to consider whether the client had suffered actual prejudice. The Court found that if one or more of the applicable conditions was not satisfied, the CFA would be unenforceable. Parliament had to be taken to have deliberately decided not to distinguish between cases of non-compliance that were innocent and those that were negligent or committed in bad faith, or between those that caused prejudice and those that did not. The conditions stated in Section 58 sub-section (3) (c) and in particular the requirements prescribed in the regulations were for the protection of solicitors' clients. Parliament did consider that the need to safeguard the interest of clients was so important that it should not be secured by providing that if any of the conditions were not satisfied, the CFA would be unenforceable and the solicitor would not be paid.

Child Abuse Work and Conditional Fee Agreements

By Annette Livingstone

Accordingly, the question of whether the client has set an actual prejudice as a result of the failure to comply with a condition was not relevant to the question of whether the solicitor had breached a condition.

Enforceability of the CFA was to be judged by reference to circumstances existing at the time it was entered into.

In this case the Costs Master had concluded that solicitors had asked the client the wrong questions. The steps that the solicitor should take to discharge his obligation under Regulation 4(2)(c) was to enquire as to the availability of insurance cover and would depend on all the circumstances of the case. The Court felt that while it was not possible to give rigid guidance as to the questions the solicitor should ask in every case, the following factors would be relevant; the nature of the client, the circumstances in which the solicitor was instructed, the nature of the claim, the costs of ATE premium and claims to be referred to solicitors who are on a Panel and the fact that the referral body had already investigated the question of availability of BTE.

Taking into consideration the nature of Child Abuse cases it may well be that in the future the Court will look very carefully at the enquiries made in respect of these regulations.

2. The matter of *Pask* was a Personal Injury matter which gave more explanation to the decisions in *Lownds*. The SCCO were asked to rule in respect of proportionality. The settlement figure amounted to just over 2.521 times the size of the costs of which almost 1/10th was disbursements. The Defendant argued that this was a case where the time spent by the Claimant's solicitors was disproportionate when seen against the amount of the costs.

The Court held that when considering whether the costs were disproportionate reference should be made to CPR r.44.5 (3) a number of different factors including the conduct of the party, including conduct during proceedings, the effort made to settle, the amount of money in dispute, the importance of the matter to the parties, the particular complexities of the matter and the difficulties or novelties of the questions raised, the skill, effort, specialist knowledge and responsibility involved, the time spent on the case and the place where, and in the circumstances in which, the work was done. Taking all those factors into consideration the net costs, excluding VAT, did not appear to be disproportionate in a case where 2.521 times as much had been recovered in damages where liability was not in issue and where the case was settled before trial.

3. The matter of *Oyston* was a commercial action in which the Claimant was suing the Royal Bank of Scotland. The Conditional Fee Agreement provided for a 100% success fee in payment of bonus in the event that the Claimant received damages in excess of a certain amount. The Claimant subsequently entered into a Deed of Variation that removed the references to bonus payments.

The Senior Costs Judge held that the CFA was in clear breach of Section 58 sub-section (4) 4 and the Deed of Variation was ineffective to rectify the situation as against the paying party. It

Responsibility for Approved Schools - 1970

Whilst searching for the correct name of the Defendant responsible for an approved school I managed to trace a document from the Home Office (Home Office Circular No 195/1970) which provides the name and body with responsibility for the approved school. This may prove helpful when identifying Defendants. I have reproduced the details below and over-

Ardale School, Stifford, Nr Grays, Essex	Essex County Council
Avalon School, Summerhill, Chislehurst, Kent	Salvation Army
Ave Maria School, Glenure Road, Eltham Park, London, SE9	Local Committee (Roman Catholic)
Avonside Street, 17 Walcot Parade, Bath	Local Committee
Axwell Park, Blaydon-on-Tyne, Co Durham	Local Committee
Aycliffe TS, Copelaw, Aycliffe, Nr Darlington	Local Committee
Bancroft School, Moor Lane, Staines, Middx	National Association for Mental Health
Banstead Hall School, Brighton Road, Banstead, Surrey	Surrey County Council
Bed Bank T.S, Newton-le-Willows, Lancs	Bed Bank Schools Limited
Bed House School, Buxton, Norwich Norfolk	Local Committee
Benton Grange School, Benton Park Road, Newcastle upon Tyne 7	Local Committee (Roman Catholic)
Blackbrook House, St Helens, Lancashire	Sisters of Charity of St Vincent de Paul (Roman Catholic)
Blackburn House, Blackburn	Blackburn County Borough Council
Boreatton Park, Baschurch, Nr Shrewsbury, Salop	Local Committee
Bryn Estyn School, Bryn Estyn Road, Rhosnessney, Denbighshire	Local Committee
Bryn-y-don School, Powis School, Paget Place, Penarth, Glamorgan Hone	Cardiff City Council and (Glamorgan County Council)
Carlton School, Carlton, Nr Bedford	Local Committee
Castle Howard, Welburn, York	Kinsgton-upon-Hull City Council
Chafford School, Michaelstowe Hall, Ramsay, Harwich, Essex	Essex County Council
Chaworth School, Ottershaw, Chertsey, Surrey	Local Committee
Cotswold Community, Ashton Keynes, Nr Swindon, Wilts	The Rainer Foundation
Danesbury School, Warren Park Road, Hertford	Herts County Council
Danesford, Congleton, Cheshire	National Children's Homes
Desford School, Desford, Nr Leicester	Leicester City Council
Dobroyd Castle, Todmorden, Lancashire	Local Committee
Druids Heath, Aldridge, Walsall, Staffs	Dr Barnardo's
Duncroft School, Moor Lane, Staines, Middlesex	National Association for Mental Health
East Moor School, Tile Lane, Adel, Leeds 16	Local Committee
Edmond Castle, Wetheral, Carlisle	Local Committee
Egerton House School, Old Town, Brackley, Northants	Local Committee

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Essex Home School, Rainsford Road, Chelmsford, Essex	Local Committee
Farnworth St Aidens, Widnes, Lancs	Liverpool Catholic Training Schools Association (Roman Catholic)
Farringdon House School, Farringdon, Clyst Honiton, Nr Exeter, Devon	Local Committee
Finnart House School, Oatlands Drive, Weybridge, Surrey	Local Committee
Glamorgan Farm School, Neath, Glamorgan	Glamorgan County Council
Greenacres School, Curzon Street, Calne Wilts	Local Committee
Greenfield House, Billinge, Nr Wigan, Lancs	Liverpool Catholic Training Schools Association (Roman Catholic)
Greystone Heath, Penketh, Nr Warrrington	Liverpool City Council
Hays Bridge School, Brick House Lane, South Godstone, Surrey	Surrey County Council
Herts Training School, Chapmore End, Ware, Herts	Herts Training School Ltd
Hyrstlands, Batley, Yorkshire	Salvation Army
Jordan's Brook House School, Upton Lane, Barnwood, Glos.	Gloucestershire County Council
Kerrison School, Thorndon, Eye, Suffolk	Local Committee
Kingswood School, Britannia Road, Kingswood, Bristol	Local Committee
Kneesworth House School, Kneesworth, Royston, Herts	Cambridgeshire & Isle of Ely County Council
Knotley House School, Chiddingstone Causeway, Tonbridge, Kent	Dr Barnardo's
Knowle Hill, Kenilworth, Warwickshire	Local Committee
Longfords School, Minchinhampton, Stroud, Glos	Church Moral Aid Association
Longhirst Hall, Morpeth, Northumberland	Local Committee
Mile Oak School, Portslade, Sussex	East Sussex County Council
Mobberly, Khutsford, Cheshire	Manchester City Council
Moorland House, Ilkley, Yorkshire	Bradford City Council
Moorside, Blackbrook Road, Sheffield 10	Sheffield City Council
National Nautical School, Nore Road, Portishead, Bristol.	Incorporated National Nautical School, Somerset
Nertherton, Morpeth, Northumberland	Local Committee
Newfield School, Cash's Lane, Coventry	Local Committee

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North Downs School, South Darenth, Dartford, Kent	Kent County Council
Northbrook School, Beacon Lane, Whipton, Exeter	Local Committee
Northenden Road, Sale, Cheshire	Local Committee
Northumberland Village Homes, Whitley Bay, Northumberland	Local Committee
Norton School, Kineton, Warwickshire	Local Committee
Parkhouse School, Peper Harrow, Nr Godalming, Surrey	Local Committee
Pelham House, Calderbridge, Seascale, Cumberland	Local Committee
Pishiobury School, Sawbridgeworth, Herts	Herts County Council
Poplar Bank, Huyton, Liverpool	Local Committee
Princess Mary Village Homes, Addlestone, Weybridge, Surrey	Local Committee
Quinta, Weston Rhyn, Nr Oswestry, Salop	Dr Barnardo's
Red House School, Buxton, Norwich, Norfolk	Local Committee
Richmond Hill, Richmond, Yorks	Local Committee
Risley Hall School, Risley, Derby	Nottingham County Council
Rowley Hall, Stafford	Local Committee
Royal Philanthropic Society's School, Redhill, Surrey	The Royal Philanthropic Society
Ryalls Court School, Marlpit Lane, Seaton, Devon	National Children's Home
Shadwell, Moortown, Leeds 17	Leeds City Council
Shawbury, Shustoke, Nr Coleshill, Warwickshire	Birmingham City Council
Shermanbury Grange, Shermanbury, Horsham, Sussex	West Sussex County Council
Skegby Hall, Skegby, Sutton-in-Ashfield, Notts	Nottinghamshire City Council
Sodbury Park, Chepstow, Monmouthshire	Local Committee
Springhead Park School, Rothwell, Nr Leeds	National Assocn for Mental Health
St Benedict's School, Wokefield Park, Mortimer, Beading Berks	Brothers of The Christian Schools (Roman Catholic)
St Camillus' Scarthingwell, Tadcaster, Yorkshire	Local Committee (Roman Catholic)
St Christopher's Home, Great Crosby, Liverpool	Local Committee affiliated to Liverpool Diocesan Board of Moral Welfare
St Christopher's School, 201 Uxbridge Road, Hayes, Middlesex	Hillingdon, London Borough Council

Responsibility for Approved Schools - 1970

St Edward's School, Sherfield English, Nr Romsey, Rants	Local Committee (Roman Catholic)
St Euphrasia's School, Troy House, Troy, Monmouth	Sisters of the Good Shepherd (Roman Catholic)
St Georges Freshfield, Cromby, Liverpool	Catholic Children's Protection Society (Roman Catholic)
St Gilbert's School, Hartlebury, Nr Kidderminster, Worcs	Brothers of the Christian Schools (Roman Catholic)
St Hilda's, Gosforth, Newcastle on Tyne 3	Local Committee
St John's School, 18 Gravelly Hill Nth, Birmingham 23	Sisters of Charity of St Vincent de Paul (Roman Catholic)
St John's Home, Wakefield	Local Committee
St John's School, Apethorpe, Peterborough, Northants	Northampton Diocesan Catholic Children's Protection & Welfare Society (Roman Catholic)
St John's School, Tiffield, Towcester, Northants	Local Committee
St Joseph's School, Ashwicke Hall, Marshfield, Nr Chippenham, Wilts	Sisters of Good Shepherd (Roman Catholic)
St Joseph's, Nantwich, Cheshire	Brothers of the Christian Schools (Roman Catholic)
St Lawrence's School, Frant, Tunbridge Wells, Kent	Sisters of Scared, Heart of Jesus & Mary (Roman Catholic)
St Michael's School, 29 Churchfields, Salisbury, Wilts	Wilts County Council
St Peters, Gainford, Darlington	Hexham & Newcastle Diocesan Rescue Society (Roman Catholic)
St Swithin's Nautical School, Yarmouth, I.O.W	Brothers of the Christian Schools (Roman Catholic)
St Thomas More School, West Grinstead Nr Horsham, Sussex	Southwark Catholic Children's Society (Roman Catholic)
St Thomas More, Birkdale, Southport	Liverpool Catholic Training Schools Association (Roman Catholic)
St Vincent's School, Castle Road, Tankerton, Kent	Southwark Catholic Children's Society (Roman Catholic)
St Vincent's School, Temple Hill, Dartford, Kent	Southwark Catholic Children's Society (Roman Catholic)
St Vincents, Formby, Liverpool	Liverpool Catholic Training Schools Association (Roman Catholic)

Responsibility for Approved Schools - 1970

St William's, Market Weighton, York	Local Committee (Roman Catholic)
Starnthwaite Ghyll, Crosthwaite, Kendal, Westmorland	Local Committee
Stockton-on-Forest, York	York City Council
The Castle Stanhope, Bishop Auckland, Co Durham	Local Committee
The Crescent School, Frenchay Road, Downend, Bristol	Bristol City Council
The Flyde, Poulton-le-Flyde, Blackpool	Local Committee
Thorparch Grange, Boston Spa, Yorkshire	Leeds City Council
Ty Mawr School, Gilwern, Nr Abergavenny, Monmouthshire	Breconshire County Council
Walsh Manor School, Crowborough, Sussex	East Sussex County Council
Wellesley Nautical School, Blyth, Northumberland	Local Committee
Werrington School, Rocester, Nr Uttoxeter, Staffs	Staffordshire County Council
West Bank, Heaton Mersey, Stockport, Cheshire	Salford Catholic Protection and Rescue Society Inc (Roman Catholic)
Winton House School, Andover Road, Winchester, Hants	Hants County Council
Woodlands School, London Rd, East Grinstead, Sussex	Salvation Army

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Educate your colleagues in Matrimonial/Child Care Departments

by David Greenwood

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Many of us have colleagues who practice childcare work. From time to time there will no doubt be cases, that trouble our colleagues, in circumstances in which the local authority has failed the child.

Leaving aside claims of direct physical or sexual abuse by carers the case of JD V Berkshire [2005] UKHL 23 now means that many of the decisions taken by social workers are subject to potential claims of negligence. The case of JD gives a helpful review of the development of the law to date, taking us through the cases of X v Bedfordshire and the preceding cases. The case itself centres around the question of duties owed by medical practitioners examining children suspected of being victims of familial abuse and concluded that the doctor and indeed social workers owe no duty of care to the child's parents, owing only a duty to the child itself.

It is now settled that children are owed a duty of care by the local authorities in negligence once the local authority has or should have become aware of the existence of circumstances which could cause the child substantial harm.

Our colleagues in childcare departments and matrimonial departments should be educated to be aware of situations in which action can be taken against the local authorities for either acting precipitously or failing to act at all.

There are numerous situations in which local authorities' action towards children can be called into question and I will try to set out a few common ones below which we should all look out for:

1. Failures by social workers to recognise warning signals such as complaints by neighbours, children not being seen on visits, inadequate explanations been accepted and no communication with schools or other agencies.
2. Parents being wrongly accused in the absence of reasonably thorough enquiry.
   Abuse in foster care situations and a lack of adequate enquiry into the background of foster parents and other occupants of the home.

We must remember that only the decisions taken by social workers which are wholly unreasonable and resulting harm to the child can be pursued.

There are a number of ways in which Claimants can tackle these situations ranging from the use of none litigious options of referrals for investigation by the local government ombudsman, claims to the CICA through to claims in trespass, breach of statutory duty and negligence and actions under the Human Rights Act article 6 (fair trial) article 8 (private and family life) article 13 (write to the effective remedy) (CZVUK2001 and DP and JCVUK). There is also the remedy of judicial review and, in cases involving the Police, potential actions for misfeasance in public office.
The practicalities of these types of cases can be difficult to overcome. The family Courts' grip on documentation relating to the children is tight. Applications for the release of documentary evidence will have to be made to the Court at the outset. Your client will, in most circumstances, still be in the care of the local

How does a Survivor of abuse cope with Life?

by Peter Garsden

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Whilst each survivor of abuse is unique, and his/her circumstances entirely different, I have learned over many years of dealing with child abuse compensation claims that most survivors feel exactly the same and find coping with life extremely difficult. So the obvious question is why? Surely it is wrong to generalise and put people in categories?

Inter-personal Relationships

When an insecure child develops a strong attachment to an older mature abuser at an impressionable age and places a lot of trust in an affectionate adult who promises love, affection, treats, presents, and gives sexual relief, particularly at puberty, then when the relationship goes wrong the child inevitably feels let down and upset. When the child has been previously let down by parents, sent away from home, and siblings, then insecurity deepens, anger rises, and behaviour deteriorates. No wonder then that many ran away from care homes. I have even come across a child who jumped out of a tree and impaled his leg on a railing spike to get away from abuse to hospital. Luckily he did not succeed in killing himself.

So how does the child feel when the relationship is over? Often he/she is moved to a different children's home because his/her behaviour becomes so unbearable. Often another abuser targets him and the nightmare starts all over again. Further incidents of abuse usually mean that the symptoms multiply several fold in severity. To stop the abuse hurting psychologically he/she builds up a hard exterior to act a protective shield against the world.

What if the abuse was a homosexual encounter yet the boy is going through puberty? If the care worker said it was quite natural and he enjoyed it, why not try it again? Often, as a senior boy in the children's home, he goes on to experiment by abusing other younger boys. If he has no predisposition to be homosexual, he becomes confused. Members of the opposite sex are interesting as well. Naturally he is confused. Is he homosexual or heterosexual? If the care worker is a net worker the boy could be introduced to strangers for pleasure. He may need the money, because now he is probably trying to anaesthetise his guilt and feelings through hard drugs.

The best analogy I have ever come across is the title of an excellent male rape support group in Liverpool

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called “Fire in Ice”. The child eventually realises that the feelings of anger cannot come out all the time because it usually results in punishment, homelessness or, worse still, imprisonment. So it has to be contained in ice. Not an effective container, obviously, because the fire melts the ice and leaks out. Before it melts, however, the person is cold, unemotional, and cannot be hurt by anyone on the outside. But all the time the anger is burning inside them. Ironically, the Fire service believes that there is a definite link between abuse survivors and arson attacks.

It is no surprise then that inter-personal relationships are extremely difficult for someone who has been abused by adults when young. The first adult whom they put their trust in, betrayed them; thus the survivor fears that the same thing will happen in every inter-personal relationship. They find it very difficult to trust anyone. At the first sign of trouble fire starts burning the ice away. If the ice cannot be rebuilt to protect the soul the flames can consume the relationship and sometimes the person. The more relationships fail, the stronger the feelings of insecurity, and the more accurate the self created prophesy of mistrust becomes.

Children

It is a commonly held fallacy that, if a child is abused, it will go on to become an abuser in adulthood. It makes survivors very angry. It is true however that many paedophiles or sex offenders were abused in childhood. Whether there are genetic influences is outside my sphere of expertise. The vast majority of abused children go on to experience extreme difficulty in coping with life. A common trigger of symptoms, or to use my analogy above, when the fire starts melting the ice and leaking out, is the birth of a child, particularly in women. For some reason this brings back memories of the abuse and mental problems. Often the abuse is investigated by the police in later life when the survivor has formed a family and settled into some sort of permanency. When the family finds out the survivor was abused in childhood they often believe the fallacy and assume the parent must have turned into an abuser. When this feeling is accompanied by changed behaviour, drinking, depression, lack of sleep, anger and drug taking, invariably the partner cannot cope and the relationship breaks down.

How does the survivor behave towards his/her own children? Invariably in an over-protective manner. When the boy gets into a fight and the father feels he has been bullied he goes out and starts another fight in retaliation. The mother will not allow her daughter any freedom at all, and protects her from everything. Thus the girl grows up timid and lacking in confidence. Separation from parents becomes impossible.

Employers

If a child is abused by a person in authority be it father, mother, care worker or teacher, particularly when the abuse hap-

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The Limitation Problem

1. Personal injury claims arising out of sexual assaults give rise to particular limitation problems. Proving that a Claimant has been sexually assaulted will be straight-forward in cases where the abuser has been convicted in a criminal court of assault, rape or buggery. The Claimant will be entitled to rely on the convictions pursuant to *section 11 Civil Evidence Act 1968* and will not need to prove the facts. The problem that arises is that prosecution of the abuser may occur many years after the assault and after the primary limitation period for bringing a civil claim has expired.

2. The Law Commission and the Courts have recognised that sexual abuse claims will frequently require to be brought many years after the event. As Lord Justice Sedley described in the case of *Ablett v Devon County Council [2001] (unreported):*

   "Inevitably there is a problem of limitation in these proceedings. I say "inevitably" because it is in the nature of abuse of children by adults that it creates shame, fear and confusion, and these in turn produce silence. Silence is known to be one of the pernicious fruits of abuse. It means that allegations commonly surface, if they do, only many years after the abuse has ceased."

3. In the case of *Stubbings v Webb [1993] AC 498* the House of Lords held that the limitation period for a deliberate assault was 6 years. A deliberate assault was found not to be characterised as "negligence, nuisance or breach of duty" and to come outside the provisions of *sections 11, 14 and 33 Limitation Act 1980.* Assaults were therefore found not to come within the provisions for extension of limitation for a later date of knowledge or in accordance with the Court's discretion.

4. In the case of *Lister v Hesley Hall Ltd [2001] 2 WLR 1311* the House of Lords found that an employer could be vicariously liable for assaults committed by his employee provided they were committed in the course of his employment or closely connected to it. If a teacher or care worker was employed to look after children, but whilst purporting to care for the children, he sexually abused them, his employer could be vicariously liable.

5. The problem is therefore that under the present law claims for deliberate assaults against abusers must be brought within 6 years of the assault or within 6 years of the Claimant becoming an adult. As discussed below the House of Lords has now given permission for Claimants to challenge the decision in *Stubbings v Webb* by way of petition to the House of Lords. Meanwhile Claimants and the Courts continue to grapple with the problem of how to deal with sexual abuse claims brought many years after the event.

Vicarious liability for Deliberate Assaults

6. In the case of *Various Claimants v Bryn Alyn Community Homes Limited and Another* (Connell J. 26 June 2001)

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unreported, Connell J found that the claim for deliberate acts of abuse for which the Defendant was vicariously liable was subject to a non extendable six year limitation period. The Court of Appeal confirmed this position in a decision given on 12 February 2003: *KR and Others v Bryn Alyn Community (Holdings) Limited and Royal and Sun Alliance PLC* and stated:

"In our view the correct approach is as Lord Millett has expressed it. Whether or not section 11 is in play, it is to identify the wrongful act, deliberate or otherwise, in respect of which vicarious responsibility is claimed and to assess the closeness of its connection to the employment in question. If the act is sufficiently closely connected with the employment, there is vicarious responsibility. In such circumstances and bearing in mind Lord Griffiths reasoning in Stubbings v Webb (para 99 above) there is no justification or need, for the purpose of establishing vicarious responsibility, to elide the duty in respect of which the employee's deliberate act is a breach of duty of care delegated or "entrusted" to him by the employer. The two are quite distinct. Where section 11 is under consideration, it follows that claims for personal injury in respect of deliberate conduct, whether considered in the context of vicarious responsibility or not, are not caught by its provisions. Accordingly, in absence of some provable allegation of systemic negligence of the first Defendant, we are of the view that its employee's deliberate abuse does not fall within section 11 and is, therefore, governed by a non-extendable six year period of limitation rather than an extendable three year period." [emphasis added]

7. Permission to appeal this decision was refused by the House of Lords in the *Bryn Alyn* case. The decision was followed by the Court of Appeal in the case of *C v Middlesborough Council [2004] EWCA 1746.* The Court of Appeal in *A v Hoare, H v Suffolk CC and X and Y v Wandsworth Borough Council* have expressed doubt about these cases and the position generally and have granted permission for the House of Lords to examine the position further.

House of Lords Consideration of Stubbings v Webb

8. In three cases: *(1) A V Iorworth Hoare; (2) H V Suffolk County Council and Secretary of State for Constitutional Affairs; and (3) X & Y V London Borough of Wandsworth* the Court of Appeal has granted permission to petition the House of Lords. In each of these cases the Claimants suffered psychiatric damage from sexual abuse that was proved or not in dispute. However, in all cases the claims were found to be limitation barred because of the decision in *Stubbings v Webb [1993] AC 498*.

9. The Master of the Rolls delivered the judgment of the Court (the other members being Lord Justice Brooke and Lady Justice Arden).

   In the judgment the Court stated:

   "The Court expressed itself willing to grant all the Claimants permission to appeal to the House of Lords, so that the House of Lords, which would not be constrained by binding case law, could consider how the issues raised by these appeals could be addressed without the intervention of Parliament."

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10. The Court explained that they hoped:

    "The House of Lords itself may be able to remedy some of the very serious deficiencies and incoherencies in the law as it stands today in a way that we cannot."

11. The Judgment reviews the history of the cases before and after *Stubbings v Webb* and the Law Commission recommendations. It pointed out that the Law Commission report was published in 2001 but Parliament has done nothing for 5 years. In considering the effect of *Stubbings v Webb* the Court pointed to the case of *S v W* and commented:

    "It might be thought that in any rational legal system the three year extendable limitation period should apply to the claim against the abusing father as well as to the claim against the negligent mother, and that a Claimant who does not possess the relevant knowledge before the expiry of the primary limitation period should be permitted in an appropriate case to advance a claim against both such parents and not merely against the less guilty one."

12. The Court considered the arguments that a teacher could be in breach of duty as well as committing trespass to the person in some circumstances. In particular when, in his capacity as teacher, he groomed a boy for abuse and did not report his abuse. In respect of these arguments the Court stated:

    "On the face of it principle and justice seem to require that when a teacher, in flagrant breach of the duty he owes a pupil in his charge, grooms him and encourages him to perform indecent acts in front of him or watch pornographic videos with him and performs indecent assaults on him and follows a prolonged policy of favouring him and protecting him from justified complaints by other teachers, so that the child truants in the short term and suffers serious psychiatric harm in the long term, in addition to losing the normal benefit of education, the law should not provide a more relaxed limitation regime for the less serious breaches of duty and a more stringent regime for the more serious breaches.

    Unrestrained by authority we would be inclined to follow what appears to be the approach of the majority in Lister v Hesley Hall and hold that such a Claimant should recover damages for breach of duty in respect of the cumulative effect of all these activities, so that recovery is not confined to those improper activities that do not constitute intentional assaults.

    [emphasis added]

13. Further the Court considered whether it could get round the difficulty, however it concluded:

    "…in our judgment we are not free to take this course. In KR v Bryn Alyn this Court expressly preferred the approach of Lord Millett in the Lister case as to the non-viability of an alternative claim based on breach of duty……We considered whether we were able to depart from that part of the judgment in Bryn Alyn, but even if we were free to do so we think it would be very much better to leave it to the House of Lords to consider this area of the law as a whole, rather than for different divisions of the Court of Appeal to provide different answers in relation to what is, after all, only one part of a larger scene."

14. On the separate point as to whether activities

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of a teacher with a pastoral role for pupils in the school was acting in the course of his activities or was acting in a role closely connected to his employment when sexually abusing a child in his own home after school hours the Court of Appeal reversed the finding of the trial judge and found the teacher's acts were closely connected to his employment.

15. The result is that the position in respect of *Stubbings v Webb* will now be considered by the House of Lords. The Court of Appeal gave their own view as to how the decision might be reviewed when they stated:

"*Powerful arguments, based on the plain words of section 11(1) can be advanced along the lines discussed in paras 19, 20 and 25 above to the effect that the Act should be interpreted like any other consolidation Act and/or that the phrase "breach of duty" should be construed as it was by Lord Justice Diplock and Lord Denning MR in Letang v Cooper.*

16. As the Court of Appeal said in paragraph 129:

"*We have already expressed the hope that the House of Lords will reconsider Stubbings v Webb at an early date.*"

The Decision of the High Court in Australia

17. The Court of Appeal granted permission to the Claimants in the cases above to petition the House of Lords in April 2006. Then on 20 July 2006 the High Court of Australia considered the decision in *Stubbings v Webb* in the case of *Stingel v Clark [2006] HCA 37*[1]. In that case the Claimant alleged that she was raped by the Defendant in 1971. The Claimant claimed she had not suffered post-traumatic stress disorder until 2000 and she then first realised her psychiatric condition was attributable to the rape. This was a similar argument to that raised in respect of date of knowledge in the *Bryn Alyn Cases.*

18. The Australian legislation in respect of limitation is drafted in similar terms to the *Limitation Act 1980* in England. The relevant legislation contains provisions similar to sections 11, 14 and 33 allowing an extension of the primary limitation period, but the provision was expressed to only operate in cases of "negligence, nuisance or breach of duty". The two issues that arose in the *Stingel Case.*

(1) Was trespass to the person a "breach of duty"?

(2) If it was, did the later date of knowledge for psychiatric injury (as opposed to disease) allow the implementation of the extension provisions of the legislation.

19. The majority of the High Court in Australia found for the Claimant and allowed the action to proceed.

(1) On the first issue, by a majority of 5-2 the Court ruled that for the purposes of the legislation in Australia "breach of duty" had to be interpreted to allow it to include actions for trespass to the person. In doing so they acknowledged that they were deciding contrary to the interpretation of

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an almost identical UK provision (conceded to have been the model for the Australian provision) given by the House of Lords in *Stubbings v Webb* [1993] AC 498.

(2) In respect of the second issue, whether late onset post-traumatic stress disorder was covered by the expression "damages in respect of personal injuries consisting of a disease or disorder contracted by any person", the Court found that it was covered and the Claimant's condition fell within the provision.

The Position in Respect of Date of Knowledge and Discretion

20. In England, at present, a Claimant is often precluded from bringing an action based on assault or vicarious liability for assault because of the non-extendable 6 year limitation period determined by *Stubbings v Webb.* However, in some cases it may be possible to bring a claim in negligence against an employer or other individual who negligently failed to prevent the abuse. In this situation claims in negligence are covered by sections 11, 14 and 33 Limitation Act 1980.

21. The decision of the Court of Appeal in *Bryn Alyn* reviewed and revised the decision of Mr Justice Connell in respect of the application of sections 11, 14 and 33 Limitation Act 1980. The position is now that in the area of sexual abuse of children it is necessary to examine the date on which the Claimant was first able to appreciate the significance of what had happened to him/her as a child in the sense of when he appreciated the extent of the psychiatric damage that could be attributed to the events. The following passage from the judgment of the Court of Appeal illustrates this point:

"Application of the section 14(2) meaning of "significance" to child victims of abuse is often the more difficult because many of them, as in the case of these Claimants, come to it already damaged and vulnerable because of similar ill-treatment in other settings. For some such behaviour is unpleasant, but familiar. As Mr. Owen put it in his supplemental submissions, such misconduct was for many of these Claimants "the norm"; it was committed by persons in authority; and they, the Claimants, were powerless to do anything about it. Some victims of physical abuse may have believed that, to some extent, they deserved it. And, in cases of serious sexual abuse unaccompanied by serious physical injury of any permanent or disabling kind, it is not surprising, submitted Mr. Owen that they did not see the significance of the conduct in section 14(2) terms, and simply tried to make the best of things.

However artificial it may seem to pose the question in this context, section 14 requires the Court, on a case by case basis, to ask whether such an already damaged child would reasonably turn his mind to litigation as a solution to his problems? The same applies to those, as in the case of many of these Claimants who, subsequent to the abuse, progress into adulthood and a twilight world of drugs, further abuse and violence and, in some cases, crime. Some would put the abuse to the back of their minds; some might, as a result or a symptom of an as yet undiagnosed development of psychiatric illness, block or suppress it. Whether such a reaction is deliberate or unconscious, whether or not it is a result of some mental

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impairment, the question remains whether and when such a person would have reasonably seen the significance of his injury so as turn his mind to litigation in the sense required by section 14(1)(a) and (2) to start the period of limitation running. At this stage the section 14(1)(b) issue of actual or constructive knowledge of attributability becomes more of a live issue than it would have been at or shortly after the abuse, because in some cases it might only be after the intervention of a psychiatrist that a Claimant realises that there could have been a causal link between the childhood abuse and the psychiatric problems suffered as an adult, an argument accepted by the Court of Appeal, but which Lord Griffiths found difficult to accept, in Stubbings v Webb".

22. The Court of Appeal therefore accepted the argument that had been rejected by Mr Justice Connell that victims of abuse often do not have the requisite knowledge to start the limitation period running against them until they can begin to talk about the abuse and can take medical and legal advice.

23. The Court of Appeal specifically considered a number of actions by various Claimants which did not indicate a date of knowledge sufficient to precipitate statutory awareness under section 11 and 14 Limitation Act 1980. These included:

(a) The fact that a Claimant sought his social services files from a potential Defendant authority [para 145 of the judgment].

(b) The fact that a Claimant has made a statement to the police about the abuse he has suffered; [para 169, 231, 301 of the judgment]

(c) The fact that the Claimant had made a claim to the Criminal Injuries Compensation Board [para 169, 231 of the judgment]

(d) The fact that a Claimant had made a complaint at the time of the abuse to a social worker and to the police [para 181 of the judgment].

24. In the *Bryn Alyn* cases where the date of knowledge was relatively recent but more than 3 years before the issue of proceedings then the Court of Appeal considered that the period of limitation may be extended by a further period pursuant to section 33 Limitation Act 1980 [See paragraph 233 of the judgment].

25. In the subsequent decision of the Court of Appeal in *T v Girls and Boys Welfare Society [2004] EWCA 1747* it was pointed out that when considering an extension of time under section 33 the Court will take into account the entire period of delay even if the period since the Claimant acquired the relevant knowledge is relatively short.

26. In the *T v Girls and Boys Welfare Society* Case the Court of Appeal found as follows:

"By the time the claim was brought, 28 years had passed since the events that gave rise to the claim, and the service of the claim was the first notice that B had of those allegations. It was no answer to say that the prejudice had only been marginally increased by the fact that the claim was made

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two years after the limitation period had expired. Parliament had determined in s.11 and s.14 of the Act where the balance of prejudice should normally be struck. It followed that s.33 was only available in special cases and it was for the Claimant in any particular case to establish that his claim was one of those special cases. The mere fact of being asked to deal with a stale claim was itself prejudice, and the staler the claim the greater the prejudice. The policy of the law was to permit people and organisations to arrange their affairs on the basis that there came a time when they should not be asked to meet such claims. The judge was fully entitled to conclude that the instant case did not come within the category of those where an exception could be made under s.33."

27. The effect of this decision is that once the Claimant is outside the three year period from the date of knowledge (actual or constructive) then the Court will look at the whole period of delay since the primary period of limitation expired (on the Claimant's 21st birthday) and to consider the date at which the abuse occurred. It has become vital therefore to consider immediately a Claimant instructs a solicitor when his date of knowledge might have arisen. If the claim is not issued within three years of this date then an extension of time under section 33 will be difficult to achieve, particularly if the claim relates to a date many years earlier.

Conclusion

28. Limitation presents a particular problem in sexual assault cases. Claims are often brought many years after the events because the Claimant has been unable to discuss the abuse earlier. Frequently the civil claim is precipitated by criminal proceedings brought many years after the events and forcing the Claimant to give details of the abuse for the first time. A claim against the abuser himself or anybody vicariously liable for his actions is at present subject to a six year non-extendable time limit. The unfairness and illogical position this creates has now been recognised by:

(1) The Law Commission report in 2001

(2) The Court of Appeal in *A v Hoare, H v Suffolk CC and X and Y v Wandsworth LBC*

(3) The High Court in Australia in *Stingel v Clark.*

The position is expected to be soon considered by the House of Lords.

29. Meanwhile claims arising out of sexual assaults that occurred more than 6 years ago (or more than 6 years from the Claimant's 18th birthday) can only proceed by way of a claim in negligence. If a claim in negligence can be brought the limitation period will run from the date on which the Claimant could first be expected to "turn his mind to litigation" or first understood that the abuse had caused the psychiatric damage experienced by the Claimant.

18 August 2006

[1] The transcript can be accessed on http://www.austlii.edu.au/au/cases/cth/high ct/2006/37.html

Psychiatric Injury - common sense or legal fiction?

by Peter Garsden

If an alien landed on Earth with abundant common sense, and was told that the English legal system imposed the following rules, then he would find it hard to believe, because these rules are more like legal fiction than natural justice.

1. It is not possible to claim for mere psychiatric injury unless it amounts to more than the usual shock reaction to a frightening incident

2. If medical science does not recognise the mental state as a disorder it is not possible to claim for it unless it is accompanied by some physical injury

3. If accompanied by physical injury, any sort of emotional reaction to an event is compensatable

4. The normal grief reaction to death is not claimable at law but pathological grief is compensatable

5. If you are a bystander and suffer shock you will receive less (or nothing at all) if you are a stranger than if you are a blood relative of the accident victim

6. If you witness the accident to a relative on the television you will receive nothing whereas if you go to the hospital immediately afterwards and suffer shock you are eligible for compensation as long as you are a close enough relative to the victim.

Our senior judge's attitude to psychiatric injury is unfortunately prejudiced and dominated by the English stiff upper lip influence of Tom Brown school days, and suffering caused by two World Wars. The feeling that there is something rather unacceptable about people like the Americans who go for counselling if they break a nail influences our law. Innate suspicion that if one cannot see the injury it is a try on by a victim of the compensation culture is prevalent. Thus psychiatric injury cases inevitably cause more debate than other types of physical injury.

In the recent Court of Appeal decision of **Rothwell v Chemical & Insulating Co Ltd and Another - [2006] EWCA Civ 27** the court heard 5 related appeals by Defendants against a finding at trial that the condition pleural plaques was physical damage which entitled the Claimants to be awarded damages for anxiety which fell short of a psychiatric condition. Pleural plaques has been accepted for years to be one of the first signs of Asbestosis and been compensated by the courts. There was, however, no appellate authority on the subject. The argument was that it was symptomless and did not amount to injury. The Court of Appeal agreed. If one reads the judgment mention is made of the claims farmers who make it their business to encourage the victims of industrial disease to make claims. Whether or not the court was reacting against such practises is not easy to judge. All Claimants failed because they did not have claims for physical injury, thus entitling them to claim for damage falling short of a psychiatric illness. Even one Claimant who had been awarded damages at first instance, because he had sustained a depressive illness after discovering he was suffering from pleural plaques, lost. The Court of Appeal quoted from a case as old as 1861 namely where Lord Wensleydale put it in *Lynch v Knight* (1861) 9 HLC 577 at p. 598:

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"Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested"

So even the Claimant who did suffer a depressive illness failed because the Court of Appeal thought that it was not a foreseeable consequence of exposing him to asbestos at work, following the guidelines laid down in **Page v Smith [1996] 1 AC 155 HL**. This was a harsh decision by any reckoning.

In the simpler case of **Reilly & Another v Merseyside Regional Health Authority (1994)** an award of £1,750 damages for having been trapped in a lift for 1 hour 20 minutes due to negligence, was overturned on appeal because there was no physical injury associated with the psychiatric injury alleged, which fell short of an identifiable psychiatric condition in that it did not amount to post traumatic stress disorder or chronic anxiety state. There was a similar unsuccessful argument in this case that there had been some physical injury.

In **Nichols v Rushton (1992) The Times 19th June**, the plaintiff was involved in a motor accident and suffered no physical injury but suffered a nervous reaction falling short of an identifiable psychiatric illness which amounted to mental suffering, fear and anxiety.

The principle that a free standing psychiatric injury is compensatable where it is the foreseeable consequence of a breach of duty is only 10 years old. In **Page v Smith** the Claimant had been involved in a road traffic accident and as a result had suffered from chronic and permanent nervous shock (myalgic encephalomyelitis chronic fatigue syndrome or post viral fatigue syndrome). Similarly the right to claim damages for stress at work is only 4 years old **Barber v Somerset CC [2002] ICR 613.** It took until the year 2000 for the House of Lords to finally accept that dyslexia was personal injury for which compensation could be claimed **Phelps v Mayor of London Borough of Hillingdon & ors. House of Lords (2000)** The concept that the entire country's care system was riddled with child abuse for which compensation should be payable only arose in around 1995. For those around at the beginning such as myself, the prospect of the courts entertaining claims for psychiatric damage which were between 15 and 50 years out of time was a daunting one, when most of the public could hardly believe that abuse of the type published actually took place. To go even further and accept that priests are commonly guilty of such behaviour took credulity to even greater heights. Yet the courts have shown themselves capable of mental gymnastics to allow Claimants to successfully recover compensation. One only has to read the judgment in **KR & Others v Bryn Alyn Community (Holdings) Ltd. [2003] EWCA Civ 85)** to see how the Court were prepared to stretch the law of limitation in order to give compensation which went beyond the JSB guidelines averaging around £45,000 in the North Wales cases.

A law which says that the nearest and dearest is not entitled to claim for what is the normal reaction to the death of a close relative even though the death was caused negligently, unless that reaction goes beyond normal limits is perhaps a little insensitive, and

Psychiatric Injury - common sense or legal fiction?

by Peter Garsden

akin to the expression "just stop snivelling and get on with it". In **Walters v North Glamorgan NHS Trust (2002)** – a 35 year old woman at Swansea High Court received the sum of **£16,000** for a severe pathological grief reaction resulting in loss of employment as an Auxiliary Psychiatric Nurse following the death of her son due to medical negligence. Whereas in **Hinz v Berry [1970] 2QB 40CA,** a mother who witnessed the death of her husband and the serious injury of some of her children was still suffering psychiatric injury four years after the incident. She was only allowed to recover the extra element on top of "normal grief". In the child abuse field the concept that the parents of children who are abused become entitled to claim where their own children were exposed to an abusive foster child provided negligently by the council and suffer a mental illness was established by the case of **W & Others v Essex County Council & Another (2000).**

The height of artificiality are the rules surrounding what can be termed rescuer and secondary victim cases, where a claim is usually made for psychiatric illness caused by the witnessing of a traumatic event. As always the traditional English judiciary are terrified of the concept of the "flood gates" opening to allow those who have been damaged from making claims for what they are entitled to. Nothing could be more obvious than the Hillsborough cases where the victims did what they are best at on Merseyside and mounted multiple claims for compensation. There are several judgments such as **McLoughlin v O'Brian [1983] 1 AC 410** where the concepts of event and relationship proximity were established. In other words one has to be a close relative of the accident victim as well as being present fairly soon afterwards, to be able to claim. In **Alcock v Chief Constable of Yorkshire Police [1992] 2 AC 310** the concept of the primary victim and secondary victim were established. The many victims who had witnessed the Hillsborough disaster were categorised into several groups. Control mechanisms were imposed on secondary victims which did not apply to primary victims. Inevitably these controls are artificial and did not extend, for example to allowing those who witnessed the disaster on television, even though they were closely related to the victims, to being able to claim. The rules extended to a rescuer at the Piper Alpha disaster from being unable to claim in **McFarlane v E E Caledonia Ltd (1983)** because it was established that a person of reasonable fortitude would not be liable to suffer in the way that the Claimant did.

So is there any hope? Well, although it has taken a long time for the judicial process to become sensitive enough to the less obvious type of injury like psychiatric damage, grief, post traumatic stress disorder, depressive illnesses, and dyslexia where there are no blood and guts to show an injury has taken place, the law is slowly moving in the right direction. However the intransigence of the law can conveniently be summarised by the comments of Lord Steyn in **Frost v Chief Constable of South Yorkshire [1992] AC 455**, paragraph 500:

> "(T)he law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify ... In my view the only sen-

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