Newsletter
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ACAL
Association of Child Abuse Lawyers

Key Articles:

President's Report

By Peter Garsden
President, ACAL

President's Piece

As I sit in our caravan on holiday in Anglesey, marooned inside, whilst the rain lashes against the windows, with the television full of the Olympics, I think back to how the news has been relatively empty of abuse for a change, and full of Brexit. From an abuse lawyer's point of view, departure from Europe and a supposed British Bill of Rights, causes anxiety, and the fear of regression of law, which over the last 20 years has increasingly protected our dysfunctional vulnerable clients. What news there has been seems to have centered around the Independent Inquiry into Child Sexual Abuse (IICSA), as several of the modules such as Janner have set off in the direction of a hearing, and leadership politics has abounded.

The Supreme Court has handed down an important judgement in a non-abuse case relevant to vicarious liability in favour of Claimants, and our usual ACAL/APIL conference has been another roaring success.

Meanwhile we are planning a response on the future of civil litigation to the Accounts and Reparations module of the Independent Inquiry into Child Sexual Abuse (IISCA). The government are also seeking responses to a consultation on Mandatory Reporting.

The June APIL/ACAL Conference

Due to the sterling efforts once again of Tracey Storey and Jonathan Wheeler, the conference on 7th June was a great success. Numbers seem to increase each year.
We were all inspired by the passionate and informative speeches from Sue Berlowitz, Richard Scorer, David McClenaghan as well as an informative lecture from the other side of the argument with the Defendant tag team of Gary Dover, and Adam Weitzman. There were also lectures on the CICA from Ben Collins QC, of Old Square Chambers, Child Trafficking from Frances Trevena, Head of Policy and Programmes, Coram Children's Legal Centre, London, and Examining the media representation of adult male sexual violation by Dr Joanna Jamel, Senior Lecturer in Criminology, Kingston University.
The house debate "Should the law of Limitation be removed for allegations of sexual child sexual abuse" was interesting. During the course of my preparations, I changed my mind, and became a convert to the proposal to abolish Limitation as is intended in Scotland for abuse cases. Whilst it was intended to make the argument balanced, it could never be so in a room full of Claimant Lawyers. Gary Dover and Adam Weitzman, however, valiantly opposed the motion.

Legal Update

Not an abuse case, but one which received a lot of publicity when it reached the Supreme Court because

of the way in which it changed the law on vicarious liability was Mr A M Mohamud (in substitution for Mr A Mohamud (deceased)) v WM Morrison Supermarkets plc [2016] UKSC 11.

The claimant was seriously attacked by Mr Khan who was employed by the respondent to serve customers at the petrol station kiosk. Mr Khan was working at the kiosk when the claimant visited the petrol station. The claimant had done nothing that could be considered aggressive of abusive when Mr Khan attacked him and told him in threatening words never to return. Mr Mohamud had asked Mr Khan if he could print off some documents from a USB Memory Stick he was holding.

The trial judge had applied the close connection test laid down by the abuse case of Lister v Hesley Hall Limited, and decided that Mr Khan was acting outside the scope of his employment, and as such Morrisons were not vicariously liable for his actions. The Court of Appeal agreed with him. In the Supreme Court, however, Lord Toulson delivered a unanimous judgment allowing the appeal and finding that Mr Khan was acting within the scope of his employment.

In giving the lead judgment the President, Lord Toulson, restated the "close connection" test laid down in *Lister v Hesley Hall Ltd [2001] UKHL 22* in terms of a two fold test. The first question is what functions or "field of activities" have been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. This question must be addressed broadly. Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice.

The Independent Inquiry into Child Sexual Abuse (IICSA)

There have been a number of preliminary hearings to determine rules on broadcasting and anonymity for all "core-participants". The various "modules" including Lord Janner which I am involved in, have been pushed forwards, with Janner listed for hearing in March 2017.

The recent news of the resignation of Lowell Goddard, the New Zealand judge who was in the Chair for 18 months, was a shock and made headline news. It upset the survivors who have issues trusting authority in any event. The new Home Secretary Amber Rudd moved swiftly to appoint in her place a non-lawyer, but respected figure in the field of social work Professor Alexis Jay, whose work on the Rotherham sexual exploitation case was widely admired. How the Inquiry are going to handle hearings without a qualified judge in charge will be interesting to discover.

As part of the section on "Reparations and Accountability", there will be an "An inquiry into the extent to which existing support services and available legal processes effectively deliver reparations to victims and survivors of child sexual abuse and exploitation." Submissions have been invited from all interested parties. Bearing in mind that we are closely involved in the civil litigation process, we considered it appropriate to provide our views. Accordingly, the Committee has met for a day and discussed submissions which can be made before the deadline of 29th September 2016. Naturally we will circulate our responses to members and publish them on our website.

Annual General Meeting

Finally, don't forget the Annual General Meeting which will take place at Irwin Mitchell in London (we alternate North and South locations year by year) on Friday 21st October 2016 between 2pm and 4.30pm. We are actively putting together a programme with interesting speakers as usual. Sadly Jonathan Wheeler will be standing down as an Executive Officer, and Treasurer of the Association. He is going to become Managing Partner of his firm and is standing down from other similar positions. A big vote of thanks must go out to Jonathan who has worked tirelessly and enthusiastically for the Association over many years. His passionate contribution to the subject matter and his genuine concern for the rights of victims has carried us through many difficult decisions. So Jonathan we all wish you all the best in your future role. Alan Collins has kindly agreed to take over the Treasurer's role in Jonathan's place.

Finally, a warm welcome to Tracey Emmott and David McClenaghan who have recently been co-opted onto the ACAL Executive Committee.

I think that is about all for now, so until next time, take care, and don't work too hard.
29th August 2016

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Limitation – article by Richard Scorer

As the numbers of civil claims brought by survivors of abuse have grown, no issue has been as fiercely contested as limitation. Claims are often brought many years, sometimes decades, after the alleged abuse. The reasons for this are well known. Victims are ashamed and embarrassed. Child abuse is accompanied by secrecy and pressure on the victim to remain silent. Until recently, children who reported abuse were frequently not believed and having reported the abuse once to a person in authority, did not do so again. Many victims only disclose childhood abuse when they become aware (e.g. from press coverage) that others have been abused by the same perpetrator, and conclude that they are now likely to be believed. As Sedley J explained in a case in 2000, "*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 most pernicious fruits of abuse. It means that allegations commonly surface, if they do, only many years after the abuse has ceased".*

In England the limitation regime is set out in sections 11, 14 and 33 of the Limitation Act 1980, as interpreted by the House of Lords in 2008 in *A v Hoare* and subsequent case law. In deciding whether to exercise its discretion to allow a late claim, the court will consider whether it is equitable to allow the action to proceed, which means having particular regard to the length of the delay, the reasons for the delay, and whether is it still possible to have a fair trial. There has been a tendency to assume that the last factor is the most important, but as illustrated by *RE -v-GE [2015 EWCA Civ 287],* the court will consider whether "it is fair in all the circumstances for a trial to take place", this being a wider question than whether it is still possible to have a fair trial: thus a claimant can be time barred by what the court considers to be some culpable delay of his own, even if a fair trial is still possible (see analysis by Susan Rodway QC in APIL PI Focus December 2015). Overall, the *Hoare* decision has helped claimants but limitation remains a significant obstacle. As McCombe LJ explained in *RE -v- GE*, one of the matters which must weigh on the court in exercising its discretion is "the very existence of the limitation period which parliament has decided is usually appropriate".

Limitation will now be considered by the Goddard Inquiry into Child Sexual Abuse as part of its examination of the fairness of current laws for survivor reparation. But there is already a growing international recognition of the inherent injustice caused by the application of time limits in abuse cases. In response, a number of jurisdictions have either recently abolished time limits entirely in abuse cases, or are actively considering doing so, in particular, in Canada, Australia and Scotland. This type of legislation is in its infancy but it is worth examining the various statutes which have been passed or are under consideration, to better anticipate the issues that may arise should similar legislation be considered in England and Wales.

CANADA

Limitation periods for abuse claims have now been abolished in 8 out of 10 of the Canadian Provinces. The most recent change was in Ontario where on 9 March 2016 Royal Assent was given to the Sexual Violence and Harassment Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment) 2015, which provides that there is now no longer any time limit for an abuse claim. In British Columbia the abolition of time limits for abuse claims was implemented through the Limitation Act [SBC 2012] Chapter 13 which came into force on 1 June 2013. In relation to sexual assault, section 3 of the Act ("Exempted claims") provides that no limitation period will

apply to “a claim relating to misconduct of a sexual nature, including, without limitation, sexual assault, (i) if the misconduct occurred while the claimant was a minor, and (ii) whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period; a claim relating to sexual assault, whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period; a claim relating to assault or battery, whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period, if the assault or battery occurred while the claimant (i) was a minor, or (ii) was living in an intimate and personal relationship with, or was in a relationship of financial, emotional, physical or other dependency with, a person who performed, contributed to, consented to or acquiesced in the assault or battery”. As can be seen, therefore, the exemption from limitation applies not simply to child abuse cases but may capture some cases involving adults.

AUSTRALIA

In Australia, national concern about the treatment of abuse victims led to the Royal Commission into Institutional Responses to Child Sexual Abuse which was established in January 2013 under the chairmanship of Justice McCllellan. The Royal Commission's final report on redress and civil litigation was released in September 2015. The Commission urged the abolition of limitation periods for civil claims, which were noted to vary considerably from state to state, something which itself had led to considerable injustice, and recommended that this should be done by state and territory governments "without delay" and "with retrospective effect".

By the time the report was released the state of Victoria had already passed into law the Limitation of Actions (Child Abuse) Act 2015, which came into effect on 1 July 2015. The Act removes limitation periods in respect of "causes of action that relate to death or personal injury resulting from child abuse". According to the Act child abuse in this context means "(i) an act or omission in relation to the person when the person is a minor that is physical abuse or sexual abuse; and (ii) psychological abuse (if any) arising out of that act or omission". The removal of the limitation period applies irrespective of whether the act or omission in question occurred before or after the date of commencement of the Act.

A similar, but not identical, Bill has just been passed in New South Wales (17 March 2016). The Limitation Amendment (Child Abuse) Bill 2016 amends the Limitation Act 1969 to exclude from its provisions any claim arising from child abuse , this being defined as sexual abuse, serious physical abuse and any other abuse perpetrated in connection with the sexual or physical abuse, where perpetrated against a person under 18. The New South Wales Bill goes further than the Victorian statute by expressly stating that the limitation period will still be excluded where a claim had been commenced previously on the same cause of action, and whether or not judgment on the cause of action had been previously given. As with the Victoria statute, however, there is a safety measure in the Bill reserving a right for the court not to apply the provisions where it would interfere with the provision of a fair trial for a defendant.

Meanwhile in Western Australia, where current limitation rules provide for a six-year time limit, a private member's Bill proposed by Liberal MP Graham Jacobs seeks to remove the limitation period entirely for personal injury, including psychological injury, suffered by victims of child sexual abuse, and the state Attorney-General has stated that in principle the government is supportive of such a measure.

SCOTLAND

In Scotland, as in England, the law currently allows the courts to exercise an equitable discretion to permit a case to proceed after the expiry of the primary limitation period. In practice this discretion has invariably been exercised so as to prevent the vast majority of cases from proceeding, making it

more difficult for abuse victims to pursue civil claims in Scotland than in England, an anomaly which has been rightly criticised.

In March 2016, The Scottish government announced formal legislative proposals to abolish the three year limitation period for personal injury actions where the person raising the action was a child (i.e. under the age of 18) at the time the injury was caused, and where the act or omission to which the injuries were attributable constituted 'abuse'. Under the proposed Limitation (Childhood Abuse) (Scotland) Bill, which will now be presented to the Scottish Parliament, “abuse” will be defined to include "sexual abuse, physical abuse, emotional abuse and neglect". The removal of the limitation period will apply whether the abuse occurred before or after commencement of the new provisions, and regardless of whether the case has been raised previously.

In launching the Bill, the Scottish Government noted concerns regarding the deterioration of the quality of evidence over time, but emphasised that a pursuer will still need sufficient evidence to substantiate and prove their claim in court. If the evidence is unavailable the claim will still fail; but the proposed change would mean that the claimant will not be presented with a wholly artificial and restrictive primary time limit which would kill an otherwise meritorious claim on purely technical grounds.

DISCUSSION

As can be seen there are many similarities between the various versions of legislation listed above. There are also differences: the British Columbia statute applies to adult sexual assault cases whereas some of the others are limited to child abuse. Some of the legislation (e.g. the Ontario statute) also applies to claims to the Criminal Injuries Compensation Board. Another issue is the treatment of cases which were brought and failed under the old limitation provisions -should a claimant now be permitted a second bite of the cherry? The New South Wales statute permits this. The Scottish bill seeks to do so but subject to constraints arising from the Human Rights Act- a point which will doubtless be tested. With all of these statutes the transitional provisions will need to be closely examined. Defendants are likely to rely on *res judicata* to resist re-litigation of claims which had previously failed.

Inevitably, defendants will say that they will now be facing claims which are stale and incapable of satisfactory determination because crucial evidence has been lost due to effluxion of time. However this would be to mischaracterise the legislation, some versions of which provide express protection for defendants against this scenario. The Victorian statute states that the abolition of the limitation period "does not limit the court’s power to dismiss or stay the proceedings where the lapse of time has had a burdensome effect on the defendant that is so serious that a fair trial is not possible, for example where the long delay in bringing proceedings means that crucial evidence has been lost". Similar wording appears in the New South Wales Bill (as recommended by the Royal Commission). In Canada defendants arguing this point are likely to rely on common law principles regarding fairness of trial and s7 of the Canadian Charter of Rights (a constitutional provision that protects an individual's autonomy and personal legal rights from government action). Similarly, although the Scottish Bill recognises the reality that traditional time limits applicable to ordinary personal injury cases are unsuitable in abuse cases, it equally recognises that the claimant still needs to prove his or her case. If the evidence is available to substantiate the claim, then the matter can proceed; if the evidence is not available, then it cannot. In understanding the likely impact of this legislation, this is a key point: these laws are not going to create a free-for-all where any claim no matter how aged can automatically succeed.

Laws which abolish limitation periods for abuse claims clearly represent a radical change: most jurisdictions apply time limits to civil litigation on the public policy grounds that potential claimants should be encouraged to act with dispatch, and that defendants should be entitled to legal certainty. The abolition of time limits entirely in a particular class of case is a bold step. But it is also a sensible

and welcome one, recognising that justice is best served by treating child abuse victims as a special class of litigant. The Scottish proposal seems likely to pass in the Scottish Parliament and become law this year. To ensure consistency and fairness, and in keeping with international developments, similar legislation should be adopted in England and Wales.

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CASE SUMMARY
JE & Others –v- LB of A (1) LB of B (2) & LB of C (3)

Osbornes were instructed to act on behalf of 6 adult siblings in relation to complicated historic neglect cases against three local authorities. The claims dated from 1965 -1980 and all of the complainants had psychological injuries as a consequence of the alleged negligence.

By way of background information, Mr & Mrs E married in 1964 and had 6 children between 1965-1978. It was a violent, abusive alcohol fuelled marriage and in 1965 JE was born and when he was 5 months old he was sent overseas to live with an aunt. Prior to his birth Mrs E sought no antenatal care or treatment from her GP or local hospital.

In 1967 HE was born and by December 1967 the NSPCC had visited the family home and Mrs E had suffered two miscarriages between 1965 – 1967.

In 1968 JE was still living with an aunt and was admitted to hospital with two fractured arms and a fractured nose. He was discharged home from hospital into his aunts care. In 1969 the police reported that Mr & Mrs E were not to be prosecuted in respect of JE's injuries but a referral was made by the police to social services. The London Borough of A (LB of A) did not carry out any further assessment of the situation.

At the end of January 1969 Mrs E attended the police stAtion threatening to harm her children. In February 1969 JE was found to have further old and new injuries and these were thought to be non accidental. JE was taken into a care home by LB of A. In April 1969, CE is born and in July 1969 Mrs E is noted to have a fractured wrist and had been beaten up by her husband. They plan to separate.

In November 1969, HE and CE are diagnosed with salmonella and dysentery. Mr E is still reported to be beating his wife. She is seen with a black eye and by 1970 family to be at risk because of Mr E's violence.

In March 1970 HE attends the police station with physical injuries and HE and CE are placed into a children's home until early April 1970. No social work visits took place between January – June 1970. Police involved and contacted LB of A with concerns regarding Mr E's violence.

April 1970 CE noted to have a fractured arm. No child protection investigation in place. Mrs E is failing to collect the children from pre school. June 1970 police attend family home and HE has facial injuries. HE And CE placed in care again in July 1970 when Mrs E is admitted to hospital and suffers a miscarriage.

In July 1970 RE is born. In August 1970, HE has nits and HE and CE return to the care of Mrs E.

The violence towards the children by Mrs E and towards Mrs E by Mr E continues. In October 1970, HE sustains another physical injury and no action was taken by LB of A. Instead JE was being integrated back into the family home even though he had not seen his parents for two years.

There are no social services visits between August 1971 – November 1971 and by 1972 to social services file is passed to LB of B. By August 1972 LB of B close the file and the matter is transferred back to LB of A. The violence continues within the family home and LB of B contact LB of A to discuss developments in the case, to no avail.

In 1973 the family move into a GLC property. Mrs E is attended pre school to collect her children intoxicated. The violence escalates and Mrs E takes the children to Ireland in October 1973. Mrs E is in court on two occasions relating to violent behaviour.

LB of B open and then close the case again. There is no social work involvement from December 1973-October 1976.

In August 1975 SE was born. The family had fled to a women's refuge for safety.

In October 1976 all of the children were placed in care as Mrs E in hospital and suffered a miscarriage. All children retuned to Mrs E's care following her discharge home. Between May 1977 – July 1977 the family lived in Ireland and on their return there was a near drowning incident involving SE when Mrs E was intoxicated. The family were now living in another part of London and came under the care of LB of C.

In August 1978, Mrs E was sentenced to two years probation. In December 1978 WE is born. The violence between Mr & Mrs E continues to escalate and Mrs E was sentenced to another 3 years probation Order in March 1979. The children are neglected by Mr & Mrs E they are living in a squat. The children are in the family home in June 1979 Mrs E's two brothers murder another squatter in the home while the children are present. The children hear the fighting between their uncles and the squatter yet they remain living in the family home.

By September 1979 the family have moved back into the LB of A, the violence continues. LB of C had failed to carry out any assessments of the family while living in their borough.

In November 1979 the case is formally transferred back to LB of A by LB of C who close their files.

Mrs E continues to be intoxicated most of the day and the children are neglected and are living in an unhygienic home with very little food. The family home is unsuitable and the violence in the home is most of the time and in March 1980 she takes the children to Ireland. In April 1980, WE is placed I the "At Risk Register" he was admitted to hospital with a severe case of the measles but discharged back into the care of Mrs E.

In late April 1980, RE and HE were taken into care. In May 1980 CE sustains a fractured arm and no clear explanation for this injury is provided by Mr & Mrs E.

All 5 children were eventually taken into care by LB of A in May 1980 only to be Furness to their parents care in July 1980. JE remained in care as he refuses to return home. In November 1980 WE's name is removed from the "At Risk Register".

In May 1982, the 5 younger children are placed in care but are returned home thereafter. In January 1983 Mrs E put all the children in a taxi and sent them to Mr E's home in LB of C. LB of C advised Mr E to return the children to their mother's care and the file was closed.

Mrs E continues to drink and is intoxicated when collecting the children from school. In March 1983, case conference by LB of A, Mrs E only wants two of her children back. All children placed in care in April 1983. It is thought that SE was sexually assaulted while in care. In July 1983 the children are returned to Mrs E despite her heavy drinking.

In summer 1985 Mrs E takes the children on holiday and is drunk all of the time and SE fell off the seaside pier while in her care. Mrs E passed out on the beach as she was intoxicated and an ambulance was called to treat her.

After further abusive years living with Mr and or Mrs E the children the children gradually all left home and each have suffered significant psychological difficulties over the years.

Once the social services records had been received read and collated Letters of Claim were sent to LB of A, LB of B and LB of C. All claims were out of time by at least 28 years and the limitation dates had expired between April 1986 – December 1999. Expert evidence on breach of duty was obtained from Maria Ruegger social work expert. This report was supportive.

Letters of Claim were served in March 2015. A joint Letter of Response from all Defendants was received and negotiations commenced of settlement without the need for issue of proceedings.

Psychiatric evidence was obtained in the form of causation and condition & prognosis reports by Dr Rachel Gibbons, consultant psychiatrist and further documentary evidence was collated in relation to any other special damages being claimed.

Unfortunately the claimants' psychiatric expert evidence was not agreed by the defendant and the proposed that each claimant be examined by their expert psychiatrist.

In the interim negotiations took place all of the cases settled for 5 figure sums with liability for payment being split between LB of A and LB of C. General Damages and past losses in each case were estimated in the region of £20,000. The remaining damages being made up of future treatment and travel costs and loss of earnings.

Solicitor for all 6 Claimants Stephanie Prior Partner Osbornes

Counsel for Claimant's Christopher Gibson QC Outer Temple Chambers

Solicitor for Defendants Laura Broadhead Browne Jacobson

Case Summary DE –v- Leonard Wilson

The Claimant brought a claim for damages against the Defendant, Leonard Wilson, for the injuries she sustained as a result of sexual abuse by the Defendant between 1975 and 1978. At the time of the abuse, the Claimant was 11 – 14 years of age; the Defendant was the father of the Claimant's school friend.

The Defendant was convicted in March 2012 of two specimen counts of raping the Claimant and was sentenced to 15 years' imprisonment. Notwithstanding his criminal convictions, in his Defence he denied that he owed a duty of care to the Claimant and made denials as to sexual activity with the Claimant. He put the Claimant to proof in those respects, as well as in relation to her injuries and consequential losses.

The Claimant relied upon the expert evidence of Dr Trevor Friedman with respect to causation, condition and prognosis. The Claimant also relied on the lay witness evidence of the Claimant and 3 other witnesses with regards to quantum. The Defendant served no evidence.

The Claimant sought general damages, aggravated damages, past and future loss of earnings, past and future treatment costs and an award for the cost of alcohol dependency.

The case was heard before HHJ Freedman sitting as a High Court Judge at the Newcastle High Court District Registry on 8 – 9 August 2016. Both Claimant and Defendant had representation at Trial.

The first issue before the Court was whether the Defendant could seek to reverse the burden of proof placed upon him by virtue of section 11(2) of the Civil Evidence Act 1968 in respect of his criminal convictions. HHJ Freedman held that on the basis that the Defendant had adduced no evidence and had not put forward a positive case (he had merely put the Claimant to proof), that he could not challenge the criminal convictions. Accordingly, liability was found in favour of the Claimant and the Trial proceeded as to quantum. The Judge made a finding of fact that the Defendant had raped the Claimant on multiple occasions; on the Claimant's evidence on at least 20 – 30 occasions.

The Judge heard Dr Friedman's unchallenged medical evidence which concluded that the Claimant suffered from chronic alcohol dependence, sexual difficulties, low confidence and low self-esteem. He attributed 50% of the Claimant's difficulties with alcohol, low confidence and low self-esteem to the abuse perpetrated by the Defendant. He did, however, on balance conclude that but for the abuse the Claimant would not have been a chronic alcoholic. 100% of the Claimant's sexual difficulties were attributed to the abuse.

The Claimant's injuries had caused a devastating impact to all areas of her life including:-

1. Behavioural difficulties as a child which led to a period of time in a children's home away from the family home and which further strained a very difficult relationship between the Claimant and her mother.
2. A dependence on alcohol from the age of 11 or 12 years old which led to her truanting from school, forming inappropriate relationships and staying out late at night.
3. Engaging in a number of abusive relationships throughout her adult life.
4. Inability to sustain a stable lifestyle – witnesses described the Claimant as being 'chaotic'.
5. Historical difficulties in the relationship with her daughters to the point where she left the family home for a period of time when she felt unable to look after her daughters.
6. Difficulties with chronic and excessive alcohol abuse which continued to date. It was the evidence of Dr Friedman that but for the abuse the Claimant would not have been a chronic alcoholic.
7. Sleep disturbance and nightmares.
8. Loss of sexual enjoyment and sexual avoidance.
9. Inability to work for a prolonged period of time
10. Inability to progress to her full ability with regards to employment – the Claimant had worked in the care sector but it was her case that but for the abuse she would have progressed to a more senior level within the care sector at a much earlier date. The Claimant's evidence was that her lack of confidence and low self-esteem had prevented her from attaining employment at a level of which she was capable.

The Judge found that the Claimant should be awarded £75,000 by way of general damages, inclusive of an award for aggravated damages.

The Judge considered the claim for past loss of earnings. The Claimant had pleaded the loss of earnings claim on a multiplicand/multiplier basis. The Judge found that there were simply too many uncertainties in which was a multifaceted case. HHJ Freedman found that there was no doubt that the Claimant's earning capacity had been adversely affected by the abuse but recognised that other factors would have also played a part, including the fact that it was likely that the Claimant would have had some dependence on alcohol in any event and that she may have been involved in abusive relationships in any event. Nevertheless the Judge found the Claimant to be an intelligent, resourceful and hardworking individual, who had worked for most of her adult life. The Judge took

what he called a broad brush and robust approach and awarded past loss of earnings by way of a Blamire award in the sum of £100,000 including interest.

A Smith v Manchester award for future loss of earnings was made in the sum of £16,500 on the basis that the Claimant had on-going vulnerabilities as a result of her difficulties with alcohol dependence, which put her at a handicap on the labour market.

The Claimant made a claim for the additional expenses which she had incurred in funding her alcohol dependency. It was the Claimant's evidence that on average, she was drinking 1 – 2 bottles of wine per day and 1 bottle of spirit per week. An attempt had been made to adduce evidence regarding the average price of alcohol at the midpoint at which the loss was claimed. Again, the Judge found this a difficult area of the claim to quantify but recognised that it was a recoverable head of loss. The Judge took a broad brush approach and awarded £15,000 under this head of loss.

The Judge allowed past and future treatment costs in full, at £825 and £18,150 respectively. The past treatment costs were notional and so the £825.00 will be paid to the charity whom provided the support to the Claimant.

The total award was £225,475. The Claimant argued that an Order should be made for indemnity costs on the following basis:

1. The Defendant's conduct – the Defendant put the Claimant to proof despite previously being convicted in the criminal courts. The Defendant had instructed his counsel to cross examine the Claimant on allegations which had already been decided by a jury and caused the matter to proceed to a full two day Trial when there was no reasonable justification for doing so.
2. The fact that at the outset of the claim, the Claimant had made an offer to settle the claim (albeit not on a part 36 basis) and that she had done significantly better than that offer at Trial.

The Judge agreed and ordered that the Defendant pay the Claimant's costs on the indemnity basis.

Counsel Justin Levinson of 1 Crown Office Row, London
Solicitor Emma Crowther of Irwin Mitchell Solicitors Newcastle

10 August 2016

Independent Inquiry into Child Sexual Abuse seeks views on criminal compensation and the civil justice system

The Independent Inquiry into Child Sexual Abuse is seeking views on the effectiveness of the criminal compensation and the civil justice systems for victims and survivors of child sexual abuse in England and Wales, with the publication of two issues papers today.

The aim of the issues papers, one on each topic, is to enable individuals and organisations to give their opinions on the two systems via written submissions during an eight-week time period, after which responses will be analysed, and some contributors invited to seminars to explore the general themes identified.

The issues papers are part of the Inquiry's investigation into accountability and reparation. They consider the extent to which existing support services and legal processes effectively deliver just outcomes to victims and survivors of child sexual abuse where there has been an institutional failure.

The issues papers will look at whether:

- processes are accessible for all victims and survivors

- processes are conducted in as timely a manner as possible
- claims are investigated fairly and claimants/applicants treated equally
- claimants/applicants are treated with sensitivity
- an apology and/or admission of liability is made (civil justice system)
- an appropriate amount of compensation is awarded (Civil and existing procedures for criminal compensation).

Inquiry Chair Hon Dame Lowell Goddard said:

"Many victims and survivors of child sexual abuse may be seeking more than financial compensation, or outcomes other than those currently available through the civil justice system in England and Wales. We want to examine whether, and how effective, current systems and processes are, and hear about the broader outcomes people may want to see."

Further information about the issues papers and the processes, including timelines, can be found on our website. The closing date for submissions is noon on 29 September 2016.

In addition to this issues papers process, individual victims and survivors of child sexual abuse wishing to share their experience of either the criminal compensation scheme or the civil justice system in England and Wales may want to consider doing so through the Inquiry's Truth Project

Thoughts of David Greenwood, Solicitor on the IICSA Accountability and Reparations investigation.

The Independent Inquiry into Child Sexual Abuse ("IICSA") has asked for submissions problems with the present system and changes that would improve responses to survivors. You can read more at https://www.iicsa.org.uk/investigations/reparations-for-victims-and-survivors-of-child-sexual-abuse

The Accountability and Reparations investigation is currently consulting and we have until 29th September 2016 to get our views across. Feedback from your clients is also expected so please pass this out to clients too.

I set out some general thoughts below.

Dynamics of child sexual abuse and institutional behaviour .

The psychologist, Finkelhor, in 1986 described how sexual offenders come to commit their crimes. His model has become widely accepted.

He sets out that fantasies are the starting point, but these fantasies are expanded, nurtured and concentrated through feelings, needs and urges. The transitional point comes when an individual gives him or herself permission to transform these problematic fantasies into reality. At this point, the potential offender becomes an individual who is likely to offend and as we know, become a serial offender. This line separates those who will never commit a sexual crime from those who go on to commit dozens of such crimes.

Importantly, ideas of fantasies and whether they can become reality are influenced by culture, attitudes shared by other professionals and perceived likelihood of being caught. This includes the adequacy of the criminal justice system and the willingness of complainants to contact the police.

As we know, the investigation and enforcement procedures particularly within church organisations have been reliant on self-policing systems and there have been numerous incidents of cover-ups in the face of clearly substantiated crime. All institutions suffer from cultural and systematic weaknesses when it comes to safeguarding. This was clearly recognised by Theresa May when she set up the IICSA.

It is my contention that neither the criminal nor civil justice systems serve survivors or society as they actively discourage complaints and litigants from seeking the justice and redress they deserve. This has led to deep and serious loss to the individuals and society in general. Only radical reform of the justice, redress and support systems can reverse this negative effect. I set out the argument and solutions in more detail below.

STATISTICS

The Extent of Sexual Violence

Unreported Sexual Abuse and Violence Ireland (SAVI) (McGee, Garavan, De Baara, Byrne and Conroy 2002) revealed that 42% of female and 28% of the male population in Ireland have suffered as a victim of sexual offences, either as children or adults.

Comparable data in the US from 1990 (Finkelhor, Ormrod, Turner and Hamby) shows that 27% of women and 16% of men indicate that they have been sexually victimised. This is significantly more than the World Health Organisation report on Violence and Health 2002 (Krug, Dahalberg, Mercy, Zwi and Lozano) which found that 10% - 20% of females and 5% - 10% of males have suffered from serious sexual violence.

A 2005 report among Swiss women showed that 35% have suffered sexual violence with only a minority (6%) reporting these crimes to the police (Killias, Simonin and De Puy).

Overall the extent of sexual violence, and therefore psychological damage done to those living amongst us in society is surprisingly high and is at very significant levels.

Conviction rates

The failure of the criminal justice system to provide effective protection and redress for victims of child sexual abuse in the UK has been identified in numerous national surveys and studies, which have found that only 3-4% of reported child sexual abuse cases result in a conviction (Child Exploitation and Online Protection Centre figures 2010 at www.ceop.gov.uk; Cawson, P. et al. (2000) *Child maltreatment in the United Kingdom: a study of the prevalence of child abuse and neglect.* London, NSPCC).

The reality we face in our society is that out of every 100 reported cases of child sexual abuse, on average 97 victims reporting abuse are deemed to be telling the truth but only 3 or 4 of the cases will result in the conviction of the offender. This leaves over 93% of sex offenders without a criminal conviction. The criminal justice system is failing dramatically.

THE COST TO SOCIETY

We know that sexual abuse causes psychological harm that can cause loss of function in some areas of life, whether it is an inability to work, socialize, relationship breakdown, divorce, crime, substance abuse, physical and mental health consequences. All these consequences lead to costs to society. In terms of mental health treatment, NHS costs, costs to the welfare state if there is unemployment, and a loss of unpaid income tax to the government.

The 2014 study by by Aliya Saied-Tessier estimated the costs of child sexual abuse in the UK in 2012 to have been :-

Child Mental Health costs	£1.6m
Child Suicide/ self harm	£1.9m
Adult depression/PTSD	£162m
Adult Alcohol/ drug health costs	£15m
Criminal justice system	£149m
Child social care services	£93m
Loss of productivity	£2,700m
Total	£3.1 bn

The message I seek to communicate is that there is a measurable and significant economic cost to each case of sexual abuse and by improving the present system of reporting and responding to those disclosing abuse the cost to society can be reduced, saving the welfare state money and increasing tax collected. This ignores the obvious benefit to the wellbeing of abuse survivors if they can be reached, encouraged to come forward, be listened to and given the support they deserve.

THE CRIMINAL JUSTICE SYSTEM – DRAWBACKS AND SOLUTIONS

Silent Victims Versus False Accusations; What do we know ?

We know from research carried out by John Jay, Australian research and research from 1993 by Ducret and Fehlmann that between 2-5% of accusations of sexual abuse are false. I also note that much more attention is paid to the phenomenon of false accusations than to the victims who suffer in silence and never come forward. The emphasis on false accusations greatly outweighs media reporting on the silent victims of abuse.

Conversely of course we know that a large number of abuse victims do not come forward. One research project on undetected sexual crime by Abel in 1987 showed that many more offences have taken place (admitted by offender) that had ever been prosecuted. The untold misery, anguish, lives of depression anxiety, and other psychological symptoms which are caused by child sexual abuse in my opinion greatly outweigh the harm done to the very small number of individuals falsely accused of sexual abuse.

These issues are linked in a fundamental way to the way in which our system fails to bring offenders to justice. Showing victims that they can trust the legal system, reducing the number of offenders in circulation and thereby reducing abuse for future generations has to be the aim of law makers.

Governments and decision makers appear to be unwilling to recognise these facts and to tackle them positively. To his credit the former DPP in the UK, Kier Starmer, in 2013 made an attempt to promote the rights of victims of abuse by putting together guidelines for prosecutors and police officers when investigating crime. His guidance to police and prosecutors encourages them to look at the crime rather than the credibility of the victim. He asks investigators to dispel common myths that :-

- The victim invited sex by the way they dressed or acted
- The victim used alcohol or drugs and was therefore sexually available
- The victim didn't scream, fight or protest so they must have been consenting
- The victim didn't complain immediately, so it can't have been a sexual assault
- The victim is in a relationship with the alleged offender and is therefore a willing sexual partner
- A victim should remember events consistently
- Children can consent to their own sexual exploitation

- CSE is only a problem in certain ethnic/cultural communities
- Only girls and young women are victims of CSA
- Children from BME backgrounds are not abused
- There will be physical evidence of abuse

The now accepted approach is that the prosecution must focus on the overall credibility of an *allegation* rather than the perceived weakness of the person making it. Investigators and prosecutors are encouraged to follow evidence trails rather than dwelling on the credibility of a complainant. Adherence to these ideals remains patchy.

One of the greatest barriers to justice for survivors of child sex abuse is the perception that they will be not be believed or that they will be subjected to unnecessary cross examination for hours or days by defence barristers. The nature of these complainants is that they are in a vulnerable state and to expect them to withstand harsh cross examination is unrealistic in many cases. Many cases do not reach court as complainants decide the stress is too great. The cards seem to be stacked against complainants. Our justice system is not flexible enough to cope with these cases. It actively discourages potential complainants from coming forward, indirectly protecting abusers. We need to find a way to make the justice system more appealing to those who have suffered. Many complainants in the Rotherham cases decided not to complain for this very reason. I witnessed day after day of QCs queueing up to cross examine complainants in the Rotherham cases. I know many of the ladies who refused to come forward to South Yorkshire Police as they felt the system would not provide them with justice or protection.

I would argue that what is needed is something more fundamental which removes potentially gullible juries from the system and which allows properly trained Judges alone to make decisions in cases of child sexual abuse. Another radical but effective approach could be the shifting of the burden of proof away from the prosecution and on to the alleged offender to prove his or her innocence where professionals are accused of serious sexual offences against those to whom they owe a duty of care.

Summary of options for the criminal justice system when dealing with non recent child sexual abuse cases.

- Lowering the standard of proof to somewhere between balance of probability and beyond reasonable doubt
- Judges to try cases without juries
- Judges giving juries clear directions that they can find a defendant guilty if fewer than the present 10 jurors find guilt.
- In cases where professionals are accused the presumption should be of guilt and the professional should prove his/ her innocence.

Only in this type of system will victims of child sexual abuse feel confident to come forward and really have their allegations taken seriously. Trained Judges would be able to appreciate the psychological consequences of child sexual abuse and the way in which it can affect victims. At present we are faced with a phenomenon in which only the very bravest victims of abuse come forward and only the ones who are least psychologically harmed able to give coherent evidence. A huge swathe of victims of abuse who have been either seriously psychologically harmed to the extent that they are unable to give evidence or who simply have no faith in the system are currently excluded from pursuing justice through the Criminal Courts either by the way they are perceived by the police and prosecuting authorities or by the fact that they are unable to express themselves due to psychological consequences of abuse.

By rebalancing the justice system more survivors of sexual offences will feel empowered to come forward. These survivors should be able to step out of the shadow of child sexual abuse which will have blighted their lives for a number of years (23 years between abuse and reporting according to the John Jay study). This will enable them to be assessed by appropriate psychologists, to access appropriate support and positive coping strategies. As we know many victims of abuse suffer in silence, adopting negative coping strategies such as alcohol or drug dependence which can lead to unemployment and a negative life trajectory.

CIVIL JUSTICE ?

Here is a summary of what I perceive are drawbacks of the Civil justice system in non recent child sexual abuse cases.

- Civil justice system not designed to cope with these cases
- Designed for accidents at work, road traffic accidents, debts, etc. Most judges not educated on the psychological effects of CSA and have little interest in the cases.
- Clients forced to undergo psychological examinations by two psychologists/ psychiatrists.
- Their accounts are not believed.
- Delay (limitation) used as a Defence.
- Consent used as a defence
- Structural changes to civil justice making it harder for survivors to get redress (compensation)
- Delays with the civil justice system.
- Legal aid is disappearing
- Clients expected to pay 25% damages to lawyers due April to 2013 LASPO changes
- Proposals to pay very low fixed costs on all cases worth under £250k (all CSA cases)
- Many claimants see lawyers as being part of "the establishment" and so don't seek out good representation.
- The whole system is confusing to potential litigants so many avoid seeking redress.

NON LEGAL SUPPORT FOR SURVIVORS

LACK OF SUPPORT WHEN IT IS NEEDED MOST

- Lack of support from healthcare sector
- Most survivors I know have sought support from the third sector. GPs are not equipped to work out survivors therepeutic needs.
- Third sector is disjointed and survivors left out in the cold and give up.

POTENTIAL SOLUTIONS

AN INDEPENDENT BODY TO OVERSEE JUSTICE AND REDRESS FOR SURVIVORS COMING FORWARD.

- Government needs to ramp up investment in therapies.
- Changes to criminal justice system needed (suggestions above)
- New independent body to build trust of survivors who presently feel too frightened, cut off from society, mistrustful of authority.
- This body would be entirely independent of government of institutions.
- It would receive complaints of abuse and allocate them to investigators and case workers who would make recommendations to decision makers. Decisions could include :-
- referring the case to the police and checking the survivor is being well served by the police
- carrying out investigations

- making decisions on whether on balance the abuse happened (and only allowing the civil justice system to be used if the survivor insisted on it)
- Survivors would be able to instruct lawyers of their choice to advise them throughout. A contribution to lawyers costs would be paid from the independent body.
- Having the power to award compensation (similar to the Irish Redress system)
- It is an ambitious undertaking but is in effect simply an expanded version of the Irish Redress system which was widely praised by all participants.
- Any redress system and access to lawyers must be well funded with no erosion of funding as we have seen with the legal aid and CICA systems.

The strategy will not be without cost as a new system and new professionals able to cope with the numbers coming forward will be required. The long term effect of this change to the justice system will be to improve the quality of the lives of many individuals, allow many victims to access work and to participate in society as contributors to the tax system rather than being dependent on it.

Finally please do respond to the consultation and ask clients to contribute. The questions are detailed and fairly repetitive. I have suggested that clients can simply send in their own views on changes needed without necessarily following the consultations questions closely.

David Greenwood
28 August 2016
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LL Traumatic Damage is physical! – Article by Sue Cox

I would like to help clarify something which is really disturbing and is doing an enormous disservice to victims of trauma , whether that is from abuse, accident or indeed from any other source. I am referring to the myth that is being perpetuated, this insistence on referring to a victim's damage as either "Physical" or "Psychological".

Insurance companies are making cynical use of it, and indeed some courts seem to have been roped in to this long standing myth that is not only minimising the effects to victims of trauma, but is also showing a distinct ignorance in the way a human being functions .

Incorrectly separating the two in this way, in fact even suggesting that the two are separate doesn't make any sense at all. Because everything that we have historically referred to as "psychological damage" ALWAYS has it's roots in physical changes that occur in the brain as a result of life events.

The criteria being used to assess damage to a victim, therefore, is at best archaic, and actually fundamentally wrong. The brain is responsible for everything which occurs in the human being, and "psychological" behaviour is simply the manifestation of structural changes which have occurred in the brain itself. There can be no "psychological" effects without there have been those structural changes. When those structural changes have occurred because of trauma, the person's brain will thereafter act differently.

If we are ever going to make a difference to how a person is treated, It is important to understand what has actually happened to them, to look at the physical changes that have occurred, which are permanent and often result in symptoms that are continually called "psychological".

People who are diagnosed with “PTSD” for example, may very well exhibit behaviour attributed to “psychological” damage, but that damage ALWAYS comes from physical changes in the workings of their brain. We need to understand therefore that ALL damage to a human being because of trauma is in fact and inevitably physical.

To explain, I am simplifying the mechanisms of action somewhat in showing how these changes occur, but in doing so I hope it will clarify and influence a change to this long held and very unfair misunderstanding.

The Human brain is the most complex structure in the known universe. It has allowed our species to fly spacecraft to the ends of the galaxy, alter the genetic code to change the course of evolution, allowed us to create beautiful art and music. It is made up of 1,000,000,000,000 neurons and at least as many other cell types that help the brain to function. These cell types communicate with each other such that the number of connections in a single human brain, outnumber the total number of atomic particles in the known universe.

The major pathways and functional units of the brain are under genetic control, and are formed before birth. However, synaptic connections are shaped and sculpted by individual life experience, forming the structural basis for memory and learned behaviour. The brain’s machinery controls our basic drives like avoiding threats, breathing, heart- rate, sleep and hunger- all essential for our survival.

Every thought we have, every emotion we feel, spring from the workings of the brain.

We should never underestimate the power that our brain has over us.

Nowhere in our body do we have a mechanism to control the brain. The brain is certainly influenced by the world around us, but the World does not control the way our brain processes information coming in from the environment or control our response to that information.

There is no way that we can make our brain “listen” to our thoughts, because our thoughts are the result of our brain talking to us! Our thoughts are purely a creation of our brain each time we experience a thought, memory or an emotion, our brains reach out and make every single organ in our body work differently, such is its strength.

The you in you is your brain!

It seems obvious then that the effects of abuse and trauma will have a permanent impact on the brain and consequently the persons we are. The individual neurons are formed into pathways and those pathways are in different regions of the brain, but they all work in the same way. They communicate with each other, like a huge circuit board, passing on information, which results in all of our physical functions, and our behaviour.

If you can imagine these pathways are rather like highways, and before they are stimulated they are pretty much like “B” roads, with not much traffic. You don’t grow new neurons in response to new information, but you strengthen those pathways making them more effective, so they become like a six lane motorway! Those pathways have then become “entrained”

Part of the brain has permanently and physically changed its function.

All learning happens in two ways, either repetitive stimulation of a given pathway, or a strong stimulus to a pathway. This is how we learn everything, from the alphabet, to riding a bike, learning to swim or what is a threat to us.

Learning a skill like swimming or riding a bike is done by repetition, whereas memory of profound fear or trauma is a strong stimulus. Both will create “Entrained” pathways which are permanent and physical and which we refer to as “Long term potentiation” LTP for short.

For example, I haven’t ridden a bike for probably 60 years, but if I was put on one, I would know what to do because I have long term potentiated pathways that were stimulated repeatedly when I was young and learning how to ride. Equally, I haven’t been swimming for many years, but if I was thrown in to the deep end I would know what to do, because in my brain is that entrained pathway.

Our personal memories aren’t in a “bank” somewhere, but in millions of these intricate “entrained” pathways, it is no use looking for memories within those pathways, the entrained pathways are the memories.

We also create new neural connections, which means that when a pathway is strongly stimulated then it “wires” to other neural pathways, this is how “triggers” happen, flashbacks and nightmares etc. This discovery led to the phrase “neurons that fire together - wire together” This is where Pavlovian conditioning fits in.

You can witness this phenomena quite easily for example if someone stops smoking, they can be easily influenced by the smell of someone’s cigarette, or an alcoholic who has stopped drinking can easily relapse with the sound of the chink of a glass, needle fixation, or the sight of a crack pipe can fit into this category.

People who had survived 9-11 and were seemingly recovered, had dreadful flashbacks when suddenly there was a bright September day, people who had no memory of a serious car accident find their memories suddenly trigger when they hear a piece of music that happened to have been playing on the car radio when the accident occurred.

Patients with senile dementia who are unable to talk suddenly start to sing word perfectly if familiar songs are played to them. Deja Vu for example occurs when several patterns overlap and are reminiscent of another situation.

Part of the brain has permanently changed its function, it has been entrained.

The brain has learned the experience of profound fear trauma and what caused it, and these persistent memories are also potentiated. Triggers , even a sound or a smell kick off the process, and reactivate the memory pathways due to LTP.

The brain seeks out familiarity because we want significant things to be quickly recognised and acted upon. We have evolved instincts to seek out pleasurable sensations and to avoid unpleasant ones for our survival.

Throughout our lifetime we gather that survival information in those “entrained” pathways. Each one of us will have different experiences, which is why we are all so unique.

But everything that happens to us effects our brain.

And all of these changes are physical and traumatic changes, even in a healthy individual will last a lifetime.

So when an insurance company refuses a settlement for what they refer to as “psychological” damage and will only recognise what they refer to as “physical damage”, they need to be educated in the fact that all damage to that victim is physical, regardless of how their symptoms manifest.

Equally when damage to the victims of abuse is trivialised, it needs to be made clear that the damage is permanent and will last a lifetime, often compounded by the self destructive behaviour that ensues. Recovery is by no means inevitable, and may well take a lifetime's work.

Research shows very clearly that victims of PTSD and also child abuse have sustained damage to their brains, their immune and other metabolic systems and statistically have shortened life spans. So when assessing a person's right to compensation, surely that should properly reflect the severity and true nature of that damage, otherwise aren't we guilty of continuing to perpetuate that myth, undermine victims and abuse them further.

If anyone is interested in really learning about the effects of trauma, and what we can actually do about it - might I suggest our workshop "Winning the Battle of the Abused Brain" Details on the website:

www.battleoftheabusedbrain.website
Sue Cox BSc.Lic.Ac.M.B.Ac.C.
Co-Founder Survivors Voice -EuropeFounder Director Smart-UK
www.suecox.website

POSITIVE WORK WITH ECCLESIASTICAL INSURANCE GROUP

David Greenwood reflects on his recent work with EIG.

I worked for the last couple of years with a Professor of Law at University of Windsor, Ontario. Her name is Julie Macfarlane. She was sexually abused by a member of the clergy in her mid teens. She is keen on making law accessible to litigants in person and her thoughts on these issues are similar to the ones we struggle with as lawyers in the field of CSA (ie that many claimants don't come to seek our help due to psychological and structural barriers).

As part of the settlement of Julie's case we insisted on meeting with EIG to work on improvements and a protocol for responding to claims of child sexual abuse by clergy. They agreed

Because EIG is a separate legal entity, the Church has claimed in the past that it has no control over how claims for sexual abuse are handled and responded to. This is not true. The Church can instruct EIG how it wishes claims to be handled.

Nevertheless after a couple of meetings EIG has now produced a set of ten "Guiding Principles" for responding to claims. They have been put together by EIG — who brought a strong spirit of commitment and collaboration to the task — in consultation with Julie, myself and church representatives. I should give some credit to Ecclesiastical Insurance Group ("EIG") and Paula Jefferson at BLM (formerly Beachcrofts) as their team is in my experience the most progressive of the defendants I meet.

The Guiding Principles are a significant step forward in humanising the often bruising and even re-traumatising legal process. It is very important that anyone bringing a claim against the Church, or considering doing so, knows and understands how the Guiding Principles will apply to their claim, and how they should expect to be treated in the claims process.

EIG has also set up a confidential contact point for any questions or complaints that anyone may have about the process, including potential failure to follow the Guiding Principles.

Changing the way that claimants are treated, and how their claims are handled, is a really important step forward, but there is still a lot more work to be done at two other stages in the process. One is

how those bringing forward complaints are responded to when they first disclose — there have been disturbing revelations about complaints being ignored by church officers to whom they were first reported.

The second is the amount of compensation offered to survivors, which must be fair and reasonable. It is my hope that, if the Church is not able to address these issues properly, the Independent Inquiry into Child Sexual Abuse will.

The commitments made in the Guiding Principles can be read in full on the EIG website at http://www.ecclesiastical.com/fororganisations/claims/abuse-claims/index.aspx

I summarise them here.

General principles for how claimants will be treated

The Guiding Principles recognise how emotionally difficult and upsetting it is to bring a claim forward, and commit to treating claimants with respect. Investigations of all claims will be conducted with "sensitivity, empathy, and integrity" and "an overriding principle of fairness". EIG advises the Church to respond "constructively" to claimants from the outset and to avoid being ". . . negative, resistant or unhelpful because this . . . may worsen the claimant's wellbeing." The goal is for the claim to be concluded as quickly as possible.

Pastoral care

There is no reason that pastoral care for anyone should be affected by making a claim (it has been a frequent complaint from survivors that they have been "cut off" from their church community when they disclosed abuse).

While the claimant's lawyer and EIG will correspond about the claim's progress, churches should continue "to support the claimant through the provision of pastoral care".

Immediate access to counselling

EIG advises the Church to consider offering counselling immediately to claimants, because "offering to pay for some counselling or treatment [is not] . . . an admission of legal liability". There is nothing to prevent the Church from paying for counselling for survivors as soon as a claim is made; this will have no effect on the legal outcome. Similarly, EIG advises that offering an apology to the claimant will not prejudice insurance cover, and may be "an extremely important step" for the claimant.

Statute of Limitations

In the past, EIG, on behalf of the Church, has sometimes used the Statute of Limitations to deny a claim based on the length of time it has taken for the survivor to come forward. But we know that many survivors do not come forward for many years, because of how hard it is to disclose abuse. The Guiding Principles state that this defence will now be used "very sparingly", and only in exceptional circumstances.

'Consent' to sexual abuse

In the past, EIG, on behalf of the Church, has sometimes argued that the survivor "consented" to the sexual abuse. The Guiding Prin-ciples state that a consent defence will now never be used in cases where the victim was under the age of 16 at the time of the alleged abuse. For those aged 16 and over, the Guiding Principles recognise that there is very often a "power of imbalance" where consent cannot truly be given. The use of a "consent" defence should now be very exceptional.

Joint medical 'experts'

As part of the investigation, a claimant will usually be examined by a medical "expert" appointed by EIG and one appointed by the claimant. EIG "recognises that requiring claimants to undergo multiple medical evaluations may cause further distress." The Guiding Principles commit EIG always to

consider using a single, jointly agreed expert.

Trying to settle cases as quickly as possible
Once it has been accepted that the abuse took place, and EIG has sufficient medical evidence to evaluate the claim, they may invite the claimant and his or her lawyer to a Joint Settlement Meeting (JSM). If an agreement can be made in a JSM, there will be no need to go to court. A JSM may even take place before formal legal action is begun; claims can be settled before this starts.

Confidentiality and 'gag' clauses
Unless the claimant personally requests a confidentiality clause, he or she will never be asked to agree to keep information about his or her settlement secret.

Finally I will continue my work with Julie Macfarlane by monitoring compliance with these guiding principles and responses from churches and EIG. I will be circulating a questionnaire in the next few months so we can keep EIG to their word.

David Greenwood
28 August 2016
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The meaning of "personal injury" under the CICA Scheme

In the case of **Y v First-tier Tribunal and (2) Criminal Injuries Compensation Authority (CIC) (Criminal Injuries Compensation: claims) [2016] UKUT 202 (AAC) (25 April 2016)** the Applicant was a man in his late twenties. His mother had been abused by her father and in about 1991 he pleaded guilty to 4 counts of incest. DNA tests showed that Y's grandfather was in fact also his father, and that he was also the father of Y's sibling born in 1990. Y's mother had been awarded compensation in her own right in respect of the assaults on her by her own father. Y was born with a genetic disorder or disorders described as "a recessive syndrome with learning and joint problems". Medical evidence showed that there was a 50% chance of such problems appearing in those who were born of an incestuous relationship, compared with a 2% or 3% chance in the general population.

In 2012 a claim was made for compensation for Y to the Authority under the 2008 Scheme, which refused to make an award on the basis that Y had not been injured in a crime of violence and that his congenital condition was a result of the relationship between his parents and not of the assault itself. This decision was maintained on review and so in 2013 the Applicant appealed to the First-tier Tribunal, which confirmed the decision of the Authority in 2014. The Tribunal drew on a decision of Lord Osborne in the Scottish Outer House in Session - **Millar (Curator Bonis to AP) v CICB 197 SLT 1180 dated 13th November 1996)**. That case decided that a genetic disorder arising as a result of the consanguinity of the parents could not be a personal injury within the then 1969 CICA Scheme. Consequently, there was no uninjured state in which Y could exist without the genetic disorder from which he suffered. Lord Osborne himself had drawn on the reasoning in the case of **McKay v Essex Area Health Authority [1982] 1QB 1166.**

The Applicant applied to the Upper Tribunal for judicial review. However, proceedings were stayed pending the decision of the Court of Appeal in **CP v First-tier Tribunal and Criminal Injuries Compensation Authority [2014] EWCA Civ 1554.** This was another CICA application where the Applicant's mother consumed grossly excessive quantities of alcohol during her pregnancy as a

direct result of which CP was born with foetal alcohol spectrum disorder. The First-tier Tribunal decided that CP was entitled to a criminal injuries compensation award on the basis that the mother had committed an offence contrary to section 23 of the Offences Against the Person Act 1861, which required administration of a destructive etc. thing "to another person". On judicial review of that decision in the Upper Tribunal **[2013] UKUT 638 (AAC),** Judge Levenson decided that the foetus could not be "another person" before birth and that the section 23 offence could not have been committed. There was no "crime of violence" under the terms of the CICA Scheme. The Court of Appeal agreed with this analysis and the Supreme Court refused to grant permission to appeal.

The present application for judicial review came before Levenson J in the Upper Tribunal in January 2016. He commented that the decision in **Millar** came from the Outer House of the Scottish Court of Session, which was not binding on the Upper Tribunal. He also considered the terms of the 2008 Scheme. In the present case, it was not disputed that there had been a crime of violence (which had been the dispute in the foetal alcohol cases). The issue was whether the Applicant had sustained personal injury directly attributable to a crime of violence. On this point, Levenson J said that if Y had been attacked as a very small baby, perhaps with blows to the head, it might well be that such an attack could have caused injuries with similar effects to some of the manifestations of his genetic disorder. Then there would have been no choice but to try to quantify the amount of compensation within the provisions of the Scheme. The First-tier Tribunal had already acknowledged that that the 2008 Scheme was not to be interpreted according to common law principles as it was expressly required that compensation was to be determined in accordance with the Scheme. Consequently, the fact that Y's claim would not be recognised at common law did not of itself exclude his claim from the terms of the Scheme. On that issue, Levenson J referred to the case of **Rust – Andrews v First-tier Tribunal [2011] EWCA Civ 1548.**

In relation to the issue of quantification, Levenson J said that under the 2008 Scheme compensation could be paid in accordance with the scheme to a person who has sustained a criminal injury. The question of whether an Applicant had sustained a personal injury was a logically and chronologically prior question and was not to be determined by a premature assessment of whether compensation could be calculated. The Scheme was intended to be a practical self-contained workable pragmatic scheme to compensate victims of crimes of violence. The 2008 Scheme provided that compensation be payable to "an applicant".

Clearly, at the time of the claim the Applicant was a person. There was no provision in the Scheme that the Applicant must have been "a person" at the time that the crime of violence was committed. Those injuries had been sustained in and were directly attributable to a crime of violence.

Consequently, the application for judicial review would succeed and the matter would be referred to the Authority for further consideration of the claim and on the basis that (as agreed between the parties) Y sustained a criminal injury and was a victim of a crime of violence and that his condition resulted from the incestuous relationship between his mother and her own father.

The CICA have now obtained permission to appeal to the Court of Appeal.

Malcolm Johnson, BL Claims Solicitors email: Malcolm.johnson@blclaims.co.uk

APIL CHILD ABUSE SPECIAL INTEREST GROUP

For many years now I have been involved with the Association of Personal Injury Lawyers' Special Interest Group on Child Abuse. I previously was the Secretary of the group and I have now been the Co-ordinator for some years. The Secretary of the group is David McClenaghan of Bolt Burdon Kemp.

The APIL Special Interest Group is aiming to have a meeting in October in London and we have invited two speakers, including Harriet Wistrich of Birnberg Pierce. Harriet will be speaking to us about her cases involving undercover police officers and allegations of rape and sexual abuse. She will be speaking about failure to investigate rape and sexual abuse and failure to prosecute cases. The second speaker will be confirmed shortly.

Each year we aim to have a meeting in the south and a meeting in the north. However over the years it has been difficult encouraging people to attend and we have for example had very low attendances in the north. We usually aim to have the meetings in the evenings, but we should be grateful for any feedback about the timings of the meetings and the locations, as well as topics to cover so that we can make the meetings more relevant and easier for people to attend.

We are currently aiming to have another meeting in the early part of 2017 with this meeting taking place in Manchester. Ideas for the meeting in the New Year include a legal update from counsel, a discussion about the removal of limitation from child abuse cases, an update on the independent Inquiry into Child Sexual Abuse and funding in child abuse cases.

Following the Manchester meeting, we will of course be having our annual APIL/ACAL conference in London in June. We are working towards a date of 15 June but again any ideas or comments about the content of the conference programme would be gratefully received.

We are always looking for fresh content, topics and speakers and so if you do have any ideas, thoughts or comments to make, please feel free to e-mail us. Our e-mail addresses are: tracey.storey@irwinmitchell.com and DavidMcClenaghan@boltburdonkemp.co.uk.

Tracey Storey,
Executive Committee Member of ACAL
Co-ordinator of the APIL Child Abuse Special Interest Group
5th September 2016

ACAL
Annual General Meeting

Friday 21st October
2pm
at Irwin Mitchell, 40 Holborn Viaduct, London EC1N 2PZ
Speakers:

Detective Superintendant Richard Fewkes, Head of Operation Hydrant
Lucy Duckworth, Member of IICSA Victims and Survivors' Consultative Panel

All members are welcome – please confirm attendance by email to info@childabuselawyers.com

The Association of Child Abuse Lawyers (ACAL) provides practical support for survivors and professionals working in the field of abuse. Formed 14 years ago, ACAL maintains a telephone help line and web site presence to sign-post survivors of abuse to lawyers who have the expertise and experience to assist them in obtaining the redress to which they are entitled. ACAL also campaigns in this area, and provides training, a mentoring service for members, access to data bases and an information exchange to members to assist them in their work. ACAL's membership is made up of solicitors, barristers, psychiatrists and social work experts who are all specialists in this field.

St**udent Member**

- Cost: £40.00
- Benefits: Website, AGM, Workshop, Newsletter

Non-practicing member, e.g. Experts

- Cost: £85.00
- Benefits: Website, AGM, Workshop, Newsletter

Barrister Member

- Cost: £85.00
- Benefits: Website, AGM, Workshop, Newsletter, Database, Experts Register

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- Cost: £150.00
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-

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ACAL website:
www.childabuselawyers.com
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