Newsletter
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ACAL
Association of Child Abuse Lawyers

President's Report

By Peter Garsden President, ACAL

I always seem to comment about the weather at the beginning of my pieces for the newsletter, so, as I turn into my 61st Year and become more traditional, I won't disappoint you by breaking with tradition. For those of us who have air conditioning, the summer was tolerable, but those without it had to endure a sticky, exhausting, yet sunny environment, rather like the post CN & GN legal landscape as Defendants did their best to derail failure to care claims.
It was also a time of change and turbulence at ACAL as two long standing and much respected stalwart members of the committee resigned to make way for fresh young blood – how old did I say I was? More below.

CN & GN v Poole Borough Council

I think the 2nd half of the year since our last newsletter in March has been less turbulent, ever since the Supreme Court granted permission to appeal, and showed real commitment by putting it forward for an early hearing on 16th/17th July 2018. The fear was that we would be waiting two years for an appeal whilst the legal world was placed in limbo.

At Simpson Millar we acted for two intervening charities in the Appeal by the name of Article 39 and the Care Leavers Association, who, together with the Aire Centre, were granted leave to put forward the wider picture on behalf of children in care everywhere in the UK, who would be affected if the Court of Appeal decision was not reversed.
I always remember Rosalind Coe telling me that once in your legal career you ought to watch the Law Lords in action. Their huge brains were breath-taking in their capabilities. She was right.
I sat through two days of argument from the likes of Ed Faulks QC, and Lizanne Gumbel QC who seemed to attract the most sympathy.
Lizanne pointed out how wrongfully the Court of Appeal had interpreted the Appellant's evidence, by choosing to ignore a strongly worded Social Care Expert's Report from Maria Ruegger. This was a genuine failure to care case involving a suicidal disabled child that the Local Authority should have removed. The Aire Centre had added several more allegations of examples of actions which the Local Authority could and should have taken but failed to do so. This case was entirely different to Police cases, and the law could not regress back 20 years to the world of X v Bedfordshire. The Court of Appeal was wrong to overrule one of its own decisions, that was the function of the Supreme Court. A comment by Lady Hale in a

previous case, that child care cases were very different to Police Negligence and should be treated differently had been ignored by the Court of Appeal, a point not overlooked by the Chair, Lady Hale.
Lord Reid thoroughly grasped the point that the less Local Authorities did in assuming responsibility for a child not in care, the less likely they would be held responsible under CN & GN.

Lord Faulks spent some time forensically explaining his argument most effectively. It sounded artificial to a bench of Law Lords, most of whom had their roots in Family Law. Lady Black seemed the most troubled by the argument that this was not a failure to care case but rather a Housing Act responsibility which had been shoe horned into a failure to care argument. Lord Reid asked Ed Faulks if he should ignore the further allegations of negligence put forward by the Aire Centre. Ed Faux replied in the affirmative, as you would expect.
. What the result will be is difficult to predict, but my money is on:-

1. The Court of Appeal should not have overruled itself and was wrong to do so.
2. D v East Berkshire is therefore good law and should stand.
3. It is wrong to strike out a case on liability,where there are allegations of breach of statutory duty. Just as Barratt v Enfield was struck out, and was overruled, the case should be reinstated. It should thus be sent back to the High Court for trial.

Lizanne did not hesitate to mention more than once that the Master based his strike out decision upon an out of date edition of Charlesworth on Negligence, which had led to the tortuous state of the law now before the Supreme Court. Whilst his decision had been overturned on appeal to the Queens Bench Division, the Court of Appeal had produced a bizarre state of the Law, which should be corrected.

We believe that we will get a decision before the end of the year. If my prediction above is proved correct, then I await a few glasses of some very nice Claret from you all in the tradition of Good Ole Rumpole of the Bailey.

Executive Committee

Half way through the year we said goodbye to both Tracey Storey, of Irwin Mitchell and Richard Scorer of Slater & Gordon, both of whom have served on the committee of ACAL for many years and are going on to pastures new. I thank them both for their hard work, humour, sound decision making, and good friendship. I will miss them both.
Richard joined us in or around the late 1990's fresh from the North Wales Tribunal where he cut his teeth. He has since been the author of at least two text books on Child Abuse Compensation with others, and a book about the Catholic Church (Betrayed). Somewhere in the midst of this, he has been a partner at Pannone, Head of PI at Slater + Gordon, and taken several cases to Appeal (D v East Berkshire being one), He has run a substantial case load of abuse cases and is currently involved in most of the modules at IICSA. He has never sought personal glory but has led teams to win various Legal Awards. He will be sadly missed.

Tracey Storey joined the committee of ACAL in 2002 at the instigation of Lee Moore, one of the founder members and a past President. Tracey, I believe is going on to do managerial duties at Irwin Mitchell, which is why she is leaving ACAL, and is following a similar route to Jonathan Wheeler, who stood down last year. Tracey has specialised in Failure to Care cases, often acting for the Official Solicitor. For many years she has organised the annual ACAL/APIL Conference with supreme efficiency, and has chaired its success with Jonathan, and latterly David McLenaghan. She has also co-ordinated the APIL special interest group on abuse. Tracey has supported our Administrators from a personnel point of view. I will

also miss Tracey's genuine affection for her clients. She keeps us all in order, me included. Thank you, Tracey.

Both Tracey and Richard have co-opted to the committee in their place the legal titans of Kim Harrison, and Luke Daniels, both of whom have been specialists in Child Abuse cases for many years. I will let you read their CV's online. They have taken over the responsibilities of their forebears.

CICA

It will not have escaped your notice that the "same roof rule" has been disapproved retrospectively at Judicial Review in the case of JT v First Tier Tribunal [2018] EWCA Civ 1735.
So what is the attitude of the CICA? You might well ask. The government have announced that they are going to do a wholesale review of the whole scheme with particular attention to the victims of child sexual abuse in light of not only this decision but the interim report from IICSA which you can read in the link - https://www.iicsa.org.uk/reports/interim
ACAL put in a paper to the Accounts and Reparations Module, and APIL heavily criticised the CICA in its own paper. ACAL adopted the APIL paper. Not a good word was said about the CICA, and I think the government are feeling the pressure.
Hopefully we can discuss the state of play at the AGM.

Miscellaneous

Please come to the AGM at Irwin Mitchell, 40 Holborn Viaduct, London, EC1N 2PZ on Friday 22nd October 2018 from 1pm to 4pm. We have some good speakers to entertain you.
Yvonne Traynor from Rape Crisis in London will be our first guest speaker talking about child abuse, paedophile tactics and behaviour and remedies through therapy.
Helen Merfield of Willis Palmer, Social Care Experts, will be coming along to talk about rehabilitation of survivors and how we can help our clients not only obtain damages but also rebuild their lives for the better with extra support – a new heading of Special Damage.
I think that is enough from me for now, so until next time, take care, and keep fighting for the rights of victims.

Peter Garsden, Simpson Millar, 2nd October 2018 – peter.garsden@simpsonmillar.co.uk
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Supreme Court to determine role of local councils in protecting vulnerable children

Charities say landmark case will impact the rights of thousands of abuse victims

A landmark case that will decide whether a local authority has a duty of care to investigate and take action to protect children at risk of possible sexual, physical or emotional abuse and neglect in its geographical area was heard on Monday, July 16th at the UK Supreme Court.

The case was brought against Poole Borough Council for failing to protect two children from the antisocial behaviour of neighbours whilst in the care of their mother. The abuse was so severe that at one point one of the victims - who has severe physical and learning difficulties, and was classed as a 'child in need' under the Children Act 1989 - attempted suicide.

Charities Article 39, which fights for the rights of children and young people who live in children's homes, prisons and other institutions, as well as The Care Leavers' Association, which supports care leavers of all ages, have been given permission to intervene in the case amidst concerns about 'justice being denied' to the people they serve.

Represented by Simpson Millar's specialist public law and abuse law teams, the charities hope the hearing will draw attention to the 'terrible impact' that abuse can have on children; claiming that it is 'incomprehensible that a local authority would not face the legal consequences for not doing enough to prevent abuse and neglect to young people in care'.

Simpson Millar Partner and abuse law expert Peter Garsden, who is representing the charities, said: "This appeal raises issues of very great public importance, concerning whether a local authority is responsible for protecting young people and children who may not be in a care institution, but are known to be at risk – either from sexual, physical or emotional abuse.

"It affects some of the most vulnerable members of our society and will have far reaching ramifications, and it is absolutely vital that the law is clarified so that abuse survivors can get the answers and access to justice that they deserve, and that will allow them to start to move forward with their lives."

Carolyne Willow, Article 39's Director, said: "We are delighted to have been given permission to intervene in this very significant case. With The Care Leavers' Association, we want to help the court consider local authorities' obligations under the Convention on the Rights of the Child and to understand the terrible impact that abuse can have on children, especially when they have tried to seek help but are ignored and left to cope alone with profound psychological pain, isolation and confusion. We appreciate that local authorities are under great financial strain but children's rights to safety and recovery must be robustly defended."

David Graham, National Director of The Care Leavers' Association, said: "It is incomprehensible that a local authority would not face the legal consequences for not doing enough to prevent abuse and neglect to young people in care. But the important thing to remember is this is not just about blame, or legal outcomes. It is about the lives of many young people and adults affected by abuse and neglect experienced as children. It is essential that they have legal recourse to challenge the decisions and omissions that facilitated those damaging experiences. We are determined to work with Article 39 and our legal team to right this wrong."

Oliver Studdert, children's rights specialist and Partner at Simpson Millar, said "The impact that the outcome of this appeal will have on victims of abuse and children's rights cannot be underestimated. Having been granted permission to intervene, Article 39 and The Care Leavers' Association are making sure that the Court understands this and ensures that the rights of the child are a primary consideration in this appeal."

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Successful Scottish Judicial Review for Historic Rape Victim

In the case of MM v Criminal Injuries Compensation Authority [2018] CSOH 63 , Digby Brown Solicitors has successfully challenged a Criminal Injuries Compensation Authority (CICA) decision which stopped a rape victim receiving compensation.

The case called before Lord Glennie for Judicial Review of the decision of the First Tier Tribunal to refuse the petitioner's application in terms of Paragraph 87 and 89 of the Criminal Injuries Compensation Scheme 2012.

The petitioner was a victim of rape which resulted in pregnancy and the birth of a son. Not uncommonly, she did not disclose the rape at that time. When she was ready to disclose, she reported the rape and her perpetrator was convicted of the offence. She claimed compensation from the Criminal Injuries Compensation Authority beyond two years from the date of the incident. The "exceptional circumstances" exception was argued. The Authority and then the Tribunal rejected the application.

Lord Glennie reduced the First Tier Tribunal's decision refusing the application and remitted the matter back to a differently constituted Tribunal.

Lord Glennie makes some very supportive statements about the "silencing effect" of abuse. In the Judgment it is recognised that the wording of the Scheme at Paragraphs 89 (a) ("due to exceptional circumstances the applicant could not have applied earlier") is apt to cover a case where the applicant is deterred from making disclosure and is not limited to a situation where the applicant is physically or mentally disabled from doing so.

Kim Leslie, Partner
Digby Brown

Does CN v GN v Poole Borough Council mark the end of failure to care claims?

This article appeared in APIL Focus Magazine around February 2018. Please see the addendum below.

Since the judgment in the CN & GN case came out on 21st December 2017, there have been several articles blogged on Defendant solicitors websites, which trumpet that this case marks the end of "failure to care" cases as we know them. Certainly, my experience is that Defendant solicitors in such cases have suggested that all work be stayed pending clarification by the Supreme Court, who is, I understand being petitioned, leave having been refused. I have now had the chance to read the judgment thoroughly. My initial instinct that this case is about the behaviour of anti-social neighbours in a block of flats rather than the failure of social workers to behave competently in allowing a child in care to remain in an abusive household, has been borne out by my reading, as I will attempt to explain.

To clarify, this case involves an allegation that two vulnerable children with learning disabilities were so plagued by the behaviour of their anti-social neighbours that they suffered psychological harm, and, at one point. attempted suicide. The police, social services, and housing authorities knew of the problem, and allegedly did nothing to prevent it from happening as, it was alleged, they should have done. Because no viable action could be mounted against the Housing Authority, the Public Housing Project, or the police, due to limitations in precedent law on duty of care and breach of statutory duty, resort was had to allegations that social services should have taken the children into care. The Claimant solicitors recast their pleadings to so say, and it is this attempt to lay blame upon social services that came in for much criticism in the Court of Appeal. It was said that it was tantamount to legal legerdemain (a new word on me but I think I follow the meaning). It was added by Davis LJ that such a case would not have passed the threshold criteria for receipt into care, and would have been an abuse of process.

Duty of Care

Much of the judgment is taken up by a discussion of the argument in the cases of Mitchell, and Michaels, which are analogous cases in that Mitchell tries to blame the police for operational negligence, and Michaels, Glasgow City Council for failing to protect a tenant who was murdered by a neighbour, known to be a danger. In both cases (one was Scottish), the Higher Courts refused to order that there was a duty of care for the omissions of public bodies to protect individuals from the actions of 3rd Parties where it was foreseeable that, if action was not taken, dire consequences would result. Predictably the predicted consequences eventuated. The analogy, obviously, is that in those cases, and the present one, a public body is being asked to take the blame for the actions of an individual whose actions affect another individual. The relationship is undoubtedly different to a child in the care of the local authority, who is failed by being left with a known abuser. The duty of care owed to a child in care is undoubted whereas the duty of care to a housing tenant is not so established or obvious. In failure to care cases one is arguing that there has been a breach of the duty of care in negligence simply. One does not have to argue that a duty of care should be implied from a statutory duty or as an extension to a breach of Human Rights under the Human Rights Act 1998.
The above is obvious from various parts of the Judgment. Irwin J delivers the lead judgment. He says at paragraph 104:-

> ", it seems to me that the Defendant is correct in submitting that this claim is not in truth based on failures arising from duties and powers under the Children Act. The proposition

> that the remedy here was removal from the family, from the care of the Claimants' mother, seems fanciful. The claim is in fact a criticism of the housing functions of the local authority, exercised through the agency of PHP, shoe-horned into a claim arising from duties and powers under the Children Act 1989."

In other words, this is not a failure to care case even though the Claimant tried to argue before the Court that it was. The only reason they did so was because they couldn't blame the Public Housing Project (PHP) or the Housing Department of the Local Authority, or indeed the Police, all of whom were involved, but all of whom, for different reasons, could not be held to blame. Indeed, a previous action, by the same Claimants, against them had been struck out in 2013. Again at para 50, Irwin J, when discussing X v Bedfordshire says: -

> " In my view, the answer would have been even more decisive were the House of Lords to have had the current case in contemplation: not a risk within the family setting but a problem arising from a housing placement. Here, to a greater extent even than in the cases in *X v Bedfordshire*, other disciplines, public bodies and public servants were involved; here the risk of complex dispute, loss of trust and ill-feeling must have been all the higher, since the allegation is that the Defendant's social workers, in the face of failure by the Defendant's housing department and/or PHP to rehouse the Claimants (and in the absence of a private law remedy against the latter), should have removed the Claimants from their mother's care."

X v Bedfordshire & JD v East Berkshire

I find it somewhat bizarre that, so much emphasis was placed in the judgment on X v Bedfordshire because I thought it was common ground that the case had been disapproved and overruled by various decisions of the European Court.

X v Bedfordshire imposed immunity from suit for social workers exercising their duties towards children. The European Court then disapproved the judgment in Osman v the United Kingdom and Z v the United Kingdom. At that time there was fear that no claim in negligence could be justified until the European cases came along. They were then followed (Lizanne Gumbel obviously pointed this out, but she gets scarcely a paragraph in the judgment) by *S v Gloucestershire County Council* [2001] Fam 313, *Barrett v Enfield London Borough Council* and, "most importantly", *D v East Berkshire Community NHS Trust* [2004] QB 558.
I remember that the tide changed completely following Barrett v Enfield, following which it became possible to take failure to care cases to court. Previously it had not been possible to do so, because of the X v Bedfordshire line of cases.

In the judgment there is much discussion about D v East Berkshire, and how it has been overruled by both Michaels, and Mitchell. Irwin J agrees that it has been overruled, but not so as to outlaw failure to care cases but in as much as it was authority to invest a duty of care in the Local Authority for acts of omission in relation to their relationships with third parties such as fellow tenants in a block of flats. Irwin is not saying that because D v East Berkshire is bad law, that all failure to care cases must fail from now on. Mention is made of the proliferation of failure to care claims, but they are not disapproved of.

In any event, even without the authority of D v East Berkshire one can still fall back on the other cases referred to above, and in particular Barrett v Enfield Borough Council, which has not been overruled or even doubted.

From my reading, there are those that are arguing that we have now gone back to the days of immunity from negligence by social workers on the grounds that if one places the risk of an action in negligence in the background, it will interfere with the way in which they conduct their duties as a social worker. This would really be a retrograde step, completely out of step with European precedent and Human Rights, and not the effect of this judgment in my view.
As an aside, it concerns me that if we part company with European law under Brexit, we could see again the sort of tortuous logic and precedent led decisions which this case has produced.
How do failure to care cases differ from CN and GN?

- They rely upon common law negligence as well as negligence derived from breach of statutory duty. There is an argument as to whether duty of care is established when the child goes into care
- The care of the children is entrusted to either the natural parents of the child or foster parents, or a children's home, where the abuser is usually someone under the supervision and surveillance of the Local Authority rather than an independent third party
- The analogous situation in failure to care cases, which could compare to CN & GN is where the child is abused by a visiting neighbour, an aunt/cousin or other wider relative not living with the family, who may be known to the local authority to be abusive. In this situation there could be arguments around duty of care and its scope

Is there now a conflict with the Supreme Court decision in Armes v Nottinghamshire County Council [2017] UKSC 60?

Armes firmly establishes that a local authority is liable for abuse by foster parents on the basis of vicarious liability when previously there was no possible right of action unless one could establish that the Local Authority had been negligent, because, for instance, it could be shown that complaints against the foster parents had been ignored.

Whilst CN and GN relate to duty of care, the two decisions, at first blush do seem at odds with each other. On the one hand the Supreme Court seem to be straining to find rights of action for abused vulnerable children, whereas on the other hand the Court of Appeal seem to be operating in completely the opposite direction, reversing back into 1990's precedent case law.

You may or may not have seen the article in the Daily Mirror - - https://www.mirror.co.uk/news/uk-news/fury-judges-deny-thousands-child-11774767 - which very much disapproved of the judgment, even showing pictures of the judges involved, and predicted that it signalled the end of failure to care cases. I am sorry, but I disagree with the learned author. Sadly, the Defendant lobby disagree with me and want all failure to care cases stayed to await guidance from the Supreme Court.

Conclusions

- This judgment is limited the peculiar facts of this case which should not mean that all failure to care cases should fail.
- Defendants should accept that failure to care cases can continue as previously and should not be arguing for stays.
- The judgment confirms that local authorities do not owe a duty of care to prevent the acts and omissions of third parties in situations such as tenants in the same building where it is known that the tenant concerned had certain propensities to behave in a certain way.
- The Court of Appeal judgment maintained that the Claimant in this case artificially argued that a care order should have been imposed when there were no adequate grounds as a

way round their inability to blame more blameworthy public bodies such as the Housing Department, the Housing Management Body, or the Police (*but see below)*.

- Failure to care cases remain viable due to the argument in Barrett v Enfield, a point tacitly conceded in the briefing note compiled by the victorious Defendant solicitors and Chambers – https://www.lexology.com/library/detail.aspx?g=1c4e239e-179a-43bd-b689-92eaeb36e3dc
- As an Association of Child Abuse Lawyers, we should lobby the Supreme Court and persuade them to expedite an appeal against the judgment so as to clarify the position which now inevitably persists. It would also be very helpful to know how many outstanding cases there are.

18th January 2018
Peter Garsden

Addendum

Since the above article, there has been much debate between practitioners and counsel as to the effects of the case.

The Claimants, of course, were successful in obtaining leave to appeal to the Supreme Court. We were granted leave to intervene on behalf of 2 charities, Article 39, and the Care Leaver's Association.

I attended the Supreme Court in July this year, and sat through 2 days of argument before Lady Hale, Lord Reid, and others. The case was expedited in view of its importance, and we are hopeful of a decision before the end of the year.

Lizanne Gumbel QC for the Appellants was emphasising that this was indeed a failure to care case with a Social Care Expert's Report. The Court of Appeal had misinterpreted the evidence.

One of the Intervenors produced a list of additional ways in which the Local Authority had failed to take steps to safeguard the children. The Defendant objected to new evidence being taken into account.

Arguments that the Court of Appeal was wrong to overrule D v East Berkshire, which was one of its own judgments, were made. The Court of Appeal should not have produced a situation which turned the law back over 20 years to the way it was in the case of X v Bedfordshire (1995)
It was said that there was a huge difference between the functioning of the police and the care of children by Social Services. It was thus wrong to find that, because of the cases of Michaels and Mitchell, the decision in East Berkshire should be overruled.

The argument that the Court of Appeal judgment produced a situation whereby the less the Local Authority did to accept responsibility for a child, the less likely it would be that they would be held to blame, did not escape the Supreme Court's notice.

In general, the feeling was that the Claimants received considerable sympathy, and that the artificiality of the Defendant's arguments was highlighted.

If I was a betting man, which I am not, my predictions would be:-

1. The Court will find that the Court of Appeal were wrong to overrule D v East Berkshire, and reinstate the law to the way it was before December 2017.

2. It was inappropriate to strike out a case on the basis of arguments that there was no duty of care. Such matters ought to be allowed to go to trial.
3. Arguments on liability should be referred back the High Court for a decision on liability.

We have heard that, the Legal Aid Agency are refusing applications for public funding in Failure to Care cases. In conversations I have had with them, I thought I had agreed that the applications should be granted to await clarification of the law but not allowed to progress beyond investigation. The recent Supreme Court hearing should assist any arguments.

3rd September 2018

£1million compensation for victim of Local Authority neglect

On 16 May 2018 Manchester County Court approved settlement in the case of JJ v Lancashire County Council. The award of £1 million is thought to be the largest ever award for a claim of this nature.

Client JJ was born in Lancashire in the early 1990's. He was one of six siblings and was raised by his step mother and father. The Defendant was the Local Authority with jurisdiction for the area in which the Claimant and his family resided.

The Defendant had dealings with the Claimant's family throughout his childhood. Shortly after birth Emergency Protection Orders were obtained in relation to the Claimant and two siblings. The Claimant's social services records revealed a catalogue of interventions and interactions with the family.

Farleys successfully argued that the Defendant had failed in its duty to JJ. Anonymous referrals of injury and mistreatment were ignored. There was a failure to act on referrals from health visitors and schools.

The claim was brought on the basis of the alleged negligence, breach of duty and breach of the Human Rights Act by the Defendant. All relevant records were obtained and carefully reviewed. An Independent Social Work expert was instructed. Liability was resolved in the Claimant's favour and Judgment entered.

Quantification of the claim was far from straightforward. Client JJ has a mild learning disability. The Claimant therefore had to establish the extent to which this pre-existing condition was worsened by his childhood experiences.

It was established that the Claimant had endured a terrible childhood. His siblings were given preferential treatment. He suffered physical and emotional abuse. He was neglected. He was described as having had a "barren, loveless and warped existence".

Medical evidence was accordingly sought from adult psychiatrists with a specialism in learning disability. Claimant JJ successfully argued that but for the abuse, and notwithstanding his learning disability, he would in all likelihood have secured employment at a minimum wage

level. The abuse suffered resulted in JJ developing PTSD. He suffers mood swings, flashbacks and depression. These psychiatric problems now make paid employment impossible.

The settlement was achieved following work by Farleys over a 10 year period. A substantial volume of records had to be obtained from various sources and carefully reviewed. Expert evidence was sought. The Court of Protection were ultimately involved. The settlement included awards for Pain and Suffering, Past and Future Earnings Loss, Court of Protection Fees, Future Treatment Costs and Loss of Support through adoption.

Farleys also acted in the previous biggest case in this area of law when an award of £650,000 was made. The same team acted for JJ namely Jonathan Bridge (solicitor) and Justin Levinson (Counsel).

Farleys Law Firm

CICA – QUICK UPDATE

The Court of Appeal found for JT in her appeal against the FTT decision not to allow her to pursue a claim for a CICA. JT's stepfather was convicted of raping and sexually assaulting her whilst living together as members of the same household. It was argued on appeal that the 'same roof rule' was incompatible with Article 14 of the European Convention on Human Rights. The Court of Appeal agreed.

The FTT had until 21 August to make application for leave to appeal. They have not done so, and speaking to the lawyer with conduct, I am told that they do not intend to do so, but no written confirmation has been given.

A 'Declaration' has been made for JT that the CICB cannot rely on the 'Same roof Rule' to deny her compensation.

For others it is to be hoped that applications will go through 'on the nod' but who knows…..

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CASE REPORTS

Commissioner of Police of the Metropolis v DSD and NBV [2018] UKSC 11 by Malcolm Johnson, Hudgell Solicitors

John Worboys, a taxi driver committed a series of sexual offences against women between 2003 and 2008. DSD was among his first victims and the other party, NBV became his victim in July 2007. Many others were attacked by him between 2003 and 2007 and yet more after NBV was assaulted.

DSD and NBV brought proceedings against the Commissioner of the Metropolitan Police Service (MPS) for the alleged failure of the police to conduct effective investigations into Worboys' crimes. The claims were brought under sections 7 and 8 of the Human Rights Act 1998 (HRA). It was alleged that the police failures in the investigation of the crimes committed by Worboys constituted a violation of their rights under article 3 of the European Convention on Human Rights (ECHR). This provides that "[*n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."* At first instance, the Claimants succeeded. An appeal by the MPS was dismissed by the Court of Appeal and now, the MPS appealed to the UK Supreme Court.

All five members of the UK Supreme Court dismissed the appeal, but Lord Hughes' reasoning differed from the majority and Lord Mance expressed caveats. Lord Kerr gave the lead judgment. He summarised the case in seven questions, to which he gave answers.

Question 1 - was the duty to protect a person such as DSD or NBV a systems duty or an operational duty?

Lord Kerr said that in **MC v Bulgaria (2005) 40 EHRR 20** the European Court of Human Rights (ECtHR) had decided that article 3 of the ECHR gave rise to a positive obligation to conduct an official investigation. Member states had a positive obligation inherent in articles 3 and 8 of the ECHR to enact criminal-law provisions, effectively punishing rape and to apply them in practice through effective investigation and prosecution. The duty was both structural and operational in nature.

The ECtHR had said in other cases that it was not concerned with "allegations of errors or isolated omissions in the investigation". It accepted that it could not replace the domestic authorities' assessment of the facts of the case, and that it could not decide on the alleged perpetrators' criminal responsibility. However, the ECtHR said this because it was a supra-national body. There were obvious limitations on its ability to examine deficiencies in a national police force's investigation. National courts (i.e. the court at first instance and the UK Supreme Court) were not so constrained.

Lord Kerr said that this case provided the perfect example of a national court making this kind of assessment. The court at first instance had heard detailed evidence of the errors that had been made by police in the investigation of Worboys' crimes. It was in a position to form a judgment as

to the impact of those errors on the Claimants' cases, and it was open to that court to find that the errors were so serious that a violation of article 3 was established.

Lord Kerr did accept, however, that simple errors or isolated omissions would not give rise to a violation of article 3. Only "conspicuous" or "substantial" errors in investigation would qualify. Put another way, those errors had to be "egregious" and "significant".

In the present case, there were both structural and operational errors. Significantly, the court at first instance had found that if the operational failings had not occurred, the police officers involved in the investigation would have taken steps which would have been capable of identifying and arresting Worboys.

Question 2 - Was state complicity a prerequisite for a duty under article 3?

Lord Kerr said that the positive obligations under article 3 were not solely confined to cases of ill-treatment by state agents, i.e. police brutality. They included crimes committed by private citizens such as Worboys. This was clear from ECtHR law.

Question 3 - was there a right to claim compensation against the state?

Lord Kerr said that compensation was by no means automatically payable for breaches of the article 3 duty to investigate and prosecute crime. In many cases the ECtHR had treated the finding of the violation as, in itself, just satisfaction under article 41.

However, the award of compensation for breach of a Convention right served a purpose which was distinctly different from that of an order for the payment of damages in a civil action. Whereas civil actions were designed essentially to compensate claimants for their losses, human rights claims were intended rather to uphold minimum human rights standards and to vindicate those rights.

The inquiry into compliance with the article 3 duty was first and foremost concerned, not with the effect on the Claimant, but with the overall nature of the investigative steps to be taken by the State. In this case, the catalogue of failures was considered to warrant the award of compensation to the Claimants, irrespective of the fact that they had received damages from both Worboys and CICA.

Question 4 - Why, if there was no common law duty of care on the police to investigate a crime, should there be HRA liability?

As the common law stood, there was no general duty of care on the police to identify or apprehend an unknown criminal, nor a duty of care to individual members of the public who might suffer injury through the criminal’s activities. The MPS argued that the exemption from liability of the police at common law should be extended to claims advanced under the HRA so that the two systems should be in harmony.

Lord Kerr would reject that argument for two reasons. In the first place, the bases of liability (HRA/common law) were different. Secondly no assumption should be made that the policy reasons which underlay the exemption of the police from liability at common law, applied also to liability for breach of Convention rights.

Question 5 - Should the case be left to the ECtHR to decide?

Lord Kerr said that the domestic courts of the UK, were obliged to give effect to (or refuse to give effect to) Convention rights as a matter of domestic law. The fact that there was no direct authority from the ECtHR on a point did not preclude the court from making a judgment.

Consequently Lord Kerr would dismiss the MPS' appeal. Lady Hale and Lord Neuberger agreed with him.

Lord Hughes agreed to dismiss the appeal of the MPS. However in a very lengthy judgment analysing the development of the law in this area, he said that only structural errors should form the basis of an article 3 claim, not operational ones. Nonetheless, in the present case, what had gone wrong was plainly structural, which was why he would dismiss the MPS' appeal in any event.

Lord Mance agreed with the majority of the court, but expressed some caveats:-

- The ECtHR had reiterated that the “scope” of the State’s positive obligations might differ between cases where treatment contrary to article 3 of the ECHR had been inflicted through the involvement of State agents as opposed to cases such as this one, where violence was inflicted by private individuals.

- The investigative duty currently under consideration should not be confused with the type of duty found in the case of **Osman v United Kingdom (1998) 29 EHRR 245**, which was a duty that fell on the state to act in the face of a real and immediate threat imperilling the life or bodily well-being of a potential victim.

Malcolm Johnson, Hudgell Solicitors

Training and Courses

Abuse Compensation Claims - The Essential Guide by Malcolm Johnson

16th November, Manchester
20th November, London
4th December, Bristol
14th January, Leeds

Course Outline:

Abuse stories are never out of the media eye. The recent Supreme Court decision in Armes v Notts CC has now opened up local authority liability for claims involving foster carers.
This introductory level course is aimed at both Claimant and Defendant lawyers and offers a comprehensive overview of abuse compensation claims.

By attending this course you will learn what type of claim is likely to succeed, how compensation can be maximised and what types of claims are likely.

This course will cover the following:

- A brief introduction to the history of abuse compensation claims
- How to navigate around the statutory framework for child and vulnerable adult safeguarding both now and in the past
- How to identify a cause of action
- How to tackle causation and damage
- Limitation - which cases are likely to get past the limitation rules?
- How to obtain and prepare evidence, and choose and instruct experts
- Handling a trial
- Particular types of Defendants and how to sue them
- How to enforce judgments against individuals
- How to set up funding - legal aid, conditional and contingency fee agreements and insurance
- The statutory complaints system - how it works for abuse compensation claims
- Drafting points including Letters of Claim, Applications for Anonymity and Schedules and Counter Schedules of Loss

To Book: **http://www.mblseminars.com/Home/Outline?progid=9091**

Save the Date: 27 November 2018 at the House of Lords
Adult Care Leavers' experience of accessing their care records: time for National Minimum Standards

Baroness Lola Young of Hornsey OBE invites you to a Seminar at the House of Lords on Tuesday 27th November from 1 pm - 4.30 pm in Committee Room G.

The Access to Records Campaign Group [ACRCG] is working with Baroness Young of Hornsey OBE to hold this invitation only seminar to discuss the current and on-going work of ACRCG, which has its focus

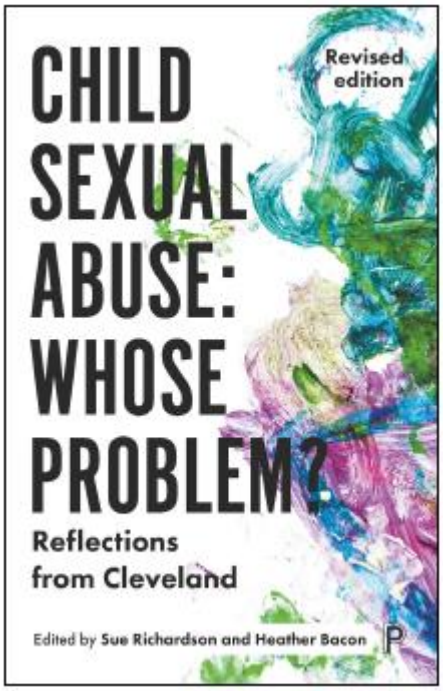
on the experiences of adult care leavers seeking access to their social care files. This work, based on three strands of research, forms an evidence base revealing the inconsistencies and hurdles encountered by adult care leavers when seeking information about their family background and time in care.

It is an opportunity for legislators, policy makers, access to records officers and information governance managers, alongside those working in the field of social care, to devise national standards for access and support services for adult care leavers when seeking access to their care files.

To reserve a place to ensure you're a part of this important discussion please register with Eventbrite or reply to the above email address. We will be sending more details shortly.

Tuesday 27 November 2018 House of Lords, 1pm - 4.30 pm, Committee Room G.

New Books



DIARY DATE

22 October 2018:

ACAL AGM – 1pm – All Members Welcome

AT THE OFFICES OF
Irwin Mitchell
40 Holborn Viaduct, London EC1N 2PZ

Further details:

http://www.childabuselawyers.com/events/acal-annual-general-meeting-3

Please RSVP: info@childabuselawyers.com

THE ASSOCIATION OF CHILD ABUSE LAWYERS

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.

Student 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

Sole Practitioner Member

- Cost: £85.00
- Benefits: Website, AGM, Workshop (3 CPA Hours), Newsletter, Database, Experts Register

Small Firm (5 partners or under) Practitioner Member

- Cost: £100.00
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- Cost: £150.00
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