Newsletter
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ACAL
Association of Child Abuse Lawyers

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President's Report

Peter Garsden, President of ACAL

I always seem to be writing this piece at the weekend, when everyone else is asleep early in the morning. My habit of being a lark started when my daughter was born. I had the insane idea of working from dawn until 3.30pm then going home to spend time with our new arrival. It lasted about 3 days but the habit remained. What has this to do with abuse law? Well nothing other than us being privileged to be involved with a new and developing area of law involving children, and the constant change which always seems to be over the horizon. So what is new?

- Brexit (yawn!) but relevant
- CICA Same Roof Rule
- Fixed Costs consultation
- IICSA (Independent Inquiry into Child Sexual Abuse)
- Limitation Cases
- The Conference

Brexit

My concern, if we leave the EEC – I think most lawyers are appalled that we should be losing an additional right of Appeal to the European Court – is that the law will go back to what it was before Human Rights were incorporated into our Legal System around 1998. It reminded me how rigid and precedent based the law was, when acting for 2 charities in the CN & GN v Poole Borough Council Supreme Court case. The law has arguably gone back to 1985 and the decision of X v Bedfordshire by making Social Workers immune from allegations of negligence. The decision in that case only came about because of a gradual erosion of precedent law into the area without proper hindsight and blurred focus, which Human Rights obliges us to do. The Defendant's argument in the Court of Appeal urged that D v East Berkshire and others were based upon the Court's fear of being in breach of Human Rights rather than proper adherence to the law of precedent. I remain a remainer, but fear that we, like a bunch of lemmings, are about to plunge into the brine.

Limitation Cases

At a time when IICSA are hearing evidence in the Accounts and Reparations Module from Defendant Solicitors that they "rarely fight a case on Limitation" (Richard Scorer, David Greenwood, and I all raised our eyebrows when that suggestion was made at a seminar in January 2018), the Court of Appeal & High Court have found in favour of the Defendants on 2 occasions in 2018. It is ironical that, on the one hand the Ecclesiastical have a policy of good practise along the lines of the above, whereas on the

other hand Royal and Sun Alliance fight Limitation where they are advised by their lawyers that they have a good arguable case – this is my interpretation of the IICSA evidence.

In Murray v. Devenshire, the Court of Appeal found that the Claimant's solicitors had contributed to the delay in bringing the case to Court and had not been expeditious (not easy reading but essential). The case failed more monumentally on the ground that the Claimant had destroyed some of his diaries after bringing their entirety into the Claimant solicitor's office for selection of the most relevant extracts. Again, from a professional point of view, the judgment does not make easy reading.

In Catholic Child Welfare Society (Diocese of Middlesbrough) and Others v CD, Lewison LJ (the same judge as heard RE v GE) overturned the discretion given by Judge Gosnell to allow the case on Limitation. This was one of the St. Williams cases which had been successful at trial. It was a physical abuse case only until very late in the litigation when an allegation of buggery arose, even after examination by the Claimant's expert. This Lord Justice gave a judgment which fell short of saying he didn't believe the Claimant's late disclosure but used it to illustrate the time that had elapsed **since the abuse had taken place as a child** despite both Counsel agreeing that time should only start to run at majority.

I think that these decisions indicate a trend which is common to all Personal Injury claims of Defendant minded judges who display a lack of sympathy with Claimants. I find it hard to believe that the angry allegedly falsely accused such as Harvey Proctor being paid damages by the Metropolitan Police, then being given Core-Participant status at IICSA does not have an effect upon Judges. We are, hopefully, at the bottom, of another parabolic curve from which we will rise into a more pro Claimant environment. If I am right, it will be the second swing of the pendulum since I have been dealing with these cases.

CICA Same Roof Rule

I am sure you all know that, after the Court of Appeal ruled that the same roof rule was contrary to Human Rights, the government announced that there would be a wholesale review of the scheme. This was compounded by the criticism made of the scheme by IICSA in its interim review report. Not a good word was said about it at the 2018 seminar.
There then followed a period of delay caused by cases going through the Scottish and English Supreme Courts.

It has now been announced that all past and future cases can be revisited by the CICA, so we are all digging into our case stocks to examine any such cases which can benefit from this decision.

I joined a support group made up of Helen Blundell from APIL, Watson Woodhouse, Neil Sugarman and others who were lobbying for the change and objecting to the delay.

Fixed Costs Rule Change

There is currently an open consultation launched by the Ministry of Justice (closes 6th June 2019) into the recommendations made by Lord Justice Jackson into rule changes so as to extend his fixed costs proposals from low value personal injury claims to most other types of case.

If you want to take part in the survey the URL is https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/
You can read the proposals in pdf form here - https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/supporting_documents/fixedrecoverablecostsconsultationpaper.pdf

You may remember that Lord Justice Jackson did recommend that abuse cases, along with some multi-party cases, police assault cases, and intellectual property cases, be exempt from the regime. This was partially due to an excellent paper put forward by David Greenwood, which I think we should publish on our site.

David has agreed to remind the Ministry of his excellent points to ensure that our cases continue to be exempt. I would, however, encourage you to reinforce our views by submitting your own firm's representations.

If you read the consultation, it explains that, as our cases involve a serious crime, as opposed to an act of negligence, they should not be restricted by the constraints of fixed costs

IICSA (Independent Inquiry into Child Sexual Abuse)

Both David Greenwood and I represented Core-Participants at the Accounts and Reparations Module of IICSA in the weeks leading up to Christmas last year. The purpose of the module is to examine the system of civil justice, and conduct

"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. 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."

You may remember that ACAL submitted a paper which is published elsewhere on the website. There followed a 2 day seminar, the collection of evidence from Core-Participants and others, then a 3 week hearing which took evidence from the Claimants and their legal representatives, the Defendants, their insurers and representatives involved in various Group Actions. The transcript is online, if you wish to read it. The Defendants came in for some criticism owing to the adversarial, and technical approach they took to the litigation, whilst the Claimant legal teams were accused of distancing themselves from the Claimants and not providing them with what they wanted – their day in Court when, after many years of silence, they would be heard and believed. Even winning Claimants gave evidence that they had not been fulfilled by the process – something I personally found quite depressing.

A formal apology was issued by Nugent Care Society, and the Home Office to some of the Claimants, who had been involved in 14 years of litigation without any reward, owing to the iniquities of the Law of Limitation, which came in for some considerable criticism.
You can expect a report at the end of this year. I am sure it will be illuminating.

The Conference

The programme and dates for this year's conference have now been fixed for 5th July 2019 at Grange City Hotel in London.

The conference is a must attend, and usually gets booked up quite early. There is a wide range of speakers covering a diverse spread of subjects including

- Research and controversy around child sexual exploitation
- CICA
- Legal regulation of image based sexual abuse
- Working with traumatised clients
- Legal update post CN
- Workshop: Enforcement and recoveries on non-insured matters
- Inquiries: Catholic and residential schools
- Breaking the silence of sexual abuse

For more information, and to book, go to the APIL website - https://www.apil.org.uk/training/apil-abuse-conference-2019-held-in-conjunction-with-acal

Incidentally, as a member of ACAL, we qualify for a discounted price of £240 + VAT for the day.

That is more than enough from me, so take care, don't work too hard, and make sure you take healthy breaks from this very intense and emotionally demanding work.

ECHR CLAIMS FOR VULERNABLE CHILDREN FOLLOWING SOCIAL CARE FAILURES

By Craig Carr, 7BR, ccarr@7br.co.uk

1. When, in *JD v East Berkshire* [2003] EWCA Civ 1151, [2004] QB 558, the Court of Appeal found that there was a duty of care owed by social workers undertaking their statutory safeguarding duties, the key justification for this development of the common law was the advent of the HRA permitting claims in domestic courts for violations of Convention rights. The decision in *X v Bedfordshire* could not, it was said, survive the introduction of the HRA.

2. Following *JD* common law failure to remove claims grew as a practice area, becoming a well-established plank of professional negligence personal injury claims. That is until the 2017 decision of the Court of Appeal (in *CN v Poole BC* [2017] EWCA Civ 2185, [2018] 2 WLR 1693) that *JD* had been implicitly overruled by subsequent authorities, principally *Michael v CC South Wales Police* [2015] UKSC 2, [2015] AC 1732 which rejected the notion that the common law ought to develop in harmony with Convention rights.

3. One of the consequences of *JD* is that cases involving social work failures have been typically pursued solely as common law claims. Whilst the Court of Appeal in *JD* explained (at paragraph 85) that the common law duty would not replicate the ECHR duty even if the factual enquiry will be largely the same, it is easy to understand why ECHR claims have not been a prominent feature given the more generous limitation period and apparent higher awards in common law claims.

4. Whilst we await the outcome of *CN*, ECHR claims are coming into sharper focus, whether as a potential adjunct (or insurance policy) for those common law claims currently stayed/frozen pending the decision of the Supreme Court, or as an alternative way of resolving the more straightforward cases.

5. They may come into sharper focus still once we have the decision in *CN* and the shape of future common law claims is clearer. Even if the *JD* position is largely restored, ECHR claims should remain on the menu of options, particularly where limitation is not in issue and/or the claim covers similar evidential ground. Indeed, there will be circumstances where an ECHR claim can be established where a negligence claim cannot. The Convention rights likely to be engaged in social worker claims are Articles 3, 6 and 8.

Article 3

Art 3: *'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'*.

6. Art 3 encompasses both a *procedural duty* to carry out effective investigation and, of greater relevance where there is an allegation of abuse, an *operational duty* to protect individuals from such treatment.

7. The operational duty extends to protecting individuals against prohibited treatment even where it is carried out by a third party. The duty is therefore wide enough to be breached by omission. Thus, the failure of social services to protect a child suffering abuse at home is capable of violating art 3.

8. There is a good summary of the relevant principles in art 3 cases involving social workers at paragraphs 72-76 of the judgment in *G v Kent* [2016] EWHC 1102. The principles are not, at first blush, that different to a common law claims. The 2011 Research Report by the Council of Europe put it as follows:

> *'the general structure of an Article 3 claim – that the state failed to protect children against sexual abuse – is relatively standard. The applicant is either the child who was abused and/or the child's parent. The claim they must make is that the abuse that was suffered satisfies the standard of torture, cruel, degrading, or inhumane treatment under Article 3. Then, they must show that a social worker or police officer knew or should have known that the victim was at serious risk of abuse and failed to take adequate measures to prevent further abuse'*

9. Any claim of sexual assault or serious/sustained physical assault is likely to be sufficiently severe to be prohibited by art 3. In *A v UK (1999)* 27 EHRR 611 the Court explained that severity was relative and was to be judged in all the circumstances *'such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim'*. The beating of a child with a garden cane resulting in bruising was found to constitute *inhuman or degrading treatment* (whereas, in contrast, in the earlier decision in *Costello-Roberts v UK (1995)* 19 EHRR 112 three smacks on the buttocks with a soft soled shoe resulting in no visible injury was insufficiently severe to violate art 3).

10. In *Z v UK (2002)* 34 EHRR 3 (X v Beds), years of neglect, insanitary living conditions, insufficient food and physical abuse was a violation of art 3. In *E v United Kingdom (2003)* 36 EHRR 31 prolonged physical and sexual abuse of children by the stepfather was a clear art 3 violation.

11. Establishing breach of duty by the authority involves considerations similar to a common law claim. The issue is whether the authority has failed to do what is *reasonable* in all the circumstances. It is, however, necessary to prove that the authority was aware, or ought to have been aware, of a *real and immediate risk* of harm, an additional/more difficult criterion when compared to a negligence claim where foreseeability will suffice. As explained in *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72, it is not necessary to show that there was a *likelihood* or *fairly high degree* of risk; a real and immediate risk is one where there is

> (1) A substantial and significant risk, rather than a remote or fanciful one
> (2) A present and continuing risk, rather than one in the future.

12. If breach of duty is a little harder to prove compared to a common law claim, causation is perhaps a little easier to prove. It is not necessary to establish *but for* causation. A failure to take reasonable and available measures that *could* have had a *real* prospect of altering

the outcome or mitigating the harm is sufficient (*E v UK*). *Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50 noted that '*a looser approach to causation is adopted under the Convention… it appears sufficient generally to establish merely that he lost a substantial chance'*.

Article 6 and 8

Article 6(1): *In the determination of his civil rights and obligations… everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*

Article 8(1): *Everyone has the right to respect to his private and family life, his home, and his correspondence.*

13. Article 6 and 8 claims can arise where there is a delay in initiating care proceedings with the consequence that the child is denied the opportunity of a suitable placement in good time, is denied the protection of the Children Act, and is denied independent representation by a Guardian. Many of the reported cases have been dealt with by, or arise in, the Family Division. A regular basis of the claims is the inappropriate use of voluntary s.20 accommodation arrangements.

14. In *Kent County Council v M & K* [2016] EWFC 28, [2016] 4 WLR 97 breaches of art 6 and 8 were declared where the chid had been accommodated voluntarily (s.20) in a number of foster placements over a period of four years before care proceedings were initiated. The failure to conduct/update core assessments and the delay in starting proceedings was found to violate art 6 and 8.

15. Similarly in *Northamptonshire CC v AS* [2015] EWHC 199 breaches of art 6 and 8 were found where a child was removed at 15 days, accommodated pursuant to s.20 and care proceedings were not initiated for nine months. The child was left without independent representation for 11 months and a suitable placement (with grandparents) was not found until two years after removal. In *A v Lancashire CC* [2012] EWHC 1689 the Court found breaches of art 3, 6, and 8 where the children were removed at an early age, a plan for adoption was abandoned after a few years, and for a prolonged period there was nobody with parental responsibility. The children were placed in a number of foster placements over the course of a decade, suffering abuse in some.

Limitation

16. The limitation regime in HRA claims is stricter than that provided by the Limitation Act. The limitation period is one year (s.7(5)(a)) though the Court has a wide and unfettered discretion to extend that if *equitable in all the circumstances* (s.7(5)(b)). In *Rabone* Lord Dyson (paragraph 75) explained that it will often be appropriate to take into account factors of the type set out in s.33(3) of the Limitation Act 1980.

17. There is no suspension of time where the Claimant lacks capacity; time runs even where the Claimant is still a child or is a patient. It was observed in *M v MOJ* [2009] EWCA Civ 419 that

> *it is a striking feature of section 7 that it provides a limitation period of only one year, to be strongly contrasted with the much longer period allowed under the Limitation Act, and indeed makes no allowance in the case of a minor. The clear inference is that, in the case of such claims against public authorities, perhaps somewhat reflecting the tight three-month*

time limit for the purposes of judicial review proceedings, it was considered right that there should be really quite tight limitation periods.

18. In AP v Tameside MBC [2017] EWHC 65 King J rejected the argument that there ought to be a presumption it is just and equitable to extend limitation where the Claimant is vulnerable, lacks capacity and relies on others to pursue proceedings. Lack of capacity was simply one factor to be weighed in the balance in the exercise of the discretion.

19. In *Bedford v Bedfordshire CC* [2013] EWHC 1717 Jay J noted (para 76) that whilst the Claimant carried the burden of persuasion in extending limitation, the burden was not necessarily a 'heavy' one and proving an absence of prejudice to the Defendant was not a prerequisite. In keeping with the observation in *M v MOJ* however, the judgment emphasises that the intention is that HRA claims should be dealt with swiftly and economically. An extension to limitation was not granted, notwithstanding the lack of prejudice to the Defendant, for a number of reasons (summarised at paragraph 93) including the culpable delay on the part representatives and proportionality (the underlying claim failed in any event).

20. The Court will have little sympathy where the delay is due to the need to obtain Legal Aid or to plead the claim (para 89 of *AP v Tameside*), or the failure to appreciate that time runs against a minor/patient (para 85 of *Bedford*).

21. In the relatively recent decision in JW v Leicester CC & Leicestershire Police (2018) QBD unreported, limitation was set aside in a claim alleging breach of art 3 and 8, in a case involving a child in care sexually abused by a registered sex offender living nearby. The Judge took into account the fact that the ECHR claim was being run alongside an in-time common law claim and was based on the same evidence. Further, the Court considered it reasonable for the Claimant to have delayed formulating the claim until after disclosure had been obtained.

Damages

22. Breach of a Convention right will not automatically give rise to an award of damages. There are circumstances in which declaratory relief alone will be deemed sufficient to provide just satisfaction (particularly where, for instance, the breach is purely procedural). Breaches of Art 3 however should generally result in compensation awards (*E v UK*).

23. Where damages are to be awarded there is the question as the extent to which the Court will consider comparable tort claims in quantifying ECHR damages. In *R (On the Application of Bernard) v Enfield LBC* [2002] EWHC 2282 the Court rejected the suggestion that ECHR awards should be lower than tort awards. Similarly, in *Anufrijeva v Southwark LBC [2003] EWCA Civ 1406* [2004] QB 1124 the Court of Appeal considered that in those cases where an award of damages was to be made, the JC Guidelines, CICA tariffs and awards by the Parliamentary and Local Government Ombudsman might provide useful guidance on the measure of damages.

24. Subsequently, the House of Lords in *R. (on the application of Greenfield) v Secretary of State for the Home Department* [2005] UKHL 4, [2005] 1 WLR 673 rejected the notion that the Court should look at domestic scales of damages when determining awards in ECHR claims, stating that the HRA was not a tort statute. *Greenfield* ought to be read alongside more recent decisions. In particular, in *Alseran v MOD* [2017] EWHC 3289 Leggatt J explained at paragraph 931 that *Greenfield* was primarily concerned with those Convention

breaches where there was no comparable tort (for instance a art 6 breach). As Leggatt J pointed out, in those cases where the mistreatment constituting breach of a Convention right, would also constitute a Tort (an obvious example is sexual abuse which would be an ECHR art 3 breach and a trespass in Tort) there was a powerful argument that the award should be similar.

25. In *E v UK* (above) the lump sum awards were £16,000 to three of the Claimants and £32,000 to the fourth (updating with RPI to £25,589 and £51,178). In *Z v UK* the award was £32,000 for general damages (updates to £52,353) with awards of £4,000 to £100,000 for special damages.

26. As for the Article 6/8 type of claims considered above, the judgment in *Medway Council v M* [2015] 10 WLUK 311 contains a helpful table (at paragraph 90) of awards in previous cases. The case also sets out the factors to be taken into account in determining the appropriate level of damages, such as the length and severity of the breach and the distress that is caused. The award made in the case was £20,000 for breaches of art 6 and 8 following a two year delay initiating care proceedings. The child was accommodated pursuant to s.20 for 27 months even though the mother lacked capacity to consent.

27. As for the other cases mentioned above, the award in *Kent CC v M and* K was £17,500, the award in *Northamptonshire v AS* was £12,000. In *A & S v Lancashire CC*, declarations were made, with the case being transferred to the QBD for assessment of damages alongside an intimated civil claim. Importantly, for these art 6/8 claims, it is not a prerequisite, as it would be in a common law claim, to prove actual physical or recognisable psychiatric injury.

Craig Carr
7BR
London
WC1R 4BS
08.04.19

Obtaining indictments and certificates of conviction – problems encountered when making a request under the Data Protection Act 2018

During the course of civil litigation relating to child abuse, it is frequently necessary to approach regional criminal courts to obtain copies of the indictment and certificate of conviction in cases where a perpetrator has been convicted and where that conviction is being relied upon as supportive evidence in the civil claim.

In early March 2019 we approached a regional Crown Court in order to request the indictment and certificate of conviction relating to the 2018 conviction of an individual who had abused our client during childhood. Our client had been a complainant in the criminal trial, and a number of the counts on which the perpetrator was eventually convicted related to our client.

We had previously generally assumed that it is appropriate to request these documents under s.45 of the Data Protection Act 2018 (DPA 2018), which provides a right of access to data processed in the course of law enforcement proceedings, as the documents contain information relating to our client. We routinely obtain indictments and certificates of conviction in cases where there is a relevant criminal conviction. We therefore sent our standard request letter to the Crown

Court, stating that we were representing our client in a civil claim for compensation against the Defendant, giving details of the criminal conviction, noting that our client was a complainant, and requesting the release of the documents under the DPA 2018.

We received the following response from the Crown Court (emphasis added):

Dear X,
Your request has been passed to me because I have responsibility for answering requests relating to the Data Protection Act (DPA) on behalf of the X Region of Her Majesty's Court and Tribunals Service (HMCTS).
I can confirm that the request as it stands does not meet the criteria for supplying a Certificate of Conviction under Criminal Procedure Rules 5.9. ***The right of access (section 45 of the DPA) does not apply in relation to the processing of relevant personal data in the course of a criminal investigation or criminal proceedings, including proceedings for the purposes of executing a criminal penalty (section 43(3)).***
Once you have explained under what legislation the Certificate of Conviction is required, the request can then be passed to a Judge for consideration.
CPR 5.9 (3) If the application satisfies the requirements of that legislation, the court officer must supply the certificate or extract requested—
(a) to a party;
(b) unless the court otherwise directs, to any other applicant.
I note you are requesting an Indictment and Certificate of Conviction for use in court proceedings. ***If the judge in those proceedings feels that the conditions for release are satisfied then we can release the requested information to either the court or the parties concerned on receipt of an order.***
Kind regards,
X

We were surprised to receive such a response, and proceeded to carefully review the provisions of the DPA 2018, General Data Protection Regulation 2018 (GDPR), Criminal Procedure Rules (CrimPR), and associated Information Commissioner's Office (ICO) guidance notes, with a view to determining how we could obtain the certificate of conviction and indictment in question.

In summary, we concluded that it appears that the Court was correct to point out that the DPA 2018 does not apply in this case. The ICO Guidance to Part 3 of the DPA 2018 indicates that documents created by or on behalf of a judge in the course of criminal proceedings are not within the ambit of either piece of legislation.

However, it appears that the reason cited for denying our subject access request was not correct. S.5.9 of the CrimPR does not appear to apply to information requested for the purposes of civil proceedings in this context. It may in fact still be possible to obtain the certificate of conviction under s.5.8 of the CrimPR, which appears to be intended to facilitate members of the public such as journalists to obtain information relating to criminal proceedings.

As this would not assist with obtaining an unredacted copy of the sections of the indictment relating to our client, it was necessary to further consider other means of obtaining this. To our understanding, an indictment is a document created by the Crown Prosecution Service (CPS) for use by the court, and therefore it appears that it may be possible to make a subject access request to the CPS under the DPA 2018 to obtain this document.

This is the first time that we have encountered this issue when obtaining indictments and certificates of conviction, and we consider that it may be of wider interest to legal professionals

who may have already encountered these objections from the Courts, and/or may encounter them in the future.

Rights of access to personal data contained in court documents under the Data Protection Act 2018 and the General Data Protection Regulation 2018

Individuals have a general right of access to their personal data under s.15 of the GDPR. Part 3 of the DPA 2018 creates a specific regime governing the processing of data for law enforcement purposes, and s.45 of the DPA 2018 provides individuals with a right of access to this data. However, s43(3) restricts the ambit of this right. It states that sections 44 to 48 of the DPA 2018 "**do not apply** in relation to the processing of **relevant personal data** in the course of a criminal investigation or criminal proceedings, including proceedings for the purpose of executing a criminal penalty".

The ICO have produced a "Guide to Law Enforcement Processing" to assist with the interpretation of Part 3 of the DPA 2018: https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-law-enforcement-processing/individual-rights/ .

The key section of this is as follows:

*"It is important to note that subject access rights and the rights to rectification, erasure and restriction **do not apply** to the processing of **'relevant personal data'** in the course of a criminal investigation or criminal proceedings.*

*'Relevant personal data' means personal data contained in a judicial decision or in **other documents relating to the investigation or proceedings which are created by or on behalf of a court or other judicial authority.***

*Access to 'relevant personal data' is **governed by the appropriate legislation covering the disclosure of information** in criminal proceedings, such as (in England and Wales) the Criminal Procedure and Investigations Act 1996.*

*This provision only applies if the judge or other judicial authority is the controller and the relevant personal data is contained in a judicial decision or in other documents which are created during a criminal investigation or proceedings and **made by or on behalf of the judge or judicial authority**. For example, the 'relevant personal data' may be contained in judge's notes."*

Therefore it appears that the DPA 2018 is not the appropriate legislation under which to request the indictment and certificate of conviction from the Court. It appears that a client has no right of access to documents created during the course of the criminal proceedings made by or on behalf of a judge or judicial authority.

We then looked into the "appropriate legislation" cited above as governing access to relevant personal data. The Criminal Procedure and Investigations Act 1996 does not apply to civil proceedings.

Obtaining court documents under the Criminal Procedure Rules

We have considered the provisions of the CrimPR in detail to determine whether or not we are able to rely on them to obtain documents created during the course of criminal proceedings, if the DPA 2018 does not apply.

We first considered the application of s.5.9 of the CrimPR, as this had been cited in the above quoted refusal of our request.

s.5.9 applies to the ""*supply of written certificates or extracts from records for use in evidence etc*." s.5.9(1) sets out the ambit of s.5.9:

5.9 (1) this rule applies where legislation –

(a) Allows a certificate of conviction or acquittal, or an extract from records kept by a court officer, to be introduced in evidence in criminal proceedings; or

(b) Requires such a certificate or extract to be supplied by the court officer to a specified person for a specified purpose.

Section (a) clearly does not apply to civil proceedings. It therefore appears that the Court's objection is that we did not cite the legislation that required us to obtain the documents requested. However, as we are not persons specified in legislation requesting documents for a purpose required by that legislation, it does not appear that (b) applies in this situation either. Therefore it is doubtful that s.5.9 applies at all to our request.

This conclusion is further supported by the guidance notes provided under s.5.9 CrimPR. The note gives examples of legislation that 5.9(b) refers to (s.73-75 of the Police and Criminal Evidence Act 1984, s.115 of the Crime and Disorder Act 1998(c), s.92 of the Sexual Offences Act 2003(d)). The note then goes on to state that "*this rule applies where certificates or extracts from court records are required for use in evidence or for some other purpose specified in legislation. Where this rule does not apply,* ***information about a case may be obtained under rule 5.8****".* It therefore appears that the Court officer was incorrect to cite s.5.9 in response to our original request.

We considered the possibility of making a request under rule 5.8 CrimPR. This section is entitled "*supply to the public, including reporters, of information about cases*". The requirements for release in this section are more detailed that in s.5.9, and appear to give discretion to the Court about what they are required to release. The guidance notes at the end of this section direct a Court officer making the decision to consider s.43(3) DPA 2018.

It appears that although a certificate of conviction and indictment could be requested under s.5.8 of the CrimPR, a Court officer making the decision may not allow it. Any copy of the indictment would also likely have a client's name redacted, as this request is not being made under the GDPR/ DPA 2018.

We also considered s.5.7 of the CrimPR. This provides for "*supply to a party of information or documents from records or case materials,*" including information about "*the outcome of a case*". It is likely that "parties" in criminal proceedings can be taken to mean the Crown and the Defendant(s), and not the Claimant in subsequent civil proceedings. However, this section may support the idea of approaching the Crown Prosecution Service to request the records, outlined further below.

Is the Court the appropriate body to approach?

It appears that a certificate of conviction would be considered "*relevant information*" not disclosable under the DPA 2018, as it is likely to be considered a document created by the court on behalf of the judge.

However, the indictment does not appear to be a document created by the court. The CPS website appears to indicate that the indictment is drafted by a Crown Prosecutor and sent to the Court (https://www.cps.gov.uk/legal-guidance/drafting-indictment). Therefore, the indictment may not be "*relevant information*" under the terms of the DPA 2018, and could possibly be requested under s.45 of the DPA 2018. It is less clear, but also possible, that the CPS may be able to obtain the certificate of conviction from the Court and disclose both this and the indictment in response to a subject access request.

The CPS website contains helpful guidance about their disclosure procedures in relation to material requested by third parties (https://www.cps.gov.uk/legal-guidance/disclosure-material-third-parties).

The section entitled "Post-Conviction Disclosure" indicates that whilst requests for information should generally be directed to the police, *"examples of requests that the CPS would expect to deal with and/or advise on include requests from private prosecutors, other prosecuting authorities, cases in which the CPS is or may be a party to any prospective proceedings, cases of complexity, for example,* ***those involving linked proceedings in the civil and criminal courts such as may occur in child abuse cases*****."**

This online guidance goes on to list the General Principles under which they will consider requests for information. These include the nature of the request, and of the person making the request, stating that information may only be supplied to ""*a person with a genuine interest in the proceedings or contemplated proceedings in question*", with examples including "*persons who are bona fide engaged in or contemplating civil proceedings or solicitors …acting on their behalf".* Although there is no specific section setting this out, there are a number of references to the CPS being able to provide *"a copy of charges and the indictment"* on request.

Conclusions

We have therefore submitted a request under s.45 of the Data Protection Act to the CPS for both a copy of the indictment insofar as it relates to our client, and for the certificate of conviction. We have yet to receive a response, but are hopeful that this approach will be successful.

Should the CPS decline to provide the documents requested, we may at that point contemplate requesting that the Defendant collaborate with us to write directly to the Judge who ruled in the criminal proceedings, to make a direct request that they consider releasing the information to us for use in civil proceedings.

By Rose Ashwood, Paralegal at Leigh Day
Research conducted on 09 April 2019
Tel: 020 7650 1200

EXPERTS

Getting the Best out of your Expert Witness, Professor Neil Thompson

In my days as a practising social worker and subsequently as a team manager, I very much enjoyed the court element of my work. I suppose it was partly the sociologist in me who enjoyed seeing how the legal system worked and how it fitted into the broader picture of keeping the wheels of society turning. I also enjoyed the problem-solving aspects, seeing complex situations getting resolved and progress being made – that sat well with my social work background which is, of course, very much about problem solving and making progress. And, in addition, I liked the structure and focus of the legal system, the sense of order. This was in some ways a breath of fresh air, given that so much of social work practice is about dealing with messy, complicated and often chaotic situations.

Of course, it wasn't always a positive experience, like the time a solicitor in the youth court who used my report as the basis of his address to the bench (without acknowledging its source and without thanking me) who subsequently treated me as if I was something the cat had dragged in when I asked him a question about the legal aid arrangements relating to the young offender concerned. Also, there was the not-so-wonderful time a magistrate tore a strip off me for the non-appearance at court of a young offender, even though I was not that boy's social worker and knew nothing about him or his circumstances.

But, the positives always far outweighed the negatives, and so, when some years later, I was invited to join an expert witness partnership, I jumped at the chance. Think about it, I was told, but I didn't need to. It suited me down to the ground.

I was fortunate that the senior member of that partnership was a very experienced expert witness who had formerly been a deputy director of social services. He proved to be an excellent guide and mentor and he played a key role in getting my expert witness career off to a good start. The other members of that partnership have long since retired and I now work on a solo basis, but being part of that group provided a sound foundation for me to build on.

That was almost 23 years ago and I have lost count of the number of cases I have dealt with during that time. It has given me lots of examples, suitably anonymised, with confidentiality fully respected, of course, for my teaching and training – plenty of examples of how and why practice has gone wrong (sometimes tragically wrong) and the sad consequences of that. So, I like to think that my expert witness work has not only assisted the Court in relation to each of the cases concerned, but also helped to improve practice by drawing out the lessons from so many cases where practice has gone awry. My experience has also helped to illuminate the training I have provide around courtroom skills for social workers, by being able to give them real-life examples of the processes involved.

But, the key question for present purposes is: What have I learned that can be of value to help lawyers get the best out of the expert witnesses they commission? I estimate that I have worked

with over 70 legal firms in my almost 23 years, and I am pleased to say that, most of the time, things have gone smoothly. But, it is from those odd occasions that things do not go so smoothly that the learning can be gained. Quite a few issues come to mind, but most significant are the following:

Give precise instructions

I have occasionally received instructions that basically say: 'Please write a report about the adequacy or otherwise of the practice in this case'. Without knowing specifically what the concerns of the instructing solicitor (or his or her client) are, it is very difficult (and extremely time consuming and therefore expensive) to have to wade through reams of documentation without a clear focus as to what I am looking for.

Ideally, the instructions should be in the form of a set of questions that you are asking the expert to address, something along the lines of: 'Despite the apparent lack of progress in addressing the risk concerns, the child's name was removed from the child protection register at the case conference on 17th September, 2008. Was this a professionally sound decision? If you feel it was not, please specify on what grounds your concern is based'.

If you are not sure how precisely the questions should be phrased, explain to the expert what you are trying to get at, what issues you are trying to highlight and ask him or her to suggest what questions would help to tackle the issues involved. Inexperienced experts may struggle with this at first, but in most cases it can be a useful way forward.

Keep the expert informed

Basic courtesy means that expert witnesses should be seen as professional partners, rather than as a resource that you pick up and then discard when you don't need them anymore. Quite a few times, I have had difficulties getting information about a case after I have submitted my report. It is as if I am past my sell-by date in terms if usefulness and can therefore safely be ignored. Many experts work from a home office base, myself included, and therefore have limited secure storage space available. On more than one occasion I have had to resort to saying words to the effect of: 'As it is now four months since I submitted my report and you have not responded to my communications about the case, I am assuming that my services are no longer required and I can safely shred the documentation. Therefore, unless I hear from you to the contrary within the next ten working days, I will work on the basis that you do not require me to retain the records or return them to you'. Thankfully, this is a rare occurrence, but sadly it is far from unheard of.

If we are thinking in terms of a working partnership, rather than resource usage, the need for keeping the channels of communication open should be more apparent. Of course, this doesn't mean that you have to keep the expert updated on every detail, but if you are going to get the best results, you need to make sure you are not keeping the expert in the dark.

Respect the expert's limitations

I can fully understand that, for some cases involving very rare circumstances, it can be difficult to find an expert with the appropriate background. However, one of the golden rules that experts are taught is not to go beyond their area of expertise. Consequently, I have occasionally had to resist pressure from an instructing solicitor to comment in a matter which I don't feel competent to address. I have very broad experience in social work in an almost 42-year career, but there are some aspects of social work that I would not be able to comment on.

So, while I have done my best every time to point instructing solicitors in the right direction for a suitable alternative expert, I have sometimes had to resist pressure from a solicitor to cross that line – 'Well, it's all social work isn't it, and you are a well-known author in the field, so surely you can comment on these issues for me', as one ever so slightly desperate lawyer once put it to me. Child protection is a broad field and not every expert can safely comment on every aspect of it.

Don't try to force the issue

A scenario that has come up many times for me, and no doubt for many other experts, goes something like this:

My report says words to the effect that I am critical of an assessment being too skimpy and not rigorous enough. I am then asked what would a more thorough assessment have determined. I then say that I cannot answer that question because there are too many variables involved. I am then pressed to specify as much as I can about what an adequate assessment would have looked like. I stick to my point, but explain the principles of good practice that the assessment should have adhered to, but didn't. I am thanked for the helpful information.

This is fine for me as an experienced, confident and assertive expert who is a recognised authority in his field, but my concern is that an expert not so advanced in their career may bow to the pressure to produce a hypothetical assessment that could actually be quite misleading (and seriously open to challenge in court).

By all means ask for changes of wording, but not of opinion

Lawyers are generally fully aware that experts are neutral and independent and that it is inappropriate to put them under pressure to change their opinion to suit whichever side the lawyer is representing. Many times, I have been asked to make small changes to the wording of my report to make it more helpful, and that is fine, of course. However, on a small minority of occasions, I have been asked to make changes of wording that amount to a change of opinion, or at least a change of emphasis within my opinion. Once again, I am enough of an old hand to resist that pressure and stick to my independent opinion. Problems could arise, of course, where there is a less experienced or less well-established expert who bows to that pressure and then ends up in hot water because of it at a later stage, when being cross examined, for example.

Don't stereotype social workers

Unfortunately, due to a hostile right-wing press, social workers are often misrepresented, and stereotypes abound. The reality of social work is very different form the oversimplified understandings that commonly prevail. It is complex and demanding work. For example, a question often raised is: How come social workers can work with families where abuse has taken place and not know about it? Are they blind? But, of course, social workers cannot be in clients' homes 24/7; there is often little direct evidence abuse has taken place (especially with sexual abuse); and many perpetrators are very adept at concealing the reality of the situation.

In my experience, social workers are, unsurprisingly, like most other occupational groups, divided into those who are excellent, those who are poor and the majority who are somewhere in between. Where litigation is involved, it will often be the practice of those who are at the less competent end of the spectrum whose work is being scrutinised, but we should not allow these exceptions to lead us into assuming that social workers as a whole are incompetent (despite what the Sun might lead us to believe).

Pay up!

And, last but not least, perhaps the most important one – money! Some experts undertake forensic work in addition to drawing a university salary, and so waiting to be paid is not necessarily a problem. However, many experts are self-employed and rely on prompt payment to pay their bills and keep their business afloat. Thankfully, most firms recognise this and process invoices in good time. However, there is a minority who seem to drag their feet and there is one I had the misfortune to deal with recently where I had to threaten County Court action before they eventually paid, having previously ignored all my communications about the outstanding bill.

But, it isn't just about cash flow; it is also about the nature of the working relationship. As I have emphasised, if you want to get the best out of your expert, you need to treat him or her as a professional colleague, with all the respect and consideration that entails. Ignoring invoices and follow-up requests for payment amounts to a kick in the teeth in terms of the contempt that is implied by such poor practice.

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These are not the only issues, but I trust that what I have had to say about them has been helpful in laying the foundations for smooth, effective and satisfying working relationships between lawyers and expert witnesses. While litigation may well be rooted in conflicting interests and adversarial approaches, we are all – lawyers and experts alike – on the same side, in the sense that we are all trying to assist the Court and serving the wider interests of justice.

Neil Thompson is a former university professor who now works as an independent writer, educator, adviser and, of course, expert witness. He has several bestselling books to his name, is a sought-after trainer and international conference speaker and the holder of a Lifetime Achievement Award from BASW Cymru, the Welsh Branch of the British Association of Social Workers. His website is at www.NeilThompson.info.

What are the benefits of lawyers outsourcing record collation and analysis?
Caroline Packer

Medical and social care records in abuse cases are voluminous and complex. Before medical experts can be instructed the records need to be sorted into type/chronological order, duplicate records removed, indexed, scanned, paginated and reviewed to identify any crucial missing records.

A review of the records at an early stage can produce a page referenced chronology of all documented cause for concerns.

This is a time-consuming process which many law firms don't have the capacity to complete in-house. This work can be easily outsourced to an external medico-legal provider who are experienced in dealing with abuse claims.

The benefits of outsourcing this work are high:

- Outsourcing these services frees up valuable time for your in-house staff to work on other matters.

- The outsourced services are recoverable on an agency basis which means that law firms can bill profit costs for the work undertaken by the medico-legal provider on their behalf, rather than recover these fees as a disbursement.

- The outsourced services are a recognised disbursement in the industry, qualifying for disbursement funding schemes and funded by ATE insurance.

- The work creates a fully indexed, uniquely paginated and navigational set of records which can be used by all parties to the action.

- Most providers offer digital scanning of the records which assists with paperless working and dramatically reduces photocopying and admin costs when providing records to the experts.

- Redaction of the records to remove client and third-party information can be completed at the same time as collation.

- If a liability or causation chronology is also required, this can be tailored to the client's specific requirements to include entries relevant to the issues of limitation, breach of duty, causation, contributory negligence and quantum. Specific specialised chronologies can also be prepared on request.

- Accompanying client memorandums will highlight a summary/timeline of events, relevant points of note, and the identification of missing, privileged and potentially discrediting records.

- Work can be completely promptly, typically within 4 weeks for collation & chronology work, ensuring that the case can be progressed quickly.

- The work is completed by experienced professionals to an extremely high standard which is subjected to intensive quality control.

Caroline Packer, Managing Director of DMR Collation, www.dmrcollation.co.uk.

CASE REPORTS

A and S v LCC, 10 December 2018

On 10 December 2018 the Queens Bench Division of the High Court approved settlement in the case of A and S v LCC. The Approval Hearing took place on the day before a five day Trial was due to commence and resulted in a combined payment to the Claimants from the Local Authority of £9.6 million. This eclipses the highest previous award in a claim of this nature.

A and S are brothers born in 1995 and 1997. They were received into the care of the Defendant on 23 February 1998 with Care Orders being made later that year.

The plan was for the Claimants to be adopted. This never happened. The Claimants instead became "statutory orphans".
On 21 June 2012 the matter came before Mr Justice Jackson who described in some detail the chaotic upbringing these two boys had endured. He describes A as having suffered some 77 different placement moves within his 16 years of life. He describes S as suffering no fewer than 96 placement moves in his 14 years of life. During some of the placements the Claimants suffered neglect and abuse. The Guardian in the Family Proceedings described A and S as profoundly damaged by their particular childhood journey through the care system. Mr Justice Jackson made various declarations under Articles 8, 6 and 3 of the Human Rights Act and from 2012 onwards we have been working with Counsel specialising in this area of work to quantify damages claims on behalf of A and S.
https://www.familylawweek.co.uk/site.Aspx?i=ed98855

The matter was transferred to the QBD and the parties were complimented on the collaborative approach to the litigation and settlement negotiations.

Various experts were instructed on a joint basis to include Child and Adolescent Psychiatrist, Adult Psychiatrist and Care Expert. Evidence was also obtained from an Educational Psychologist and Court of Protection Expert.

Liability was resolved at an early stage with the Local Authority offering apologies to A and S both at the conclusion of the Family Proceedings and at the Approval Hearing of the civil damages claim. Four separate Joint Settlement Meetings took place before an offer of £9.6million jointly to the Claimants was put forward which was deemed acceptable by the Litigation Friend who in this case was the Official Solicitor and which was thereafter approved by the Queens Bench Division.

Damage's included awards for loss of earnings (past and future), care and Court of Protection fees.

The size of the award reflects the significant damage that was done to A and S by the Local Authority's failings during their childhood. The previous highest award in a damages claim

against a Local Authority was another case dealt with by the same legal team when an award of £1million was made for failings which resulted in a Claimant suffering severe physical and sexual abuse during childhood. The award to A and S is almost ten times this previous case. The same legal team dealt with both cases as follows:

Jonathan Bridge, Head of Abuse Claims, Farleys solicitors

Lizanne Gumbel QC, Senior Counsel

Justin Levinson, Junior Counsel

Abuse Compensation Claims - The Essential Guide by Malcolm Johnson

13th May, Manchester
12th June, London
1st July, 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/Outline/Abuse-Compensation-Claims---The-Essential-Guide/9091

DIARY DATE

5TH July 2019
APIL ABUSE CONFERENCE

AT
GRANGE CITY HOTEL, COOPER'S ROW, LONDON

Further Details & Booking Info:
https://www.apil.org.uk/training/apil-abuse-conference-2019-held-in-conjunction-with-acal

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.

St**udent Member**

- Cost: £40.00
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Non-practicing member, e.g. Experts

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

Barrister Member

- Cost: £85.00
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ACAL website: www.childabuselawyers.com
E-mail: info@childabuselawyers.com

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