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The floodgates stay shut

Limitation rules in historical abuse cases have fundamentally changed after *Hoare*, but it does not make it easier to bring claims, says Peter Garsden

THE HOUSE OF LORDS' decision in *Hoare* [2008] UKHL 6 was followed by a flurry of warnings that the law of limitation in the area of historical abuse had changed, so that lawyers could now defend historical cases rather than settle them. Rather like the prospect of huge success fees in conditional fee cases and the costs war, insurers and local authorities feared that the floodgates would now open.

The changes in the law

The most important change brought about by *Hoare* concerns assault cases. The ruling reverses the Lords' decision in *Stubbins v Webb* [1993] AC 498 which interpreted sexual assault narrowly as a trespass to the person, preventing the victims of sexual assault from bringing proceedings after their 24th birthday (six years after the date of majority – 18). They could not take advantage of the generous exceptions to the three-year limitation period afforded by s.11 Limitation Act 1980 in negligence but rather were confined by the non-extendable provisions of the six-year period afforded by s.2. Following *Hoare* all victims of sexual assault can use provisions of s.14 (date of knowledge) and the discretionary powers of s.33.

It is well documented that victims of sexual assault are so traumatised by what happened at the time, perhaps intimidated into silence by their abuser, or often psychologically silenced by the unbearable pain required to disclose, that they keep the memory a secret for many years, often taking it to their grave. To prevent such survivors from disclosing due to the circumstances of the offence, is understandably unfair.

In negligence cases, although *Lister v Hesley Hall Ltd* [2002] 1 AC 215 helpfully extended vicarious liability to abuse in institutions by care workers, subject to the act being close enough to the scope of employment, *Bryn Alyn* [2003] EWCA Civ 85 and 783 narrowed its applicability to trespass to the person. Thus where claimants were over 24 years, lawyers had to argue, not that the employers were vicariously liable for the assaults, but rather systemic negligence – that is, they should have known what was going on because of obvious signs such as boys being taken off to staff quarters in front of other employees. This led to artificiality recognised by the House of Lords in *Hoare*.

What are the cases about now?

All we now have to prove is that the assault took place – though this is not necessarily an easy task where the abuse took place many decades ago. Both the abuser and their employers become, subject to arguments on vicarious liability, automatically liable. Thus the defendant's armoury has been reduced to questioning the credibility of the claimant, which in itself can be insulting and cause more damage, or more conventional argument surrounding limitation (for instance, the abuser or witnesses are dead, or the documents have been destroyed, thus a fair trial is not possible). While the defendants have been looking to the higher courts for guidance on how s.33 should be interpreted, each case depends on its own facts, and the way the presiding judge interprets the claimant's evidence.

Interestingly a Master of the High Court in a priest case has confirmed an old line of authority, and held that limitation in these types of case should not be heard as a preliminary issue (*J (2) K (3) P v (1) Archbishop of Birmingham (2) Trustees of the Birmingham Archdiocese of The Roman Catholic Church High Court QBD* [2008] unreported). Unlike mainstream personal injury cases, it is not really possible to split the case up and try limitation without hearing the majority of the evidence.

Stronger or weaker?

Since *Hoare*, historical cases of assault against an abuser have become possible. At our firm such enquiries account for only about 5 per cent of all cases. Only defendants with assets are worth pursuing. In priest cases, it makes the artificial argument that the religious person was not employed by the church but rather fulfilling a vocational position less attractive where the church are indemnifying the priest.

Before *Hoare* one had to produce evidence of systemic negligence, which was difficult in very old cases where there had been no police investigation, and the defendants objected to provide huge amounts of discoverable documents on systems of management over a number of years. Now the issues are narrower, in that, in most cases, one only has to prove that the abuse took place. While pre-*Hoare* proof of abuse was also necessary, the defendants usually did not challenge the veracity of the allegations. One is now mounting a quasi-criminal trial but with a lower standard of proof. Thus contemporary evidence of corroboration from other pupils, staff, or evidence of complaint become important. And it is still important to group claimants together and provide "similar fact" evidence of method of operation and commission by the abuser. It must still be relevant that the institution received complaints but turned a blind eye, which was all too common. The quality of evidence by the claimant must also be assessed.

Punitive damages

Where clients are being compensated for an assault, it should be possible to claim punitive, exemplary, or aggravated damages in a similar way to police assault cases. Previously the clinical negligence case of *Rookes v Barnard* [1964] Appeal Cases 1226 stated that it was inappropriate to award anything more than general damages where the tort is negligence and no more than inattention took place. But although these cases were fought in negligence, in reality they are about intentional assault. Moreover, in some of the institutions, the degree of "inattention" borders on criminal negligence to such an extent that some police forces have tried to prosecute the "disbelieving" head warden.

Documents relevant to the quality of managerial care, or the lack of it, will thus, once again, become disclosable, and comments made at public or other enquiries from investigations will also be relevant.

The floodgates have not opened. Many claimants do not know that the law has changed. Following *Hoare*, one or two claimants, who years ago had been turned down by lawyers for a number of reasons including limitation, wanted to resurrect their claims. In most cases however, the further passage of time worked against them.

Across the country, at any one time, there are between 2,500 and 5,000 cases. The defendants' attitude has hardened because of comments made by Lord Brown in *Hoare*. This development will simply serve to delay the inevitable success of publicly funded cases with a consequent monumental increase in adverse costs.

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