

The test of time

The *Hoare* decision sought to simplify the law on limitation but practitioners are still seeking clarification from the higher courts as to how judges should exercise their discretion in historical abuse cases, says **Peter Garsden**

THE FLOODGATES HAD not ushered in a tide of claimants at the time of my last article, nearly a year after the *Hoare* decision relating to institutional and historical child abuse in children's homes (*A v Hoare & 5 Others* [2008] UKHL 6; see 'The floodgates stay shut', *Solicitors Journal* 16 September 2009). But law in this area moves so quickly that an update is due six months later.

Efforts by defendant solicitors to stop the dam from bursting are gathering apace. Cases are building up in their numbers, and costs escalating as a small team of defendant lawyers frantically seek "clarification of the law" without success in the higher courts. The hot topics are now s.33 Limitation Act discretion, and applications to treat limitation as a preliminary issue. The defendants are anxiously seeking guidance that they may well never find.

Limitation as a preliminary issue

At the time of writing, an application is pending at the High Court in Manchester for a group litigation order on behalf of approximately 150 individuals abused at homes managed or controlled by Manchester City Council. This is the second group to be formed. The first cohort settled amicably for £2.6m in March 2007, before *Hoare* was decided. Although survivors were continuing to come forward, we were reassured that they did not have to join the group, because their cases were to be settled. With some cynicism, we went along with it.

Two things then happened:

1. Insurers came on the scene (because many of the allegations were later in time when the council was not self-insured) and attitudes changed.
2. The *Hoare* decision was handed down. It trumpeted a simpler and less costly approach to the law in response to quite a lot of survivor protests, many of whom had been frustrated by the severe treatment of 'date of knowledge' in the Court of Appeal case of *Young v Catholic Care and the Home Office* [2006] EWCA Civ 1534.

Short of arguments to defeat abuse claims, and anxious to prevent the floodgates from opening, the defendants have concentrated their efforts on trying to knock out historical



abuse claims early by claiming that money and time can be saved by having limitation tried as a preliminary issue. They rely upon the judgment of Auld J in *KR v Bryn Alyn Community Ltd (CA)* [2003] QB 1441, which incidentally was obiter dicta, where it was said: "It is not always feasible to produce savings in time and costs for the parties to be able to deal with the matter by way of preliminary hearing, but a judge should strain to do so wherever possible."

Sadly for the defendants this is the only judgment in their favour. The remainder favours the claimants. The most recent example of this is the High Court decision of *Thompson v Archbishop of Birmingham* (unreported High Court decision of 19 December 2008, but on ACAL (Association of Child Abuse Lawyers) website for members only). Here, the predominant factor appeared to be the desirability of not subjecting the claimant

to having to give evidence twice. Because issues have now narrowed, little time and cost can be saved by way of the limitation argument being heard as a preliminary issue.

Yet Manchester City Council and other defendants continue to make repeated applications. The issue is endemic to abuse cases, where limitation arguments are so intertwined with the main case that it is not possible to hive it off without practically running a full trial. Evidence to justify delay, for example, may only be revealed in historical documents produced on full disclosure.

Section 33 discretion

Defendants have anxiously been seeking guidance from higher courts on the implications of *Hoare* for 18 months now. Meanwhile, rather than settle existing cases, most local authority defendants are now denying everything to await clarification from the

higher courts.

In January 2009, four test cases in the Nugent Care Group Action came before Irwin J at Manchester High Court (*AB & Others v Nugent Care Society* [2009] – unreported, but viewable on the ACAL website). The group is celebrating its 12th anniversary, during which time several attempts have been made by the defendants, without success, to persuade the court to treat limitation as a preliminary issue. Irwin J, however, decided that limitation should be tried first before other issues at the trial.

Two of the four cases were successful. It is difficult to summarise any common themes from the judgment because the judge was simply exercising his discretion under s.33. Unusually, leave was given to appeal three cases. The judge was aware of the defendant's enthusiasm to seek "clarification of the law". To date, the only real guidance appears in the *Hoare* judgment of Lord Brown in this often quoted section:

"Whether or not it will be possible for defendants to investigate these sufficiently for there to be a reasonable prospect of a fair trial will depend on a number of factors, not least when the complaint was first made and with what effect. If a complaint has been made and recorded, and more obviously still if the accused has been convicted of the abuse complained of, that will be one thing; if, however, a complaint comes out of the blue with no apparent support for it (other perhaps than the alleged abuser has been accused or even convicted of similar abuse in the past), that would be quite another thing. By no means everyone who brings a late claim for damages for sexual abuse, however genuine his complaint may in fact be, can reasonably expect the court to exercise the section 33 discretion in his favour. On the contrary, a fair trial (which must surely include a fair opportunity for the defendant to investigate the allegations) is in many cases likely to be found quite simply impossible after a long delay".

While Lord Brown was obviously trying to be helpful, he was dealing with an appeal where there had been a conviction. In the 1990s there was much enthusiasm on the part of the police force to trawl, investigate, and prosecute historical abuse in institutions, whereas now, with new targets from Government, much historical abuse is going undetected. Thus there are many cases where:

- a) the abuser has been prosecuted and convicted, but not for the allegations complained of by the claimant;
- b) the abuser is dead, but has been subject to a police investigation;
- c) the abuser is dead, has not been investi-

gated, but many claimants from the same home make allegations against him/her of a similar nature;

d) the abuser has been prosecuted but found not guilty because of a technical breach of the law by the prosecutor at the trial;

e) the abuser has been prosecuted for offences against other individuals and found not guilty.

"Abuse cases are being fought in a more vigorous manner"

Unanswered questions

One can see that although Lord Brown was trying to be helpful, he left open a number of unanswered questions as to how the courts were going to exercise their discretion in historical cases.

In the *Nugent Care* case the only summary that one can deduce is that Irwin J used the word "proportionality" which is derived from the case of *Robinson v St Helen's Metropolitan BC* [2002] EWCA Civ 1099, which was a dyslexia case where the negligence of the education department of the local authority was alleged.

It seems that in two of the four cases the judge came to the conclusion that the allegations involved sexual abuse, and some serious psychological harm, and were proportionate to send forward to a trial on liability. Of the two cases which failed, one involved physical abuse only, and the other some debate between the experts as to whether the abused had suffered a psychological disorder. Since the case of *Bryn Alyn*, of course, the claimant is compensated for the act of abuse itself as well as the psychological consequences, thus the absence of a disorder is not necessarily fatal to the claim.

Irwin J said in the case of JPM: "It seems to me that this abuse was bad, and that must be weighed to some degree in the balance. If a more liberal approach to s.33 discretion is to be taken in these cases, then on balance this is a proper case for the exercise of the discretion, and I so rule."

In relation to JB's case, Irwin J said: "The nature of the abuse here is much less stark. On balance, I do not extend discretion in the case of JB."

In respect of DB he asked: "Is it proportionate that an action should proceed on these facts? The damages here would be relatively

limited, but this is not trivial abuse, even though it is a single incident. This matter should be capable of a short trial. It will need active case management to ensure that it is kept within bounds, given the basis upon which discretion has been exercised, but given that consideration also, it seems to me possible to have a fair trial. Therefore it is both proportionate and equitable to permit this case to proceed, for the reasons stated."

Finally in HC's case he said: "Would an action be proportionate? Here the damages would be likely to be very modest indeed, on what might conceivably be proved. Even a carefully case managed case, kept to what was absolutely essential, would be likely to cost far more than any compensation for the claimant, and I bear that strongly in mind. I therefore conclude that it would not be equitable in this case to permit the action to proceed, and the discretion is exercised accordingly."

An impossible dream

Despite liability being narrowed to the abuse itself rather than systemic negligence, cases are not being settled but fought on limitation grounds in a more vigorous manner, in the hope that some precedent will appear from the higher courts to show whether cases should be settled or fought. It would well be argued that the defendants are chasing an impossible dream, based on the following considerations:

1. Section 33 discretion depends upon the combination of five factors, which are not exhaustive, and only examples of matters considered by Parliament. Each case is peculiar to its unique facts. So diverse are child abuse cases that a rule of thumb is almost impossible to find.
2. Commonly, in all areas of law, the appellate courts are reluctant to interfere with a judge's discretion. Witness how the House of Lords sent the *Hoare* case back to the High Court judge for him to reconsider his discretion under s.33.
3. It will be interesting to see how the appeals are considered by the Court of Appeal, and whether they will be tempted to interfere with Irwin J's discretion.
4. The only real way of dealing with these cases is to send them all to trial, but at what cost? If there are 150 cases in the Manchester Group, will the defendants want to take the economic risk, particularly where most of the claimants are publicly funded?

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