Newsletter
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ACAL
Association of Child Abuse Lawyers

Key Articles:

President's Report

By Peter Garsden
President, ACAL

It seems that the world of celebrity abuse prosecutions is never ending, with more focus now, it seems on Parliament, than show business eg. Ted Heath, Leon Brittan, Harvey Proctor, and Cyril Smith, all bound up, it is alleged in the Dolphin Square scenario and Operation Midland. This obviously heightens public interest in the subject of abuse, and encourages more complainants to come forward, which in turn results in more abuse enquiries at our offices.

The question is, are all clients going to ACAL Members? I suspect not. Because of the dearth of well paying fast track cases, more PI solicitors are "having a go" because the fees are not fixed. The problem is that the whole case can become stale through lack of investigation, then a request made to one of us to one of us for a transfer of instruction. We usually refuse because the delay can affect Limitation if severe. If medical negligence also goes the way of mean fixed fees and becomes unprofitable, I hate to think what will happen.

The June APIL/ACAL Conference

If you missed the conference which seems to become more popular each year then you missed a treat. A big thank you to Tracey, Jonathan, Sue, APIL staff, and many other to helped make it a huge success.

There was some controversy over the Mandatory Reporting panel in view of the confrontation between Tom Perry who is passionate on the subject and Barbara Hewson, who took a fairly mild line in comparison to some of her articles. She was arguing that the law would not work because of lack of clarity over the chain of reporting abuse. It did provide some spice to the day and a foray of social media overflow.

Justin Levinson provide his usual legal update, particularly in view of the fact that he was involved in some of the cases, and Richard Scorer provided a helpful summary update on Sexual Exploitation. We also heard from speakers on the history of enquiries, the new Advocates gateway, and correct methods for interviewing clients. All in all a very varied and interesting day. The feedback we received was excellent as usual.

Legal Update

All case summaries we receive for the newsletter are posted to the Legal Cases area of the website with links to judgements, where available. We also include many unreported cases which settle, and group the cases into subject areas – Limitation, Liability, Causation, Quantum, and Miscellaneous, also by Year, and Court type – well worth a look if you are interested.
Examples of cases recently published following the conference from Justin's notes are:-

RE v GE – a case on Limitation where the Claimant in a familial case lost, on the ground of procrastination, which led Justin Levinson to advise that proceedings should be issued within 9 months of instructions

JL v (1) Archbishop Bowen & (2) The Scout Association – 27/5/15 Manchester County Court – an interesting case on consent to assault where the Claimant was awarded damages for some of the abuse which took place in his minority but also a short way into majority. The case is also interesting from a vicarious liability, and limitation point of view.

NA v Nottingham County Council – at the time I write this piece, we are anxiously waiting for the judgment in this case which is important from the point of view of the Woodlands chain of authority, the non-delegable duty of care argument, and failure to care cases. At first instance it succeeded on Limitation, and failed on Liability. Although it passed all the tests laid down by Woodlands, it failed on discretion, on the ground that it was arguably an unreasonable burden of liability to place on Local Authorities.

The Goddard Enquiry

Finally, after the wait of a year, the Goddard enquiry opened its doors and has started taking evidence. It is predicted to last several years. The latest development is an approach by the enquiry to search our homes/cases database for details of allegations at institutions which should be investigated. We are presently negotiating with them as to the mechanics of how access will take place, but are agreed in principle that it is information which should be relayed to them. If anyone has any thoughts on the matter please approach David Greenwood or Richard Scorer who are dealing with the Home Office.

Access to Care Records Campaign

The campaign has leapt forwards since the last newsletter in the sense that we have held several very successful Round Table Meetings in London (thanks to Leigh Day for their help), Manchester (thanks to Slater + Gordon), Coventry (Father Hudson Society), and Essex (the County Council).

The campaign has an important impact on all ACAL cases in the sense that it seeks to influence Data Protection Departments in Local Authorities, not to redact records for either Care Leavers, or lawyers acting for them in contemplated litigation. The case of Durham v Dunne, of course, is of assistance (see the website for more detail). I have also written articles in previous newsletters.

The Round Tables came about because of the desire by the Department of Further Education to find out what the practical issues experienced by Data Protection Officers and Social Services Departments are. Many common themes such as fear of litigation, conflicts over the effect on families, and resource issues will be highlighted in a report being produced by our Barnado's representative Rachael Coffey. Our small team all working purely voluntarily must take much of the credit led by Baroness Lola Young. Darren Coyne of the Care Leavers Association, Leonie Jordan, an in-house solicitor from the now defunct BAAF, and I have organised the Round Tables. We have 2 more left at Leeds (thanks to Bond Dickinson), and Newcastle (thank you Irwin Mitchell), again details on the ACAL Events page.

Mandatory Reporting

Finally, on a very hot week in April, I attended the BASCPAN conference in Edinburgh to argue, in a live debate, the case for Mandatory Reporting. I was against an academic from America who told me she was used to a very negative reception in America where mandatory reporting has been in force since 1963.

Bearing in mind that I was speaking to social workers, psychologists, and academics, who were to be persuaded that subjecting them to prosecution was a good idea, I did not expect a good reception. I did not expect a representative from New South Wales in Australia (it was an international conference), who would question data I produced from the state.

A vote was taken at the beginning and the end to gauge opinion. Those undecided moved to being against mandatory reporting but there were many in favour. I was surprised that those practitioners from foreign countries, who had it,were very much in favour, whereas academics generally were against.

So, as usual, keep well, work hard, empathise with the client no matter how angry and conflicting they may seem. Always remember that any heightened emotion can normally be blamed on a triggering experience from childhood, which we are provoking by taking them through litigation. I find that as long as I keep that in focus, I can forgive whatever is thrown at me.

30th August 2015

Peter Garsden – peter@abneys.co.uk, www.abuselaw.co.uk

Opening Pandora's box – Reflections on the IICSA

By Graham Wilmer MBE – Independent Safeguarding Advisor.

It's not every day that you get a phone call from the Home Office, asking if you would accept a position on an independent panel of inquiry into child sexual abuse. But that is what happened to me on September 4th last year. My response was, 'yes', of course, why would I say anything else? After all, a public inquiry into the catastrophic blight that sexual abuse has inflicted (and still does) on generations of children was what I, and many other survivors like me, had been calling for for many years, with few actually expecting that it would ever happen, but here it was!

A while later, the phone rang again. This time it was the Home Secretary herself. A brief conversation later and my fate was sealed. The following day, a press release from the Home Office confirmed that Barbara Hearne OBE and myself were to assist Fiona Woolf, the then Lord Mayor of the City of London, who had agreed to chair this enormous and complex task, once her term as Lord Mayor was over. The combination of excitement and trepidation I had felt in the hours that followed my discussion with the Home Secretary was short lived, as the following day, September 6th , the attacks on myself and Barbara Hearne began. Our reputations, our experience, our ability and our very existence on the planet became the subject of a level of hostility that was hard to comprehend, as it was not coming from the institutions we were tasked with investigating, but from other survivors, the very people we had been appointed to help!

Difficult as those first few days and weeks were, no one could have known that five months later, the full panel, which by then comprised eight highly skilled individuals, would have been disbanded, and replaced with a smaller panel of four, three from the original panel and one new, and of course, all now under the chairmanship of a senior judge, Justice Goddard from New Zealand, with full powers of compulsion to call witness and evidence, under the Public Inquiries Act 2005.

The attacks continued, and by the time we had been replaced as a non-statutory panel, in February 2015, malicious articles about me had appeared in all of the National press and on social media, but I was not allowed to respond – one of the harsher conditions of being a panel member of an independent inquiry, which was why, on December 28th, I had suffered a heart attack, due entirely to the relentless pressure on me, my family and the Lantern Project, all because I had said 'yes'!

I can't say much more about this here, as there are criminal investigations ongoing that are looking at why some of those who attacked me acted as they did, and civil action may follow, once those investigations are concluded. What I can say is that, as the fog has cleared, the different factions within the numerous survivor groups, who had fought each other from the moment the Home Secretary first announced her intention to hold an inquiry (July 2014), had almost all exhausted themselves, without anything to show for their efforts.

The new inquiry, under Justice Goddard, has no survivors on the panel, whereas the original inquiry panel had two; myself and Sharron Evans, founder of the Dot Com Children's Foundation. Instead, some of the more vocal survivor groups were invited to sit on a consultative panel, the VSCP, which would advise the inquiry, but not be part of it, so they would not be able to attend witness interviews, or see confidential and sensitive documents, nor would they be involved in writing the final report.

Out of this chaos has emerged a new survivor group, Reflections UK, which held its first meeting on July 25th in Loughborough. The new group was founded by Phil Lafferty, Esther Baker and Jenny Tomlin, all of who have also suffered relentless attacks in the press and on social media by the same hard core of individuals who attacked me, and continue to do so, although the clock is ticking as action to call them to account is under active consideration.

At the launch of Reflections UK, Nicky Morgan, Education Secretary, and Jess Phillips, newly

elected Labour member for Birmingham Yardley, both gave their staunch support for the new group, promising to advocate with conviction in both Parliament and the Cabinet, on behalf of survivors, which was greeted with applause from the many survivors in the hall, many of who, including myself, had understandably grown sceptical of what politicians have said to us over the years, when we stood up and tried to speak truth to power.

The founders of Reflections UK have offered a heart felt call to all survivors, regardless of their differences, as the group's Chairman, Phil Lafferty, confirmed at the meeting: "Let's stand united, together, and change the way people and the Government view the issues of Child Abuse."

Given the survivor wars we have seen over the past months, this would seem like an aspiration that will be hard to achieve, but when you see the strength and experience of the team of advisors Phil, Esther and Jenny have appointed to help them, they are a force to be reckoned with, and I am very proud and excited to be one of them. Message to bad guys – we are coming to get you. Pandora's box has been opened.

Gary Wilmer MBE

GIVING EVIDENCE IN CRIMINAL PROCEEDINGS

After almost 18 years specialising in child abuse litigation, I was recently asked to give evidence as a witness for the prosecution in criminal proceedings relating to a client I advised several years previously.

Essentially, my client at that time was a victim of childhood sexual abuse and she attended my firm's offices to seek advice regarding the options available to her. She was incredibly upset during the initial consultation and was unable to really comprehend what advice I was giving to her. She told me that she was sexually abused by her father and her stepfather when she was a child and as an adult she had grappled with this for many years. Her children were all grown up and she felt unable to cope with the psychological effects of the abuse on a daily basis. It had wrecked her life.

I advised her to contact her local police station and speak with the child protection team for further advice in regard to a potential criminal prosecution. I also explained to her the procedure regarding pursuing a civil claim and I also explained to her in detail the Criminal Injuries Compensation Authority Scheme.

My client was visibly upset and was unable to stop crying during the consultation. She told me that she was unable to contact the police as she was too upset and asked me to telephone the police for her and to ask the police to visit her at home so that a witness statement could be taken and the matter could be progressed.

I then telephoned the police and advised the telephone operator that I had a client with me who wanted to speak to the Child Protection Team about reporting historical abuse and that she wanted to meet with a police officer at her home address to discuss matters in more detail. That was the extent of the involvement I had with the police and I terminated my telephone conversation after providing the operator with my client's full name, address and contact telephone number.

Thereafter I had very little contact with my client who I had assumed was awaiting the outcome of the criminal proceedings before taking any further action regarding a civil claim. I had minimal contact with her during this period save writing her a few letters and I spoke to her at least once and she told me that the criminal proceedings were ongoing and taking a long time to progress.

Several years later I was contacted by the police to give evidence in the criminal proceedings regarding the telephone conversation I had with the operator at the time of the consultation with my client. I then gave a witness statement to the police in September 2014 explaining the fact that I had merely telephoned the police operator, provided my clients contact details and asked the police to arrange a home visit to interview my client.

In July 2015 I was summoned to give evidence in the criminal proceedings. I could not understand why I was required to give evidence as the police and the CPS had a copy of my clients file with the typed up attendance note of the consultation I had with my client and all correspondence on file. By that time I had moved firms and I no longer had the conduct of the file which incidentally had been archived a year or so earlier.

I tried in vain to persuade the police witness liaison officer that there was no need for me to attend court to give evidence as my witness statement was straightforward and the prosecution had access to my previous firms client file. In fact, a proper file had not been opened it was a temporary file as I did not have instructions from the client to proceed with the matter any further.

The criminal proceedings commenced and were then adjourned mid trial and resumed again in late July 2015.

Unfortunately, the prosecution insisted that I gave evidence and I had to travel to Woolwich Crown Court to do so.

I arrived at court at 9.45am. I was told to get there for 10am. Unfortunately I did not give evidence until 11.50am and after almost 25 minutes in the witness box being cross examined by counsel for the Defence I was released by the Judge.

The main emphasis on my evidence was the fact that I had advised my client on the civil litigation procedure in regard to pursuing a claim for damages and the prosecution tried to insinuate that that was the main and only reason why my client had reported the matter pertaining to the childhood sexual abuse to the police. I stood my ground and I explained that I provide information to all of my clients at the outset including information regarding criminal proceedings, CICA and civil proceedings.

Counsel for the Defence tried to persuade me that my client had asked for that information and I explained very clearly that I provide the information to all my clients and that I confirm my advice in writing. She even tried to persuade me that I had only written to my client about the potential Defendant's financial standing and land registry details because my client had asked me to do so. I explained again that I advise all of my client's, if necessary about the potential Defendant's financial standing and property information from the land registry if they own a property as there is no point pursuing a man of straw.

Another client of mine recently gave evidence in criminal proceedings and was noted as telling the court that his claim was worth £50,000. The thing is I don't think I ever told him the potential value of his claim and that was his downfall as he was seen by the jury to be reporting the matter of the proposed abuse to the police so that he could bring a civil claim for compensation. My client's case is unusual in that the potential abusers were his work colleagues and he is off

sick from work and his earning capacity is limited. It also came out at trial that he was working on the side while off sick. He had failed to tell me that.

The moral of this story is to take careful notes when seeing a client, ask everything, explain the advice that you give to your client in a straightforward letter and do not offer to telephone the police for your client in the first place!

Stephanie Prior, Partner
Osbornes Solicitors LLP

Claiming for lost foster care allowances
Article by Malcolm Johnson of BL Claims

At present I am running a claim against foster carers for physical and emotional abuse over a period of eight years. The local authority that placed my client with these foster carers is also a Defendant. The claim against the foster carers is framed in trespass to the person together with harassment, whilst the claim against the local authority is framed in negligence insofar as it is alleged that the Claimant never should have been placed and allowed to remain with the foster carers. There are also claims based on vicarious liability and non-delegable duty against the local authority. The usual claims are made for pain and suffering, therapy and loss of earnings.

A further claim is made in relation to the foster care allowance paid to these foster carers by the local authority. It is the Claimant's case that during the period of their foster care, his foster parents used a proportion of that allowance for their own benefit and paid out the lowest possible minimum amount for the benefit of the Claimant. Over the period in question, we can show that around £75,000 to £77,000 was paid over in relation to this foster child. The documentation that we have provides an insight into how foster care allowances are paid. In 1996 to 1997, the rate for the child was around £100 a week, and by 2005 had risen to nearly £200 a week. The longer the foster placement, the higher the rate as the foster parents moved from being short term to long term foster carers. With each birthday, the rate increased.

What is the legal premise on which the claim is made? The first is to say that the local authority by their negligence allowed the foster carers to divert the foster care allowance into their own pockets. The second is to say that both the local authority and the foster carers held the foster care allowance in trust for the Claimant, and that they breached that trust. This second argument requires the court to imply a trust, in the same way as a testator might set out a trust for his/her children in the event of death. There may be an argument in some cases for using the tort of conversion, or the remedy of unjust enrichment. In addition, there is the possibility of making a claim similar to that advance in **Hassall v Secretary of State for Social Security**[1] where it was held that there was an entitlement to non-recoupable benefits lost as a result of an accident. The counter argument to a **Hassall** type claim is that it is a loss incurred by reason of the operation of statute, whereas here the loss occurs because an allowance has been diverted into someone else's pocket.

There are bound to be a number of arguments against this kind of claim. Firstly it might be said that the loss of foster care allowance is double recovery. It simply reflects the pain, suffering

[1] [1995] 1 WLR 812

and loss of amenity element, which in turn reflects the neglect of the foster child. The answer to that is that foster care allowances are paid for the upbringing of a child. That upbringing encompasses a whole host of factors (which we discuss below) all of which are collectively quite different to the term "pain, suffering and loss of amenity". Secondly it might be argued that the foster care allowances are not paid to the children direct. They are paid to the foster parents for food, clothing, outings, presents, pocket money and so on. The child has lost nothing. The answer here is that the child has lost the benefit of the money, in the same way that a victim of an accident takes the benefit of gratuitous care and is permitted by a legal device to turn that claim into another head of damages. That device has been invented by the courts to enable victims of accident to recover the value of the care undertaken by relatives and friends. In this particular case, the foster parents were at one point reminded by social workers that the allowances were not a "wage" but were intended the costs of looking after the children.[2]

I would point out at this stage of the discussion, that what we are claiming for is not in fact care in the **Hunt v Severs**[3] sense, but the cost of bringing up a child, which is very much wider and which incorporates a number of elements as we will see below.

Before we consider the way in which such a claim is calculated, we should take a brief look at how foster care allowances have developed over the years. First of all, foster care is a very old concept. There are statutory fostering arrangements going back to the Gilberts Act 1782, but it appears that the historical preference of the authorities was for residential placements. The Curtis Report in 1945[4] put forward the recommendation that foster carers be paid and thus be subject to local authority control. Some European countries do in fact pay foster carers a wage.[5] The counter argument to the Curtis Report was that remuneration would cut at the root of the foster parent/child relationship.

Section 13(1)(a) of the Children Act 1948 placed a duty on a local authority to find every child in care a foster home as a first option before considering residential care. It was felt that foster care represented the best solution for children deprived of their parents. Section 49 of the Children and Young Persons Act 1969 modified this duty so as to place foster care and residential care as equal possibilities for a local authority choosing a placement.

In relation to allowances, the Boarding-Out of Children Regulations 1955 were remarkably silent. The 1988 Regulations set out a schedule of matters to be included in any agreement with foster carers, which in turn included "*Arrangements for the financial support of the child during the period of the placement*" as did the Foster Placement (Children) Regulations 1991 and the current Fostering Services (England) Regulations 2011.[6]

However residential homes proved more expensive than foster care. By way of example in 1972, the average cost of a residential placement was £21 per week, whereas foster care only cost £4 a week. In 1984, the cost was £304 per week for a child in residential care and £42 per week for a child in foster care. There is an argument that the real cost of fostering a child is considerably higher than the foster care allowance, and that the difference between the two types of cases are in fact narrower. Nonetheless as the post war years went by, more and more children were being place in foster care. As time went on, Sir William Utting in his report "*People Like Us*" noted that in 1995, there were some 8,000 children in homes as opposed to 40,000 in 1975.

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2 This does of course provide an argument against the foster carers being treated as the local authority's employees.

3 [1994] 2 AC 350

4 Report of the Care of Children Committee 1946, Command 6922, HMSO

5 According to "The Adequacy of Foster Care Allowances" published in 1997, these were Denmark, France, Germany, Luxembourg, Portugal and Norway

6 SI 1955/1377, 1988/2184, 1991/910, SI 2011/581

The preference for foster care put pressure on a creaking system. In September 1997 the UK Joint Working Party on Foster Care recommended a new initiative to encourage local authorities to set up a reward system for foster carers. At around the same time, the National Foster Care Association launched a publication "*Foster Care in Crisis: A Call to Professionalise the forgotten Service*" This was a campaigning document, containing a clarion call for an upgrading of foster care services, greater professionalism and the introduction of national standards. This led to the UK National Standards for Foster Care published by the Fostering Network in June 1999, and they were followed by the National Minimum Standards – attached to the Fostering Services Regulations 2002 which replaced the Foster Placement (Children) Regulations 1991. Those standards are now attached to the Fostering Services (England) Regulations 2011.[7] Standard 28 states that each foster carer should receive *"at least the national minimum allowance for the child, plus any necessary agreed expenses for the care, education and reasonable leisure interests of the child, including insurance, holidays, birthdays, school trips, religious festivals etc., which cover the full cost of caring for each child placed with her/him".*

In relation to foster care allowances, there was also pressure to set a minimum national rate. A publication in 1997 "*The Adequacy of Foster Care Allowances*" (published by Ashgate) written by Nina Oldfield makes the point that as at 1997, foster care was the most common form of care and accommodation for children "looked after" by the state. The book also studies the attitudes of foster carers. As at 1997, there was evidence that long term foster parents did not regard themselves as working for any kind of reward whereas short term foster parents regarded themselves differently. In other words, there was a considerable degree of altruism present in what was a core social services function. Each local authority determined its own level of allowance, reflecting the age of the child, and that allowance was sensitive to supply and demand in the local area.

Section 49 of the Children Act 2004 allowed what is now the Department for Education and Skills to set a National Minimum Fostering Allowance[8]. However there are minimum rates set by other bodies such as the Fostering Network[9] and the national rates do not include any element of "reward".

We now come back to the way in which one calculates the use of a foster care allowance. As it happens in my case, at the outset of the placement, there were a number of important publications that examined the nature of foster care. One of these was "*Small Fortunes – Spending on children, childhood poverty and parental sacrifice*" by Sue Middleton, Karl Ashworth and Ian Braithwaite published by the Joseph Rowntree Foundation around 1997. This survey was based on a random sample of individual children taken between February and June 1995. The survey divided children into four groups:-

- Babies (under two year olds)
- Pre-school (two to under five year olds)
- Primary (children in full-time school under the age of 11)
- Secondary (11 to 16 year olds)

Table 8 on page 19 of "Small Fortunes" sets out the various elements of weekly expenditure on an average child in percentage terms (as at 1995) as follows. For the purposes of my case, only three of those categories are relevant:-

[7] www.gov.uk/government/uploads/system/uploads/attachment_data/file/192705/NMS_Fostering_Services.pdf
[8] https://www.gov.uk/foster-carers/help-with-the-cost-of-fostering
[9] https://www.fostering.net/all-about-fostering/resources/good-practice-guidance/fostering-networks

	Pre-school Age 2 to 5 %	Primary 5 to 11 %	Secondary 11 to 16 %
Food	39	38	41
Clothes	13	9	7
Nappies	4	0	0
School	0	8	11
Activities	6	12	9
Baby-sitting	2	1	1
Telephone	0	0	1
Other regular spending	14	7	7
Other money	1	1	3
Christmas	6	7	8
Birthdays	4	3	4
Holidays/outings	10	12	8
	99	99	100
Actual cost as at 1995	£41.28	£46.30	£52.38

"*Small Fortunes*" does not explain what happens to the 1% for the first two categories, but the Table above provides a rough and ready breakdown of a foster care allowance. These 1995 weekly costs are actually well below the general level of foster care allowances paid in that area of the country for that time. The book "*The Adequacy of Foster Care Allowance*" provides evidence to show that foster children are more expensive to bring up, and that they generate extra costs (for instance in terms of telephone calls to social services or damaged furniture). The book also explores the financial consequences for foster parents of bringing up a "looked after" child. Table 3.27 on page 130 sets out these costs, which are said to exceed the costs of bringing up a non "looked after" child by the following percentages:-

0-4 years – 62%
5-10 years – 54%
11-16 years – 51%

Coming back to "*Small Fortunes*" at page 20 onwards, the following definitions are pertinent.

- "School" includes categories such as school trips; leisure trips; extra lessons; contributions to schools; sponsorship and charity donations; sport; school plays and concerts.

- "Other regular spending" includes items such as toys and games; books; computer games; stationery and craft equipment; audio and video tapes; and toiletries.

- "Other money" is pocket money.

The claim for lost foster care allowance is made on the basis of a percentage reduction. The Claimant alleged that in relation to certain items of expenditure listed in the Table above, these were either not made or made inadequately. Thus it is alleged that:-

(a) The foster carers spent no money on any holidays
(b) The Claimant was fed bland and dull food
(c) The Claimant was only given poor quality clothing;
(d) The Claimant was not allowed to undertake extra-curricular activities at school
(e) The Claimant was not bought presents
(f) The Claimant was not given pocket money

Therefore what we did was calculate the loss to the Claimant by taking a percentage "lost" from each element and putting the total percentage into the foster care allowance paid over the years. That percentage was obviously based on an estimate realised from the Claimant's evidence and to some extent his social services notes. The percentage obviously changes depending on the age of the child.

	Pre-school Age 2 to 5 %	Primary 5 to 11 %	Secondary 11 to 16 %
Food	10	10	10
Clothes	5	5	5
School	0	5	5
Activities	6	6	6
Other regular spending	5	5	5
Other money	1	1	3
Christmas	6	7	8
Birthdays	4	3	4
Holidays/outings	10	12	8
Total	47%	54%	54%

The actual reduction came out at around 52%.

Obviously we do not know whether such a claim would be accepted by the court, but the above method cannot be described as less accurate from the calculations that the court makes in the calculation of a constructive trust in relation to a home owned by two co-habitees, where years of contributions by both sides, many of which will not be documented are weighed in the balance.

(Certain details of the case referred to above have been changed to protect identity)

Malcolm Johnson – BL Claims – August 2015

Acting for Adults Abused by Practitioners by Victoria Thackstone

For in excess of 10 years, I have represented Claimants in claims for compensation for "professional abuse" as a result of the inappropriate crossing of patient/practitioner boundaries and in respect of abusive treatment by a wide range of health care professionals. I also deal with cases relating to psychotherapy and counselling which has been negligent in other ways, sometimes (but not always) connected to the crossing of patient/practitioner boundaries and abuse.

I found it very interesting to hear what the Speakers had to say at the ACAL Abuse Conference on 2 June 2015, in particular Eloise Power's talk on abuse claims in the medical profession as it was so closely connected to my work.

The Clients

In some ways, acting for adults who have been abused in adulthood by health and social care practitioners is similar to working with adults who were abused as children, as both are vulnerable people who have been abused by someone who was in a position of trust and power.

However, not only do we need to take into account the psychological impact the abuse/negligent treatment has had on the Client, we also have to take into account the exacerbation of the effects the Client continues to suffer as a result of past life events, such as childhood/adolescent sexual

abuse, not only when presenting the claim but when working with the Client as well.

It can also be difficult to manage the Client's expectations in that what may be an obvious moral wrong doing to the Client may not necessarily equate to legal negligence, and in their expectations of what a civil claims process can or cannot achieve.

The Client may be in the midst of a criminal investigation into the practitioner's conduct, or a regulatory or membership organisation complaint investigation into the conduct, or sometimes both at the same time. Consideration must be given in respect of whether to pursue a claim at the same time as these investigations, both in respect of the legal interaction between the different process, and the Client's own psychological ability to pursue more than one process at once.

We have worked with people from all walks of life and all combinations of Claimant and Defendant genders.

Our extensive experience in claims of this nature has meant we have been able to successfully pursue claims for people when other experienced clinical negligence solicitors have declined instructions.

We are regularly contacted by people who have obtained my details from Advocate Services and other mental health practitioners who are aware of my work.

Legal issues

All manner of legal issues can arise in cases of this nature, such as:

- Limitation – it can often take the patient a number of years to be able to disclose the abuse/negligent treatment.

- Disclosure of documentation by Defendants and redaction of the same.

- Breach of confidentiality (which can be an ongoing breach of confidentiality).

- The legal status of the Defendant when in a non-NHS setting.

- The practitioner's potential lack of insurance or the insurance company's refusal to indemnify the practitioner.

- Overlap into other areas of law – there can be elements of breach of contract and breach of the Data Protection Act 1988 which have to be considered alongside the abuse/negligence.

- Issues in respect of causation (see below).

- Issues in respect of vicariously liable (again, see below).

In addition, where the case relates to psychotherapy or counselling, although each case is individual, any number of complex and technical psychotherapy/counselling issues can arise when dealing with breach of duty, as this highly specialised area of law falls in the grey area between clinical negligence law and psychology. Also, as there are many ways of conducting psychotherapy, what may be deemed "acceptable" for one mode but not for another and knowledge of this is imperative in order to properly advise the Client.

A common legal issue faced in claims for professional abuse is that of causation as, at the end of the day, there was a reason the Client was seeking mental health support in the first place. The Defendant's legal representatives will often seek to say that even if there has been breach of duty, the effect of the breach of duty has not impacted the Client beyond the Client's pre-existing mental health condition and is a "blip" in an already troubled life.

If the claim is pursued against both the practitioner and their employer (i.e. a private company or the NHS) there can be extensive correspondence with the legal representatives acting on behalf of the employer Defendant in respect of whether the employer is vicariously liable for the practitioner, especially if the allegations are of a sexual or intimate nature.

Many Defendant legal representatives do not appear to understand the detrimental consequences of an abusive practitioner/patient relationship, and time (and legal costs) has to be spent to, in effect, "teach" the legal representative of the issues and how damaging the practitioner's conduct was. This is especially so when the claim relates to technical counselling/therapeutic negligence which occurred behind closed doors (i.e. the practitioner's word against the word of a 'mental health' patient), rather than the more obvious breach of duty by the practitioner engaging in a sexual relationship with their patient.

Counsel & experts

It is important to work with specialist Counsel and experts.

Although it may seem surprising, not all experts actually realise what harm can come from an abusive relationship. The experts we tend to use are dual qualified as both Consultant Psychiatrists and psychotherapists. This means that as well as the expert being able to deal with both breach of duty and causation, the expert can also deal with the issues in a more therapeutic manner and set out the context which links breach of duty and causation.

It is also vital that the Barrister instructed is able to deal with the various legal issues, as well as being able to convey his or her Opinion to the Client in an empathetic and sensitive manner.

Type of practitioner

We have pursued claims against both mental health and non-mental health practitioners such as: counsellors, psychotherapists, psychiatrists, psychologists, mental health social workers, key workers, GPs, A&E doctors and plastic surgeons.

Additional training

As part of my training, I have completed the Counselling Psychotherapy Central Awarding Body (CP/CAB) Level 2 Introduction to Counselling and Level 3 Certificate in Counselling Skills. These qualifications are part of the progression towards qualification as a professional counsellor and have provided me with a valuable insight into the role of a counsellor and have allowed me to develop listening and communication skills that are of particular assistance and relevance when dealing with Clients who have experienced professional abuse.

Personal observation

Many Clients will have been through complaint or disciplinary processes and be dissatisfied in the way they have been treated during the process – as a "witness". I have found that working in the way I do with my Clients empowers them and helps them to rebuild their trust in other professionals, and helps them to move forward with their lives. One of the great pleasures in working with Clients in this kind of claim can be to see the Client gathering strength and power as the case progresses to a resolution.

Victoria Thackstone
Litigation Executive
hlw Keeble Hawson LLP, 14 Prince's Street, Doncaster, DN1 3NJ
01302 308685
20 August 2015

Respond
By Dr Noelle Blackman, CEO, Respond

Respond was established as a charity in 1991 with the aim of providing therapeutic support to people with learning disabilities and autism who were victims of abuse. At

the time, there was very little recognition of the scale of sexual abuse amongst people with learning disabilities and autism, and there were practically no services offering specialist knowledge and support. As the organisation developed it became apparent that it was often difficult to differentiate between people who were victims of sexual abuse victims and those that were perpetrators. This was due to some perpetrators having themselves been victims of sexual abuse when they were children, or later on in their lives. For this reason, Respond made a decision to provide services to both victims and perpetrators. Working in this way, the clinical team came to see the devastating effects of abuse in childhood upon a person later in life, such as difficulties in trusting people, in being able to develop healthy relationships and a positive sense of self. It sometimes also led them to engage in sexually abusive or harmful behaviour, which only furthered the suffering to both themselves and others. Although Respond's initial purpose was to respond to sexual abuse, the remit has extended to include all forms of abuse and neglect, as well as other significant trauma. One of the main reasons for this was to be able to extend specialist therapeutic support to a greater number of people with learning disabilities and autism. Respond works with children, adolescents and adults. Over the years we have have developed a specific model of psychotherapy, at the centre of the Respond model of psychotherapy is the person with learning disabilities and the therapeutic relationship, surrounding this is the relationship that our organization develops with the supportive network connected to the person with learning disabilities. The people that we work with are often dependent on others to support them in so many ways, we believe that in order for our client's lives to improve there is a need for both internal and external changes. Our aim is to build inner resilience for the person with learning disabilities and at the same time influence the environment in which the person lives. So as well as providing long term one to one psychotherapy we also work to enable the supportive network to become more reflective and conscious about how they support and empower the person that they work with. It is made clear at the beginning of contracting the therapeutic work that this is an important component of our form of psychotherapy. Our relationship with the network has a therapeutic and an educational dynamic and we often challenge existing practice.

Although we are a small organisation our reach is wide and varied, in our 24 years we have grown into an organisation that provides a wide variety of services including one-to-one and group therapy in both clinic and community based settings such as schools, we offer comprehensive risk and parenting assessments, training for families, clients (harm prevention) and professionals. We also have an Independent Sexual Violence Advisor (ISVA) and policy and campaigns officer who is currently focusing on the issue of forced marriage for people with learning disabilities.

Over the years we have developed to move from not only providing therapeutic support but also engaging with wider social issues in order to change attitudes and prevent future harm to some of the most disadvantaged and marginalized members of our society. Our Violence against Women and Girls (VAWG) project and our forced marriage campaign are just two illustrations of Respond working with wider communities in order to change attitudes and therefore improve long term outcomes for people with learning disabilities. One of our newest projects is the Circles of Support and Accountability (COSA) project, which aims to provide community based support and supervision to young people with learning disabilities who have either sexually offended or who are displaying harmful sexual behaviour. COSA is a team of volunteers, carefully selected, trained and supervised by a project coordinator, which is placed around the young person, offering

them the opportunity to engage with the wider community in a safer way.

In a recent report entitled 'Loneliness and Cruelty – *People with learning disabilities and their experience of harassment, abuse and related crime in the community'* Carwyn Gravell interviewed people with learning disabilities and discovered that they regularly experienced 'abuse, harassment and related crime when they spent time 'out and about". Interviewees reported that it was their 'neighbours and local residents that were the common types of perpetrators'. And that the forms of abuse were varied from name calling and physical attacks to financial and sexual abuse.

Respond is unique in the work that it does with some of the most vulnerable people in our society, people with learning disabilities who have been abused. Since the exposure of horrific abuse in the Panorama documentary about a learning disability private hospital, Winterbourne View in 2011 many more cases have emerged. This has led us to develop a family support service that supports families at a time of crisis or trauma. We provide a range of services which include a telephone helpline, trauma assessments for the person with learning disabilities (this can enable them to receive appropriate therapy), counselling support for their families, and training and consultancy for professionals. We have recently supported family members of high profile cases (Winterbourne View and #BringJosh home) to meet with the Minister of Health and Social Care in order for him to further understand their situation and support them to get the help that they need.

We are leaders in the field of recognising the effects of trauma on this client group and their families. We have been commissioned by NHS England to assess the effects of abuse on the ex - patients from Winterbourne View. We are also working in Partnership with Hertfordshire County Council running a pilot training programme with a group of their senior professionals which is trauma focussed. The aim is to train a small team of LD nurses and social workers to recognize and understand trauma from a psychodynamic perspective. These trained professionals will then be able to enable the care network to understand the challenging behaviours that are connected to trauma and to support them to respond to these appropriately, with the aim of preventing the placement breaking down. We aim to have the course validated and train many other teams nationally.

We are keen to support people with learning disabilities to be able to contribute to the Independent Inquiry into Child Sexual Abuse (ICCSA) as many of the people who have been sexually abused in institutions were children with learning disabilities and it would be so easy for this to be overlooked as their voices are so seldom heard.

Dr Noelle Blackman
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AC v DC

The Claimant sexually abused by his step-father, DC. The Defendant filed a defence but played no significant part in proceedings and apparently did not attend trial. The defence admits that the Defendant was convicted of sexual offences against the Claimant on 20th March 2006 but denied the more extensive abuse alleged in the Particulars of Claim. The Defendant did not file witness evidence.

The unchallenged medical evidence concluded that the Claimant suffers from significant psychological illness. Dr Aitken is unable to apportion the causes of the psychological symptoms but the Claimant's experiences have a significant effect on his development.

The Claimant sought general damages (including a claim for disadvantage on the labour market), any appropriate special damages (including therapy costs), and aggravated damages.

The case was heard before HHJ Robinson at Sheffield County Court on 28th July 2015. The Claimant had previously sued the local authority in negligence and the Judge recognised that he should avoid double recovery for that proportion of damages attributed to the council's failure between the age of 11 and 13.

The Judge found that the Defendant and two accomplices had penetrative sex with the Claimant over a number of years.

The Claimant recounted significant sexual assaults including rapes. His psychiatric issues were detailed by Dr Aitken as including

- Borderline personality disorder, with acute trauma symptomatology and 'as if' experiences with risk of decompensating into "psychotic" episodes, and/or
- Post traumatic stress disorder/Complex PTSD and/or Complex Trauma
- Elevations in strait and trait anger
- Anxiety
- Thought disorder and depression.

The practical impact of these conditions included self-injury and suicide attempts (the most recent attempt at suicide was 3 months before the date of the report), the smearing of excrement, which was still ongoing at the date of the report, punching walls (last done the day before the report) and problems with smoking, drugs and alcohol abuse which had stopped since he had met his then current partner. He had nightmares on a daily basis relating to the abuse and/or being murdered or hit, he felt that he was being watched, and the thought of being raped kept going through his mind. He had flashbacks about being raped and hit. His sex life with his partner was affected. He had visualised/believed that the Defendant had his arms around his partner which had led him to hit her.

In terms of long-term effects, his experiences have and are having a significant effect on his development as a person, the ways he relates to himself and others and his ability to function in the world. He had an impaired sense of identity; a borderline/trauma presentation characterised by a range of intrusive experiences (thoughts, nightmares, voices, sense of presence, visual hallucinations); a dysregulation of emotions; a range of coping strategies (smearing, self injury, responses to perceived abandonment).

The judge found that the Claimant should be awarded £72,000 in general damages plus a 10% LASPO uplift totalling £79,200.

The Judge also awarded £16,000 as aggravated damages as the abuse was a gross breach of trust.

In relation to loss of earnings the Judge found that an award of £5,000 to be appropriate as the Claimant's prospects of work were never good but were worsened by the abuse.

The total award (excluding interest) was £100,200. The judge mentioned that the Defendant may wish to raise the issue of the previous £25,000 award made in proceedings against the council.

Counsel Rob Harland of 7 Bedford Row, London
Solicitor David Greenwood of Switalskis, Wakefield. 8th September 2015.

Independent Inquiry into Child Sexual Abuse
Update September 2015

Since my last update the Inquiry has effectively got key personnel in place and has started the "scoping" exercise to assess the breadth of the problem and how to tackle it. As you know the terms of reference are drawn widely.

In order to manage the vast range of work effectively, the Inquiry has divided the institutional sectors under investigation into five broad workstreams. Each workstream will be led by a member of the Inquiry Panel, or by the Chair. The five workstreams are:

(1) Allegations of abuse by people of prominence in public life - led by the Chair, Hon. Lowell Goddard DNZM

(2) Education and religion - led by Panel member, Prof. Malcolm Evans OBE

(3) Criminal Justice and law enforcement - led by Panel member, Drusilla Sharpling CBE

(4) Local authorities and voluntary organisations - led by Panel member, Prof. Alexis Jay OBE

(5) National and private service organisations - led by Panel member, Ivor Frank.

The inquiry will gather evidence in 3 ways :-

- Through Research,
- from the Truth project,
- and in Public Hearings

The Research Project

This will involve a comprehensive literature review to bring together, for the first time, analysis of all the published work addressing institutional failures in child protection. Led by an expert Academic Advisory Board, the Inquiry will also commission sector-specific research to better understand the scale of the problem and to identify recommendations for change. The Research Project is already under way.

Both David Grenwood and Richard Scorer of ACAL have fed in information into the inquiry. We have agreed that we would put out an appeal to ACAL member firms to assist also. At present the inquiry is working out the scale of the problem and needs to establish an evidence base of cases which have been litigated or settled without proceedings. We are currently waiting to hear from the inquiry what information they will need and will set out more detail to member forms in the next few months.

The Truth Project

This will allow victims and survivors of child sexual abuse to share their experiences with the Inquiry. Those who wish to take part can contact the Inquiry via our dedicated helpline, by email, post or online. https://www.csa-inquiry.independent.gov.uk/share-your-experience or by phone on 0800 917 1000. Survivors will have the option to attend a private session to share their experience with a member of the Inquiry. Their accounts will not be tested, challenged or contradicted. Every person

who shares their experience with the Inquiry will be given the opportunity to leave an anonymised message to be published alongside the Inquiry's reports. The first Truth Project sessions are likely to commence in October 2015.

The Public Hearings

These will resemble a conventional public inquiry, where witnesses give evidence on oath and are subject to cross examination. The Inquiry will select case studies from a range of institutions that appear to illustrate a wider pattern of institutional failings. Evidence is likely to be taken from both representatives of the institutions under investigation and from victims and survivors of sexual abuse. Each hearing will last for around six weeks and the Inquiry expects to hold up to 30 separate hearings. Collectively, the evidence heard in the range of case studies will assist the Inquiry in drawing conclusions about the patterns of child protection failings across a range of institutions in England and Wales. The first Public Hearings are likely to start in 2016.

Again if your clients wish to participate they should contact the Inquiry on :-

Tel: 0800 917 1000

Web page: https://www.csa-inquiry.independent.gov.uk/share-your-experience

David Greenwood

9th September 2015

DIARY DATES

Please note the following:

Friday 23rd October 2015: The ACAL AGM will be held at 2pm in Manchester. An agenda will be circulated to members in the next couple of weeks.

Thursday 9th June 2016: The APIL/ACAL Abuse conference.

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

Other Practitioner Members

- Cost: £150.00
- Benefits: Website, AGM, Workshop (3 CPA Hours), Newsletter, Database, Experts Register
-

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