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IICSA – limitation reform and its flawed approach to re-arranging the goal posts?

By Alan Collins, Hugh James Solicitors

Articles Index

The Independent Inquiry into Child Sexual Abuse ("IICSA") published on, 20 October 2022, its report.

Amongst its recommendations IICSA has proposed reform of the Limitation Act 1980 ("the Act"). It recommends that the UK government makes the necessary changes to the Act in order to ensure:

· *the removal of the three-year limitation period for personal injury claims brought by victims and survivors of child sexual abuse in respect of their abuse; and*

· *the express protection of the right to a fair trial, with the burden falling on defendants to show that a fair trial is not possible. These provisions should apply whether or not the current three-year period has already started to run or has expired, except where claims have been:*

· *dismissed by a court; or*

· *settled by agreement.*

They should, however, only apply to claims brought by victims and survivors, not claims brought on behalf of victims and survivors' estates.

Practitioners in the field of child abuse litigation are only too familiar with the provisions of the Act. The overwhelming majority of claimants seeking compensation for sexual abuse are time barred. The period between suffering the abuse and coming forward is usually measured in decades and presents often considerable evidential and legal hurdles that need to be overcome in order to succeed with a claim.

The courts have recognised in both criminal and civil contexts the reasons why victims and survivors delay in coming forward and reporting the sexual abuse suffered as children.

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S.33 of the Act provides for a civil claim to proceed out-of-time allowing the court to disapply the provisions of sections 11 and 12 if it appears that it would be equitable to allow the action to proceed.

A relatively recent example of where discretion was exercised is that is the case of *FZO v Haringey LBC 2* . The Claimant had been sexually abused by his teacher and was "out-of-time" [sic] by some 25 years, and the Defendant argued it was prejudiced by the delay.

The court, nevertheless, allowed the claim to proceed having concluded that the cogency of the evidence had not been adversely affected.

If, however, there is real prejudice s.33 will unlikely be exercised in the Claimant's favour and a good example is where the alleged abuser is dead and cannot be questioned about the allegations. An example of such a case is that of: *FXF v Ampleforth Abbey Trustees 3* where the alleged abuser was dead, and the court declined to exercise discretion under s.33 and the claim was dismissed. The case illustrates absent a death bed confession or a conviction of the deceased alleged abuser a Claimant is going to struggle to successfully overcome the time bar.

IICSA recommends the sweeping away of the limitation period in such cases, but what it gives on the one hand arguably takes away on the other. It says that there must be the "express protection of a fair trial" which, possibly, is limitation by the back door in all but name? If the defendant, can show that it cannot properly assess the claim it faces let alone defend because, for example, the alleged abuser is dead it will cry, whether justly or not, that it is prejudiced. Therefore, this begs the question why change the law?

To address what is seen as an unjust barrier to justice the proponents of limitation reform point to legislation recently passed by the Scottish Parliament, and by other legislatures amending limitation laws not dissimilar to that in England and Wales. The rationale behind such a reform is to make it fairer for victims and survivors to bring claims who are invariably out-of-time by the time they do so.

The Limitation (Child Abuse) Scotland Act 2017 provides for the lifting of the three-year time limit, in Scotland, in compensation claims arising from childhood abuse. Inserting the new ss 17A-17D in the Prescription and Limitation (Scotland) Act 1973, it represents a sea change in societal attitudes towards child abuse and in appreciation of the consequences not just for the victims, but the wider community.

The Act's objective in lifting the time bar is to ensure that victims of childhood abuse by virtue of the particular nature of the harm suffered are not debarred from obtaining justice simply because of the effluxion of time. The new s.17D, however, provides the court with the power to stay an action brought by a pursuer if a fair hearing is not possible, or if the defender would be substantially prejudiced if the case were to proceed. The question to be asked is what does s.17D mean in practice?

A starting point is to examine an Australian case from Victoria, which has enacted legislation not dissimilar to the 2017 Act. In *Connellan v Murphy 4* the defendant was granted a stay of proceedings. The plaintiff, born in 1961, in her claim alleged that the defendant, who was born in 1954, sexually assaulted her in "approximately 1967 or 1968". The defendant denied the allegation.

Prior to 1 July 2015, the plaintiff's alleged cause of action was statute-barred. However, on that date, the Limitation of Actions Amendment (Child Abuse) Act 2015 commenced, with the effect that in Victoria, limitation periods no longer apply in child abuse claims. The 2015 Act, by s 27R inserted in the principal Limitation Act, expressly does not limit a court's power to summarily dismiss or permanently stay proceedings where the lapse of time "has a burdensome effect on the defendant that is so serious that a fair trial is not possible". For the Court of Appeal in Victoria the fact that key witnesses were alive and able to give evidence was not a trump card, as might have been expected for the plaintiff. The court was required instead to look at, as it saw it, the reality which was that the defendant was being asked to defend himself in respect of an allegation that he had sexually assaulted the plaintiff 49 years before, and "the burdensome and oppressive nature of that task is manifest".

That “task” was made “more oppressive” because the passing of time made it impossible for both parties to investigate, let alone call evidence in relation to, the surrounding circumstances. Moreover, the plaintiff’s own vague recollections were more of a hindrance than an asset. 6

Delay, the court concluded, also hindered the investigation of quantum and causation. The plaintiff was allegedly suffering from PTSD, but the court was not satisfied that the cause could now be investigated after so many years had passed, and any conclusion would now be “dependent upon little more than the plaintiff’s assertions of her subjective recollection of events to which she now attributes importance”.

The court held that it would be unjust to permit the plaintiff’s case to continue and ordered a stay: “The defendant cannot realistically be expected to defend a cause of action that is alleged to have accrued almost five decades ago in circumstances where so little is known about the surrounding circumstances and facts, and all of the principal witnesses who were adults at the time are now dead. A trial of the plaintiff’s allegations would be one that proceeded on a very unsure footing with mere scraps of evidence, the reliability of which must seriously be doubted, being tendered and relied upon. As genuine as the plaintiff’s recollections might be, it would be unjustifiably burdensome to require the defendant to now attempt to defend allegations made against him as a child so many years ago”.

The lesson, perhaps, to be learned from the case is that a survivor, no matter how genuine in the telling of their account, is going to struggle to succeed in the absence of corroboration and must be able to provide significant circumstantial details. So, for example, in a case of sexual abuse in a school, are they able to remember the names of their form teachers; do they have their school reports?

Staying in Australia, the criminal *case R. v. Jacobi* serves as a useful reminder of the issues that defendants may want to raise to argue prejudice occasioned by delay:

(i) the reliability of the victim's recollections;

(ii) the risk of the possibility of reconstruction and reinterpretation of memories;

(iii) the difficulty of having to travel back in time to recall, check and verify the accuracy of events about which evidence is to be given; and

(iv) the difficulty confronting the defendant in endeavouring to obtain and produce documentary evidence or oral evidence from other witnesses which might put in question the evidence of a complainant as to events, times and places.

The same rationale will be found in English civil and criminal jurisprudence: *NA v. Nottinghamshire County Council* ; and *R. v. Dunlop* where it was succinctly said: "The passage of time is, of itself, no impediment to the fairness of a [re]trial".

Case law on delay reveals that courts are again less concerned with the period of time that has elapsed than the effect that delay can be said to have had on the defendant's ability to mount an effective case, for example, where there is evidence of collusion, or a key witness has died.

It is against that backdrop the recent Scottish decision in B v. Sailors' Society and the judgment of Lady Carmichael needs to be considered. The Claimants (pursuers) alleged that when resident at the Defendant's children's home members of staff and visitors physically and sexually abused them. The allegations went back forty plus years which is a scenario that practitioners in the field of child abuse claims will be familiar with. By the time the Claimants' claims were intimated the alleged abusers were dead as, indeed, were other, potentially, key witnesses. Nevertheless, the claims were pursued.

There was supporting if not corroborating evidence from other former residents, and in addition there was also what could be considered similar fact evidence. The Defendant sought a preliminary hearing at which it successfully applied to have the case dismissed on the basis that a fair trial was no longer possible, or in the alternative that it was substantially prejudiced by the passage of time. It relied on the reformed legislation which can be found in the Prescription and Limitation (Scotland) Act 1973 as amended by the Limitation (Child Abuse) (Scotland) Act 2017. By section 17A limitation is abolished viz abuse claims, but there is from a defendant perspective a safety valve which provides as follows:

· 17D Childhood abuse actions: circumstances in which an action may not proceed

(1) The court may not allow an action which is brought by virtue of section 17A(1) to proceed if either of subsections (2) or (3) apply.

(2) This subsection applies where the defender satisfies the court that it is not possible for a fair hearing to take place.

(3) This subsection applies where—

(a)the defender satisfies the court that, as a result of the operation of section 17B or

(as the case may be) 17C, the defender would be substantially prejudiced were the

action to proceed, and

(b)having had regard to the pursuers interest in the action proceeding, the court is satisfied that the prejudice is such that the action should not proceed.

The application was heard without oral evidence, and instead it was considered on the content of the affidavits of the claimants and other witnesses. This has an echo from the past where in the relatively early days of child abuse litigation it was considered appropriate for limitation to be tried as a preliminary issue. It was a practice that came to frowned upon by the English courts and is now very much an exception to the rule. It was recognised that it ran the risk of victims having to give evidence twice, and trial judges effectively deciding on what could be a relatively narrow but crucial issue without having had the benefit of hearing all of the evidence.

Dismissing the Claimants' claims, Lady Carmichael found that a fair trial was no longer possible, and she did so on the basis that the alleged abusers were dead as were other potential witnesses. This she considered to be fundamental because the Defendant was deprived of the ability to obtain potential evidence to refute, if necessary, the allegations. Its ability to question and cross-examine was seriously compromised. The argument that alleged abusers would simply deny matters was not sustainable because they may arguably have information that was pertinent to the issues in the case. This has echoes of the judicial approach in: *FXF v Ampleforth Abbey* Trustees (as noted above the case was dismissed where the alleged abuser was dead).

The Court's attention was drawn to English cases where the Claimants had succeeded where the alleged abuser was dead, but they could be distinguished on the basis that they had either been convicted of child abuse or had made admissions. The alleged abusers in B v Sailors' Society had gone to their deaths, apparently, unconvicted, and absent any kind ofadmission having been made. This distinction was considered to be significant.

If it was thought that the weight of claimant evidence would suffice under s.17A then it was a mistaken one. The consequence of this decision is one that makes it abundantly clear that a fair trial is not possible if the alleged abuser is dead absent a conviction or admission.

In one sense the burden is clearly placed on the defendant's shoulders to demonstrate that a fair trial is impossible, but that's only part of the story. Claimants who have a credible account of abuse would face an impossible burden to discharge if the alleged abuser, absent a conviction or admission, is dead regardless of similar fact evidence being available. We have seen this again in another Australian case where the Court of Appeal in New South Wales in *The Council of Trinity Grammar School v Anderson 14* granted a stay because the defendant could not because, inter alia, crucial witnesses were dead not address *"…in any meaningful fashion with the critical question of whether [the alleged abuser] was placed by Trinity in a position of power and intimacy which gave the occasion for the wrongful acts".*

In simple terms the issue of vicarious liability could not assessed. The judicial approach to these cases can be seen in another New South Wales case where a stay was refused : *Estate of Judd v McKnight 15* , where the plaintiffs had commenced proceedings for damages against the estate of the alleged abuser. The estate sought a stay because the abuser was dead, and because of the delay between the alleged events and the proceedings. The alleged abuser before he died had made a series of admissions which corroborated at least in part the claim now faced by the estate. The court refused to stay the proceedings because, inter alia, they were not manifestly unfair to the estate or would otherwise bring the administration of justice into disrepute among right-thinking people, for the reasons that: each claimant was alive and able to be cross-examined and challenged; the credibility of each claimant was able to be challenged; the claimant's statements to medical practitioners, police or any other person could be examined for consistency and challenged;and as noted already there was evidence available about the alleged abuser's account concerning sexual activity with one of the plaintiffs.

The Judd, FFX and Sailors' Society cases bring us full circle in that they clearly demonstrate that it is not the passage of time alone that defeats a claim but the erosion of the cogency of the evidence as a consequence.

Whilst it would be tempting to applaud IICSA for recommending the abolition of "limitation" but what is proposed, on analysis, is not what it says on the tin. All that can be said based on the case law to-date in the wake of reforms in similar jurisdictions is that the burden has shifted to the defendant to demonstrate why a claim should be stayed but, arguably, the result is the same regardless.

IICSA has merely re-arranged the goalposts and not even shifted them. If, it had taken on board the caselaw from Australia and elsewhere then surely it would have realised what it recommended would not redress the realities of child sexual abuse litigation, and that it would need to go further? The solution arguably applies in the reasoning set out in Judd? The issue or question before the court should be: has the claimant on the balance of probability proved his or her case?

Such a question should not be tempered with arguments as to whether the claimant is time barred or should their claim be stayed. It is clear from the some of the cases cited that on the same facts the claimants may not be able to prove on the balance of probability their cases, but surely such a test is fairer and likely to command more respect than tinkering with the status quo?

The opinions contained in this article are of course my own.

Alan Collins, Partner, Hugh James Solicitors

13 November 2022

Law Society Gazette – Child Sexual Abuse – "Not just a national crisis, but a global one"

By Malcolm Johnson, Lime Solicitors

On 20.10.22, the Independent Inquiry into Child Sexual Abuse published its final report. The Inquiry began seven years ago and it draws on the Inquiry's 15 separate investigations, resulting in a number of reports over the years. Those investigations covered a wide variety of institutions. It covered the Roman Catholic Church in England and Wales, which included Ampleforth and Downside Abbeys and schools, as well as Ealing Abbey and St Benedict's Schools as well as the Anglican Church. The latter investigation included the case of Peter Ball, who was a bishop in the Chichester Diocese and who was convicted of a number of offences in 2015. The Inquiry also considered child protection in other faiths and highlighted the danger of unregistered schools providing full time education.

Various children's homes were investigated, including three run by Rochdale Council, where the Inquiry heard about the predatory activities of the former MP, Cyril Smith. The Inquiry looked into five decades of abuse in homes run by Nottinghamshire City Council and Nottinghamshire County Council, as well as Lambeth Council. In the case of Lambeth, the Inquiry identified a "politicised" culture in "turmoil", which effectively distracted the council from providing children's social care.

The investigation into Child Sexual Exploitation emphasised that this problem was widespread.

In relation to the Internet, the Inquiry noted the dramatic rise in abuse. The Inquiry said that internet companies had "failed to demonstrate that they knew the scale of underage internet use." ." In 2020, the Internet Watch Foundation processed over 153,000 reports containing child sexual abuse imagery and the figure is rising.

There was also an investigation into the experience of children outside the United Kingdom, which began with an examination of the Child Migration Programmes. It was found that migrating children (mainly to Australia) would commonly live in settings, where their treatment was akin to torture.

The Westminster investigation considered the allegations made against persons of public prominence. Although the Inquiry concluded that there was no Westminster paedophile network, it noted that it was "unacceptable" that at the time of the public hearing, some political parties had chosen not to put appropriate safeguarding and child protection policies in place. Political parties were more concerned about political fallout. The recent ruckus in the voting lobbies of the House of Parliament may stem from the behaviour of adults, but it is an illustration how far those who profess to govern us, have to go.

Association of Child Abuse Lawyers – Continued 1

The investigation into the "Institutional responses to allegations involving the late Lord Janner of Braunstone QC" considered the allegations brought against the former Labour peer, in circumstances where there was no conviction nor any judicial finding of fact. It found no evidence that the police had been unduly influenced or placed under improper pressure, but it criticised heavily the police investigation. There were then the investigations into Children in Custodial Institutions, Accountability and Reparations (relating to legal processes and compensation) and Residential Schools.

In relation to the criminal justice system, "Delays in investigations and criminal proceedings appeared to be endemic within the system." Since 2016, the number of Defendants prosecuted for abuse has fallen.

Current estimates indicate that 1 in 6 girls and 1 in 20 boys experience child sexual abuse before the age of 16. The Inquiry states that "this is not just a national crisis, but a global one" and it refers to similar inquiries that are taking place internationally as well as the soaring numbers of child victims of internet-based sexual abuse. There is an economic costs – over £10 billion in one year according to a Home Office study.

The Inquiry also said that the global financial crisis from 2008 onwards had led governments to cut child protection budgets, and there was clear evidence that the Covid-19 pandemic had led to an increase in child sexual and domestic abuse.

The Inquiry's report is comprised of two parts, the voices of victims and survivors - more than 6200 people contributed to the Inquiry's Truth Project - and its recommendations for change, which "are focussed on making England and Wales places for children to grow up safely and thrive." There are 20 recommendations, but the Inquiry identifies three of these as the centre piece of its work.

- The government should legislate to introduce "mandatory reporting". At present in England and Wales, there is no statutory obligation for reporting abuse. Most European countries together with parts of the US, Canada and Australia have this law. This recommendation requires individuals in certain employments (paid or voluntary) and professions to report allegations of child sexual abuse to the relevant authorities. Failure to do so could lead to the commission of a new criminal offence of "failure to report an allegation of child sexual abuse when required to do so."
- . There should be a national redress scheme for England and Wales, to provide some monetary redress for child sexual abuse for those who have been let down by institutions in the past. The Inquiry recommends a "fixed-term scheme" with straightforward processes. The scheme would be funded by contributions from the institutions affected.

Association of Child Abuse Lawyers – Continued 2

- There should be a "Child Protection Authority" established to secure the long term spotlight on child sexual abuse. This will have powers to inspect any institution associated with children, but will not replace the current inspectorates set up by existing child care legislation. Over time, the Child Protection Authority will become a centre of expertise and may extend their functions to other forms of harm experienced by children.

Other recommendations include a single set of core data relating to child sexual abuse. This core data would identify the prevalence of child sexual abuse by identifying the characteristics of victims and alleged perpetrators, the factors that make victims vulnerable and the settings in which child sexual abuse occurs.

Also proposed, is the creation of a Cabinet-level Minister for Children, a ban on the use of pain compliance techniques on children in custody. There are also recommendations designed to address gaps identified by the Inquiry in child protection. These include the registration of care staff in residential care, and staff in young offender institutions and secure training centres. There are also proposals to strengthen the Disclosure and Barring Service regime, which operates to prevent those deemed to be unsuitable to work with children, from obtaining employment in "regulated activity". Interestingly as a response to the recent scandals of aid workers abusing children in foreign countries, the Inquiry proposes extending the DBS regime to those working with children overseas. It also proposes extending the barred list of people unsuitable to work with children as well as improved compliance duties.

In relation to the internet, the Inquiry proposes more robust age-verification as well as mandatory online pre-screening for sexual images of children. Pre-screening enables internet companies to prevent child sexual abuse images from being uploaded to platforms and social media profiles. At present, what we have in the UK is the "Interim Code on Online Child Sexual Exploitation and Abuse" but this doesn't go far enough because it simply sets out what is "expected" of media companies. We also have the Online Safety Bill, which was laid before Parliament in March 2022, but we do not know when this will be enacted. The Bill proposes giving Ofcom the power to require providers to use "accredited technology" to identify abuse however communicated and to take that content down. The Inquiry recommends that the UK government makes it mandatory for all regulated providers of search services and user-to-user services to pre-screen for known child sexual abuse material.

The Inquiry also identifies the problem of "end-to-end" encryption which effectively prevents anyone from seeing a message between a sender and a recipient. It is not clear that the Online Safety Bill will actually require a social media company to have the specific technology to detect abuse in end-to-end encrypted messages.

Finally the Inquiry proposes removal of the three-year limitation period for personal injury claims brought by victims of abuse and further changes to the Criminal Injuries Compensation Authority, which exists to compensate victims of crime. There is a rider to the removal of the three year limitation period, namely that the Defendant would have the express protection of "the right to a fair trial" and the rule would not apply to a deceased victim's estate.

Mandatory reporting is to be found in many other jurisdictions, including certain parts of the United States. In this country, I would expect some resistance from teachers and social workers who are likely to be subject to new criminal sanctions. Nonetheless this recommendation was widely expected from the Inquiry, and it is probably the most important step forward in terms of advancing the cause of child protection, particularly given the long and sad history, identified in tragic detail of institutions repeatedly failing to act in cases of child abuse. A national redress scheme is welcome, but identifying contributing organisations (including financially pressed local authorities) and effectively levying a further tax on them, will be very difficult indeed. Moreover, the creation of government compensation schemes has a decidedly mixed history, as the debacle surrounding the Windrush Compensation Scheme clearly shows. The establishment of a Child Protection Authority is laudable, but I would only comment that we already have a wide range of institutions, such as the Children's Commissioner, Ofsted, the Independent Schools Inspectorate and local authorities who fulfil the proposed function of the CPA. Adding another layer of inspection may not actually improve the existing system.

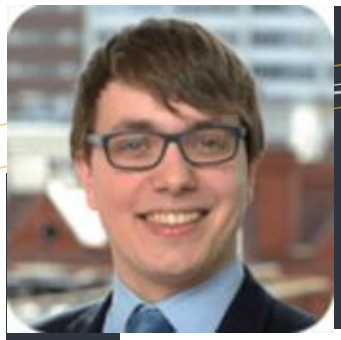
Other recommendations made by the Inquiry are eminently sensible and demonstrate its firm grasp of the complexity of the problem, which is based on powerful evidence of safeguarding failure going back decade. These are matters that a competent government should be able to implement relatively easily.

The removal of the three year time limit in child abuse compensation claims, is bound to meet with fierce resistance from insurers and local authorities. That time limit and current caselaw operates to exclude from compensation all but a few cases.

The recommendations made by the Inquiry are to be welcomed, and its tireless work over the years should be applauded. This was a once in a lifetime opportunity to confront the many different forms of child sexual abuse, and the Panel to the Inquiry has stepped up to that task. However, its central recommendations are bound to run into resistance, not least from a government which is at present dysfunctional. It is to be hoped a future administration will grasp the nettle and implement the Inquiry's recommendations in full.

Malcolm Johnson, Head of Abuse Claims, Lime Solicitors

20th October 2022



Case Analysis - The Court of Appeal Judgment in HXA & YXA Surrey County Council and Wolverhampton City Council [2022] EWCA Civ 1196

by Richard Sweetman Irwin Mitchell LLP

Summary

The Court of Appeal handed down its much-anticipated Judgment in the case of HXA & YXA on 31 August 2022. The appeal concerned two separate cases relating to alleged failures by social services departments to protect the Claimants from childhood abuse.

The Claimants were appealing against the decision of Stacey J ([2021] EWHC 2974 (QB)), which had upheld the earlier first-instance decisions of Deputy Master Bagot and Master Dagnall to strike out the Claimants' claims on the basis that, following the Supreme Court decision in CN v Poole Borough Council [2019] UKSC 25, it was not arguable that a common law duty of care could be owed to the Claimants.

The Claimants were both successful in their appeals, with the Court of Appeal confirming that on the facts of both cases it was at least arguable that the Defendant Local Authorities assumed aresponsibility to safeguard and protect the Claimants from the alleged harm. The claims were therefore restored and will be allowed to proceed to a full trial for determination.

The Defendants have stated, however, that they will seek permission to appeal the decision to the Supreme Court.

Background

The Court of Appeal Judgment in *HXA & YXA* concerns the question of when it is possible for a duty of care to be owed to a child by local authorities in the performance of their child protection functions, and prior to the child being formally made the subject of a Care Order. It represents the highest judicial authority on this question since the Supreme Court's decision in CN v Poole, which was handed down in June 2019.

The Court of Appeal's Judgment also follows on from the High Court decision of Lambert J in *DFX & 3 Ors v Coventry CC* [2021] EWHC 1328 (QB), which had found following a full trial that, inter alia, no duty of care was owed by the Defendant despite extensive social services involvement spanning over 14 years and which specifically related to a risk of sexual abuse within the family home. Lambert J considered that claimants would need to show "something more" on the part of a Local Authority's social services department, *"either something intrinsic to the nature of the statutory function itself which gives rise to an obligation on the defendant to act carefully in its exercising that function, or something about the manner in which the defendant has conducted itself towards the claimants"* (para. 199).

The Court of Appeal's Judgment in HXA & YXA thus carries extra import given the trajectory of case law to date: if the Claimants' appeals had been dismissed it would likely be very difficult for claimants to advance negligence claims against Defendant local authorities in this context save where a child was already the subject of a Care Order in favour of the Defendant (Barrett v Enfield BC). Such a restrictive interpretation would have significantly impeded claimants' access to civil justice and compensation.

Positively for claimants and claimant practitioners, the unanimous Judgment delivered by Lord Justice Baker clarified that the frequently advanced narrow interpretation of CN v Poole favoured by defendants is mistaken and that a duty of care may arise in a wide range of circumstances when social workers are carrying out their child protection functions.

The Facts

HXA

HXA was born in 1988 and their childhood was characterised by physical abuse, emotional abuse and neglect by their mother. From September 1993, the Defendant's social services were aware of an abusive home environment and HXA was placed on the child protection register on 28 July 1994. In November 1994, the Defendant sought legal advice with a view to starting care proceedings following a full assessment of HXA's circumstances, but this never occurred. A risk of sexual harm from the mother's partner emerged in 1999, with disclosures made by HXA and HXA's sister. In January 2000, the Defendant resolved to complete 'keeping safe work' with HXA, but again this was never completed. HXA moved out of the family home in 2004. It transpired that the Claimant had suffered very serious sexual abuse as a child and on 12 January 2009 the mother's partner was convicted of 7 specimen counts of rape relating to HXA between the ages of 9 to 16 (i.e.between 1997 – 2003).

YXA

YXA was born in 1991. He had additional needs as a child, including a diagnosis of ASD and learning difficulties. The Defendant had completed an assessment on 6 November 2007, which identified concerns about YXA's parents' ability to care for him. In March 2008, a paediatrician advised the Defendant that the Claimant was being over-medicated by his parents and should be received into the Defendant's care. The Defendant agreed to accommodate the Claimant on an intermittent but regular basis under s. 20 Children Act 1989 (a voluntary arrangements requiring the consent of the parents) - 1 night every two weeks, and 1 weekend every two months.

Between 2008 – 2009, further concerns were raised and known by the Defendant's social services department regarding excessive medication, drug use within the home and physical abuse. YXA's parents eventually admitted over-medicating YXA to keep him quiet in December 2009, following which the Claimant was taken into foster care and care proceedings were initiated.

In both cases, the Claimants had brought a claim in negligence alleging that, but for the failures by the Defendants' social services departments, they should and would have been protected from at least some of the childhood abuse they experienced.

The Decision of the Court of Appeal

Given the appeal related to strike-out decisions, the Court of Appeal were keen to emphasise that their Judgment shouldn't be seen as laying down any general guidance on the topic (para. 92). The question of when an assumption of responsibility will be owed to a child by a Defendant Local Authority is fact specific, and will still need to be determined on a case by case basis. Nevertheless, the Court had to grapple with the legal arguments raised by the parties in this case and explain their decision: in doing so, the Judgment makes a number of observations and statements that are likely tobe very persuasive in other cases.

Dealing first with the proposition that claimants are often faced with when advancing claims of this nature, the Court of Appeal rejected the idea that a duty of care can only be owed by a Local Authority if there is a Care Order, or an Interim Care Order (i.e. in circumstances where the Local Authority has acquired parental responsibility for the child). This is made plain at paras. 91 and 105 of the Judgment, with Lord Justice Baker stating that:

"If the assumption of responsibility were to be confined to cases where a local authority had acquired parental responsibility under a care order, the line would be clear. But in my view that is not the effect of the decision in Poole. The responsibility for a child required to give rise to a duty of care can be assumed in wider circumstances." (para. 105).

Turning to the facts of YXA's claim, the Court of Appeal found that a duty of care may arise in respect of Looked After Children (which would include children accommodated with parental consent under s.20 Children Act 1989) if circumstances arise amounting to an assumption of responsibility. For example, one will need to look at the conduct and actions of the Defendant and its social workers performed pursuant to its statutory obligations and related guidance and regulations. Furthermore, the Court of Appeal rejected the notion that any common law duty owed in this context would only relate to the period of accommodation (i.e. keeping a child safe whilst in care), but rather the duty could extend beyond this to include, perhaps, a duty to ensure that it would be safe to return a child to their parents and/or take further steps to protect a child from known risks of harm if required.

On this point, the Court of Appeal appear to have been influenced by the broad statutory duty under s. 22(3) Children Act 1989 to safeguard and promote a child's welfare where a child is deemed to be a Looked After Child. The Judgment nevertheless makes it clear (see para. 95) that the existence of a statutory duty is not the same as the existence of a common law duty, and claimants will need to consider *"the conduct of the local authority pursuant to the statutory scheme relating to the accommodation of the child" and* whether this gives rise to an assumption of responsibility.

In YXA's appeal, The Court of Appeal concluded that "a local authority accommodating a child under section 20 is capable of amounting to *"something more" so as to give rise to an assumption of responsibility by the local authority. Accordingly, this was not a claim which should have been struck out under CPR 3.4(2)(a)."* On reflection, this conclusion is perhaps a victory for common sense. If the significant act of accommodating of a child into care for temporary periods with the purpose of trying to ensure their welfare and/or protect them from known risks wasn't capable of giving rise to a duty of care, then what could?

Turning to HXA's appeal, The Court of Appeal confirmed at para. 96 that *"a duty of care may arise in circumstances where a local authority, acting in accordance with its duties under statute, regulation, or statutory guidance, has taken, or resolves to take, a specific step to safeguard or promote the welfare of a child which amounts to an assumption of responsibility for a child".*

This potentially covers a very broad range of circumstances, especially as the Judgment makes clear that a duty may arise not only where a Local Authority has taken a specific step to safeguard a child, but also if they had "resolved to" to take a certain step, but then failed to do so. The Judgment goes gives a specific example of when this might arise, noting that:

"One example might be a decision to undertake or to commission a specific piece of work to assess the level of risk and/or protect a child from a particular type of harm."

It is of interest that this example was put forward explicitly in the case of DFX referred to above, as in that case a specialist forensic psychiatric assessment was obtained by the Local Authority to assess the risk of sexual harm to the children. This was rejected as a basis for a duty of care in DFX, but Lord Justice Baker goes on to cast doubt over Lambert J's reasoning in that case, leaving the door wide open for future claimants and, ultimately, Judge's at first-instance to take a different to approach to that espoused in DFX (see para. 97).

In HXA's case, the Court of Appeal concluded that in deciding to take legal advice with a view to starting care proceedings and carrying out a full assessment constituted steps taken by the Defendant which could arguably give rise to an assumption of responsibility. Similarly, resolving to undertake Keeping Save Work with the Claimant following disclosures of sexual abuse was arguably an assumption of responsibility, notwithstanding the fact that such work was never completed.

In summary, it was the Court's clear view that this area of law was still developing and therefore it would be wrong to strike-out cases before a full examination of the facts could be conducted at trial.

Conclusions

The Court of Appeal's Judgment rejects the very narrow interpretation of CN v Poole advanced by defendant local authorities in recent years, which had also found favour with a number of Judges in the lower Courts. Rather, the factual scenarios which may give rise to a duty of care are likely to be broad and wide-ranging and, if disputed, should be determined after a full trial on the facts. Those cases which are currently being advanced against local authorities that share factual similarities with HXA and YXA's claims, e.g. where there is a history of s. 20 accommodation and/or decisions to complete direct work with children, will be particularly encouraged by this Judgment.

Subject to any successful appeal to the Supreme Court, defendants will now find it very difficult to successfully apply for such claims to be struck-out. The litigation of negligence claims regarding allegedly poor social work practice is therefore set to continue until a reliable body of case law can emerge. In the meantime, one would expect Defendants and their insurers to reassess the level of risk faced by these claims and it may be that a pragmatic approach to resolving such claims at an early stage can be put back on the table, which would no doubt benefit and assist a number of very vulnerable claimants who have sadly been let down by our social care system.

Richard Sweetman, Associate Solicitor, Irwin Mitchell LLP

Case Analysis - "Daisy" v CICA 25TH October 2022 CICAP (via video)

by David Greenwood of Switalskis Solicitors

I represented two claimants in appeals to the Criminal Injuries Compensation Appeals Panel in October, both appeals attempt to extend the interpretation of the 2012 scheme to cover an important subsection of cases not currently covered.

This case involved a woman conceived as a result of rape of a minor.

1. The applicant was born in the 1970s. At the time of her birth her mother was 13 years old. The Claimant was conceived 9 months earlier as a result of the rape of her mother by her natural father, Carvel Bennett. As a victim of a sexual offence the Claimant's birth mother cannot be named.

2. The rape occurred when Bennett, a friend of the birth mother's parents, asked for her to babysit his children. When the birth mother attended his home Bennett forced himself upon her.

3. The birth mother reported the rape to the police at the time and she was interviewed, but a decision was made not to prosecute. Social services were involved at the time of the birth, the birth mother residing in a mother and baby home immediately prior to her delivery. Following her birth, the Claimant was placed in foster care.

4. Given both the circumstances of the conception and her young age, the birth mother agreed that the Claimant should be adopted.

5. At the age of 18 the Claimant accessed her social services files and for the first time learnt that she had been conceived as a result of rape. She subsequently re-established contact with her birth mother.

6. From the mid 2010s the Claimant sought to initiate a prosecution of Bennett for the rape of her birth mother. The police investigation commenced in September 2019. The birth mother provided a statement. The Claimant herself provided DNA evidence to establish that Bennett and her birth mother were her natural parents. Bennett was convicted of the rape and sentenced to 11 years at the Birmingham Crown Court in July 2021 – press link here - https://www.theguardian.com/uk-news/2021/aug/03/rapist-jailed-fight-justice-daughter-born-following-attack-carvel-bennett

7. In June 2020 the Claimant applied to the CICA for compensation in respect of the psychological injury which she had suffered. Her application was refused in November 2020. While it was accepted that a crime of violence had occurred it was determined that the Claimant did not fall within paragraph 4 of the Criminal Injuries Compensation Scheme 2012 (the Scheme) because she was not a direct victim of the rape perpetrated by Bennett.

8. The Claimant applied for a review of the initial decision. On 14th April 2021 the reviewing officer again declined to make an award on the basis that the Claimant did not fulfil the definition of a direct victim under paragraph 4. The review letter states, "It was your birth mother who was the direct victim of a crime of violence and it was she who sustained a criminal injury. It is not possible for you to have been the direct victim of violence in relation to the crime, as you had not yet been conceived. This means that you could not then have sustained a criminal injury as defined under the terms of the Scheme".

9. The appeal was heard on 15th October 2022. Adam Weitzman KC represented the Appellant assisted by his junior,Joshua Yetman.

Grounds of appeal

10. 1st Ground of Appeal: The Claimant is a direct victim of a crime of violence for the purposes of paragraph 4 of the Scheme.

11. 2nd Ground of Appeal: If her application is excluded by paragraph 4 this is discriminatory and so contrary to Article 14 of the European Convention on Human Rights (the Convention). To avoid such an unlawful act the words "direct victim" in paragraph 4 should be construed to include children who are conceived as the victim or rape.

Article 14 reads :

"1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

The right being violated here is a right to fair compensation under the scheme which is expressed in Article 1 Protocol 1 as a possession.

Article 1 Protocol 1 reads :

"Article 1 of Protocol No. 1 – Right to property "1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

12. The CICAP panel chaired by Judge Farrelly declined to give a decision on the day and a written decision is awaited.

13. This is an important case which could open up the CICA to many similar claims.

David Greenwood

18th November 2022

Case Analysis - YZ v CICAP 8th November 2022 CICAP (via telephone hearing) - by David Greenwood of Switalskis Solicitors

The case involved a woman who had been stalked and harassed online by a former male friend for 12 years.

The Appellant had struck up a friendship online with the perpetrator when she was at University feeling lonely. This progressed to an in person meeting and she eventually invited him to have Christmas dinner at her home. Whilst there were absolutely no romantic hints by the appellant the perpetrator declared his love for her and at this point the appellant broke off contact with him. There followed 12 years of online stalking and harassment behaviour, the following being a small extract :

The Appellant approached the police when it started who were uninterested so she endured years of fear and altered her behaviour as a result. She has suffered PTSD symptoms and anxiety and depression. A friend advised her to report the matter to the police in 2017 and in 2019 the perpetrator was convicted and sentenced to 4 years 8 months imprisonment.

The CICA refused her application on the ground that she was not a direct victim of a crime of violence. She applied for a review which again refused compensation on the same grounds. Her appeal was heard by the CICAP via a telephone hearing on 8th November. YZ was represented by David Greenwood of Switalskis solicitors.

The grounds of appeal were that :

1) YZ was a direct victim of a crime of violence according to the decision in Regina (Jones) v FTT [2013] UKSC 19 per Lord Hope :

“A crime of violence is, he submits, one where the definition of the crime itself involves either direct infliction of force on the victim, or at least a hostile act directed towards the victim or class of victims. We think that this comes near enough to the ordinary meaning of the words as generally understood."

2) The actions of the perpetrator fall within scheme as they were “threats against a person causing fear of immediate violence in circumstances which would cause a person of reasonable firmness to be put in such fear.” (reference the messages reproduced above).

3) If the application is still excluded this is discriminatory and contrary to Article 14 of the European Convention on Human Rights (the Convention).

Article 14 of the Convention – Prohibition of discrimination

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

The CICA is a public body and pursuant to section 6(1) of the Human Rights Act 1998 it is unlawful for it to act in a way which is incompatible with a Convention right. To avoid incompatibility the words Annex B paragraph 2(1) B and C in should be construed to include those suffering threats of serious violence and stalking.

Grounds under the HRA

According to the wording of the Scheme, her circumstances are those of someone who, under the declared purpose of the Scheme, should receive compensation. The CICA decision currently excludes her because of her special status as a female victim of stalking. The effect of the CICA decision was to discriminate against the Claimant by reason of that status which includes the fact that she is female. Females tend to be much more susceptible to stalking than men. Such discrimination is contrary to Article 14 of the Convention read in conjunction with Article 1 of the 1st Protocol to the Convention as this discrimination would deprive the applicant of her possession (which in this context is the right to claim to the CICA)

Article 1 protocol 1:

Article 1 of Protocol No. 1 – Right to property "1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. 2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

While not a specific status named in Art 14, a female person suffering stalking behaviour and threats is capable of coming within either sex or "other status".

The Scheme directly discriminates against the Claimant because by reason of her status she is treated differently to an analogous group, those who have suffered mental injury because they are a "more direct" victim of a violent offence or men who are less likely to suffer from stalking.

Decision

The decision of the Panel given in writing two days later was to reverse the CICA decision and allow her to qualify for compensation on the ground that she had suffered threats causing fear of immediate violence in circumstances which would cause a person of reasonable firmness to be put in such fear.

I have asked the CICA to allow me to obtain a psychology report and will look into the loss of earnings and therapy claims.

David Greenwood

18th November 2022

THE ASSOCIATION OF CHILD ABUSE LAWYERS

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