

## HOUSE OF LORDS CALL NEW TIME ON ABUSE CASES

### LANDMARK HOUSE OF LORDS RULING PAVES THE WAY FOR "OUT OF TIME ABUSE CASES"

The House of Lords, in a landmark decision, has overturned its earlier decision in the case of **Stubbings -v- Webb** in the recent conjoined appeals referred to as **A -v- Hoare & Others 2008**.

Limitation is often one of the main issues in child abuse cases, with claims brought many years, often decades, after the alleged period of abuse. Prior to the recent House of Lords ruling a prospective Claimant whose cause of action was founded in trespass to the person, i.e. physical assault, were limited by the House of Lords decision in **Stubbings -v- Webb**. In that case the Claimant was sexually abused by her stepfather and stepbrother during childhood. The abuse exceeded 15 years prior to the issue of proceedings. The issue before the House of Lords was whether to apply Section 2 or Section 11 of The Limitation Act. If Section 2 applied the limitation period was 6 years from the date the cause of action arose, i.e. when the Claimant turned 18, and therefore the claim was statute barred. However, if Section 11 applied the limitation period was 3 years from the date the Claimant realised that significant injury resulted from the abuse that she had suffered. The Claimant alleged that she did not have knowledge of significant injury until 3 years prior to the issue of proceedings, and therefore sought to rely upon Section 11 of The Limitation Act.

The House of Lords held that actions of intentional trespass to a person cannot be said to arise from negligence, common nuisance or breach of duty within Section 11 and therefore Section 2 must apply. The Claimant was therefore outside the limitation period and the claim was statute barred.

The case of **Stubbings** permitted the perpetrator of abuse immunity after expiry of the limitation period under Section 2. However, a person who has allowed the abuse, usually in the context of a claim for vicarious liability by an employer, is vulnerable to a claim in negligence as this falls within the remit of Section 11, and therefore is subject to the Court's discretion to extend the limitation period in accordance with the principles set out in Section 33 of The Limitation Act. The state of the law therefore before the **A -v- Hoare** decision appeared to be anomalous. Arguably less culpable Defendants were exposed to potentially more liability or vicarious liability than the perpetrators who could seek immunity under Section 2 for claims brought 6 years after the assault.

In **A -v- Hoare (2008)** a retired teacher had brought a claim against her attacker 19 years after the assault. The Defendant Mr Hoare won £7 million pounds in the lottery in 2004 while serving a custodial sentence for his attack on the Claimant. Prior to this the Defendant had not been worth suing, however on hearing of the Defendant's change in circumstances Mrs A brought a claim which was unsuccessful in the first instance, due to the binding decision in **Stubbings -v- Webb**.

Lord Hoffman, in the leading speech, identified that before the law recognised potential vicarious liability on the employers for actual assault there had been little effect of the earlier decision on the perpetrators of assault who were seldom worth suing. He commented that in **Stubbings** the Claimant seemed to be motivated by something other than recovery of compensation.

The historical anomaly of different treatment of limitation cases was put starkly in the case of *S -v- W (Child abuse damages 1995)* in which the Claimant sued both parents for the sexual abuse she had suffered at the hands of her father. The action was commenced nearly 10 years after the last act of abuse. The cause of action against the father was intentional assault and the claim was therefore struck out as statute barred under Section 2. However, the cause of action against the mother was negligence and failing to protect the Claimant against the father. As such this claim fell under Section 11 of the 1980 Act and was subject to a discretionary extension under Section 33, which the Judge granted, and the Court of Appeal later affirmed. The action against the mother was allowed to proceed, but the result in this case was commented on as being manifestly absurd and deserving of the attention of the Law Commission.

As such in abuse cases where the claim against the perpetrator of abuse (or his or her employer by way of vicarious liability) has become statute barred in accordance with Section 2 of the Act, it has to be established that the abuse suffered was the result of systemic negligence on the part of the abuser's employer in order that the limitation period under Section 11 could be exercised. In reversing the decision in *Stubbings -v- Webb* the House of Lords accepted that claims of intentional abuse should be considered under Section 11 of The Limitation Act and not be statute barred under Section 2 of The Limitation Act.

Once the Section 2 obstacle had been removed, the House of Lords went on to consider cases in which the Section 33 discretion should be exercised. Lord Hoffman rejected the Court of Appeal's approach in *Bryn -v- Alyn 2006*; that the delay in bringing a claim was a product of the abuse and therefore a matter best dealt with under Section 14. He stated "I am precisely of the opposite view if the Lords agree this approach the discretion will have to change". Lord Hoffman's views were accepted and Lord Brann added the following guidance in relation to the discretion under Section 33. "In so far as future claims may be expected to be brought against employers on the basis of vicarious liability rather than for systemic negligence in failing to protect them, they would probably involve altogether narrower factual disputes than before." This is likely to bear significantly upon the possibility of having a fair trial.

Through the combined effects of *Lister & Stubbings* a substantially greater number of allegations are now likely to be made many years after the abuse complained of. Whether the Defendant can investigate (and therefore lead to a fair trial) depends on a number of factors not least when the complaint was first made and to what effect the complaint was resolved. For example, was there a prosecution against the abuser or did the allegations come out of the blue with no apparent support for them. A fair trial must include a fair opportunity for the Defendant to investigate the allegations, which in many cases is likely to be quite simply impossible after such a long delay.

#### COMMENT

There is no doubt that this case redresses the anomalous situation where more culpable parties were protected from claims by the operation of Section 2 of The Limitation Act. The victims of abuse were often required to construct an artificial distinction between vicarious liability caused by the abuser, and liability caused by systemic failures by the employers allowing the abuser to carry out their heinous crimes.

The test for whether the employer is vicariously liable for the actions of the abuser will still be subject to the guidelines set down in the case of **Lister**. In the future issues of why the person did not turn their mind to litigation will be dealt with under Section 33 and not Section 14. It does not follow that the Claimants will have an automatic right to proceed.

There is good reason (as evidenced by the conjoined appeals and prospective claims that Kennedys are dealing with awaiting the outcome of the appeal) that more claims will be brought. The emphasis will now shift onto prejudice caused by delay pursuant to Section 33 and the practicability of holding a fair trial many years after the alleged period of abuse.