

LIMITATION: A BUSY PERIOD

A -v- Hoare & others [2008] UKHL 6:

1. For the second time in less than 18 months, the House of Lords has overturned one of its own decisions relating to the law on limitation. In Horton -v- Sadler [2006] UKHL 27, the court had held that where a claimant in a personal injury action had initially issued proceedings before the time limit had expired and had brought a second action in respect of the same injuries after time had expired, the court could use its discretion under section 33 of the Limitation Act 1980 to disapply the time limit. Thus, the much criticised decision in Walkley -v- Precision Forgings Limited (1979) 1WLR 606 was overruled. Although the Walkley decision had created injustice, its effect had of course been limited to a fairly discrete situation. The decision in A -v- Hoare will have far more reaching consequences. In overturning their decision in Stubbings -v- Webb (1993) AC 498, the House of Lords has at a stroke swept aside some 15 years of jurisprudence and opened the door to thousands of potential claims from victims of assaults arising out of incidents which occurred many years ago. In particular, this is likely to result in a significant increase in the number of claims brought by claimants alleging that they were victims of sex abuse as children. A lottery winner such as Mr Hoare will be rare and individual defendants will usually be impecunious and not worth suing, but schools, local authorities and other employees are likely to be vicariously liable for the acts of their employees or agents following the decision in Lister -v- Hesley Hall Limited [2002] 1 AC 215.
2. Section 11 (1) of the Limitation Act 1980 provides:

“This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence,

nuisance or breach of duty consists of or include damages in respect of personal injuries to the plaintiff or any other person”

3. In *Stubbings*, the House of Lords had overruled the Court of Appeal decision in *Letang -v- Cooper* (1965) 1 QB 232 and decided that the regime provided for in sections 11, 14 and 33 of the Limitation Act 1980 did not apply to cases of assault on the grounds that they were not actions for “negligence, nuisance or breach of duty” within the meaning of section 11 (1). The effect of this was that all cases involving deliberate acts resulting in personal injury fell within the regime provided by section 2 of the Act, namely a fixed six year limitation period which could not be extended. This provided an absolute bar to proceedings more than six years after the date of the assault or, in the case of a child victim, after his 24th birthday.
4. The result of this was that practitioners acting for claimants in such cases where the six year time limit had expired took to finding ingenious and sometimes artificial methods of creating actions in negligence so as to bring their cases within section 11 of the Act enabling them to argue that either the case was not statute barred due to the claimant’s date of knowledge of his psychiatric injuries or alternatively enabling an application under section 33 to be made.
5. No such arguments were available to the lawyers acting for Mrs A. The defendant had been convicted in 1989 of an attempted rape of the claimant, involving a serious and traumatic sexual assault. He was sentenced to life imprisonment. In 2004, whilst still serving his sentence, he won £7m on the National Lottery. The claimant started proceedings for damages in December 2004 but the action was struck out as statute barred under section 2 of the 1980 Act pursuant to the *Stubbings* decision.
6. The cases of *X & Y -v- London Borough of Wandsworth*, *C -v- Middlesbrough* and *H -v- Suffolk County Council*, which were heard together with the *Hoare* case in the Court of Appeal and the House of Lords, all involved claimants who had been sexually abused as children while in the care of local authorities.

7. In those cases, the claimants did seek to create actions in negligence by alleging systemic negligence against the defendants and also alleging that the defendants were vicariously liable for the abusers' negligence in failing to report their own intentions and the abuse that they were carrying out. These latter arguments had been described as artificial by Lord Hobhouse in *Lister* but as worthy of further consideration by Lord Steyn. Had the House of Lords not decided to overturn their own decision in *Stubbings*, their Lordships would have had to have considered the validity of this type of imaginative pleading which claimants have adopted so as to circumvent the effect of the *Stubbings* decision. As Lord Hoffman stated in paragraph 25 of the judgment "*Claimants who have suffered sexual abuse but need to seek the discretion of the court under section 33 are driven to alleging that the abuse was the result of, or accompanied by, some other breach of duty which can be brought within the language of section 11.*"
8. Quite apart from the injustice of placing claimants who had been the victims of intentional torts in a worse position than those who had been the victim of accidental torts, the *Stubbings* decision had also created some absurd anomalies. One example is the case of *Seymour -v- Williams* [1995] PIQR P470 where the plaintiff issued proceedings against her father and mother, alleging her father had been guilty of physical and sexual abuse and that her mother was guilty of negligence for permitting that abuse to take place. The Court of Appeal was obliged to hold that the claim against the actual perpetrator was statute barred whereas the claim against the mother could proceed.
9. However, in the light of the House of Lords' unanimous decision to grasp the nettle and overturn *Stubbings*, these anomalies will no longer occur and their Lordships did not have to consider the alternative arguments that the abusers were in some way negligent in failing to report their own actions or their intentions to carry out abuse. From now on, it will rarely be necessary to plead actions in negligence, whether of this artificial type or in relation to systemic negligence on the part of the employers. It should be sufficient to prove the assault, in which case the employer will be vicariously liable if the assault is sufficiently connected with the employment as per *Lister*.

10. The law laid down in Letang -v- Cooper has been reaffirmed and there is now a single limitation regime for personal injury cases pursuant to sections 11, 14 and 33 of the Act whether those injuries were caused by an intentional or non-intentional act.
11. Although the primary limitation period for assault cases has been reduced to three years, victims will now be able to extend that period in appropriate cases with a direction in their favour under section 33.
12. Having decided to depart from their own decision in Stubbings, the House of Lords then went on to consider the meaning of “significant injury” in section 14 (2). This section provides:

“For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.”
13. This issue arose in the case of Young -v- Catholic Care (Diocese of Leeds) & Others which had been consolidated with the other cases for the House of Lords' hearing.
14. The House of Lords held that the test was an entirely impersonal standard and that the court should not consider whether the claimant himself would have considered the injury sufficiently serious to justify proceedings but whether he would reasonably have done so. Thus, the court should ask what the claimant knew about the injury and ask whether a reasonable person with that knowledge would have considered the injury sufficiently serious to justify issuing proceedings for damages.
15. The House of Lords' interpretation of section 14 (2) means that in the majority of cases, victims of assault will know from the time of that assault that they have suffered an injury of sufficient significance to justify the issue of

proceedings whether or not they subsequently suppressed what had happened to them and did not realise that they had suffered psychiatric injury for many years. Thus, some cases which may not have been thought to have been statute barred till now will in fact be statute barred and claimants will now have to depend on a direction in their favour under section 33. Thus, there has been a shift in emphasis from section 14 to section 33. The facts in the case of H -v- Suffolk County Council illustrate how this interpretation of section 14 (2) can affect the date of knowledge.

16. H was born in 1975 and after living in a succession of foster homes was sent to a boarding school run by the defendants in 1989. He remained there for a year during which time he was sexually abused by one of the teachers. In July 1999, he was on remand in Chelmsford prison when the police visited him and asked him about his time at the school and whether he had been sexually abused there. Investigations had begun because another former pupil had complained of such treatment. H, who had suppressed the fact that he had been abused, suffered such a severe psychiatric breakdown following this interview that he was in a wheelchair for several days.
17. In April 2002, he issued proceedings against the local education authority and the teacher who had abused him. At first instance, the claim against the teacher was struck out on the grounds that it was statute barred by virtue of the Stubbings decision. The claim against the defendants for systemic negligence proceeded because the judge found that the date of knowledge for the purposes of the negligence claim was not before July 1999 and therefore less than three years before the issue of proceedings. That claim failed, although the judge found as a fact that H had indeed been abused by the teacher, this having been denied in the trial by the defendants.
18. However, given the interpretation of section 14 (2) by the House of Lords, their Lordships have remitted H's case to the judge for consideration as to whether he should exercise his discretion in the claimant's favour pursuant to section 33 on the grounds that contrary to the finding by the judge, the case was in fact statute barred.

19. However, lest it be thought that this will make it more difficult for claimants to bring actions, while making it clear that they would not wish to fetter the discretion of first instance judges, their Lordships gave a fairly clear steer to the effect that courts should look upon such applications favourably in this type of case as liability for sexual assaults rather than systemic negligence would probably involve narrow factual disputes and in a lot of cases there will have been a conviction. Lord Brown also commented on the unusual facts in A -v- Hoare and stated that the definition of “significant” injury in section 14 (2) refers to the justifiability of bringing proceedings against a defendant “able to satisfy a judgment”. He commented that it would be unfortunate if people felt obliged to bring proceedings of sexual abuse against indigent defendants simply with a view to their possible future enforcement.

Smith -v- Hampshire County Council [2007] EWCA Civ246:

20. The claimant had left school at the age of 15 and when he was 23 began proceedings alleging failure on the part of the local education authority to diagnose his dyslexia. More than three years before the commencement of proceedings, he had consulted his GP who had referred him to a clinical psychologist. The psychologist’s report stated that the claimant had a pattern of difficulties consistent with a diagnosis of severe dyslexia. Proceedings had been issued within three years of receiving the report.
21. However, the claimant had been told before he was 21 that he should seek an assessment for dyslexia and the court held that there was no reason why he could not have obtained professional help sooner.
22. The proceedings were found to be statute barred and the judge declined to disapply the normal three year limitation period because although the claimant had some prospects of success, the evidence of prejudice to the local authority was very strong because of the absence after the passage of time of relevant documentation. The Court of Appeal upheld this decision.

Secretary of State for Trade & Industry -v- Mackie [2007] EWCA Civ 642:

23. The claimant had been employed by British Coal as an electrician. In 1992 he had a hearing test and was informed by a union official that he had a hearing loss of 9.98db. He claimed that the official informed him that he did not have a hearing problem or a claim but a firm of solicitors had written to British Coal intimating a claim on his behalf for noise induced deafness. That claim was later abandoned. The claimant denied knowledge of the firm's actions but in 1993 became aware that other employees who had similar hearing losses were bringing claims. Ten years later, he was examined by a consultant who reported that he had a hearing loss of 10.8db attributable to noise exposure and he issued a claim. The judge at first instance found that the claimant knew in 1992 that he had a significant hearing loss but he had not had actual or constructive knowledge that his deafness was attributable to his working conditions.
24. The Court of Appeal found that the judge had not dealt with all the necessary factual issues and found that in 1992 he plainly had knowledge that his hearing loss was capable of being attributed to noise exposure and that that was enough to fix him of knowledge for the purposes of sections 11 and 14 of the Limitation Act 1980. In any event, in the knowledge that other employees were claiming, he did nothing to clarify his situation in the next ten years. His claim was statute barred.

Kamar -v- Nightingale [2007] EWHC 2982:

25. After a criminal trial, the claimant had been sentenced to 5 years imprisonment but the convictions were subsequently set aside because there had been no good character direction in the summing up. The barrister who had represented the claimant at the trial should have introduced his good character in the course of the proceedings. Some seven years later and nine years after the original criminal trial, the claimant brought a claim for personal injury on the basis of the barrister's negligence causing him to suffer serious mental health problems.

The judge found that the limitation period had expired almost six years earlier but granted the claimant a direction in his favour under section 33.

26. On appeal, the barrister argued that he was severely prejudiced on causation and quantum as he wished to argue that there were other contributing factors leading to the claimant's mental health problems and that it was necessary to instruct an expert to assess the claimant's mental state as it was nine years previously.
27. The appeal was allowed on the basis that it was extremely difficult for the court or any expert psychiatrist to assess the impact of negligence on the claimant's mental state. The claimant had been aware of his mental health problems many years previously and could have consulted a doctor much nearer the time with a view to assessing his chances of bringing proceedings for negligence. The delay was culpable and there was no reasonable excuse for it.

Sindall -v- Kirklees Metropolitan Borough Council (2007) QBD 29/6/07

28. The claimant had been in care from the age of 11 to 18 and claimed that during that period she had been neglected and been the subject of sexual abuse. She reached the age of 18 in 1980 and in 1993 she suffered a severe mental illness. She issued proceedings in 2000 as a result of her mistreatment in care.
29. The court held that it was unable to reach any conclusion other than that the primary limitation period expired in 1983, three years after the claimant's majority. The cogency of the claimant's own evidence had been seriously affected by her mental illness and the evaluation of her evidence, particularly in relation to allegations of sexual impropriety, would be extremely difficult. After a lapse of thirty years a fair trial of the allegations was no longer possible and the exercise of discretion under section 33 was declined.

Furniss –v- Firth Brown Tools [2008] EWCA Civ 182:

30. The claimant had worked for the defendant from 1976 until about 1982. He admitted in cross-examination that he first became aware of hearing problems in about 1996 but considered that the hearing loss was due to ear wax and that the tinnitus was hereditary. He underwent a medical examination in 2004 which revealed that he had hearing loss and tinnitus probably caused by exposure to loud noise at work and commenced proceedings in 2006. The judge held that from about 1996 the claimant had enough knowledge of the possibility of noise affecting his hearing for him to have associated that with his work.
31. On appeal it was held that the judge had not dealt with the question as to whether he knew or ought to have known that the injury was significant as defined by section 14 (2) and that there was little evidence to support the proposition that the claimant knew or ought to have known that the hearing loss was significant by 1998. The claimant's admission that he could not hear the telephone and needed to have the television sound turned up as early as 1996 did not sufficiently support the conclusion that the injury was significant to justify the commencement of an action for damages. In the absence of evidence as to the date by which the claimant did have knowledge that his injury was significant, the defence under sections 11 and 14 had not been made out as the burden of proof lay on the defendant.

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