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BRIEFING
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# ABUSE

Introduction by
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# INTRODUCTION

**Andrew Warnock KC**

**Deka Chambers is a pre-eminent common law Set. We have leading practitioners in civil, family and criminal law. We consider this diversity a real strength in the service we are able to offer our clients. Legal problems often straddle more than one field of law. In helping clients resolve them, we are able to offer and draw upon the expertise of our members across our different practice areas. There are many areas where we have complementary expertise: for example the related work of our police, crime and inquests and inquiries teams; the union of our cross border and clinical negligence teams in overseas surgery cases; and the benefit our professional negligence team enjoys from having in house commercial, criminal, family, property and personal injury practitioners.**

This Briefing demonstrates this cross-jurisdictional expertise in cases involving allegations of abuse. It is an area where in the last 12 months members of chambers have advised and represented clients in precedent setting cases in the Supreme Court[1] and Court of Appeal, as well as at first instance in the family, criminal, civil courts and inquests and inquiries. Here, our contributors cover a range of topics, including the law governing the removal of children from their families, crime, developments in clinical settings following the Lucy Letby case, limitation and contribution proceedings in civil claims, package holiday claims, and the threshold for a claim under the Human Rights Act 1998.

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[1] *HXA v Surrey County Council* [2023] UKSC 52; *AB v Worcestershire County Council* [2023] EWCA Civ 529.

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# LIMITATION IN ABUSE CASES

By Andrew Spencer

By definition, claims for historic abuse are not brought until many years after the abuse took place, and often long after the end of the primary limitation period (which will often expire on the victim's 21st birthday – a date which may itself be quite some time after the abuse). There can be any number of reasons for this, including the effects of mental health conditions caused by the abuse. The result is that there are many claims for historic abuse where limitation – and notably, applications under Section 33 of the Limitation Act to disapply the limitation period – are a key battleground between the parties.

The basic question Section 33 requires the judge to answer is "whether it is fair and just in all the circumstances to expect the defendant to meet this claim on the merits, notwithstanding the delay in commencement" (per Janet Smith LJ in *Cain v Francis* [2022] EWCA Civ 1451). When considering this question the court is required to look at the matter broadly, and to consider "all the circumstances" and 6 factors in particular – notably, for these purposes, the length and reasons for the delay; and the extent to which the evidence has become less cogent by reason of delay since the expiry of the limitation period.

A number of cases have focused on whether or not it remains possible to have a fair trial, with judgments including dicta that "proof the defender will be exposed to the real possibility of significant prejudice will usually determine the issue in his favour" (*AS v Poor Sisters of Nazareth* [2008] UKHL 32, 2008 SC (HL) 146, approved in *Catholic Welfare Society (Diocese of Middlesbrough) v CD* [2018] EWCA Civ 2342); that "if a fair trial cannot take place it is very unlikely to be "equitable" to expect the Defendant to have to meet the claim"; and "I would regard the possibility of a fair trial as being a necessary but not a sufficient condition for the disapplication of the limitation period" (*GE v GE* [2015] EWCA Civ 287). However, whilst this factor is certainly very important, the Court of Appeal made clear in *Blackpool Football Club Limited v DSN* [2021] EWCA Civ 1352, no single factor has a priori importance and all the factors – and all the circumstances – must be considered in each case.

In *Carroll v Chief Constable of Greater Manchester* [2017] EWCA Civ 1992 [2018] 4 WLR 32 the Court of Appeal set out a very useful summary of the principles arising from the cases up to that date. This emphasises:-

a) The claimant has the burden of showing it would be equitable to disapply the limitation period. But the defendant has an evidential burden of showing a reduction in cogency of the evidence as a result of delay.

b) If the defendant has caused evidence to be lost irresponsibly, this may weigh against the defendant.

c) It is "particularly relevant" if, and by how much, the defendant's ability to defend has been prejudiced by delay. Subject to questions of proportionality, the defendant "only deserves to have the obligation to pay due damages removed if the passage of time has significantly diminished the opportunity to defend the claim on liability or amount".

d) Delay after the limitation period carries particular weight. But the court may also have regard to delay before the limitation period until the claim was first notified to the defendant.

e) If delay arose for an "excusable reason",

it may be fair and just that the action should proceed despite some unfairness to the defendant due to the delay." But lack of an excusable reason means there is nothing to meet the prejudice caused to the defendant by the delay.

f) Where it is the claimant's advisors, rather than the claimant, who caused the delay, this may be excusable.

g) If the claimant reasonably suppressed knowledge or information which otherwise would have led to proceedings being issued earlier, this is relevant to the balancing exercise.

h) Proportionality is relevant. This includes whether the claim has poor prospects of success; the claim's value and whether costs are likely to be disproportionate; or whether the claimant has a clear case against her solicitors.

The interplay between these factors was considered in the recent case of *TA v Westminster City Council and the London Borough of Lambeth* [2023] EWHC 3267 (KB) (HHJ Freedman, sitting as a High Court judge).

The claimant brought proceedings contending that the defendants' social workers had been negligent in permitting the claimant to live with his mother for a period of months in the early 1970s, and asserting that the second defendant's social workers had failed to record or take any action in respect of abuse at a children's home that he claimed to have reported to them.

The defendants argued they were very significantly hampered in defending the claim by reason of the half century that had passed since the underlying events took place. Whilst there was support in the social work records for the Claimant's mother having neglected him (he was ultimately removed from a locked room by emergency services), there was no record of the specific and detailed allegations of abuse the Claimant reported in the claim. There was no record at all of the Claimant suffering abuse at the children's home. The social workers involved were no longer available; there were difficulties finding a social work expert with knowledge of relevant standards in the early 1970s; the social work records were not comprehensive; and the alleged abuser at the children's home had died without the allegation ever having been put to him. The Defendants also argued that the cogency of the Claimant's own evidence had been very much diminished due to the passing of time. The Claimant had not been entirely consistent about what had happened, and it was clear that his own recall of events was limited. Many of the Claimant's medical records were missing, which made determining causation of the Claimant's injuries difficult.

The Claimant explained the delay on the basis that he had sought to supress memories and resorted to drug taking to do so; and that it was not until he saw reporting of the Independent Enquiry into Child Sexual Abuse in the news that his memories were triggered and he felt the confidence to commence proceedings.

The judge considered the delay in bringing the claim was "very substantial" and noted that the first opportunity the defendants had to investigate events from 50 years ago was only 2 years earlier. The judge found that the defendants' ability to defend had been "sorely prejudiced" by the delay. Despite the defendant's attempts to trace them, key witnesses were no longer available. In particular, the social workers involved were assumed (after investigation) to have died, and to have died after the expiry of the limitation period. The judge did not accept the Claimant's arguments that their evidence would have been of no real value – their absence meant that the defendants were not able to tender evidence to counter some of the Claimant's key allegations. The Claimant's own evidence had been adversely affected by the passage of time, as would be expected given he was a young child at the time, and given his history of seeking to suppress memories, and as shown by

inconsistencies in his evidence about what had happened. There was also real prejudice due to documents (including medical records) being missing, which was as a result of the delay, and the lack of suitable expert evidence was a source of prejudice. In these circumstances a fair trial was no longer possible.

The judge was sympathetic to the Claimant's reasons for the delay, which, from the Claimant's perspective, were plausible. The judge accepted that the Claimant had sought to suppress memories and been unwilling to stir up the past, because of the effect this was likely to have on his well-being. The judge also accepted that there had been times when the Claimant was unaware which of his memories were real, and which were imagined. But on the judge's findings, the Claimant did know he was a victim of abuse at all material times. He was not 'disabled' from bringing proceedings earlier, and could have done so.

Overall, the reasons for the delay were not sufficient to tip the balance in the Claimant's favour, in circumstances where a fair trial was no longer possible. The judge refused to disapply the limitation period.

This case illustrates the value for a defendant in obtaining strong evidence of real prejudice. The defendants had had no opportunity of investigating earlier, and, once notified, had attempted to remedy gaps in the evidence by tracing witnesses and documents, and by seeking to find a suitable expert. These had all turned a blank. The defendants had demonstrated, on evidence, why it would be inequitable to allow the claim to continue.

Andrew Spencer and Lisa Dobie represented the successful defendants.

# ABUSE IN THE CLINICAL CONTEXT: LESSONS FROM LETBY

By Lisa Dobie

Sadly, willful and deliberate acts of harm in a clinical context are, whilst rare, not unheard of. Often, but not exclusively, they occur in settings where patients are vulnerable and not able to protect themselves, or advocate for themselves.

It is now 20 years since the inquiry into Harold Shipman and 10 years since the Mid Staffordshire Inquiry, the latter of which led to 290 recommendations and the introduction of the NHS's Duty of Candour.

More recently, the horrifying acts of Lucy Letby have shocked us all. Lucy Letby will spend life in prison for murdering seven infants and attempting to kill at least six others during her time as a nurse. Her acts have caused unimaginable pain and sadness to families of the victims and caused lifelong injuries to some of her surviving victims. Attention is now turning to establishing what happened and what can be learned.

## Inquiry

An inquiry into the Letby scandal will be chaired by Lady Justice Thirlwall. On 19th October 2023 the terms of reference for the statutory inquiry were published. The inquiry will cover 3 broad areas:

- the experiences of the parents of the babies named in the indictment;
- the conduct of clinical and non-clinical staff and management, as well as governance and escalation processes in relation to concerns being raised about Letby and whether these structures contributed to the failure to protect babies from her;
- the effectiveness of governance, external scrutiny and professional regulation in keeping babies in hospital safe, including consideration of NHS culture.

## Calls for change

It is inevitable that such a shocking case will attract significant media attention and public calls for urgent change have been made.

Early calls have been made for the greater protection and support for whistleblowers. It has been reported that doctors who worked with Letby claimed their concerns were ignored by senior managers and said they were told to apologise for singling her out.

Dr Stephen Brearey, lead consultant on the neonatal unit who expressed his disquiet over Lucy Letby in 2015, has highlighted that he has been contacted by doctors across the country who have had similar experiences after raising concerns regarding patient safety.

It has also been reported that there have been further calls for non-clinical managers in the NHS to be regulated. In 2015 it was reported in the *British Medical Journal* that the British Medical Association (BMA) felt that NHS managers should belong to a professional body in the same way as doctors. A motion proposed by the BMA subsequently said that any professional organisation for NHS managers should be statutory and should have the power to 'censure, suspend, and withdraw the ability of managers to work in health or social care organisations'.

These are now matters for the inquiry to explore.

NHS England has responded to the inquiry in the following terms

*"...NHS England is committed to doing everything possible to prevent anything like this happening again, and we are already taking decisive steps towards strengthening patient safety monitoring.*

*The national roll-out of medical examiners since 2021 has created additional safeguards by ensuring independent scrutiny of all deaths not investigated by a coroner and improving data quality, making it easier to spot potential problems.*

*This autumn, the new Patient Safety Incident Response Framework will be implemented across the NHS – representing a significant shift in the way we respond to patient safety incidents, with a sharper focus on data and understanding how incidents happen, engaging with families, and taking effective steps to improve and deliver safer care for patients.*

*We also wanted to take this opportunity to remind you of the importance of NHS leaders listening to the concerns of patients, families and staff, and following whistleblowing procedures, alongside good governance, particularly at trust level.*

*We want everyone working in the health service to feel safe to speak up – and confident that it will be followed by a prompt response.*

*Last year we rolled out a strengthened 'Freedom to Speak Up (FTSU) policy'. All organisations providing NHS services are expected to adopt the updated national policy by January 2024 at the latest.*

*That alone is not enough. Good governance is essential. NHS leaders and Boards must ensure proper implementation and oversight. Specifically, they must urgently ensure:*

1. *All staff have easy access to information on how to speak up.*

2. *Relevant departments, such as Human Resources, and Freedom to Speak Up Guardians are aware of the national Speaking Up Support Scheme and actively refer individuals to the scheme.*

3. *Approaches or mechanisms are put in place to support those members of staff who may have cultural barriers to speaking up or who are in lower paid roles and may be less confident to do so, and also those who work unsociable hours and may not always be aware of or have access to the policy or processes supporting speaking up. Methods for communicating with staff to build healthy and supporting cultures where everyone feels safe to speak up should also be put in place.*

4. *Boards seek assurance that staff can speak up with confidence and whistleblowers are treated well.*

5. *Boards are regularly reporting, reviewing and acting upon available data".*

## 'The cost' of abuse

Undoubtedly, the 'cost' of abuse in clinical settings is significant. The personal cost to the victims and their families is immeasurable. Such acts lower morale for those working hard in the NHS and significantly erode public confidence.

As to the financial cost, figures on abuse released to the *BMJ* under a freedom of information request show that the legal bill for physical and sexual abuse and violence on NHS premises in England between 2017 and 2022 was almost £83m. These figures include claims where staff and patients were both the perpetrators and the victims.

Claims from *patients* who were abused while they were having clinical care totalled just under £18m for 233 cases, and 95 claims for sexual abuse amounted to more than £5m.[1]

## The legal landscape

Such cases are acutely sensitive and laden with complexity owing to the range of causes of action and the different forums in which the facts and/or allegations may be investigated. Whether acting for Claimants or Defendants, these cases require a breadth of experience across a number of areas of law. They attract significant media attention and may take a number of years to resolve.

The causes of action that can arise from abuse in clinical settings include:

- Criminal prosecution
- Inquest (if abuse results in death)
- Inquiry
- CICA claim
- Civil claims – vicarious liability for the abuse / battery and/or breach of a direct or non-delegable duty of care, such as:
    - Failure to carry out background checks relating to the individual or individuals concerned;
    - Failure to adequately train or supervise staff;
    - Failure to identify a pattern of concerning behaviours and act upon the same;
    - Failure to heed earlier concerns reported by colleagues.
- Civil Claim – Human Rights Act 1998: Often, the NHS Trust will be the provider of the care. They are a public body, which may give rise to allegation under the Human Rights Act 1998. This may include allegations:
    - Article 2 where the abuse has resulted in death;
    - Article 3 where the abuse has caused the patient to suffer inhuman and/or degrading treatment at the hands of the clinician;
    - Article 5 where the abuse has included unlawful restraint / detention of patients.
    - It has even been argued that parents of a victim are able to recover damages for infringement of *their* Article 3 and/or 8 Convention Rights.

However, putting the civil and criminal justice system to one side, the real challenge now is finding the answers as to what happened and how it was able to happen, so as to bring about meaningful improvements. No doubt there is a feeling of urgency for such answers and change, but meaningful improvements will take time to identify and implement.

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[1] *BMJ 2023,* 381: p1185

# *WOODCOCK V CHIEF CONSTABLE OF NORTHAMPTONSHIRE* [2023] EWHC 1062 (KB) - A COMMON LAW DUTY OF CARE TO WARN?

By Ian Clarke

On 19 March 2015 the Claimant was leaving her house with her children when she was attacked by her former partner (RG) and stabbed at least seven times. As a result of the attack, which was witnessed by her children, she suffered serious injuries. Her attacker was convicted of attempted murder and imprisoned for life.

The appalling attack did not come out of the blue. The Claimant had endured a long history of terrible behaviour at the hands of RG. She had reported him to the police on numerous occasions, he had been arrested and bail conditions (which he broke) imposed. The Claimant received death threats from persons she believed had been put up to them by RG. The relationship continued on and off until 4 February 2015 when they finally separated.

RG's distressing behaviour continued and escalated. The Claimant reported RG to the police in February 2015 saying that he had attended her workplace and had to be removed by the management. The Claimant reported that her car mirrors had been damaged and that, following a visit by police officers, RG had sent her 25 abusive messages within 24 hours. The messages included threats to rape the Claimant's children.

RG was arrested. In error he was assessed as "medium risk" when the risk assessment should have revealed that he posed a "high" risk. In breach of his bail conditions RG was reported to have entered the Claimant's car when she was inside and asked her to drop the charges against him.

On 17 March 2015, the Claimant reported that RG had approached her in the town and tried to hug, kiss and talk to her and then followed her to her car. The police attended and took a statement. RG's behaviour continued and it was reported to the police that he had made threats to kill "*every person in her household*" should he go to prison. There were other threats and CCTV footage showed RG climbing over the rear fence of the Claimant's home.

On 19 March 2015, CCTV footage showed RG had arrived at the Claimant's home and kicked the front door trying to get in. The Claimant reported to the police that RG had threatened to kill her. The police arrived and the Claimant asked the officers to stay and protect her.

The police devised a safety plan in the following terms: "*the Claimant to keep her mobile phone fully charged at all times; if RG attended her home to get into a locked room and call the police; to lock all windows and doors; to have family and friends stay over for the night; to call the police on 999 if she saw RG; to make neighbours aware of the issue.*"

At 07.32 on 19 March 2015 one of the Claimant's neighbours called 999. The neighbour told the operator that "*I can see him* [RG] *lurking outside the lady's house, I think he's gonna attack her when she comes out to go to work*." At 07.36 a constable was dispatched to the Claimant's house to arrest RG but did not warn the Claimant that RG was outside or that they were on their way. At 07.43 another officer self-dispatched to the address but again did not call the Claimant. No one else from the Defendant force made any call to the Claimant to warn her about RG's presence.

The Claimant sued the police in negligence arguing that the police owed her a duty of care to "*keep her safe*" and that this duty was breached in several respects. At first instance, HHJ Murdoch held that the police

did not owe the Claimant a duty of care in negligence. The Claimant appealed and the matter came before Ritchie J.

Ritchie J found that the "*real issue*" was whether "*through special or exceptional circumstances or through an assumption of responsibility, having received the 999 call, the Defendant had a duty of care to the Claimant to warn her by phone that RG was loitering outside her house and that the police were on their way to arrest him (and perhaps also to stay indoors until the police arrive).*"[99].

Such an argument would conventionally be advanced as a breach of Article 2 rights. As was noted by the House of Lords in *Van Colle v The Chief Constable of the Hertfordshire Police* [2008] UKHL 50:

> "*It is plain from Osman and later cases that Article 2 may be invoked where there has been a systemic failure by member states to enact laws or provide procedures reasonably needed to protect the right to life. But the article may also be invoked where, although there has been no systemic failure of that kind, a real and immediate risk to life is demonstrated and individual agents of the state have reprehensibly failed to exercise the powers available to them for the purpose of protecting life."*

However, the Claimant's claim was in negligence. The problem with such a claim is that the law does not generally recognise a duty of care to prevent harm caused by third parties. In *Robinson v The Chief Constable of West Yorkshire* [2018] UKSC 4, Lord Reed observed at [50]:

> *... the general duty of the police to enforce the law did not carry with it a private law duty towards individual members of the public. In particular, police officers investigating a series of murders did not owe a duty to the murderer's potential future victims to take reasonable care to apprehend him. That was again in accordance with the general law of negligence. As explained earlier, the common law does not normally impose liability for omissions, or more particularly for a failure to prevent harm caused by the conduct of third parties. Public authorities are not, therefore, generally under a duty of care to provide a benefit to individuals through the performance of their public duties, in the absence of special circumstances such as an assumption of responsibility. This was recognised by Lord Toulson JSC in Michael's case. As he explained, at paras 115–116:*
>
> > *"115. The refusal of the courts to impose a private law duty on the police to exercise reasonable care to safeguard victims or potential victims of crime, except in cases where there has been a representation and reliance, does not involve giving special treatment to the police ...*
> >
> > *116. The question is therefore not whether the police should have special immunity, but whether an exception should be made to the ordinary application of common law principles ..."*

Summarising the position, Lord Reed at [70] held:

> *...it follows that there is no general rule that the police are not under any duty of care when discharging their function of preventing and investigating crime. They generally owe a duty of care when such a duty arises under ordinary principles of the law of negligence, unless statute or the common law provides otherwise. Applying those principles, they may be under a duty of care to protect an individual from a danger of injury which they have themselves created, including a danger of injury resulting from human agency, as in the Dorset Yacht case [1970] AC 1004 and Attorney General of the British Virgin Islands v Hartwell [2004]*

> *1 WLR 1273. Applying the same principles, however,* ***the police are not normally under a duty of care to protect individuals from a danger of injury which they have not themselves created, including injury caused by the conduct of third parties, in the absence of special circumstances such as an assumption of responsibility****."*

Ritchie J went on to hold that a duty of care did exist based upon "*special or exceptional circumstances*" and that the Defendant had assumed a responsibility based upon their words and actions which "*gave rise to the Claimant having a reasonable expectation that the Defendant would inform her that RG was loitering outside her house in circumstances where she was likely soon to leave her house and there would be a 5 to 10 minute gap before the arrival of the police to arrest RG. The Claimant was relying on the police to pass on neighbour's message*."[113]

It is arguable that the conclusion as to the existence of a duty of care runs contrary to the weight of earlier authority. In *Tindall v The Chief Constable of Thames Valley* [2022] EWCA Civ 25, Stuart-Smith LJ at [54] distilled various principles to be applied when considering whether the police had assumed responsibility to an individual member of the public so as to give rise to a duty of care to protect them from harm. In particular:

> "iv) Knowledge of a danger which the public authority has power to address is not sufficient to give rise to a duty of care to address it effectually or to prevent harm arising from that danger:
> ...
>
> viii) The circumstances in which the police will be held to have assumed responsibility to an individual member of the public to protect them from harm are limited. ***It is not sufficient that the police are specifically alerted and respond to the risk of damage to identified property (Alexandrou) or injury to members of the public at large (Ancell) or to an individual (Michael)*****".**

That the Court found that a duty exists can be seen as surprising as knowledge of a risk to the individual is not of itself sufficient. It would appear to be the first time that a Court has found that "*exceptional circumstances*" of themselves could found a duty of care in negligence. The fear for local authorities is that "*exceptional circumstances*" become over time less and less exceptional in their application. The need to fashion a duty of care in this situation is perhaps all the more significant given that the Claimant had an appropriate cause of action under Article 2 of the ECHR already without the need to fashion one out of cloth of the common law. Moreover, the finding that the Claimant relied on the police to pass on her neighbour's warning is debatable as it relied upon an inference drawn from the apparent implications of that plan (as to which see [81] of *GN v Poole BC* [2019] UKSC 25).

There is also a tension between the imposition of a duty of care in these circumstances and the authoritative position that local authorities are to be treated in the same way as private parties when it comes to questions of duty (*GN v Poole BC* at [26]).

The Court of Appeal granted the Defendant permission to appeal on 31 October 2023, and those proceedings will be watched with great interest by police forces and local authorities.

# RECOVERING LOSSES FROM ABUSERS: CLAIMS UNDER THE CIVIL LIABILITY (CONTRIBUTION ) ACT 1978

By Conor Kennedy

The growth in abuse claims over recent decades has placed an increasing strain on the resources of defendant organisations. It will often be the case that the abusers responsible have secured their positions of trust or power by virtue of their professional role. Whether that is as a teacher, a police officer, a medical professional, or some other respected profession, it is frequently the case that they have had a career with at least some degree of success. Where there is a career, there will often be some kind of asset which the abuser holds, usually their family home or pension rights. In circumstances where the abuser's actions have caused not only incalculable damage to victims, but corresponding financial loss to their employers or principals, organisations (which I shall call "Defendant Organisations" henceforth, to avoid the disorienting terminology of claimant; defendant/part 20 claimant; and part 20 defendant) are increasingly choosing to pursue those assets by means of a claim for contribution against the abusers personally.

## The basis of liability

As a reminder, the legal framework for contribution claims is found in the Civil Liability (Contribution) Act 1978. Section 1(1) provides:

> *"[...] any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)."*

Often Defendant Organisations will settle abuse claims before trial for the usual obvious reasons. In those circumstances, section 1(4) provides:

> *"A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage [...]shall be entitled to recover contribution [...] without regard to whether or not he himself is or ever was liable in respect of the damage, provided [...] that he would have been liable assuming that the factual basis of the claim against him could be established."*

Section 1(4) was intended to avoid a situation whereby defendants would be disincentivised to settle or compromise if it would forfeit their right to claim a contribution from another party. It therefore *"neither requires nor permits any investigation"* into whether the Defendant Organisation was actually liable to the Victim (*WH Newson Holding Ltd v IMI Plc* [2017] Ch. 27). The Defendant Organisation need only show that the Victim's claim against it disclosed *"a reasonable cause of action"* against the Defendant Organisation. A collateral defence, such as one that alleges the Victim's claim would have been time-barred under the Limitation Act 1980, would not defeat the Defendant Organisation's claim for a contribution.

## The quantum of the contribution

Whilst the right to bring a claim for contribution is relatively clear-cut, the question of how much the Abuser should pay can be more difficult, depending on the facts of the case.

Section 2(1) of the 1978 Act provides:

> *"[...] the amount of the contribution recoverable from any person shall be such as may be found by the court to*

> *be just and equitable having regard to the extent of that person's responsibility for the damage in question."*

The words *"just and equitable"* might at first sight seem to be unhelpful as guidance, but the provision allows for necessary flexibility in allocating liability for the variety of factual scenarios that can give rise to claims for contribution.

As part of establishing the extent of the Abuser's responsibility for the damage, the Defendant Organisation must establish that the Abuser would have been liable to the Victim. That is not always straightforward, particularly where the Defendant Organisation has settled the Victim's claim against it.

The most obvious and straightforward way by which to establish the Abuser's responsibility is by relying on a criminal conviction. Section 11 of the Civil Evidence Act 1968 provides that the fact a person has been convicted of an offence in the UK shall be admissible for the purpose of proving that they committed that offence, *"unless the contrary is proved"*. In effect, that imposes a rebuttable presumption that an Abuser convicted of abusing the Victim committed that abuse. Because the presumption is rebuttable, a Defendant Organisation cannot apply to strike out a defence filed by a convicted Abuser, but an application for summary judgment under CPR 24.3 would be permissible and would generally be difficult for an abuser to oppose, thereby saving a great deal of time and money. Where an Abuser has already had a full opportunity of contesting the allegation in criminal proceedings, where the legal presumptions and rules of evidence were as high as they could be in their favour, it will usually be fanciful to think that the Abuser could realistically rebut the applicable presumption.

Where there is a criminal conviction for abuse, the Defendant Organisation's liability will generally be based solely or primarily vicarious through the wrongdoing of the Abuser and the court will order a full indemnity, as was the case in *KD v Chief Constable of Hampshire* [2005] EWHC 2550 (QB) where a chief constable had sought an indemnity against one of his police officers for a claim arising out of sexual harassment and abuse.

It is important to distinguish such cases of abuse from cases of neglect. Where a Victim suffers damage by reason of negligence of two or more parties (say, the Defendant Organisation and a social worker) the apportionment of liability will be made on a "fair and equitable" assessment that will turn on the levels of culpability and causative impact of each party's negligence. Such an assessment will include an apportionment of the Victim's costs payable by the Defendant Organisation.

Whilst most cases of abuse will not fall into this category of negligence, there will be cases where there are a number of Defendant Organisations who bear some degree of culpability or responsibility for abuse which has taken place, and in such cases one Defendant Organisation may wish to consider contribution proceedings against another Defendant Organisation, e.g. where there are police, social services, teachers and medical professionals involved in a case where abuse has inadvertently been allowed to take place.

## Time limits for contribution claims

Time does not start to run on the right to bring a claim for contribution until either judgment or the date of any settlement agreement. The issue was recently considered by the Court of Appeal in *URS Corp Ltd v BDW Trading Ltd* [2023] EWCA Civ 772 where a developer had brought a contribution claim against a structural designer for defects in buildings they had designed. The Court of Appeal held that it was not a condition precedent to the making of a contribution claim under section 1(1) that a third party should have brought a claim against the contribution claimant. Rather, the

three ingredients required for a claim under section 1(1) were established when (i) the contribution claimant was liable, or could be found liable, to the third party; (ii) the contribution defendant was liable, or could be found liable, to the third party; and (iii) their respective liabilities were in respect of the same damage suffered by the third party.

## Enforcement against pension assets

Defendant Organisations contemplating contribution proceedings will often begin and end their investigations with an enquiry as to the real property assets of abusers, but pension assets should not be ignored. A number of authorities, including recently *Bacci v Green* [2022] EWHC 486 (Ch), have held that victims of fraud should be permitted to enforce judgments against pension assets, overcoming section 11 of the Welfare Reform and Pensions Act 1999 (which prevents pension rights from falling into a bankrupt's estate). Whilst that related to liability for fraud, there is an analogous argument to be made in respect of liability for personal injury.

## Conclusion

At a time when the average UK house price is around £285,000, and where pension funds and stock indexes are reaching record heights, there is every reason for Defendant Organisations to look to recover their financial losses from those who bear primary responsibility for them. In cases of criminal convictions, establishing liability through an application for summary judgment will be quick and cost effective, but a claim for contribution can merit consideration even in less clear-cut factual matrixes.

# CLAIMS ARISING OUT OF ASSAULTS IN A PACKAGE HOLIDAY CONTEXT

By Sarah Prager KC and Kerry Nicholson

Recently the travel and cross border team at Deka have identified a concerning increase in claims arising out of sexual and other assaults occurring during the course of holidays. Many of these claims involve young women on holiday with their families or on a first trip abroad with friends of the same age. Often the alleged assailants are members of hotel staff: waiters, gardeners, sometimes hotel managers.

The traumatic nature of all such assaults is obvious; but in the case of incidents occurring abroad the complainant's feelings of powerlessness continue long after the assault is over. (S)he is far from home and from his or her familial support network, often in a country in which the local authorities do not speak English and have very different methods of dealing with crimes of this nature, and sometimes forced to remain in the very hotel at which the assault took place, even whilst the assailant continues to work there.

## Non-package holidays

In the case of holidays not booked as a package there are limited options as regards bringing a civil claim for damages for a sexual assault committed outside the jurisdiction, and generally it will be necessary for the complainant to bring his or her claim in the country in which the incident occurred. Sometimes it is possible to link a civil claim to criminal proceedings, enabling all claims to be dealt with at once and necessitating only one trial; alternatively it may be necessary for the complainant to bring freestanding civil proceedings, using local lawyers, often at his or her private expense. In many jurisdictions damages are modest by English standards, and costs are not recoverable. In addition, the trauma involved in returning to the place in question to give evidence at trial should not be discounted. In these cases the complainant will often decide that it is not in his or her best interests to bring a civil claim.

## Package holidays

By contrast, where an assault has occurred during the course of a package holiday, and where the alleged assailant is a member of hotel staff, it may well be possible for a claim to be brought within the jurisdiction of England and Wales. This is due to the operation of the Package Travel and Linked Travel Arrangements Regulations 2018, Regulation 15(2) of which provides:

> *The organiser is liable to the traveller for the performance of the travel services included in the package travel contract, irrespective of whether those services are to be performed by the organiser or by other travel service providers.*

This provision imposes a quasi-vicarious liability on a tour operator or other package organiser in respect of the provision of services under the package contract, including the provision of accommodation. At one point there was some doubt as to whether or not this liability extended to the deliberate acts of hotel staff, but following the decision of the Supreme Court in *X v Kuoni Travel Ltd* [2021] 1 WLR 3910 this doubt has been involved in favour of claimants in these cases.

## The facts

Mrs X and her husband entered into a package holiday contract with Kuoni for return flights to Sri Lanka and two weeks' all-inclusive accommodation at a hotel in July 2010.

The booking conditions incorporated into the contract, which were standard terms used in

the industry, provided that: *'Your contract is with [Kuoni]. We will arrange to provide you with the various services which form part of the holiday you book with us'*. Clause 5.10(b) of the contract provided that:

> *'... we will accept responsibility if due to fault on our part, or that of our agents or suppliers, any part of your holiday arrangements booked before your departure from the UK is not as described in the brochure, or not of a reasonable standard, or if you or any member of your party is killed or injured as a result of an activity forming part of those holiday arrangements. We do not accept responsibility if and to the extent that any failure of your holiday arrangements, or death or injury is not caused by any fault of ours, or our agents or suppliers; is caused by you; ... or is due to unforeseen circumstances which, even with all due care, we or our agents or suppliers could not have anticipated or avoided.'*

In the early hours of 17th July 2010, whilst making her way through the grounds of the hotel to the reception, X came upon N, an electrician and hotel employee, who was on duty and wearing the uniform of a member of the hotel staff. After offering to show X a shortcut to reception, N lured her into an engineering room where he raped and assaulted her.

At first instance, Judge McKenna dismissed the claim on the grounds that *"holiday arrangements"* in clause 5.10(b) did not include a member of the maintenance staff conducting a guest to reception. He further held, obiter, that Kuoni would in any event have been able to rely on the statutory defence under regulation 15(2)(c)(ii) of the Package Travel, Package Holidays and Package Tours Regulations 1992 ("the PTR", the precursor to the 2018 Regulations, which contain a similar provision) because the assault was an event which could not have been foreseen or forestalled even with all due care. The Court of Appeal (Sir Terence Etherton MR, Longmore and Asplin LJJ) dismissed the appeal by a majority (Longmore LJ dissenting).

## The Supreme Court and Court of Justice of the European Union

On a further appeal, the Supreme Court decided that a referral to the CJEU was necessary to determine the appeal. In essence, the issues referred were as follows:

1) Where there has been a failure to perform/improper performance of a package holiday contract due to the actions of an employee of a hotel supplier, (1) is the defence under regulation 15(2)(c)(ii) of the PTR available to a tour operator in principle and if so (2) how does the defence operate? Alternatively,
2) Is an employee of the aforesaid hotel himself a *'supplier of services'* for the purposes of regulation 15(2)(c)(ii)?

It is important to note that the CJEU was asked to assume for the purposes of its decision that (1) a member of maintenance staff conducting a guest to reception was within the scope of the *'holiday arrangements'* contracted for and (2) the rape and assault constituted improper performance of the contract. Neither issue had been determined by the Supreme Court.

The CJEU determined that:

I. An employee is **not** a 'supplier of services' since he has not concluded any agreement with the package travel organiser, but merely performs work on behalf of a supplier of services.

II. However, an organiser may be liable for the acts or omissions of an employee of a supplier of services, where they constitute improper performance of an obligation under the contract.

The Court held that:

- Where the obligations arising from a package travel contract are performed by the employees of suppliers of

services, the performance or failure to perform certain actions by those employees may constitute non-performance or improper performance of the obligations arising from the package travel contract.

- That non-performance or improper performance, although caused by acts of employees of a supplier of services, is such as to render the organiser liable.

- In the present circumstances *'a travel organiser such as Kuoni may be held liable to a consumer such as X for improper performance of the contract between the parties, where that improper performance has its origin in the conduct of an employee of a supplier of services performing the obligations arising from that contract'.*

- The deliberate act of an employee of a supplier of services is not an *'event'* which could not be *'foreseen or forestalled'*.

The exemption from liability refers to situations in which the non-performance or improper performance of the contract is due to an event which *'the organiser or the supplier of services, even with all due care, could not foresee or forestall'.*

The Court held that an organiser may rely on the exemption:

i) even if the event is not unusual, provided it cannot be foreseen; or,

ii) even if it is not unforeseeable or unusual, provided it cannot be forestalled.

However,

- The *'event'* is not the same thing as a *force majeure* (which constitutes a separate ground for exemption from liability).

- The grounds for exemption from liability contain specific instances in which non-performance/improper performance is not attributable to the organiser/ supplier of services (e.g. where failures are attributable to the consumer or a third party). Those instances reflect the aim of the Directive that an organiser/ supplier of services should be exempt where they are not at fault for the failure.

- *'That absence of fault means that the event which cannot be foreseen or forestalled referred to in the third indent of Article 5(2) of Directive 90/314 must be interpreted as referring to a fact or incident which does not fall within the sphere of control of the organiser or the supplier of services.'*

- Since (for the reasons under point II above) *'the acts or omissions of an employee of a supplier of services, in the performance of obligations arising from a package travel contract, resulting in the non-performance or improper performance of the organiser's obligations vis-à-vis the consumer fall within that sphere of control, those acts or omissions cannot be regarded as events which cannot be foreseen'.*

The Supreme Court, applying these determinations, unanimously allowed Mrs X's appeal from the decision of the Court of Appeal, finding that:

- The deliberate acts of the hotel employee constituted an improper performance of the tour operator's obligations under the package contract within the meaning of Regulation 15;

- A 'broad view' should be taken of the obligations owed by tour operators, to include obligations in relation to a range of ancillary services necessary for the provision of a holiday of a reasonable standard;

- It is an integral part of a holiday that a hotelier's employees should provide

guests with assistance with 'a range of ordinary matters affecting them during their stay', including assistance guiding them around the hotel;

- (Perhaps unsurprisingly) the actions of the hotel's employee constituted a failure to provide this service with proper care;

- There was no defence under Regulation 15(2)(c). Following the binding judgment of the CJEU, a narrow view of the defence relied on (and presumably the other defences under that provision) must be taken. It does not apply where the acts or omissions forming the basis of the claim are those of employees of the supplier.

## Conclusion

The decision of the Supreme Court related to the operation of the 1992 Regulations, of course, and these have now been replaced by the Package Travel and Linked Travel Arrangements Regulations 2018. Nevertheless, the same rationale applies in respect of the 2018 regulations as in relation to their precursor; the courts will be astute to interpret consumer protection legislation widely so as to encompass deliberate acts of suppliers' employees.

In this respect the case is encouraging for those representing claimants in package holiday cases, and in particular in claims arising out of assaults occurring on package holidays. But although the legal nexus in such cases is now known to be advantageous to complainants, the human cost of them should not be underestimated. Mrs X was assaulted in 2010; she was cross examined at trial on the basis that her account of what happened was untrue; she was found at first instance to be an unreliable witness in some respects; her case was then considered by the Court of Appeal (where she failed), the Supreme Court (which referred it to the Court of Justice of the European Union), the CJEU, and then again by the Supreme Court, in 2021, when she finally succeeded in her claim. All told, it took her over a decade to obtain judgment in her favour, no doubt due to the tenacity of those representing her.

Not all complainants would be willing or able to pursue a claim of this nature over such a protracted period. In the view of the authors it is one of the duties of those representing this cohort of claimants to explain to them at an early stage what is required of them and the likely timescales involved in litigating claims of this nature – either in the courts of England and Wales or, in some cases, in a foreign jurisdiction.

# THE REMOVAL OF CHILDREN FROM THE CARE OF THEIR PARENTS IN THE FAMILY COURT: RELEVANT STATUTORY PROVISIONS AND CASE LAW

By Tim Parker KC and Thomas Jones

In this article, Tim Parker KC and Thomas Jones consider the key statutory provisions and the case law which set out the legal test under the Children Act 1989 ("the Act") for the removal of children from the care of their parents at the conclusion of care proceedings. Section 47(1) of the Act charges local authorities with a duty to investigate the circumstances of a child resident or found in their area where there are grounds to believe that the child is suffering or at risk of suffering significant harm. The duty to investigate may be triggered by the local authority's own information or by a referral made by the police, medical professional, school or member of the public.

## Statutory framework

Parts IV and V of the Children Act 1989 are concerned with child protection and orders available to local authorities in relation to children. Once the s47 duty is triggered a local authority must undertake inquiries "directed towards establishing .... whether the authority should make any application to the court, or exercise any of their other powers under this Act ...." (section 47(3)(a)). Before making an application to the court, a local authority is expected to consider whether a child can be sufficiently protected by a child in need plan (s17 of the Act) or by child protection plan (Working Together to Safeguard Children Regulations 2018).

A local authority has no power simply to remove a child from a parent's care. The local authority must obtain the court's sanction for removal, either by an emergency protection order (section 44) or a care order (section 31 (1)(a)). A care order may be applied for by a local authority or an "authorised person", which is defined in section 31(9) as being the NSPCC. The court is precluded from placing a child into local authority care pursuant to its inherent jurisdiction (section 100(2)(a)). A child can only be in care if the court makes a care order (section 105(1)). The parties to a public law application are the parents and the child by their children's guardian appointed by Cafcass.

## Stage one: threshold

In considering whether to make a public law order, a court must first be satisfied that the legal threshold for the making of an order is crossed. The rationale for this staged process is that since the local authority is a state entity, obligations under the ECHR apply. The local authority intervention in a family is an arguable breach of Article 8 and must therefore be proportionate to the concern that has triggered the intervention.

The threshold criteria to be fulfilled are set out in section 31(2), namely:

> that the child concerned is suffering, or is likely to suffer, significant harm; and
> that the harm, or likelihood of harm, is attributable to:
>
> > the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
> >
> > the child's being beyond parental control.

"Harm" is defined in section 31(9) as "ill-treatment or the impairment of health or development" and "development" means the child's physical, intellectual, emotional, social or behavioural development.

In *Re L (Care: Threshold Criteria)* [2007] 1

FLR 2050 Hedley J explored the meaning of "significant harm" and made the following observations:

> 50. In order to understand this concept and the range of harm that it's intended to encompass, it is right to begin with issues of policy. Basically it is the tradition of the UK, recognised in law, that children are best brought up within natural families. Lord Templeman, in *Re KD (A Minor Ward) (Termination of Access)* [1988] 1 AC 806 at 812 said this: "The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not in danger. Public authorities cannot improve on nature."
>
> There are those who may regard that last sentence as controversial but undoubtedly it represents the present state of the law in determining the starting point. It follows inexorably from that, that society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done.

These observations by Hedley J have been repeated with approval by the Supreme Court in *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33. Similarly, Baroness Hale in *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35 makes the same point in the following terms:

> 20. Taking a child away from her family is a momentous step, not only for her, but for her whole family, and for the local authority which does so. In a totalitarian society, uniformity and conformity are valued. Hence the totalitarian state tries to separate the child from her family and mould her to its own design. Families in all their subversive variety are the breeding ground of diversity and individuality. In a free and democratic society we value diversity and individuality. Hence the family is given special protection in all the modern human rights instruments including the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 8), the International Covenant on Civil and Political Rights (article 23) and throughout the United Nations Convention on the Rights of the Child. As McReynolds J famously said in *Pierce v Society of Sisters* (1925) 268 US 510, 535, "the child is not the mere creature of the state".

The local authority has the power to apply for an interim care order pending the final hearing. The purpose of the interim care order is to maintain a status quo pending the conclusion the proceedings. The statute introduces a slightly lower threshold test: threshold will be met where there are "reasonable grounds to believe" that the threshold criteria are met (section 38(2)).

The court has the power to sanction removal of children at the interim stage where the child's welfare needs demand separation. The Court of Appeal set out a five stage test in *In C (A Child) (Interim Separation)* [2019] EWCA Civ 1998, [2020] 1 FLR 853, the Court of Appeal considered the legal principles to be applied to the circumstances where the local authority seeks to separate a child from its parents pending a final order. Jackson LJ sets out the propositions derived from the case law as follows:

a) An interim order is inevitably made at a stage when the evidence is incomplete.

It should therefore only be made in order to regulate matters that cannot await the final hearing and it is not intended to place any party to the proceedings at an advantage or a disadvantage.

b) The removal of a child from a parent is an interference with their right to respect for family life under article 8. Removal at an interim stage is a particularly sharp interference.

c) Accordingly, in all cases an order for separation under an interim care order will only be justified where it is both necessary and proportionate. The lower ('reasonable grounds') threshold for an interim care order is not an invitation to make an order that does not satisfy these exacting criteria.

d) A plan for immediate separation is therefore only to be sanctioned by the court where the child's physical safety or psychological or emotional welfare demands it and where the length and likely consequences of the separation are a proportionate response to the risks that would arise if it did not occur.

e) The high standard of justification that must be shown by a local authority seeking an order for separation requires it to inform the court of all available resources that might remove the need for separation.

## Stage two: welfare

If the court finds that the threshold criteria are not satisfied, there is no jurisdiction to make public law orders and in all likelihood the proceedings are dismissed. If threshold is met either by agreement or by decision of the court, the jurisdiction to make care or supervision orders is activated. Having justified its intervention, the local authority must then produce a plan for the child (s31 (3A) of the Act). In formulating the plan, the local authority's evidence will have to assess the risk that has been identified by the threshold findings and how that risk can be managed. The local authority has to undertake a global assessment of the placement options for the child in making a recommendation for their accommodation and care during childhood. The plan may provide, non-exhaustively, for support within the family, placement with a family member away from home, placement outside the family in foster-care or adoption. The local authority needs to decide whether an order is required to support the plan and if so which order will best achieve that aim. At all times the plan and order supporting it must be proportionate to the needs of the case: *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33.

The welfare of the child is paramount when the court evaluates the proposed plan (s1(1) of the Act). Statutory guidance as to the considerations which must be taken into account when applying the paramountcy principle is set out in the "welfare checklist" in section 1(3) of the Act. The court will receive evidence from the local authority, expert witnesses, the family and the analysis of the children's guardian. Ultimately the welfare checklist requires the court to consider the powers that it has to make orders and it will need to be satisfied that making an order is better for the child than making no order (section 1(5) of the Act). At the final hearing the court has the option of either accepting or rejecting the local authority plan for the child; it cannot impose a plan or order upon an unwilling local authority. The court must make the least interventionist order possible: *Re H-W (children); Re H-W (children) (No 2)* [2022] UKSC 17 at para 45.

# TOLERATING DIVERSE PARENTING: THE THRESHOLD FOR ARTICLE 3 IN FAMILY CASES

By Patricia Londono

In *AB (by the Official Solicitor: his litigation friend) v (1) Worcestershire County Council and (2) Birmingham City Council* [2023] EWCA Civ 529 the Court of Appeal ('CA') dealt with the threshold that must be met to establish that a local authority has breached its operational duties under the European Convention on Human Rights ('ECHR') Art 3 – the prohibition on inhuman or degrading treatment or punishment – in failing to remove a child from the care of its parents.

AB (d.o.b. 05/10/2002) lived with his mother and younger brother within the area of Birmingham City Council ('BCC') between July 2005 and November 2011, and of Worcestershire County Council ('WCC') between November 2011 and January 2016. In August 2014, AB was accused of sexually abusing a friend of his brother and was accommodated by WCC. An interim care order placing him in the care of WCC was made in May 2015 and a final care order in January 2016. He did not return to the care of his mother. AB brought his claim that the two respondents, WCC and BCC had failed in their duties under Article 3 whilst he was living within their areas between 2005 and 2014.

## The factual basis of the claim

The claims against BCC involved 7 incidents over a period of 4 years. There were two incidents in July 2005. In the first, AB was reported to be *"living in a dirty home, not being fed properly, was dirty and smelly and had bleached hair which had left him with chemical burns to his scalp and neck".* In the same month, a second report noted that AB had bruising to his legs that were said to have been caused by his mother's partner ('Ms X' - a Sch 1 offender with a conviction for abusing her daughter who had been staying with the family). There was one report in 2006 that AB was always locked in his room and often hungry. In 2008 there were two further reports: one in July which said that Ms X had struck AB with the consent of his mother and then in December that AB's mother was dressing AB in women's clothing *"for the amusement of her friends".* There were a further two reports in 2009: in April a report noted that AB's mother had pushed him to the ground, and in November AB's mother had reported to the police that he had been slapped by a babysitter.

The claims against WCC involved 4 incidents over a period of 2 years. In April 2012, AB and his two-year-old brother are taken into police custody after being seen walking at night unaccompanied. The two were returned to Ms B who was at the time caring for them. She was intoxicated and admitted being an alcoholic. It was reported that *"[t]he accommodation is squalid with evidence that [AB] and his brother had been eating from the floor".* In July 2013, it was reported that AB's mother *"pushed him; sat on him; bumped his head and scratched his arm and neck with fingernails"* [*sic*]. In January 2014, AB reported that his mother hurt him *"including dragging him upstairs with her hands around his throat".* Finally, in June of the same year, AB reported *"that his mother was being emotionally and physically abusive"* [19].

## The application for summary judgment

WCC and BCC were successful in an application for summary judgment pursuant to CPR 24.2. The judge, in granting their application concluded that there was no realistic prospect of establishing that AB was either subject to the treatment that fell within the scope of Art 3, nor that he was at *"real and immediate risk"* of such treatment and

that the respondents knew or ought to have known of such a risk. Furthermore, there was no realistic prospect of establishing that *"the disorderly and unstable family situation should have led the social services to conclude that a care order was required". AB* would not be able to establish that the respondents had *"care and control"* of *AB "such that they had assumed responsibility for his welfare"* or that the respondents had breached their investigative duty under Art 3 [26-41]. It had not been suggested that the claims were *"the tip of the iceberg"* in that it was not suggested that *"other forms of ill-treatment were taking place which the defendants would have discovered if they had responded appropriately to the reports that* ***were*** *made"* [30].

In concluding that the claim had no realistic prospect of success, the judge concluded:

> *"It would be difficult not to empathise with AB. There were a catalogue of reports in the social service records which raised a cause for concern and strongly indicate that the parenting skills of his mother were inadequate. He may well feel that he did not have a good start in life, and he is now a vulnerable adult. However, my task has been to determine whether the claims as pleaded are viable...there is insufficient evidence that the various incidents relied upon by AB reach the high threshold required to sustain an Article 3 claim".* [41]

## The decision of the Court of Appeal

The leading judgment was delivered by Lord Justice Lewis. He relied on the oft-cited principle that in order for a positive obligation to arise:

> *"...it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk of ill-treatment of an identified individual from the...acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk"* (*X v Bulgaria* (2021) 50 BHRC 244 [183]).

The obligation thus comprises (1) a risk that is *"real and immediate"* (2) of treatment of sufficient severity to reach the threshold of Article 3 (3) that the authority *"knew or ought to have known of the risk"* and (4) that they *"failed to take measures within their powers which, judged reasonably, might have been expected to avoid that risk"* [57]. In relation to point (2) namely the minimum level of severity needed to ground an Art 3 claim, he reiterated that *"[t]he assessment of that level is...relative and depends on all the circumstances of the case,"* such as the duration, physical and mental effects, and the state of heath, sex, and age of the victim [59]. In cases where what is alleged is a failure to remove a child from a parent, *"serious and prolonged ill-treatment and neglect, giving rise to physical and psychological suffering"* is capable of reaching the threshold ([59]; *Z v United Kingdom* (2002) 34 EHRR 97]). The risk must be *"present and continuing"* at the time of the alleged breach, as opposed to a risk that might materialise in future (Lord Dyson *Rabone v Pennine Care NHS Trust* [2012] UKSC 2 [39]). Whether the authorities *"knew or ought to have known'* is a matter that should not be determined with the benefit of hindsight – the assessment should be of *"events as they unfolded at the time"* ([61]; *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50 [32]). The duty should not *"impose an impossible or disproportionate burden on the authorities bearing in mind the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources"* [62]. In this type of case, regard also needs to be had to Art 8 and the "*difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life"* (*Z v UK* [74]). The test for breach is stringent and not easily met (*Van Colle* Lord Hope [66], Lord Brown [144]).

The CA found that in relation to the allegations against BCC, the judge was entitled to make the findings that she did. The reported injuries were not of sufficient severity to reach the Art 3 threshold; the incidents were isolated, occurring over a 4-year period with *"significant gaps in between"* and did not "*evidence a real and immediate risk, that is, a risk that was present and continuing"* [68]. The report regarding the dressing of AB in women's clothing for the amusement of the mother was *"insensitive, unkind and an example of poor parenting but did not, objectively, meet the threshold required"* [69]. In relation to the appeal against WCC. AB had been placed in the care of his aunt and then foster parents between July 2013 and May 2014 when AB alleged *"that his mother had pushed him, sat on him, bumped his head and scratched him".* The authorities had sought to keep the family together and had not failed to take appropriate measures by seeking alternative ways of dealing with the problems in the mother's care as opposed to seeking a care order. The CA held that:

> *"An application for a care order, with a view to removing a child from the care of the child's parents, is the last resort where the child is suffering, or is likely to suffer, significant harm (or in the case of interim care orders, there are reasonable grounds for believing that such harm may result). That does mean that children will remain if possible with their families. Society will have to tolerate very diverse parenting including the barely adequate and the inconsistent and children will have very different experiences of parenting and very unequal consequences as a result"* (*MA (Care Threshold* [2009] EWCA Vic 853 Ward LJ 49-53)

The CA's view, the matter was dealt with appropriately by summary judgment. The evidence did not establish a *"real and immediate risk"* of treatment which met the threshold for Art 3. It was not suggested that other evidence might become available [83] and neither BCC nor WCC had breached Article 3 by adopting methods that were less intrusive than a care order [87].

This case illustrates the difficulties in bringing breaches of operational duty claims against local authorities and the high hurdles that must be overcome to establish breach. Isolated incidents of inadequate or dysfunctional parenting are unlikely to be sufficient.

# STAYING CRIMINAL PROCEEDINGS FOR ABUSE OF PROCESS: A BRIEF DIGEST

By Giles Bedloe

Rarely can there have been a better moment to reflect upon the law of abuse of process than as the plight of hundreds of sub-postmasters – wrongly prosecuted, let alone convicted – has been laid bare. The scandal of the injustice of innocent people succumbing to criminal records, and in many cases facing sentences of imprisonment, whilst the Post Office – simultaneously the investigator, the prosecutor and the 'victim' – was reckless as to if not fully aware of the flaws in its own evidence has caused public outcry.

Judicial discretion to stay criminal proceedings for abuse of process is a fundamental to the operation of the rule of law. It is a benchmark of our legal system, protecting parties from failings, culpable or otherwise, in the conduct of the investigation and / or subsequent proceedings by the state, or any agency with a delegated function to prosecute. It is also a huge topic and impossible to cover comprehensively in a short article. What follows is a broad overview of some aspects of this important jurisdiction of criminal courts.

There are two categories of case where the court has the power to stay proceedings – where it is impossible for the accused to have a fair trial, or where it offends the court's sense of justice and propriety for the accused to be tried in the particular circumstances of the case *R v Maxwell (Paul)*[1].

The burden is on the accused to satisfy the court, on the balance of probabilities, that the test is met (*R v Canterbury and St Augustine Justices Ex p. Klisiak*; *R v Telford Justices ex p Badhan*[2]). The accused must apply as soon as practicable after becoming aware of the grounds for doing so, and in any event before the accused pleads guilty or alternatively before the jury retires to consider its verdict. Criminal Procedure Rules Rule 3.28 applies.

In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings. No question of the balancing of competing interests arises.

In the second category, the classic test set by Lord Lowry in *R v Horseferry Road Magistrates' Court, ex p Bennett*[3] is whether a trial would offend the court's sense of justice and propriety. The opportunity to stay will also arise where the continuation of the case would undermine public confidence in the criminal justice system and bring it into disrepute (per Lord Steyn in *Latif*[4]). The court has to exercise a broad discretion to strike a balance between the public interest in ensuring that those accused of serious crime are prosecuted and the competing public interest in ensuring that prosecution misconduct does not undermine public confidence in the criminal justice system and bring it into disrepute.

A subset of category two cases, and a very common basis for applications particularly in the current climate, is delay. That test will be determined in accordance with *Attorney General's Reference (No.1 of 1990*[5]). Delay will be a truly exceptional basis for staying proceedings, especially where the prosecutor is not at fault for that delay.

Another subset of category two is entrapment, when an agent of the state – usually a law enforcement officer or a controlled informer – causes someone to commit an offence in order that he should be prosecuted. Such cases will clearly have the potential to undermine the integrity of the criminal justice system. They will turn on their own facts, and require consideration of a series of questions, including whether the

accused was presented with no more than an unexceptional opportunity to commit a crime. For example, was police conduct preceding the commission of the offence no more than might have been expected from others in the circumstances, such as test purchase officers in drug supply cases. Clearly, the police should not 'create' crime. See for example *Latif*[6] and *R v TL*[7].

Non-disclosure and / or failure to preserve evidence are commonly pleaded in support of applications to stay. This author has recently obtained the stay of proceedings in two complex fraud cases where the (non-CPS) prosecuting agency was responsible for egregious failures in disclosure and investigative processes. For an example of the loss or destruction of evidence, see the key authority of *R (Ebrahim) v Feltham Magistrates' Court and Mouat v Director of Public Prosecutions*[8] – failure of investigator to obtain and preserve CCTV recordings of purportedly relevant events. More recently in *Clay v South Cambridgeshire Justices*[9], the accused lorry driver had applied to stay proceedings for careless driving after police destroyed the car with which he had collided, depriving him of the opportunity to investigate the car's tyres and brake lights. Pitchford LJ upheld the justices' decision to refuse the application on the basis the trial was able to cope with the disadvantage that arose from the loss of evidence.

Two recent cases reveal the court's approach to abuse arguments in cases where the strategic decisions and promises of the prosecutor were under scrutiny.

In *Mansfield v DPP*[10], an 18 year old defendant appealed by case stated a magistrate's refusal to stay proceedings as an abuse of process. Of previous good character, the young man had admitted possession of a small quantity of cannabis and possession of a knife after the interviewing officer informed him that her sergeant had authorised a caution if he made full admissions. After making those full admissions there was reconsideration by the police, and he was charged and prosecuted. The appeal succeeded, the court holding that most cases falling within category 2 which arose in the magistrates court would be suitable to be considered and determined in that jurisdiction, including cases where it was alleged that a prosecution had been instituted oppressively or unfairly.

Furthermore, a breach of an assurance that there would be a caution would not amount to an abuse of process unless those with the conduct of the case had made an unequivocal representation that the defendant would not be prosecuted and the defendant had acted on the representation to his detriment; and where the defendant had acted on such a representation to his detriment the question whether there had in fact been an abuse of process would then depend on the facts of the case.

In *R v AAD*[11] *and others*, the Court of Appeal considered the position of defendants who were convicted of or pleaded guilty to criminal offending when they had been victims of trafficking or modern slavery. They each received a Single Competent Authority conclusive grounds decision that they had been the victims of trafficking or modern slavery. Section 45 of the Modern Slavery Act 2015 provides an accused with a defence where they can demonstrate that they were compelled to commit the offence as a result of slavery or relevant exploitation, i.e. being a victim of human trafficking. Clearly, different considerations would apply to the convicted defendant as to the defendant who pleaded guilty.

However, on the question of whether it would be an abuse of process to prosecute them when a conclusive grounds decision existed pre-pleas or pre-trial, the Court observed that authorities prior to the Modern Slavery Act 2015 had acknowledged an abuse jurisdiction. The Court held that the decision to prosecute was for the CPS, not the courts, such that where the CPS had taken into account the relevant prosecutorial guidance and any conclusive grounds decision, and had a rational basis for departing from that decision if favourable to the prospective

defendant, there was no basis for an abuse of process challenge. If, however, the CPS had failed unjustifiably to take into account such guidance or had no rational basis for departing from a favourable conclusive grounds decision, the prosecution might be stayed in an appropriate case.

Staying proceedings is of course a remedy of last resort, and will be exercised sparingly and with great caution by judges. Generally, practical and realistic alternatives to a stay will always be exhausted before considering the ultimate sanction. These alternatives will include giving a party more time by adjournment of proceedings if necessary, penalising the prosecution in costs, giving directions to the jury, and excluding evidence under s. 78 of PACE.

The above authorities concern the position of defendants making abuse applications, or challenging adverse outcomes. Last year the Court of Appeal considered the counter position, where a judge had acceded to an application and stayed proceedings, and the Crown appealed that decision in *R v BKR*[12]. The Court held that a Crown Court judge's decision to stay a prosecution on a single count of sexual assault as an abuse of process, because the defendant had pleaded guilty to similar counts and the overall sentence would therefore not be affected, was unsustainable. There was no suggestion of bad faith or deliberate abuse of power and the exercise on which the judge had embarked was not properly open to her. The judge had engaged in a review of the CPS's decision-making process in circumstances where no reasonable judge could have found that it was capable of constituting misconduct which justified a stay of a prosecution as an abuse of process. On request, the CPS had further reviewed the case. It considered the evidential part of the Code test to be met and that it remained in the public interest for the prosecution to continue.

That decision was readily understandable, not least given the separate identity of the complainant from the victims of the other similar counts that the accused had admitted. The balance of the court's assessment may well have been different had this been one of the same complainants.

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[1] [2010] UKSC 48 (at [13]), per Lord Dyson
[2] [1982] Q.B. 398; (1991) 93 Cr App R 171)
[3] [1994] 1 AC 42
[4] [1996] 1 WLR 104 (at 112F)
[5] [1992] Q.B. 630
[6] See footnote [4], heroin importation, appeal refused. The House of Lords held that whether the proceedings should have been stayed on the ground of abuse was a matter of discretion for the judge, balancing the interests of avoiding an affront to the public conscience and the public interest that those charged with serious crimes should be prosecuted
[7] [2018] EWCA Crim 1821 – a judge had applied the wrong test when staying as an abuse of process (entrapment by a private citizen, individual charged with attempting to meet a child following sexual grooming online) by not distinguishing between the conduct of a private citizen and that of state agents when making a finding of entrapment
[8] [2001] 2 CR 33
[9] [2014] EWHC 321 (Admin)
[10] [2021] EWHC 2938 (Admin)
[11] [2022] EWCA Crim 106
[12] [2023] EWCA Crim 903

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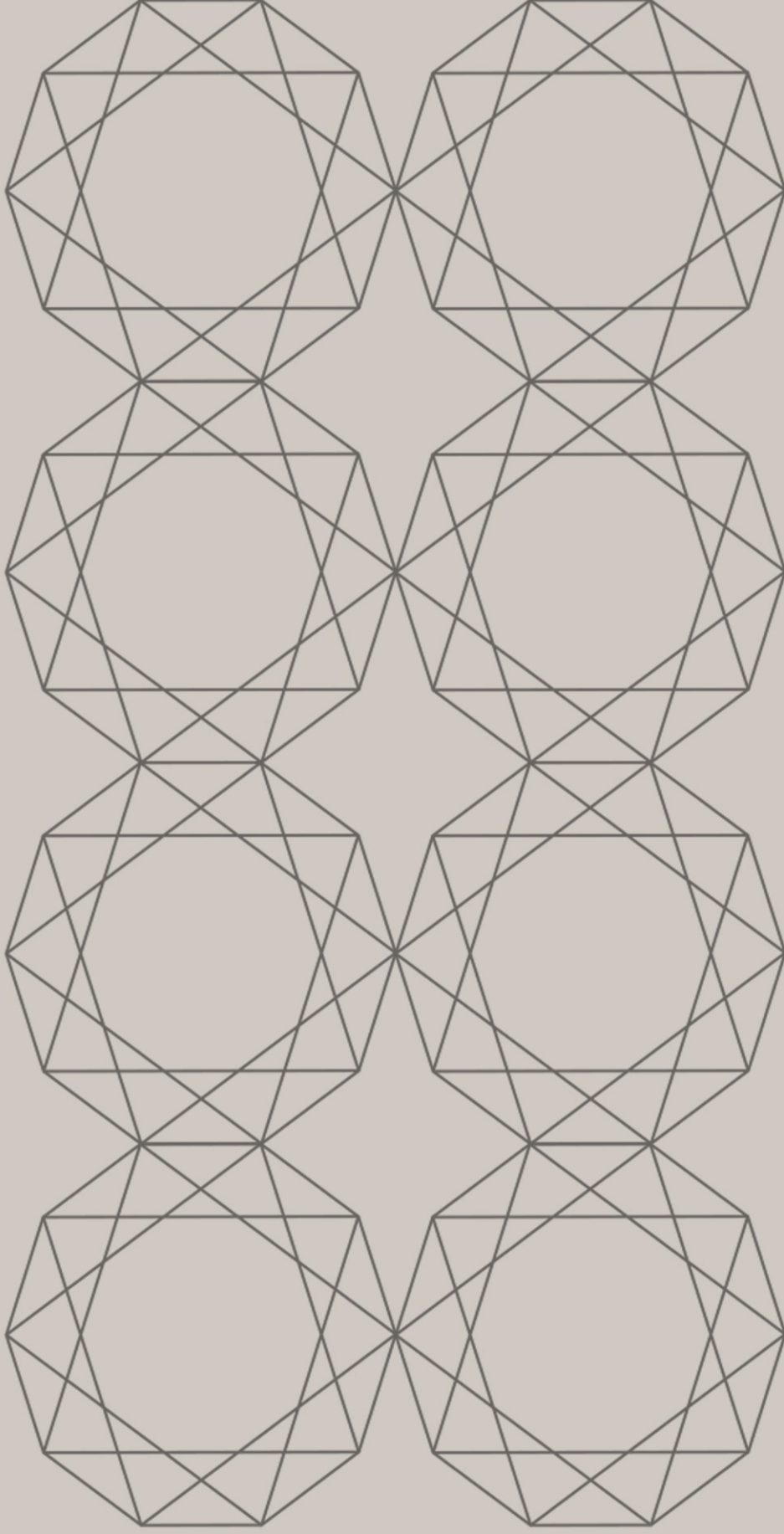

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