

Guidance Note / July 2008

UK abuse claims - a new long-tail liability

A recent House of Lords decision may result in a significant increase in abuse claims. This type of claim has led to a raft of expensive settlements in the US, notably involving the Catholic Church, and we look set to face a similar tide of claims in the UK. This decision will make it easier to bring such claims. The result is that those who suffered abuse decades ago – a large class of potential claimants - are now likely to be able to seek compensation. The court's new approach has turned abuse claims into a long-tail liability. Moreover, such claims might well turn out to be relatively high volume and high severity.

Abuse, whether physical or sexual in nature, is not ordinarily a subject publicised by those involved. Victims can be understandably reluctant to come forward or to seek criminal or civil redress. The perpetrators and/or those responsible for the perpetrator or the victim in some way (such as churches or schools) actively suppress the flow of information into the public domain. Consequently, it is hard to estimate the scale of the UK's abuse claims liability problem.

The House of Lords in *A v. Hoare* (2008) UKHL 6 has fundamentally changed how the courts will approach limitation in claims alleging intentional personal injury such as cases of abuse. Previously the law applied a six-year, non-extendable time limit in which to bring a civil claim for abuse. The time limit began from the date when the claimant had been abused. In many cases, a victim did not consider action until more than six years had passed; consequently a claim would be time-barred. Following the decision in *Hoare*, the primary limitation period for abuse claims has been shortened to three years, but, crucially, the court can extend that three-year time limit where it finds it equitable to do so. The three-year period runs from the date of abuse (or the victim's 18th birthday if the abuse occurred before then) but it also, alternatively, may begin from the claimant's date of knowledge that the injury was significant.

It is the availability of the court's discretionary powers under section 33 of The Limitation Act 1980 to disregard the three-year time limit which will allow previously time-barred claims to be brought and which is likely to lead to an upsurge in claims. The only qualification to the exercise of the court's discretion to extend the limitation period is that it must be "equitable to do so", regarded as a low threshold to overcome. Moreover, there is no long-stop date where the discretion becomes unavailable so that potentially the court may extend the three-year time limit indefinitely.

In addition, the courts are increasingly accepting that there are good reasons why victims of abuse have delayed the commencement of proceedings. In particular, the courts are paying more attention to research suggesting that victims of abuse psychologically dissociate themselves from the abuse suffered and that often the victim's experience is not confronted until some later date. For example, in *Hoare*, Lord Hoffman noted that the claimant's mental processes such as "blocked out memory" were relevant when it came to an assessment of the delay in commencing proceedings. Such factors had previously been considered as part of when the claimant had "knowledge" that he had suffered a significant injury (the abuse). However, it was made clear in *Young v. Catholic Care* (one of the five cases heard with the *Hoare* case) that such factors should instead be addressed as part of the court's discretion under section 33.

The House of Lords made it clear in *Hoare* that the courts should be mindful of the defendant's right to a fair trial when considering whether to extend the three-year time limit. In particular, there is clearly a concern in respect of cases where there is no reliable and accurate evidence that the claimant had been abused. For example, in *Hoare*, Lord Brown of Eaton-Under-Heywood noted that it was one thing that a complaint had been made and recorded and more obviously still if the accused had been convicted of the abuse complained of but quite another thing if a complaint simply came "out of the blue" with no apparent support for it.

Ultimately, whether or not to extend the three-year time limit will be a balancing exercise for the courts, but *Hoare* has left ample room for the discretion to be exercised in the claimant's favour.

The significance of the decision in *Hoare* is compounded by a principle laid down in the case of *Lister v. Hesperley Ltd* (2002) 1 A.C. 215. Following *Lister*, employers can be held liable for abuse

perpetrated by their employees in circumstances where the abuse is so closely connected to the nature of the employment that it is just, fair and reasonable to hold the employer liable. Liability is strict in that the claimant need not prove that the employer was at fault in any way. The abuser is unlikely to be worth suing, but the abuser's solvent (and probably insured) employer is a potentially attractive target.

Taken together the decisions in *Lister* and *Hoare* present a new environment for employers susceptible to abuse claims, most likely to be churches, schools, local authorities and care homes. Such employers – and their insurers – face a backlog of claims relating to abuse over the last few decades. The level of damages in such cases could be extremely high, especially where a court makes an award for loss of earnings when a victim is abused as a child. For example, in one case (*A v. Archbishop of Birmingham*) and another (2005) EWHC 1631 (QB)) the court awarded damages of over £620,000, almost all of which (£572,000) was in respect of loss of past and future earnings, to a victim abused between the age of 7 and 18.

Public liability cover is likely to be the insurance most affected by claims. Employers' liability insurance would be relevant only in the rare cases where an employee is the abused person.

Public liability policies were typically underwritten on the basis that they would respond to injury occurring during the policy period. Therefore insurers on risk several decades ago are likely to be asked to indemnify claims. Abuse claims alleging that an employer is liable for abuse carried out by an employee are likely to give rise to a number of coverage issues. For example:

- if the policy contains an exclusion for deliberate or intentional

acts, does that apply only to the policyholder itself or also to the acts of the employees? Such exclusion clauses will be particularly relevant in circumstances where the acts of employees can be "attributed" to the insured so that the deliberate acts of the employees are treated as those of the insured.

- abuse is likely to lead to psychiatric rather than physical injury – policies are often expressed to cover liability for "bodily injury"; legal authority suggests bodily injury should be construed to cover psychiatric injury, but the precise wording of the policy would have to be considered.
- there will be difficulties in identifying when an injury has occurred for the purposes of deciding which policy is triggered - the abuse can be said to have caused the injury, but there may be medical evidence that the psychiatric injury does not occur until many years after the abuse has ceased – this would mirror the current dispute in relation to the trigger of cover for claims involving mesothelioma (a cancer caused by asbestos exposure).
- situations where an individual has abused more than one person or where there are several abusers with the same employer are likely to give rise to aggregation questions – if the policy contains aggregation provisions, the precise circumstances will have to be analysed in order to apply the deductible, any aggregate limit or other policy limits – abuse claims are likely to raise acute aggregation issues.

Given the possible severity of the problem, insurers would be well-advised to review their books of public liability cover for the last three or four decades.

This note is for guidance only and is not intended to be a substitute for specific legal advice. If you would like any further information please contact:

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