

AB & Ors v The Nugent Care Society

Case No: [DPA]

Court of Appeal (Civil Division)

17 June 2008

[2008] EWCA Civ 795

2008 WL 2596082

Before: Lord Justice May Lord Justice Keene and Lady Justice Smith DBE

Date: Tuesday, 17th June 2008

On Appeal from the High Court of Justice Queen's Bench Division Manchester District Registry (Mr Justice Holland)

Representation

Mr R Maxwell QC and Ms A Weeraratne (instructed by Messrs Abney Garsden & McDonald) appeared on behalf of the Appellants.

Mr E Faulkes QC and Mr N Fewtrell (instructed by Messrs Hill Dickinson) appeared on behalf of the Respondents.

Judgment

Lord Justice May:

1 Since Holland J, before his recent retirement, decided the issues relating to limitation in the two matters that are before the court, the relevant legal landscape has changed considerably. The change was made by the recent decision of the [House of Lords in A v Hoare \[2008\] 2 WLR 311](#) .

2 I can refer to the facts briefly. A more extended version of the facts may be found in Holland J's judgment, which is at [2006] EWHC 2986 QB . Each of the now adult claimants claims damages from the proprietors of the care home in which, as young teenagers, they spent fairly short periods after convictions as juveniles. The first of the claimants was there between [DPA] 1967 and [DPA] 1968. He claims to have been sexually assaulted by an employee of the home, [Name Redacted], when he was working in the horticultural department. The second of the claimants, [Name Redacted], was in the home from [DPA] 1971 to [DPA] 1972. He claims to have been the object of serious physical abuse and arbitrary corporal punishment by the [DPA] [Name Redacted]. He also complains of three instances of sexual groping by a house master, James McEvoy. [Name Redacted] started his proceedings on 8 October 2001. [Name Redacted] started them on 22 January 1998, many years outside any primary limitation period if that were to start from the dates of the assaults or when each of the claimants became adult at the age of 18.

3 The claims were framed in systemic negligence against the care home. The cases for extending the limitation period were considered by Holland J under [sections 11 and 14 of the Limitation Act 1980](#) . He held that each of the claimants' date of knowledge for the purpose of [section 14](#) was outside the three year limitation period from the date when they began proceedings. He then proceeded to consider whether the court should in its discretion extend the periods under [section 33](#) of the 1980 Act. In the case of these two claimants he declined to do so. The main, short reason for that decision included that the claims had to deal with systemic negligence taking place many, many years ago and the defendants would be unduly prevented from having a fair trial if they were required to have to face up to that. A feature of these cases was that the individuals against whom the allegations were made had been the subject of criminal proceedings which had been stayed as an abuse. There was a third case, no longer

change of emphasis should not result in a different conclusion, not least because he submits that a fair trial in each of these cases would not be possible because of difficulties which the defendants have and have acknowledged in dealing evidentially at all with the fact of the abuse and because of difficulty of challenging any consequences of the abuse. I for my part have sympathy with these submissions in general terms but do not consider that that is the right course.

8 This court has not heard the oral evidence, and what is more the oral evidence has not in its entirety been directed towards the legal landscape, which has now changed. Holland J for his part did not address this [section 33](#) point with a view to each of the two changes which the case of *A v Hoare* has effected. Indeed, as things presently stand today, there is no pleaded case of vicarious liability and certainly the judge has not addressed in the [section 33](#) context the question which may well be found, that these defendants are vicariously liable for the sexual assaults which the claimants allege. The judge also did not address [section 33](#) in the light of the now admissible impact of any inhibition to complain or bring proceedings, which is now, as Hoare clearly indicates, available as an ingredient to enhance the [section 33](#) decision. In that context the judge did address the question of inhibition in Name Redacted case, in the context of his consideration of [section 14](#) and his knowledge of significant injury. The judge did say at paragraph 26b of his judgment that, prior to October 1998, Name Redacted was reasonably inhibited from obtaining medical advice. That inhibition is common and understandable, and he correctly adopted the joint medical opinion to that effect. He said that the inhibition can only be a factor for his consideration and in this case he did not regard it as decisive. That was, as I say, in the context of his consideration of [section 14](#) . When it came to [section 33](#) the judge did mention the inhibitions on complaint embedded in a sentence of his consideration of [section 33](#) , but, to my way of thinking, he did not have that in the forefront of his mind as he would now be entitled to do in relation to [section 33](#) . As to Name Redacted in form at least, the judge does not mention inhibition as part of his [section 33](#) decision. Before the judge systemic negligence was of prime importance, and what the judge in addition has not dealt with at all in the context of [section 33](#) is the causative effect of the abuse; that is to say, the extent to which the abuse, a long time ago, may have causatively carried through so as to be causative of any psychological condition that the claimant may now suffer. Nor, importantly, has the judge considered the defendants' difficulties of examining this question at this late stage. He has not dealt with any difficulties that either parties may have of dealing with the fact of the abuse either. In my judgment, in the round, these are matters which this court simply cannot supply.

9 Importantly also, this court has not heard the evidence which has been given and we are not able to judge the credibility of the claimants nor the impact of the medical evidence that has been given, beyond the extent to which the judge has accepted it for the different purposes which he was addressing. It is at least accepted by Mr Faulkes that this court should not go through the medical reports in detail in order to form a view of our own about that. In the result I am persuaded, notwithstanding the joint submissions of each of the parties, that it would not be right for this court to re-address and decide, on the material now available, the [section 33](#) issues which become necessary for determination in the light of the House of Lords' decision in *Hoare* . Accordingly I would not only allow the appeal on that point but I would remit that matter to the judge.

10 We are invited to give guidance generally as to how, following *Hoare* , these limitation issues should be dealt with procedurally by courts of first instance. I would decline to do so in this case, confining myself to a procedural decision only in this case. And in this case it seems to me that the judge and the parties should consider as a matter of case management how to proceed now that the case is to be, as I think, remitted to the judge; not only in the light of where this particular case has got to but also in the light of its possible impact on other actions which we are told remain active.

11 For these reasons I would allow the appeal and remit the matter to the judge.

Lord Justice Keene:

12 I agree both with my Lord's judgment and with the order which he proposes.

Lady Justice Smith:

13 I also agree in both respects.