

Neutral Citation Number: {2009} EWHC 481 (QB)

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

The Civil Justice Centre,
1 Bridge Street West,
Manchester.

Friday, 30th January, 2009

BEFORE:

THE HONOURABLE MR. JUSTICE IRWIN

IN THE MATTER OF:

AB AND OTHERS

-V-

THE NUGENT CARE SOCIETY

MR. R. MAXWELL Q.C. AND MISS A. WEERERATNE instructed by ABNEY
GARSDEN McDONALD SOLICITORS appeared on behalf of the Claimants

MR. E. D. FAULKS Q.C. AND MR. N. FEWTRELL instructed by HILL DICKINSON
LLP appeared on behalf of the Defendants

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J U D G M E N T A S R E V I S E D (1)

to 43. It does not seem to me necessary to repeat those findings, or to incorporate them in full into this judgment.

51. Before dealing with his findings in detail and the cases individually, it is relevant to note that there were discussions in the Court of Appeal and indeed conclusions by the Court of Appeal, to the effect that the fact of abuse was proven or 'in the bag', a phrase which was used by the court in respect of each of these two cases. That is reinforced by the remark of Holland J. in his judgment at paragraph 55, where he said in respect of both these claimants, that they

"Have had the satisfaction of being heard and believed."

52. Therefore, the starting point in dealing with his findings is that he found proven abuse in both cases. The details or extent of that abuse, I do not regard as being necessarily proven. However, there is sufficient precision as to the findings for considering the exercise of discretion, and that was indeed the conclusion of the Court of Appeal when they remitted the matter for consideration, initially by Sir Christopher Holland himself.

The case of [Name Redacted]

53. I turn first to the case of [Name Redacted]. Here it is helpful to recite one passage from paragraph 16 of the judgment of Holland J. He said this:

"I was satisfied that when giving evidence, the claimant was doing his best to give me a fair and truthful history. Thus, as to the abuse itself, his account has been reasonably consistent, and, notwithstanding the acquittal of [Name Redacted] it is understandably not been challenged before me. As to the subsequent 38 year period, (1968 to 2006), his account is of virtual necessity blurred and broad brush, but his bona fides are to my mind clear, even if his reliability is inevitably more open to question."

He concluded that [Name Redacted] knew what had happened to him, and realised that that was clearly a significant injury.

54. This claimant had been cross-examined in a very detailed way as to the detail of his account, as part of the evidence leading to those findings to which I have referred. At paragraph 23, the Judge concluded that this claimant was always aware of the serious impact of the abuse. The Judge accepted in paragraph 24 that [Name Redacted] had tried to deny the effects, and had been inhibited from seeking advice from doctors and others, directly as a consequence of the abuse and the nature of the abuse. Indeed in paragraph 26 of his judgment, the Judge described the claimant as being "reasonably inhibited", meaning that the inhibition was comprehensible and reasonable, although he

64. It follows, therefore, that the issue is really causation. There may perhaps be dispute about abuse, but mostly the case will turn on the effect of the abuse and general damages. The analysis of credibility and the analysis of causation are, in my judgment, not radically affected by the passage of time. It is not of course for me to pre-judge the outcome of this dispute between the parties. The question is whether the dispute can fairly be resolved, and whether the defendants have been prejudiced to any significant degree. It seems to me that this abuse was bad, and that must be weighed to some degree in the balance. If a more liberal approach to S.33 discretion is to be taken in these cases, then on balance this is a proper case for the exercise of the discretion, and I so rule.

The case of [REDACTED]

65. I turn to the case of [REDACTED]. In paragraph 31 of his judgment, Holland J. summarised the abuse alleged to have taken place in [REDACTED]'s case as being -
- "Excessive and arbitrary corporal punishment" and "sexual groping on three occasions by a house master, Mr. James McEvoy."
66. It is plain that Holland J. having heard the evidence of [REDACTED], was impressed by the anger and shame focused on the theme of homosexuality, evinced by [REDACTED] in the course of his evidence.
67. One notable aspect of this case is that [REDACTED] gave an account in writing to the authorities of abuse by McEvoy to another boy, another inmate of St. Aidan's. In that manuscript account dated 30 July 1972, at that stage he did not suggest that he himself had been abused. That underpins how the shame of what had happened to him led to what is often termed denial, until the police investigation arose.
68. That aspect of the case is well summarised by Holland J. in paragraph 36 of his judgment, which I need not repeat. In paragraph 37 of the judgment, the learned Judge recited his findings on the exercise of discretion in a slightly different format than he had done in relation to the previous claimant. However, he recited all of the matters which in his view meant it was clear that this claimant had knowledge from the beginning. In particular, he emphasised, as the joint note of the experts in this case confirms, that there was never any psychological condition which would prevent [REDACTED] from complaining.
69. There are two further important factual matters in the joint note of the expert discussion in this case. In this instance also the two experts were Dr. Wood and Ms Lovelock, the psychologist. They met on 4 November 2005, and as part of the answer to the seventh question recorded in the note, they said this:

72. In my judgment, the causation question here is rather more complicated than that in the case of [redacted] Miss Lovelock's views do not seem to be as unequivocal in the reasoning she advances. Here there is a history of criminal offending, both before and after the admission to St. Aidan's. There was a loss of employment in the 1980s through back trouble, before [redacted] spoke to the police about the abuse in his past and before his psychological symptoms worsened, as they did at that stage. Therefore, there is no claim for loss of earnings. There is a claim for some handicap in the labour market. It seems to me that would probably be difficult to achieve, though I make of course no finding on that.
73. In terms of the specific criteria under the Act, firstly in relation to subparagraph a), the length of the delay is somewhat less than that of [redacted] but it is still long. As found by Holland J., this claimant had no thought of suing. There was a clear inhibitory effect. It is to be noted this is much less serious sex abuse than in the case of [redacted]
74. When considering the extent of delay, the evidence adduced would be less cogent, but this mostly bears on the issue of system which has gone. The primary abuse is proven, although its detail might need to be elaborated. There was a pre-existing disorder. There is a range of missing documents here, which both sides agree might have quite a degree of significance for causation. The causation issue seems to me to be more complex than in [redacted] The trial of that issue seems to me undoubtedly to be affected by time. Dr. Wood gives some ascription in what seems to me, with great respect to him, to be rather a throwaway and clearly very approximate conclusion. On the facts of this case that cannot act to set aside the difficulty of causation.
75. The conduct of the defendant does not arise here. Nor is there any history of disability, meaning that limitation should be suspended in time. I have dealt already with delay by the claimant, and of the steps taken by the claimant in what I have said.
76. In considering whether it would be proportionate to exercise a discretion here, I do bear in mind that this again is a general damages only claim. It seems to me that causation evidence will mean a trial of experts, involving the assessment of a previous psychological disorder which will not necessarily be straightforward. It is not a large claim, on any view.
77. Is it equitable to let the action proceed, with all of those considerations in mind? Accepting that abuse has been proved here and that this claimant has been believed, I bear in mind that the House of Lords has made clear that cannot be the only consideration. Not every abused person, even where that is established, can proceed. The nature of the abuse here is much less stark. On balance, I do not extend discretion in the case of [redacted]

The case of [REDACTED]

78. I turn to the case of [REDACTED] [REDACTED] was born on [REDACTED] DPA [REDACTED] 1964, and brought up in the [REDACTED] DPA [REDACTED] area of Greater Manchester. He is the middle child of [REDACTED] DPA [REDACTED] and by his own account, grew up in a difficult and poor family. He recites that he was often beaten by his father, who was subject to a violent temper, and by the age of 12 or so, he had become very difficult to control. He was by then regularly truanting from school. On his account, his home was one where he was not permitted to show his emotions, and if he did, he would be told that he was soft and be sent to his room. He felt unable to tell anyone about his problems.
79. When this claimant got to secondary school, he did not try hard, and he began to get into trouble. There is a useful contemporaneous source as to his background narrative contained in the report from Chris Tucker, the claimant's social worker, dated 16 December 1980. This gives a history of previous court appearances, beginning with a [REDACTED] DPA [REDACTED] in [REDACTED] DPA [REDACTED] of 1977, when the claimant was 13 years of age. This was followed by further offences of [REDACTED] DPA [REDACTED] which led to a Care Order in June of 1978, with further offences of [REDACTED] DPA [REDACTED] to follow in 1978 and 1979. Mr. Tucker's report recites how, in the last year he was at home, the claimant ran away on a couple of occasions, fearing his parents' discipline after an extended period of truancy. It is clear from that report, and indeed from the claimant's own account, that the family relationship had come under very considerable strain.
80. Whilst in care, the claimant was placed in a childrens' home, an unsuccessful placement, and he then went for the first time to St. Aidan's. This first placement ended when the claimant was convicted of a further offence of [REDACTED] DPA [REDACTED] and on [REDACTED] DPA [REDACTED] 1979, was sent to [REDACTED] DPA [REDACTED] for three months.
81. After release from detention, the claimant returned to St. Aidan's, initially to the main building, but after a period of good behaviour, he was transferred to one of the units, which he describes as "more like being in a house." To his memory, there were something like 12 lads in each unit. The housemaster in the claimant's unit was a man called Colin Dick.
82. Colin Dick has subsequently been convicted of significant sexual offending in relation to his time at St. Aidan's. On 7 June 1995, Mr. Dick entered pleas of guilty to some of the counts on a 16 count indictment, all relating to his period at St. Aidan's. I have had the advantage of seeing the record of the proceedings before the Chester Crown Court on 7 June 1996, which records that -

consequences. That may be so specifically on the case because although there was a significant injury at the time, in the sense of a significant sexual assault, the psychological consequences for the claimant arose only from 1995 onwards. Within two years or so of the beginning of the effects of the reawakening of these events for [redacted] these defendants were aware that he was in question as the victim of sexual abuse in St. Aidan's.

107. I do bear in mind that the key issues here being that of causation, they relate in fact to the later 1990s, and are limited in extent.
108. Will the evidence of the key issues be made less cogent by the passage of time? The fact of abuse, it seems to me, will not be made less cogent in this case. There is no possibility that a convicted abuser such as Mr. Dick, would realistically have been called as a witness to deny a single episode of this kind, given the convictions in his case. Even though those convictions do not relate to this claimant, as I have said, they are powerful evidence supportive of his account as to the fact of abuse. As I have already observed, the key medical issues here are more recent, although still old by now, given the dreadful delay which has happened in these cases since the issue of proceedings. The issues are narrow and seem to me well capable of resolution. There is little loss of cogency as to the trial of the medical issues, causation and what happened in late 1990.
109. There is, I find, no relevant conduct on the part of the defendant, and no question of disability, and the considerations on this case thrown up by subparagraphs e) and f) have been covered.
110. Is it proportionate that an action should proceed on these facts? The damages here would be relatively limited, but this is not trivial abuse, even though it is a single incident. This matter should be capable of a short trial. It will need active case management to ensure that it is kept within bounds, given the basis upon which discretion has been exercised, but given that consideration also, it seems to me possible to have a fair trial. Therefore it is both proportionate and equitable to permit this case to proceed, for the reasons stated.

The case of [redacted]

111. I now turn to the last case of the four, that of [redacted] [redacted] was born on [redacted] [redacted] 1960 in [redacted] [redacted] Glasgow. His family moved to [redacted] [redacted] [redacted] in 1969. About the time he was 12, he was already getting into trouble in the courts, acquiring a conviction for [redacted] [redacted] [redacted] in a public place in August 1973. His offending continued as he was made the subject of a Care Order by the Fylde Juvenile Court on [redacted] [redacted] 1974. He was involved in repeated offences of [redacted] [redacted] [redacted] throughout 1974

132. As to the ways in which the evidence at the trial is likely to be less cogent as a consequence of delay, I have dealt with that. Time has undoubtedly, in my judgment, muddled and extended the claimant's story, and on his own evidence, never mind anything else, it would be very difficult to disentangle the truth.
133. The defendants here did have ample time to explore events from 1997, from the time of the conviction onwards. It might well have been possible for them to do so at that stage, but the evidence they found would be unlikely to help on the fact of abuse. It may have had an effect on the extent or detail of abuse. It follows, that it seems to me there is little prejudice to the defendants from the sheer passage of time, and that is not the key element in my decision.
134. There is no relevant conduct here, nor is there relevant disability. I have dealt in effect with sub-paragraphs e) and f). There was knowledge of an assault, there was knowledge of its consequences in terms of upset.
135. Would an action be proportionate? Here the damages would be likely to be very modest indeed, on what might conceivably be proved. Even a carefully case managed case, kept to what was absolutely essential, would be likely to cost far more than any compensation for the claimant, and I bear that strongly in mind. I therefore conclude that it would not be equitable in this case to permit the action to proceed, and the discretion is exercised accordingly.
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