FAILURE TO REMOVE RESULTS IN COMPENSATION AWARD

Pierce v Doncaster Metropolitan Borough Council [2007] EWHC 2968 (QB)

Jake Pierce was born in Doncaster on the 1st March 1976, and is now 32. His parents were known to be ill equipped to care for the large number of children in their family. Jake was placed in foster care by the Local Authority, Doncaster MBC shortly after his birth. Then, 15 months later, despite concerns about the parents' ability to cope with him, he was returned to the family home in November 1977 with little if any ongoing monitoring or support. The decision to return home coincided with a change in personnel at the Defendant's social services department. On one occasion thereafter, Jake presented at hospital in 1979 aged 3 with severe burns (both fresh and old) which it was suspected were non accidental. However he remained at home although his name was placed on the child protection register; it was removed 2 years later without any contact having been established with the family, and without any meeting with Jake and his parents seemingly having taken place.

From the time that Jake was placed back into the care of his parents, to the age of 14, he experienced severe neglect, physical and emotional abuse at the hands of his parents. This included not being properly fed, not being provided with an adequate level of hygiene, being beaten, assaulted and physically injured, threatened with serious harm and death, being bullied and tormented by his family, and not attending school regularly. At 14 he ran away from home, living on the streets, occasionally earning money as a rent boy, and as a result of which he suffered further physical and sexual abuse. He was later diagnosed with TB and is HIV positive.

Jake had attempted to access his social services records from the age of about 18 but had been thwarted in his attempts, by a combination of his own mental health difficulties and the Defendant's prevarication. He finally gained access in July 2004 and soon after a limitation moratorium was agreed with the Defendant's solicitors. The Defendant withdrew its agreement on limitation in May 2006 on 28 days notice, and proceedings were issued later that month. The trial of Jake's case was heard over the 26th to 29th November 2007 at the High Court in London, before Mr Justice Eady. Matters of liability, causation, limitation and quantum were all in issue. Judgment was handed down on the 13th December 2008, entering judgment for the Claimant.

Liability

On the facts, Eady J found that no reasonable local authority would have returned Jake to the care of his parents in 1977. The Judge accepted Jake's account of the abuse, and rejected the Defendant's argument that because clearly records were missing from the file, the Claimant could not prove that there had been gaps in the way they approached the case at the time; indeed Doncaster argued that they could be inferred to have carried out all necessary reviews and procedures. In fact the opposite was the case. There was sufficient

evidence in the social services files which remained for the Judge to come to an opinion on liability. He was aided by Patrick Ayre, the Claimant's social work expert whose report he described as "impressive" and whose evidence in the witness box was "careful and illuminating". The Judge did not find Mr Lane's approach for the Defendant as thorough.

As a result, the Judge found that Doncaster had failed to carry out the relevant statutory review prior to returning Jake to the care of his parents in 1977, which in itself flew in the face of earlier opinion and evidence in the records about the parents' lack of commitment to the care of their son. Doncaster clearly owed Jake a duty of care (JD v East Berkshire NHS Trust [2003] Lloyds Law Rep Med 552), they had breached it, and as a result they were liable to the Claimant in damages.

Causation & quantum

The Judge found that had Jake not been returned to the care of his parents, he would have remained in local authority care, fostered or adopted. The Defendant's argument that he may well have been abused there in any event, whilst a damning indictment of their own services, was rejected by the Judge – one must proceed on the basis that had the negligence not occurred, Jake would have been looked after properly.

Jake's psychiatric condition was described by the experts for each side as a personality disorder with features of anxiety and agoraphobia. The Judge found that Jake's condition was mainly inherited and the later episodes of abuse whilst on the streets were too remote to be laid at the door of the Defendant. As a result, claims for psychological damage, treatment costs and loss of earnings/ employment opportunity were disallowed. The Judge found that some damage was shown to have flowed from the abuse at home from the ages of 18 months to 14 years and with the assistance of the Bryn Alyn cases and Z v UK, awarded general damages of £25,000 for the violence and neglect suffered.

Limitation

The Judge accepted that Jake's date of knowledge did not run until he had received his social services records. Only then could he ascertain what in fact the Defendant local authority knew or didn't know about his situation, and understand therefore that he potentially had a claim against them. This followed Hoffman LJ's judgment in Hallam-Eames v Merrett Syndicates Ltd [1995] Med LR 122. Therefore under section 14, Jake was in time. The Judge did not feel the need to go on to consider section 33 discretion as an alternative finding.

Parties and experts

Doncaster were represented by Halliwells Solicitors and Catherine Foster of counsel. Professor Maden and David Lane advised them on psychiatry and liability respectively.

Jake was represented initially by Stewarts and then Bolt Burdon Kemp, with Elizabeth Anne Gumbel QC. Dr de Taranto advised on psychiatry whilst Patrick Ayre was retained as Jake's liability expert.

Appeal

Doncaster applied for permission to appeal the judgment which was refused by the trial Judge and later on paper by Sedley LJ. They have since been granted permission to appeal on breach of duty, quantum, causation and limitation at an oral hearing in the Court of Appeal. The appeal hearing itself is due to take place in October 2008 and Jake is currently waiting to hear from Mr Gore of the Legal Services Commission as to whether public funding will be granted to allow him to be represented. We will keep you all posted!

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THE LIMITATION GAME

A v Hoare and related appeals [2008] UKHL 6, 30th January 2008

The judgment is of particular interest in that it completely changes the limitation landscape for abuse (and other) cases. The main points are summarised below:

- Stubbings v Webb [1993] AC 498 has been overturned. Since 1993, to sue for intentional injury (assault & battery/ false imprisonment) the limitation period was 6 years from the date of the assault under section 2 of the Limitation Act 1980, with no extensions permitted under section 11. Now, cases for intentionally caused injury will be treated as all other PI claims – i.e. with a 3 year limitation period, extendable by way of date of knowledge arguments (section 14) and discretion to disapply the limitation period (section 33).

- This means that abuse cases are more likely to be run on vicarious liability grounds (where Lister v Hesley Hall [2002] 1 AC 215 applies – close connection to employment) as opposed to the 'systemic negligence' cases child abuse lawyers have had to contort their cases into in the recent past.

- Section 14 (2) of the Limitation Act (when a person would reasonably have the knowledge that an injury is significant) gets a restrictive interpretation: It is an objective test and the HL basically consider that anyone who has been subjected to sexual assaults for example will know within 3 years of the assault (or their 18th birthday, whichever is later) that they have suffered a significant injury. This is notwithstanding that there may be mental processes going on which effectively 'block out' the abuse, and which come to the fore later, unless of course the Claimant can show he/she is under a disability by his/her mental incapacity.

- Note also that s 14 (2) knowledge is the knowledge when a person would reasonably consider not only that his injury was significant but also serious enough to institute a claim for damages against a defendant "who did not dispute liability and was able to satisfy a judgment". It is not expected that a claimant needs to issue proceedings against impecunious defendants in the hope that one day they may be rich enough to satisfy a judgment. This allows the appellant in A v Hoare to issue much later only when she knew that her attacker had won the lottery.

- Section 33 on the other hand gets a much wider interpretation than it has done recently. Some guidance is offered in this judgment:

a) It is noted that if more cases are going to be brought against employers for vicarious liability, as opposed to systemic negligence, cases will be put on a much narrower factual basis so a fair trial is more likely to be possible.
b) The issues which have previously been recently taken into account by the courts when considering section 14 (2) as a subjective test (eg. the character of the claimant, the reasons for his delay, his inability to disclose the abuse due to psychiatric injury, the secretive nature of the abuse itself and threats if the claimant discloses etc etc) are to be properly considered on a section 33 application.
c) A fair trial is more likely if a complaint of abuse has been previously recorded, and in particular if the accused has been convicted of the abuse complained of.
d) A fair trial may not be quite as likely if the complaint has come out of the blue without support
e) The length of delay and the ability to have a fair trial at all remain key issues for judges in exercising their discretion (or not).

- The judgment will also have relevance to other areas of PI litigation – eg. adult assault cases and clinical negligence cases where lack of consent to surgical treatment is alleged. The guidance given as to how the courts should interpret section 14 and section 33 is of universal application.

- Bottom line – review those diary systems!

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28th March 2008