

Personal Injury Practice Group Newsletter

January 2011

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Richard Tutt

Welcome to the first edition in 2011 of the Personal Injury Newsletter. We hope that the following articles, on a diverse range of topics, will be of use and of interest. As usual the CPD quiz is available online for those needing to acquire CPD points. Best of luck with the quiz and have a very Happy New Year!

TOWARDS COMMON SENSE? HARVEY V PLYMOUTH CITY COUNCIL

The Court of Appeal's recent ruling in **Harvey v Plymouth City Council [2010] EWCA Civ 860** has been regarded by many as a welcome decision in favour of common sense. Certainly, the case appears to show that Judges will be far less inclined to find a Defendant landowner liable for any accident that occurs on its property.

The decision is significant in how the Courts view the duty of

landowners towards uninvited visitors and how we advise clients, both Claimants and Defendants, in such cases. Seemingly, the Courts are less willing to find that Defendants should be made to pay out as a matter of course whenever an accident occurs on their land.

At the same time, all but the most cold hearted must feel a degree of sympathy for the



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young Claimant, Mr Harvey, who is left with significant injuries, including serious brain damage. He suffered injuries that have resulted in dramatic changes to his life and will receive no compensation for the same following the Court of Appeal ruling. Had his claim been successful, the damages would have been significant.

Background

The Claimant was in drink, having had a night on the town with a group of friends. Fuelled by alcohol, he fled a taxi in order to avoid paying the fare. In so doing, he travelled over grassed parkland owned by the Defendant council. From there, he ran through a gap in some bushes and tripped on a chain link fence which was broken. Having tripped, he fell over 5 metres on to concrete in the neighbouring Tesco supermarket car park.

The Decision of The High Court

The High Court held that the Defendant was liable for the significant injuries sustained by the Claimant under the Occupiers Liability Act 1957, albeit that there was a finding of 75% contributory negligence. The High Court agreed that Mr Harvey was a lawful visitor for the purposes of the Act and it was found that the Council had failed to comply with its legal duty to ensure that the premises were safe. In particular, the fence had been allowed to fall in to disrepair and the Council should have taken steps to avoid the tripping hazard caused by the broken fencing.

The Appeal

The Defendant Council appealed but there was no cross appeal relating to the finding of contributory negligence.

The main consideration of the Court of Appeal was whether Mr Harvey was a "visitor" within the meaning of the Act and, crucially, whether he had been an "*implied licensee*". In considering this point, the appellate Court concluded that the council had licensed the public to use the grassed area for normal recreational purposes. It had not done so for any activity, however reckless.

The Court of Appeal Judges decided that the Council had permitted visitors to use the grassed land and possibly even to travel through the gap in the bushes. As such, it had a legal duty to ensure that the property was safe for that purpose. However, the Council had not consented to an individual running over the land, drunk and at night so that they could not see the broken fence and the large drop to the car park beyond. Accordingly, it was found that the Claimant had not been the Defendant's lawful "*visitor*". The scope of an implied licence to enter property may be limited by implication, rather than express notice. The licence may be impliedly limited to the carrying out of "normal", as opposed to "reckless" activity.

Accordingly, the Claimant's claim was dismissed.

John F Chapman

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LIMITATION – *AB AND OTHERS (JA, JPM, RM) V THE NUGENT CARE SOCIETY (FORMERLY CATHOLIC SOCIAL SERVICES, LIVERPOOL) [2010] EWHC 1005 QB*

This was a further case in respect of The Nugent Care Society litigation (see: ***AB and Others v. The Nugent Care Society [2009] EWHC Civ 827***) whereby the three Claimants JA(1), JPM (2) and RM(3) were making claims against the Defendant in respect of abuse they had allegedly suffered whilst residing in care homes run by The Nugent Care Society. During a previous hearing the Court had exercised its discretion under the Limitation Act 1980, Section 33 to allow JPM's claim to proceed out of time. In the instant case Irwin J was required to consider the issues of limitation, in particular the Section 33 discretion, causation and quantum in claims by victims of abuse.

Irwin J followed the approach adopted to the exercise of the discretion as set out by the Court of Appeal in ***AB and Others v. Nugent Care Society [2009] EWHC Civ 827***.

In respect of JA it was common ground that it was some 22 years from the end of the primary limitation period to the issue of proceedings. The delay by JA was principally as a result of a strong desire on his part to suppress or avoid this whole aspect of his early life, a factor accepted by both experts as applying strongly in his case. Irwin J stated that this case was:-

'a classic case where the nature and impact of the abuse has itself contributed to the delay. To adapt slightly the language of Lord Hoffman in A v. Hoare and Others [2008] UKHL 9, para 49, this is a case where for practical purposes, the Claimant was disabled from commencing proceedings by the psychological consequences of the abuse suffered'

In doing so Irwin J emphasized the real significance which had to be attached to the specific factor arising in sex abuse claims where the very tort itself had the tendency to inhibit the Claimant from complaining or litigating against the perpetrator. The judge found that although there could be no doubt that the evidence relating to the abuse was rendered less cogent by the delay before issue, the principal loss of evidence was from the alleged abuser himself. However, he was not persuaded that the evidence before the court was rendered less cogent to any great degree by dint of the absence of the evidence of the care worker. In the circumstances the Court found that there had been little loss of cogency in the evidence by reason of delay, he found the Claimant to be generally credible, and there had been no significant delay in commencing proceedings once JA had in fact realized that he could do so, albeit reluctantly. The claim was deemed proportionate in that, if proved, the abuse suffered by the Claimant made a significant contribution to his ongoing problems. As a result of the above the Court extended the limitation period to allow JA to proceed with his claim.

As to causation and loss, the Court found that JA had suffered at least three episodes of sexual abuse at the hands of the abuser. However, the experts at trial had disagreed on the attribution of the abuse which Irwin J described as 'very difficult waters'. The Court determined that JA had not sustained any psychiatric illness as a consequence of the abuse. Further, the care worker in question, now deceased, had been acquitted in relation

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to Crown Court proceedings brought in 2001 and specific criminal proceedings brought in respect of JA. The Court had born in mind that compensation may be a motivation for exaggeration by Claimants in these cases.

General damages were awarded in the sum of £10,000.00 together with interest at 2% from 1st January 2000.

In respect of the claim by RM the Court found that the evidence bearing on the abuse had been rendered to a marked degree less cogent as a result of the delay before issue of the proceedings. In particular the Court found that the Claimant's successive accounts of the alleged abuse rendered it difficult to see how the truth could properly be established whilst he was resident in the institutions operated by the Defendant. As result of the discrepancies and the conflicts in the accounts provided by the Claimant Irwin J found that there was a real risk of injustice were the claim to proceed. For those reasons he declined to extend the limitation period.

It can be clearly seen from this case that the extent of the court discretion remains wide and unfettered. Following the decision of the House of Lords in **Walkley v. Precision Forgings Limited [1979] 1 WLR 606 (HL)** it had long been understood that where a Claimant has commenced an action in time but subsequently failed to proceed with it, he would not be permitted to pursue a second action out of time under the Limitation Act 1980, section 33. In such circumstances the court was of the opinion that the Claimant had

been prejudiced not by section 11, but as a result of his failure to pursue the first claim. It was not until the House of Lords decision in **Horton v Sadler [2006] 2 WLR 1346**, where it was held that **Walkley** was based upon unsound reasoning which had led to the creation of a line of unsatisfactory jurisprudence. Lord Bingham at paras 21-22 stated:-

'Counsel for the Appellant submitted that the effect of section 11 is to provide the defendant with a time limit defence in any proceedings brought after the expiry of the three-year period. When Section 33(1) refers to consideration whether it would be equitable to allow 'an action' to proceed it is referring to such an action....this analysis is, as I think, plainly correct.'

The nature of the judge's exercise was looked at again in the case of **KR v. Bryn Alyn Community (Holdings) Limited [2003] QB 1441** whereby Auld LJ stated:

'The discretion of a judge under section 33 is fettered only to the extent that it provides a non-exhaustive list of circumstances to which he should have regard. However, the matter is not determined simply by assessing comparative scales of hardship.....the overall question is one of equity, namely, whether it would be 'equitable' to disapply the limitation provisions having regard to the balance of potential prejudice weighed with regard to all the circumstances of the case, including those specifically mentioned in section 33(3).....'

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The effect of these decisions and that of Irwin J in **AB and Others (JA, JPM, RM) v. The Nugent Care Society (Formerly Catholic Social Services, Liverpool)** (*supra*) is likely to make it easier for Claimants to persuade a court to exercise its discretion pursuant to section 33 of Limitation Act 1980. There is no longer the requirement to establish systemic negligence and evidence that the Claimant was inhibited by the abuse suffered is now a relevant factor in the exercise of the Court's discretion. However, it should be born in mind that the relevant date of knowledge is earlier than it was previously thought to have been.

Further, in the House of Lords decision of *A v. Hoare*, Lord Brown sounded a cautionary note where he stated:-

'By no means everyone who brings a late claim for damages for sexual abuse, however genuine his complaint may in fact be, can reasonably expect the court to exercise the section 33 discretion in his favour. On the contrary, a fair trial (which must surely include a fair opportunity for the defendant to investigate the allegations—see section 33(3)(b)) is in many cases likely to be found quite simply impossible after a long delay.'

J Andrew Grime

CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT 2007

As the first cases prosecuted under the Corporate Manslaughter and Corporate Homicide Act 2007 ('the Act') reach the Crown Court, it is plainly important that personal injury practitioners have a working knowledge of its ambit.

BACKGROUND

The Act received Royal Assent on 26 July 2007. Most of the Act came into force on 6 April 2008 (With the exception of provisions which relate to the duty of care that a custody provider owes to a person who is detained. It was made clear to Parliament when it passed this legislation, that a period

of 3-5 years would be needed for custody providers to prepare for its implementation).

The Act puts the law on corporate manslaughter (in Scotland, corporate culpable homicide) onto a new footing, setting out a new statutory offence. In summary, an organisation will be guilty of the offence if the way in which its activities are managed or organised causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased. A substantial part of the breach must have been in the way activities were managed or organised by senior management.

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CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT 2007 CONTINUED

Prior to the Act, organisations could only be convicted of manslaughter if a “directing mind” (that is, a senior individual who could be said to embody the company in his actions and decisions) was personally liable. The Act allows an organisation’s liability to be assessed on a wider basis, providing a more effective means of accountability for very serious management failings across an organisation.

The offence is intended to complement, not replace, other forms of accountability, such as prosecutions under existing health and safety legislation.

APPLICABILITY OF THE ACT

The Act applies across the UK. The offence can be prosecuted if the harm resulting in death is sustained in the UK, in the UK’s territorial waters, on a British ship, aircraft or hovercraft or on an oil rig or other offshore installation already covered by UK criminal law (s.28).

The Act applies to (s.1(2):

- a) a corporation;
- b) a department or other body listed in Schedule 1 (list of Government Departments etc);
- c) a police force;
- d) a partnership, or a trade union or employers’ association, that is an employer.

The Act makes provision for the range of organisations covered by the offence to be extended by secondary legislation (s.21).

Companies within a group structure (i.e. parent companies and subsidiary companies) are separate legal entities and are therefore subject to any offence separately.

Contrary to the doctrine of Crown immunity, Schedule 1 of the Act sets out a list of government departments to which the Act applies. In addition, the Act applies to Crown bodies that are incorporated, such as the Charity Commission. The Act also applies to a wide range of statutory public bodies that are not part of the Crown, including local authorities, NHS bodies and many non-departmental public bodies with executive responsibilities.

For the purposes of the Act, a partnership is to be treated as owing whatever duties of care it would owe if it were a body corporate. Proceedings are to be brought in the name of the partnership (and not in that of any of its members). A fine imposed on a partnership is to be paid out of the funds of the partnership (s.14).

THE OFFENCE

The wording of the offence is as follows (s.1):

- (1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised-
 - (a) causes a person’s death; and
 - (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

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(2) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1).

A breach of a “relevant duty of care” is a “gross breach” if the conduct of the organisation falls far below what can reasonably be expected of the organisation in the circumstances (s.1(4)(b)).

The offence builds on the responsibilities that organisations already owe under the law of negligence, to their employees, in respect of the premises they occupy and for the activities that they carry out. For the offence to be committed, the organisation concerned must owe “a relevant duty of care”(s.2). Death must be a result of a gross breach of such a duty because of the way the organisation’s activities have been managed or organised.

The “relevant duties” in relation to an organisation include (s.2):

- a) a duty owed to its employees or to other persons working for the organisation or performing services for it;
- b) a duty owed as occupier of premises;
- c) a duty owed in connection with
 - (i) the supply by the organisation of goods and services (whether for consideration or not),
 - (ii) the carrying on by the organisation of any construction or maintenance operations (for further definition see s.2(7))

- (iii) the carrying on by the organisation of any activity on a commercial basis, or
- (iv) the use or keeping by the organisation of any plant, vehicle or other thing.

For the purposes of the Act, whether a particular organisation owes a duty of care to a particular individual is a question of law. A judge must make any findings of fact necessary to decide that question (s.2(5)).

“Senior management” in relation to an organisation, means the persons who play significant roles in the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or the actual managing or organising of the whole or a substantial part of those activities (s.1(4)(c)).

EXEMPTIONS

The Act sets out two classes of exemption to its applicability, comprehensive and partial exemptions. Where a comprehensive exemption applies, any duty of care owed by an organisation is deemed not to be a “relevant duty of care”. Comprehensive exemptions apply to:

- a) Public policy decisions s.3(1).
- b) Military activities such as peacekeeping operations and operations for dealing with terrorism, civil unrest, or serious public disorder, in the course of which members of the armed forces come under attack or face the threat of attack or violent resistance. Activities carried on in

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in preparation for, or directly in support of, such operations. Or hazardous training to improve or maintain the effectiveness of the armed forces with respect to such operations (s.4).

c) Policing and law enforcement activities such as operations for dealing with terrorism, civil unrest or serious disorder, where officers or employees of the public authority come under attack or face the threat of attack or violent resistance. Activities carried on in preparation for, or directly in support of, such operations. Or hazardous training to improve or maintain the effectiveness of officers or employees of the public authority with respect to such operations (s.5).

Where a partial exemption applies, only an organisation's duties as employer or occupier of premises are deemed to be "relevant duties of care". Partial exemptions apply to:

- a) Policing and law enforcement activities (s.5(3))
- b) The emergency response of (s.6):
 - fire and rescue authorities and other emergency response organisations;
 - NHS bodies (including ambulance trusts) – this does not exempt duties of care relating to medical treatment in an emergency, other than triage decisions (s.6(3)).
 - the Coastguard, Royal National Lifeboat Institution and other rescue bodies; the armed forces.
- c) Inspections carried out by a public authority in the exercise of a statutory

function (s.3(3)), child protection functions undertaken by a local authority or other public authority, or probation activities (s.7).

d) The exercise of "exclusively public functions" (s.3(2)). This includes:

- functions carried out by the Government using prerogative powers, such as acting in a civil emergency; and
- functions that by their nature require statutory (or prerogative) authority, such as licensing drugs or conducting international diplomacy.

DOES THE ACT APPLY?

The following series of questions aims to assist in the assessment of whether or not the offence is likely to be made out.

1. Does the case fall into one or more of the alternative categories set out below?

- a) Was the deceased an employee of the organisation concerned?
- b) Were they otherwise working for the organisation or performing services for it?
- c) Was the death connected with premises occupied by the organisation?
- d) Did the death relate to:
 - i) Goods supplied by the organisation?
 - ii) Services supplied by the organisation?
 - iii) Construction or maintenance carried out by the organisation?
 - iv) An activity pursued by the organisation commercially?
 - v) Use or keeping by the organisation of plant, vehicle, or other thing?

2. Was the deceased owed a duty of care by the organisation in this respect?

3. Do any of the exemptions apply?

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4. Was there a gross breach of a relevant duty, caused by the way the organisation's activities were managed or organised by its senior management?

PENALTIES

An organisation convicted of the new offence can receive:

- a) A fine (s.1(6)). There is no upper limit.
- b) A publicity order. This requires an

organisation to publicise the fact of its conviction and certain details of the offence and penalty, in a way specified by the court (s.10).

c) A remedial order (s.9) (on application by the prosecution specifying the terms of the proposed order). This requires the organisation to address the cause of the fatality.

Richard Tutt

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