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Personal injury: Knowing the limits

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Brent McDonald *examines pupils' supervision in school, setting aside consent orders & the latest case on limitation*

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In Brief

- *Palmer v Cornwall County Council*.
- *Ruolt v Northwest Strategic Health Authority*.
- *AB and others v Ministry of Defence*.

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In *Palmer v Cornwall County Council* [2009] EWCA Civ 456, [2009] All ER (D) 191 (May) which comes shortly after *Orchard v Lee* [2009] EWCA Civ 295, [2009] All ER (D) 39 (Apr), the Court of Appeal was again asked to consider the liability of schools for injuries caused by the activities of pupils at playtime.

The play area designated for years 9 and 10 was at one end of a field, with the area designated for years 7 and 8 at the other end. Each area was about the size of a football pitch. The claimant, who was aged 14½ and was therefore in year 9, was playing outside during a lunch break, having just been released from detention. Only 15 minutes of playtime remained.

One of the claimant's fellow pupils had strewn food on the ground in order to tempt seagulls to swoop down. As the birds attempted to pickup the food, he then attempted to throw stones or rocks at them. In doing so he accidentally struck the claimant in the eye with a thrown rock.

Proceedings against the child who threw the rock were withdrawn shortly before trial. The action against the school under the Occupiers' Liability Act and in negligence continued. The claim was dismissed by Recorder Chippindall. The claimant appealed.

During the trial it had emerged that supervision during the lunch break was carried out by two dinner ladies, one supervising pupils situated inside and one supervising pupils outside. Despite the appellant's challenge, the Court of Appeal accepted the Recorder's finding that during lunchtime around 300 pupils were outside. The supervising dinner lady's evidence was that she directed her main attention to years 7 and 8, although she said that she occasionally glanced over at the pupils in years 9 and 10.

Notwithstanding that no expert evidence had been led on the point, the Court of Appeal considered the Recorder's finding that this level of supervision was adequate perverse. Lord Justice Waller, the vice president, with whose judgment Lords Justices Longmore and Richards agreed, observed: "If there were 300 pupils out on the field at the time of the incident, of which it would seem clear that well over half would be years 7 and 8, it is doubtful whether two supervisors concentrating 100% on those age groups would have been sufficient."

Therefore the level of supervision provided to years 9 and 10 was held plainly inadequate.

Although there was limited evidence the school was aware of stone-throwing, Waller LJ did not think this was important. In any event, he thought that the likely explanation for the lack of knowledge was down to the school's inadequate supervision.

The council argued that the claimant had failed to show that any failure to supervise was causative of the accident, pointing to the duration over which stone-throwing had occurred and the limited opportunity to stop the boys. It was said that if the boys were not deterred by the presence of one supervisor, two supervisors would not have made any difference.

The Court of Appeal disagreed. In their Lordships' opinion, there was no reason to doubt the boy's evidence that had there been more supervision he would not have started throwing stones in the first place. Therefore there was no need for the claimant to prove that the stone throwing would have been detected within time. In any event, the vice president observed that: "Since the purpose of appropriate supervision is to deter children taking part in dangerous activities, as well as to stop dangerous activities if they do occur, the court should not be too ready to accept the dangerous activity would have happened anyway."

Accordingly the appeal was allowed.

Setting aside consent orders

In *Ruolt v Northwest Strategic Health Authority* [2009] EWCA Civ 444, [2009] All ER (D) 173 (May) the Court of Appeal were asked to decide whether or not CPR 3.1(7), which states "The power of the Court under these Rules to make an order includes the power to vary or revoke the order" could be used to revoke an order approving a final settlement.

As a result of the defendant's admitted negligence, the claimant suffered serious injuries at birth. Settlement on quantum was reached between the parties with the award for care and accommodation being agreed on the basis that the claimant would be housed in a local authority group home. On what was due to have been the first day of trial, the judge approved the settlement.

However some heads of loss still had to be quantified, and so approval was given simply to the terms of the agreement. An order was drawn up reciting that the agreement was approved, quantified some heads of loss as set out in Sch 1 (which included accommodation valued at "nil") at £904,567, and in Sch 2 setting out the heads of loss which required further quantification. Schedule 2 (which included future costs of care) was likewise based on the assumption that the claimant would be housed by the local authority. Therefore it was clear from the terms of the settlement that the agreement reached and the order drawn up was underpinned by the claimant's acceptance that the best place for him to reside would be with the local authority.

Some 18 months later the claimant served a revised schedule in respect of the sums to be quantified. In the meantime the claimant had tried to stay at a local authority group home, but had found it unsuitable and had left. The revised schedule sought damages for future care in privately obtained accommodation with the necessary attendant (and expensive) privately engaged carers.

The defendants objected and the matter was referred back to the court to ascertain whether or not it was open to the claimant to pursue such costs given the previous agreement. The judge, Mr Justice Christopher Clarke, held that it was not. The claimant appealed.

Before Lords Justices Hughes, Smith and Carnwath, the claimant contended that the general power under CPR 3.1(7) to revoke an order could be applied if an unforeseen event had occurred (in this case the claimant's subsequent discovery that local authority accommodation was unsuitable) which destroyed the assumption upon which the original order had been made.

The claimant referred by analogy to the jurisdiction which exists in matrimonial ancillary relief cases which allows the court to set aside an order reached by consent in rare cases where an unforeseeable event occurs which destroys the basis of the original order per *Barder v Caluori* [1988] AC 20, [1987] 2 All ER 440. In *Barder*, the House of Lords set aside a consent order transferring the former matrimonial home to a wife, after the wife subsequently murdered her children and then killed herself. It was accepted that the application of this principle to cases under the CPR was novel.

Lord Justice Hughes referred to previous case law and observed that there was "scant authority" as to the application of CPR 3.1(7). While he declined to attempt any exhaustive classification of circumstances in which 3.1(7) could be invoked, he held that it certainly could not apply here. To do so would come close to allowing any party to ask any judge to review his own decisions and, in effect, to hear an appeal against himself on the basis of some subsequent event. The power under CPR

3.1(7) should not be used where the order had been a final one, "especially where the final order had been founded upon a settlement agreed between the parties after the most detailed and highly skilled advice".

Lord Justice Thomas added that even if 3.7(7) were to be invoked, the event must be truly unforeseeable, which was not the case here: "It was always foreseeable that the prediction might turn out to be erroneous; that is simply unavoidable...[B]efore any application for leave to appeal could be mounted on the basis of fresh evidence of a dramatic Barder-type event, the case must be so clear that it is plain that such appeal would be certainly and very likely to succeed."

AB and Ors v Ministry of Defence

Following on from widely reported decisions in favour of allowing claimants to pursue potentially stale cases of abuse by clergy, in *AB and others v Ministry of Defence* [2009] EWHC 1225, [2009] All ER (D) 54 (Jun) the High Court was asked to determine preliminary issues as to limitation and a strike out application by the MOD in a group action claim arising out of the claimants' exposure to ionising radiation due to nuclear tests carried out by the British government in the 1950s. Ten lead cases were selected out of a group comprising a formidable 1,011 claimants.

Mr Justice Foskett, while acknowledging possible difficulties in proving causation, was of the view that it could not be said the cases were "doomed to fail". Causation was, the judge held, essentially a matter of factual evidence, both lay and expert, which had not yet been established. In the absence of those facts the court also could not say which test for causation should be applied. The strikeout applications were therefore dismissed.

Foskett J likewise refused to accept the defendant's argument that, where claims involved multiple injury, the reference to "the injury in question" in s 14(1)(a) of the Limitation Act 1980 (LA 1980) referred to the first significant injury in time.

The judge referred to a number of cases including *Spargo v North Essex District Health Authority* [1997] 8 Med LR 125 and *Sniezek v Bundy (Letchworth) Ltd* [2000] PIQR P213, [2000] All ER (D) 942. Knowledge of whether the significant injury in question was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty under s 14(1)(b) of LA 1980 was a factual one. It had to be resolved in each individual case in accordance with previous judicial guidance. The court should look at the state of belief on the part of the claimant, and any intention to refer to experts was relevant. To found knowledge certainty was not required, but mere suspicion would not normally suffice. On the evidence, five of the 10 test cases had been commenced outside the primary limitation period and were prima facie statute-barred.

In respect of those five cases, however, Foskett J held that the interests of justice meant that the discretion under s 33 of LA 1980 should be applied to extend time. A fair trial remained possible; there was voluminous documentation created at or about the time of the tests, reference could be made to the accounts of participants and the cogency of the evidence was not substantially diminished by the deaths which had occurred since limitation expired. As such a reasonably well-informed and fair-minded layman would consider that the claims should be allowed to proceed.