

# End of the line for *Stubbings*?

**Patrick Sadd** examines the legal history underpinning calls for changes to the rules governing limitation

## IN BRIEF

- In *Stubbings v Webb* the Court of Appeal declared itself bound by its previous decision in *Letang v Cooper* in finding that the assaults were breaches of duty rather than torts.
- In *A v Hoare*, if the House of Lords follows the sense of legal indignation aired by the Court of Appeal in relation to *Stubbings*, its decision will be one of the most significant of the last decade and is likely to have a profound impact on civil claims for abuse.

The claimants' appeals recently argued before the House of Lords in *A v Hoare*, *H v Suffolk County Council*, *X v London Borough of Wandsworth*, *C v Middlesbrough* have been characterised in the headline "Lotto rapist goes to House of Lords" (see *Daily Telegraph Online* 29 October 2007). As Richard Scorer has described (see 157 NLJ 7297, pp 1596–97) the House of Lords has been invited to depart from its much-criticised decision of *Stubbings v Webb* [1993] AC 498, [1993] 1 All ER 322.

Lost in the headlines is the legal route the House of Lords has been invited to take in deciding whether or not to depart from *Stubbings*, an outcome in which all four appeals share a common interest. It is rare for the House of Lords to depart from one of its own decisions. Yet in 2006 it did so in *Horton v Sadler* [2006] UKHL 27, [2006] 3 All ER 1177, Lord Bingham stating simply:

"As made clear in the 1966 Practice Statement former decisions of the House are normally binding. But too rigid adherence to precedent may lead to injustice in a particular case and unduly restrict the development of the law. The House will depart from a previous decision where it appears right to do so."

**Line needed here**

## INCOHERENT LAW

*Hoare* is the culmination of an arduous legal journey that has involved a long-awaited review of the statutory limitation framework in personal injury claims set against the growing legal momentum that has striven for change in the law on limitation in civil claims for historical sexual assaults. The journey is forcefully depicted in the Court of Appeal's 220 paragraph judgment which seeks to persuade the House of Lords to change the "incoherent state" of the law (see *A v Hoare* [2006] EWCA Civ 395, [2006] All ER (D) 203 (Apr)) expressed no more powerfully than in the following passage when dealing with the appeal in *X*:

"We find it unsatisfactory that we have to set on one side the intentional assaults, and we have already expressed the hope that the House of Lords will reconsider *Stubbings v Webb* at an early date."

Controversially, in the appeal of *X* the House of Lords was asked to consider whether a teacher has a duty to report himself in circumstances where he felt he might abuse, or where he had abused or was grooming a pupil. Even more controversially, did a teacher's grooming of a child amount to a breach of duty capable of causing injury?

## ASSAULT

When *Stubbings* reached the Court of Appeal, Vice-Chancellor Sir Nicholas Browne-Wilkinson noted in relation to civil actions against child abusers, that Leslie Stubbings' case was "apparently the first case in which the alleged victim has sought to sue her abusers". *W v Meah* [1986] 1 All ER 935 was the first reported civil action for rape.

*Stubbings* had succeeded at first instance and in the Court of Appeal in persuading the court that her claim was to be determined under the Limitation Act 1980 (LA 1980), ss

11 and 14—that her claim was one based on negligence, nuisance or breach of duty rather than on tort. As such it fell within the three-year extendable regime (including a later date of knowledge) as opposed to the non-extendable six-year limitation regime under s 2. This was critical to her claim going forward.

The context in which *Stubbings* justified bringing her claim nine years after her 18th birthday and 13 years after she had last been sexually assaulted has since pre-echoed the memory triggering events for many claimants of sexual abuse when seeking to establish date of knowledge (see for instance the individual cases in *KR v Bryn Alyn Community (Holdings) Ltd* [2003] EWCA Civ 85, [2004] 2 All ER 716). Aged 27, *Stubbings* watched the documentary *Incest in the Family* and rang the helpline given at the end of the programme. This in turn led to psychiatric assessment in which a suggested link was made between her adult psychological problems and her sexual abuse she alleged as a child.

In *Stubbings* the Court of Appeal declared itself bound by its previous decision in *Letang v Cooper* [1964] EWCA Civ 5, [1964] 2 All ER 929 in finding that the assaults were breaches of duty rather than torts. In *Letang* Lord Justice Diplock had construed the phrase "breach of duty" in the Limitation Act 1939 (as amended) as wide enough "to cover any cause of action which gives rise to a claim for damages for personal injuries". This would have included intentional trespass. Three years later, in *Long v Hepworth* [1968] 1 WLR 1299, Mr Justice Cooke, while bound by *Letang*, was in little doubt:

"An intentional trespass by A to the person of B is just as much a breach of the duties owed by A to B as an unintentional trespass by A to...B."

## DATE OF KNOWLEDGE

By the time *Stubbings* came to court, LA 1980 was in force. Once it was determined that the alleged sexual assaults came within s 11, the Court of Appeal had then to consider at what date *Stubbings* first had knowledge that she had suffered significant harm. Lord Justice Bingham (as he then was) presciently drew a distinction between the physical injury that *Stubbings* may have been caused at the time of the assaults and the psychological damage that may have occurred over time:

"I do not for my part think that the plaintiff could reasonably have been expected to

acquire knowledge of the causal link from the facts observable or ascertainable by her, since mental impairment caused as this allegedly was almost necessarily produces a lack of insight and during the period in question there was not that general awareness among the public of the psychological effects of child abuse which certain well-publicised events since then have caused.”

Fourteen years later, the Court of Appeal in *Hoare* observed that at the time of the *Stubbings* decision psychiatric injury alone “could not give rise to a cause of action in tort” except in post traumatic stress disorder as secondary victims and in certain exceptions. This may have explained Lord Griffiths’s view when *Stubbings* went to the House of Lords:

“I have the greatest difficulty in accepting that a woman who knows that she has been raped does not know that she has suffered a significant injury.”

His comments on date of knowledge exposed a lack of understanding of the true extent of harm caused by sexual assaults but they were not central to the House of Lords’ decision. Put simply the assaults alleged to have been committed by the Webbs were intentional acts of trespass and as such subject to a six-year limitation period under LA 1980, s 2, which applied to actions founded on tort.

The Court of Appeal in *Hoare*, although bound by the *Stubbings* decision, felt there was much to be said for Diplock LJ’s wide interpretation. Because the Human Rights Act 1998 (HRA 1998) cannot be given retrospective effect (see *Wilson v First Country Trust Ltd* [2003] UKHL 40, [2003] 4 All ER 97) and causes of actions in all the claims arose before the passing of HRA 1998, the Court of Appeal could not construe LA 1980, s 11 by applying HRA 1998, s 3.

### PROOF OF NEGLIGENCE

In the conjoined appeals of *H* and *X*, heard at the same time as *Hoare*, the appellants were adults claiming damages for the sexual assaults perpetrated on them as children by schoolteachers employed by local authorities. In *H*, the teacher was never prosecuted; in *X*, the teacher (head of year responsible for the boys’ pastoral care) was convicted. In both cases the claimants had brought their claims after the six-year limitation period had expired for a claim in trespass against the teacher (following *Stubbings*). In both

cases the claimants sued the local authority in negligence and therefore within the LA 1980, ss 11 and 14 limitation regime. And in both cases the trial judges found that the local authority had not been negligent of any systemic failure.

The impact for these claimants, and others like them, of the House of Lords’ departing from *Stubbings* is set out in Scorer’s article—in essence, once the allegations of assault are proved (in *X* the record of conviction was sufficient) then the claimants could sue the local authority without proof of negligence (following *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 2 All ER 769) bringing their claim under s 11.

### A DUTY TO TELL YOURSELF

In *Lister* the claimants had sought to avoid the rule in *Stubbings* by arguing that the warden who had been convicted of sexually assaulting the claimants had failed to report his acts of abuse for which his employers were vicariously liable. The reasoning was simple: the existence of such a duty rendered any breach of that duty negligent and therefore subject to the s 11 limitation regime. The House of Lords in *Lister* found that the employers could be vicariously liable for the warden’s acts of assault. No ruling was given on whether or not there was a duty to self-report, although Lord Hobhouse considered such a duty could exist while Lord Millett felt it was artificial.

Were they not constrained by the authority of *KR v Bryn Alyn* the Court of Appeal in *X* would have considered “quite carefully” Lord Hobhouse’s reasoning “to the effect that it is legitimate to include a failure to report among a teacher’s breaches of duty”. The court concluded:

“It would follow from this reasoning that the boys’ head of year is under a duty to report to the headteacher that another master was about to involve himself in acts of indecency with a boy, a fortiori in that capacity he was under such a duty if he was about to behave in this way himself.”

The court acknowledged that this was artificial, but its artificiality was based on the flaw stemming from *Stubbings*:

“Its artificiality stems from the way in which as the law now stands we have to segregate those acts of indecency that amount to intentional assaults from acts of indecency that do not involve touching (as

when an abuser persuades a boy to strip off his clothes and masturbate in front of him) but are nevertheless causative of harm.”

### GROOMING

In *X* there was substantial evidence that showed the teacher went to great lengths to groom both claimants, and psychiatric evidence was led to show that the grooming process had harmed both men psychiatrically. The claimants had argued that grooming in itself amounted to a breach of duty, as opposed to the acts of intentional assault, the culmination of grooming, and that the acts of grooming had made a material contribution to the claimants’ psychiatric harm. In this way they sought to avoid the *Stubbings* rule.

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On this issue the Court of Appeal was emphatic:

“It would be tempting to allow these appeals on this basis and to remit them to the county court for an inquiry into damages, but such an inquiry would have to be conducted on an entirely artificial basis which would bring the law into disrepute. We consider that it would be better for us to dismiss the appeals and to grant permission to appeal to the House of Lords...so that the House can consider if it can do anything to rescue the law from its incoherent state without the intervention of Parliament.”

### FAR-REACHING

If the House of Lords follows the sense of legal indignation aired by the Court of Appeal in relation to *Stubbings*, its decision will be one of the most significant of the last decade and is likely to have a profound impact on civil claims for abuse. Whether it addresses the issues of self-reporting and grooming is less certain, since it may not need to do so to achieve what many feel would be the just result: the end of the rule in *Stubbings*.

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