Too little, too late

Jonathan Wheeler discusses limitation and consent in abuse compensation claims following the Court of Appeal decision in *JL*

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Solicitors representing survivors of abuse in compensation claims have become rather blasé of late over the application of section 33 of the Limitation Act 1980. This may be about to change. A number of test cases arising out of abuse at St William's, a Catholic-run children's home in the North East of England, were thrown out by Mr Justice Gosnell in *GH v The Catholic Child Welfare Society (Diocese of Middlesbrough) and others* just before Christmas, essentially because the defendants were prejudiced by the cases being litigated so late.

The Court of Appeal has now hammered another nail in the same coffin with its judgment last month in *JL v Archbishop Bowen and the Scout Association*. JL alleged he had been sexually abused by his scout leader and parish priest, Father Laundy. JL looked up to Laundy as a friend and a father figure. The sexual assaults started when Laundy was in his forties and JL was 16, and he alleged they continued until he was about 31.

The judge at first instance decided that the assaults between the ages of 16 and 19 were non-consensual, in that JL had been groomed and manipulated by the priest and so did not give free consent. However, the assaults which continued after the claimant had been to university were not proven trespasses to his person as he was consenting by that time.

The judge directed himself that the delay in bringing proceedings was between nine and 23 years and he allowed the claim for the pre-university assaults to proceed under section 33 after a full trial. However, having dismissed the claims for the post-university assaults, in fact the delay in bringing the proceedings was between 21 and 23 years.

The defendants said they had been prejudiced in defending the claim because while Father Laundy had pleaded guilty to assaulting the claimant (and others) in criminal proceedings back in 2000, he had since died. They had wanted to advance evidence that Laundy had only pleaded guilty to avoid publicity, and the likelihood that he may have received a longer sentence had the case gone against him.

The church had an unsigned statement from Laundy, prepared for the purpose of the proceedings, in which he said that the sexual activity with JL was consensual. Proceedings were issued in 2011, the unsigned statement was taken in 2012, and Laundy had died in 2014. It seems an indulgence that in such circumstances the defendant can pray in aid the death of a witness they should have proofed much earlier. But that is indeed what the Court of Appeal found in overturning the judge's decision on limitation.

The judgment below – accepting that JL had been manipulated by his 'father figure' of a priest into some sexual activities but not others – was always rather odd. It perhaps would have been wise for the claimant to have cross-appealed against that finding.

> **It is rare for an appellate court to overturn a judge's exercise of his discretion under section 33**

Lord Brown in the leading case of *A v Hoare* indicated that where an assailant had been convicted in criminal proceedings, the problems of investigating events which happened years ago would not be so onerous for the civil courts, and claims otherwise out of time should be allowed to proceed under section 33. However, the Court of Appeal in *JL* said that here the criminal conviction did not necessarily prove the tort and consent was a live issue and capable of being argued, even if the conviction shifted the burden onto the defendant under the Civil Evidence Act 1968.

It is rare for an appellate court to overturn a judge's exercise of his discretion under section 33. However, here the court felt able to do so because the judge had not considered that, had the case been brought earlier, the defendants could have adduced evidence now lost to them, which might have altered the outcome of the trial. The trial judge had to rely mainly on the claimant's evidence, and while that was just about credible, there were elements of JL's account that were exaggerated and which the judge ultimately rejected.

In future, defendants will be taking up the point on limitation in many more claims, seemingly to redress an imbalance in the application of the law since *A*. Claimant lawyers in England and Wales should be keeping a close eye on events north of the border, where the Scottish government is legislating to do away with limitation periods in such cases. I hazard that there will soon be calls for similar legislation here. **SJ**