HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 6

on appeal from: [2006] EWCA Civ 395
[2006] EWCA Civ 1746
[2006] EWCA Civ 1534

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

A (Appellant) v Hoare (Respondent)
C (FC) (Appellant) v Middlesbrough Council (Respondents)
X (FC) and another (FC) (Appellants) v London Borough of Wandsworth (Respondents)
(Conjoined Appeals)
H (FC) (Appellant v Suffolk County Council (Respondents)
Young (FC) (Appellant) v Catholic Care (Diocese of Leeds) and others (Respondents)

APPELLATE COMMITTEE

Lord Hoffmann
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
A: Alan Newman QC
Paul Spencer
(Instructed by DLA Piper UK LLP)
C: Elizabeth-Anne Gumbel QC
Henry Witcomb
(Instructed by Griffith Smith Farrington Webb)
X: Elizabeth-Anne Gumbel QC
Henry Witcomb
(Instructed by Bolt Burdon Kemp)
H: Nigel Cooksley QC
Stephen Field
(Instructed by BTMK LLP)
Young: Stuart Brown QC
Rosalind Coe
(Instructed by Sharpe Pritchard (for Jordans))

Respondents:
A: Christopher Sharp QC
Andrew McLaughlin
(Instructed by Atkins Law)
C: Kate Thirlwall QC
Steven Ford
(Instructed by Crutes)
X: Kate Thirlwall QC
Steven Ford
(Instructed by Browne Jacobson)
H: Kate Thirlwall QC
Steven Ford
(Instructed by Browne Jacobson)
Catholic Care: Edward Faulks QC
Nicholas Fewtrell
(Instructed by Hill Dickinson LLP)
Home Office: Nigel Wilkinson QC
Malcolm Sheehan
(Treasury Solicitors)

Hearing date:
1, 5, 6 & 7 NOVEMBER 2007

ON

WEDNESDAY 30 JANUARY 2008

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

A (Appellant) v Hoare (Respondent)
C (FC) (Appellant) v Middlesbrough Council (Respondents)
X (FC) and another (FC) (Appellants) v London Borough of Wandsworth (Respondents)
(Conjoined Appeals)
H (FC) (Appellant v Suffolk County Council (Respondents)
Young (FC) (Appellant) v Catholic Care (Diocese of Leeds) and others (Respondents)

[2008] UKHL 6

LORD HOFFMANN

My Lords,

1. These six appeals all raise the question of whether claims for sexual assaults and abuse which took place many years before the commencement of proceedings are barred by the Limitation Act 1980. The general rule is that the period of limitation for an action in tort is six years from the date on which the cause of action accrues. This period derives from the Limitation Act 1623 and is now contained in section 2 of the 1980 Act. All the claimants started proceedings well after the six years had expired. It follows that, if section 2 applies, their claims are barred. But sections 11 to 14 contain provisions, first introduced by the Limitation Act 1975, which create a different regime for actions for "damages for negligence, nuisance or breach of duty", where the damages are in respect of personal injuries. In such cases the limitation period is three years from either the date when the cause of action accrued or the "date of knowledge" as defined in section 14, whichever is the later. In addition, section 33 gives the court a discretion to extend the period when it appears that it would be equitable to do so. The chief question in these appeals is whether the claimants come within section 2 or section 11. In the latter case, the claimants say either that the date of knowledge was less than three years before the commencement of proceedings or that the discretion under section 33 should be exercised in their favour.

2. In *Stubbings v Webb* [1993] AC 498 the House of Lords unanimously decided that section 11 does not apply to a case of deliberate assault, including acts of indecent assault. An action for an intentional trespass to the person is not an action for "negligence, nuisance or breach of duty" within the meaning of section 11(1). The lower courts are bound by this decision and have therefore held that the claimants are statute-barred. But the claimants submit that *Stubbings* was wrongly decided and that the House should depart from it in accordance with the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

3. In the context of limitation of actions, the phrase "negligence, nuisance or breach of duty" made its first appearance in the Law Reform (Limitation of Actions, etc) Act 1954. The background to this enactment was the Report of the Committee on the Limitation of Actions 1949 (Cmd 7740) under the chairmanship of Lord Justice Tucker. The committee was particularly concerned with the fact that, as the law then stood, the general limitation period for tort actions (including claims for personal injuries) was six years but claims against public authorities had to be brought within one year. The committee thought that the first period was too long and the second too short. It recommended a period of two years for all personal injury claims, with a judicial discretion to extend it up to six years. In para 23 they said:

> "We consider that the period of limitation we have recommended should apply to all actions for personal injuries, whether the defendant is a public authority or not. We do not think it is necessary for us to define 'personal injuries,' although this may possibly be necessary if legislative effect is given to our recommendations. We wish, however, to make it clear that we do not include in that category actions for trespass to the person, false imprisonment, malicious prosecution, or defamation of character, but we do include such actions as claims for negligence against doctors."

4. There are minor puzzles about why malicious prosecution or defamation of character were thought capable of causing personal injury or why doctors were singled out for mention, but the committee certainly seems to have intended to exclude actions for trespass to the person from their proposal. They did not explain why. The reason they gave for adopting a short period for personal injury claims ("the desirability of such actions being brought to trial quickly, whilst

evidence is fresh in the minds of the parties and witnesses": para 22) would seem equally applicable to cases in which the cause of action is trespass. Perhaps they had in mind only intentionally inflicted injuries and thought that a defendant who caused deliberate injury should not have the benefit of a short limitation period.

5. When some years later Parliament implemented the report, it accepted the general principle of a single period of limitation for personal injury claims, whether against public authorities or private bodies. It also accepted that it should be shorter than six years. It did not however accept either the period of two years or the possibility of extension. Instead, it adopted a fixed period of three years. This was provided by section 2(1) of the Law Reform (Limitation of Actions, etc) Act 1954:

> "At the end of subsection (1) of section 2 of the Limitation Act 1939 (which subsection provides, amongst other things, that there shall be a limitation period of six years for actions founded on simple contract or on tort) the following proviso shall be inserted - 'Provided that, in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years."

6. It will be seen that in defining the actions to which the three year period was to apply, Parliament adopted neither the simple concept of an action for personal injury (for which, as the committee had suggested, the Act provided a definition) nor the specific exclusions mentioned by the Tucker Committee, but spoke of "actions for damages for negligence, nuisance or breach of duty…where the damages claimed…consist of or include damages in respect of personal injuries".

7. The phrase "negligence, nuisance or breach of duty" was not entirely new. It had appeared in the Personal Injuries (Emergency Provisions) Act 1939, which had given the Minister power to make a

scheme for making payments of compensation in respect of "war injuries" irrespective of fault. As the other side of the coin, section 3(1) extinguished common law claims for compensation or damages for such injuries when they were:

> "on the ground that the injury in question was attributable to some negligence, nuisance or breach of duty for which the person by whom the compensation or damages would be payable is responsible."

8. The meaning of these words was briefly considered by the Court of Appeal in *Billings v Reed* [1945] KB 11, in which the plaintiff's wife had been killed by a negligently piloted RAF aeroplane. It was argued that, although this was a war injury, the language of section 3(1) did not exclude a claim based on trespass to the person. Lord Greene MR said, at p 19:

> "It seems to me that in this context the phrase 'breach of duty' is comprehensive enough to cover the case of trespass to the person which is certainly a breach of duty as used in a wide sense."

9. Thus when Parliament used this phrase in the 1954 Act, it had already been judicially construed as having a wide meaning. Furthermore, Parliament added the parenthetical words "(whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision)" which seem to stress its breadth.

10. A provision in words materially identical with those of section 2(1) of the 1954 Act was adopted by the legislature of the State of Victoria: see section 5(6) of the Limitation of Actions Act 1958 (Victoria). In *Kruber v Grzesiak* [1963] VR 621 Adam J had to consider whether the section covered an allegation of unintentional trespass to the person. The plaintiff, who had issued a writ claiming damages for personal injuries caused by negligent driving more than three years after the accident, wanted to amend the writ by adding a claim for trespass to the person based on the same facts. The judge said, at p 623:

> "I would see no sufficient reason for excluding an action for trespass to the person] from the description of an action for damages for breach of duty, especially when it is provided that the duty may be one existing independently of any contract or any provision made by or under a statute. After all, do not all torts arise from breach of duty – the tort of trespass to the person arising from the breach of a general duty not to inflict direct and immediate injury to the person of another either intentionally or negligently in the absence of lawful excuse? The substance of the matter appears to be that section 5(6) is intended to provide a special limitation period of three years for actions in which damages for personal injuries are claimed. No doubt, as was pointed out in argument, this intention might have been achieved by the use of other and perhaps simpler and more direct language, but that does not seem to be a sufficient reason for not giving to the language chosen its full meaning."

11. The reasoning in *Kruber v Grzesiak* was gratefully adopted by the Court of Appeal in England when the same point arose in *Letang v Cooper* [1965] 1 QB 232: see Lord Denning MR at p 241F and Diplock LJ at p 245E. In addition, the Court of Appeal found further support in *Billings v Reed* [1945] KB 11, which had not been cited to Adam J. Diplock LJ noted the prolixity of the statute but said, at p 247F, that "economy of language is not invariably the badge of parliamentary draftsmanship." The fact that negligence and nuisance were specifically mentioned was not enough to give rise to an inference that the wide general words:

> "were not intended to cover all causes of action which give rise to claims for damages in respect of personal injuries; particularly when the same combination of expressions in a similar context had already been given a very wide interpretation by the Court of Appeal."

12. *Letang v Cooper* [1965] 1 QB 232 was concerned with an unintentional trespass to the person (the defendant had negligently driven his car over the plaintiff's legs) but, in view of the reasoning of the Court of Appeal, it is unsurprising that in *Long v Hepworth* [1968] 1 WLR 1299 Cooke J decided that section 2(1) of the 1954 Act also applied to intentional injuries (the defendant had deliberately thrown cement into the plaintiff's face). That was the state of the authorities in

1975, when the Limitation Act 1975 introduced the radical changes into the law of limitation which are now contained in sections 11 to 14 and 33 of the 1980 Act.

13. These changes may be summarised as (1) postponing the date at which time starts running from the date of accrual of the cause of action to the "date of knowledge" and (2) creating the section 33 discretion. These were both reforms intended to improve the position of plaintiffs who would otherwise be time-barred. But for the purpose of defining the class of actions to which they applied, Parliament used the same language as it had used when it passed section 2(1) of the 1954 Act to cut down the limitation period from six to three years.

14. This seems to me a highly significant circumstance. When the 1954 Act was passed, it could have been argued that the exclusion of intentionally inflicted injuries reflected a moral policy of denying the shorter limitation period to an intentional wrongdoer. Such an argument did not find favour in *Kruber v Grzesiak* [1963] VR 621 or *Letang v Cooper* [1965] 1 QB 232, but I should have thought that, given the terms of the Tucker Committee Report and the obscurity of the Parliamentary language, it was seriously arguable. But there could be no moral or other ground for denying to a victim of intentional injury the more favourable limitation treatment introduced by the 1975 Act for victims of injuries caused by negligence. The inference I would draw is that in using the same form of words in the 1975 Act, Parliament must have intended them to bear the meaning which they had been given in the uniform line of authority in England and Australia to which I have referred.

15. There is a good deal of authority for having regard, in the construction of a statute, to the way in which a word or phrase has been construed by the courts in earlier statutes. *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402 is a well known example. The value of such previous interpretations as a guide to construction will vary with the circumstances. But the circumstances of this case seem to me to have much in common with the decision of the House in *Lowsley v Forbes* [1999] 1 AC 329. In that case, the Court of Appeal in 1948 (*W T Lamb and Sons v Rider* [1948] 2 KB 331) had given a provision of the Limitation Act 1939 an interpretation which the House thought was probably wrong. But Parliament had then enacted the Limitation Amendment Act 1980 in terms which made sense only on the basis that it was accepting the construction which had been given to the Act by the

Court of Appeal. The House decided that it was therefore too late to overrule the decision: see Lord Lloyd of Berwick at p 342.

16. There is a further indication to the same effect in the Twentieth Report of the Law Reform Committee (Cmnd 5630) which was published in May 1974 and to which the 1975 Act gave effect. It is plain from that report that its members thought they were dealing generally with personal injury actions: see, for example, the summary of recommendations in para 69. There is no discussion of an exclusion of intentionally inflicted injuries from the benefit of the proposed reforms.

17. That brings me to the decision in *Stubbings v Webb* [1993] AC 498. The main criticism which I would respectfully make of the reasoning of the House, as contained in the speech of Lord Griffiths, is that it decided the case as if the 1954 Act had just been passed. I must admit that even if the case had arisen at that time, I would have been inclined to take the same view as Adam J in Victoria and the Court of Appeal in *Letang*. The decision in *Stubbings* seems to me to have put more weight upon the report of the Tucker Committee and Hansard than they could properly bear. The language of section 2(1) of the 1954 Act is not traceable to anything said by the Tucker Committee but appears to derive from the language construed by the Court of Appeal in *Billings v Reed* [1945] KB 11. Parliament did not adopt all the Committee's recommendations and it is quite impossible to say whether section 2(1) was intended to give effect to the last sentence of para 23 of the Report or not. (See the discussion of what the Committee may have meant in *Mason* v *Mason* [1997] 1 VR 325,327-328). As for Hansard, Lord Griffiths relied upon a very general statement that the bill was intended to give effect to the recommendations of the Tucker Committee by Mr Peyton (who was not a lawyer), when moving the second reading in the House of Commons (Hansard, HC Debates 4 December 1953, col 1545), but said nothing about the speech of Viscount Hailsham, moving the second reading in the House of Lords (Hansard, HL Debates 20 May 1954, col 812), who said that a main object of the bill was:

> " to reduce from six years to three years the period of limitation for actions in which a claim is made for damages for personal injuries."

18. Having said that, I would certainly not suggest that the opposite view was not tenable as a construction of the 1954 Act and if matters had rested there, I do not think it would have been right to depart from

the decision. Where I must respectfully disagree with Lord Griffiths is in relation to the effect of the 1975 Act. He drew attention to the origins of the 1975 Act (and its unsuccessful predecessor, the Limitation Act 1963), which were to "meet the problem of the insidious onset of industrial disease", and said:

> "In my view no light is thrown on the true construction of section 11(1) by this sequence of Acts which were passed to deal with a very different problem.": [1993] AC 498, 506-507.

19. But the fact that the later Acts were passed to deal with a different problem was exactly the point. Although claims in respect of insidious diseases, as in *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, formed the background to the 1963 and 1975 Acts, the legislation was not confined to insidious diseases. The problem was perceived as applicable to personal injuries generally. It was because Parliament used the language of the 1954 Act to deal with that very different problem, where no rational explanation existed for treating victims of injuries caused intentionally worse than victims of injuries caused negligently, that one was driven to the conclusion that it must have intended to adopt the construction given to the 1954 Act in *Letang*.

20. In *Stingel v Clark* (2006) 80 ALJR 1339 a majority of the High Court of Australia declined to follow *Stubbings* and adhered to the construction of the Victorian statute which had been adopted by Adam J in *Kruber v Grzesiak* [1963] VR 621. I find the reasoning compelling and therefore consider that *Stubbings* was wrongly decided. But that is not in itself a ground for departing from it. The *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 was intended, as Lord Reid said in *R v National Insurance Comrs, Ex pp Hudson* [1972] AC 944, 966, to be applied only in a small number of cases in which previous decisions of the House were "thought to be impeding the proper development of the law or to have led to results which were unjust or contrary to public policy." Lord Reid also observed, at p 966:

> "It is notorious that where an existing decision is disapproved but cannot be overruled courts tend to distinguish it on inadequate grounds. I do not think that they act wrongly in so doing: they are adopting the less bad of the only alternatives open to them. But this is

> bound to lead to uncertainty for no one can say in advance whether in a particular case the court will or will not feel bound to follow the old unsatisfactory decision. On balance it seems to me that overruling such a decision will promote and not impair the certainty of the law."

21. For some time after it was decided, I do not think that *Stubbings* gave rise in practice to much difficulty. That was because it was generally believed, on the authority of cases like *Trotman v North Yorkshire County Council* [1999] LGR 584, that an employer could not be vicariously liable for sexual assaults committed by his employee. They were inherently outside the scope of his employment. Only the abuser himself could be liable. But people who commit sexual assaults are seldom worth suing. In the appeal before the House of *A v Hoare* [2006] 1 WLR 2320, the claimant decided to sue only when she heard that the defendant had won the lottery. In *Stubbings*, where the plaintiff wanted to sue her adoptive father and step-brother for sexual abuse more than 20 years earlier, Lord Griffiths observed, at p 501, that neither of them appeared to "have the means to satisfy any significant award of damages." The fact that the motive for the proceedings seemed to be something other than the recovery of compensation may have influenced the construction which the House gave to the statute.

22. The situation was radically changed when the House of Lords decided in *Lister v Hesley Hall Ltd* [2002] 1 AC 215 that sexual abuse was not necessarily outside the scope of an employment. It depended upon whether there was a sufficiently close connection between the work which the employee had been employed to do and the acts of abuse. A company which owned and operated a school boarding house was held liable for sexual abuse of pupils by a man employed as warden. After that, claims against the operators of schools, detention centres and similar institutions for sexual abuse by employees came thick and fast. And these threw into relief the anomalies created by *Stubbings*.

23. Perhaps the most remarkable example of the anomaly was *S v W (Child Abuse: Damages)* [1995] 1 FLR 862, a pre-*Lister* case, in which the plaintiff sued her father and mother for sexual abuse by the father. The action was commenced nearly 10 years after the last act of abuse. The cause of action against the father was intentional assault and the claim was therefore struck out. The cause of action against the mother was negligent failure to protect the plaintiff against the father. This fell under section 11 of the 1980 Act and was subject to a discretionary extension under section 33, which the judge granted and the Court of

Appeal affirmed. The action against the mother was therefore allowed to proceed. Sir Ralph Gibson commented, at p 867, that the result was "illogical and surprising" and deserving of the attention of the Law Commission.

24. The matter was considered by the Law Commission as part of a comprehensive review of the law of limitation of actions which was presented to Parliament in 2001: Limitation of Actions (2001) (Law Com No 270). The effect of *Stubbings* was described as anomalous, with particular reference to *S v W (Child Abuse: Damages)* [1995] 1 FLR 862: see parapara 1.5 of the Report. The Commission recommended a uniform regime for personal injuries, whether the claim was made in negligence or trespass to the person: see the summary at para 1.14. There has not yet been any implementing legislation, possibly because the Commission's recommendations were not confined to the *Stubbings* anomaly but proposed a completely new law of limitation of actions.

25. Lord Reid's observation [1972] AC 944, 966 that unsatisfactory decisions of the highest court can cause uncertainty because lower courts tend to distinguish them on inadequate grounds is also pertinent to the consequences of *Stubbings*. Claimants who have suffered sexual abuse but need to seek the discretion of the court under section 33 are driven to alleging that the abuse was the result of, or accompanied by, some other breach of duty which can be brought within the language of section 11. Thus, in addition to having to decide whether the claimant was sexually abused, the courts must decide whether this was the result of "systemic negligence" on the part of the abuser's employer or the negligence of some other person for whom the employer is responsible. In the appeals before the House, the appellants put forward at least four alternative theories of liability on which they wish to rely if the rule in *Stubbings* is upheld. These are, in increasing degree of artificiality (1) breach of a direct duty of care owed by the employer to the claimant; (2) breach of a duty of care by other employees; (3) breach of a duty of care by the abuser himself and (4) breach of a duty by the abuser to notify the employer of his own wrongful acts. In *KR v Bryn Alyn Community (Holdings) Ltd* [2003] QB 1441, para 100 Auld LJ said that the need to frame a claim in one or other of these ways when the real cause of complaint was sexual abuse for which the employer was vicariously liable was causing "arid and highly wasteful litigation turning on a distinction of no apparent principle or other merit." I therefore think that it would be right to depart from *Stubbings* and reaffirm the law laid down by the Court of Appeal in *Letang v Cooper* [1965] 1 QB 232.

26. That is sufficient to dispose of all but one of these appeals. In *A v Hoare* the defendant was convicted in 1989 of an attempted rape of the claimant, involving a serious and traumatic sexual assault. He was sentenced to life imprisonment. In 2004, while still serving his sentence, he won £7m on the national lottery. The claimant started proceedings for damages on 22 December 2004 but Master Eyre, applying *Stubbings*, struck out the action as barred under section 2 of the 1980 Act. This decision was affirmed by the judge and the Court of Appeal [2006] 1 WLR 2320. I would allow the claimant's appeal and remit the case to a judge of the Queen's Bench Division to decide whether the discretion under section 33 should be exercised in the claimant's favour.

27. In *C v Middlesborough Council* the appellant claims to have been subject to sexual abuse at various times between 1982 and 1988 (when he was 10 to 16 years old) at a school managed by the council. He commenced proceedings on 8 May 2002. In May 2004 there was a trial on liability, causation, limitation and quantum. The judge found that the appellant had been subjected to sexual abuse, that the council was vicariously liable and that if the action had come within section 11 of the 1980 Act, he would have exercised his discretion to allow it to proceed and awarded £60,000 general damages, £10,000 in respect of past loss of earnings, £25,000 in respect of the appellant's disability on the labour market and the cost of therapy. But, in accordance with *Stubbings*, he held that the action was barred by section 2. He dismissed allegations of negligence against the council. This ruling was upheld by the Court of Appeal. I would allow the appeal and make the orders which the judge would have made if he had been free to decide that the action camecame within section 11.

28. In *H v Suffolk County Council* the appellant claimed that while resident during the period December 1989 to October 1990 in a school for difficult children managed by the council, he was sexually abused by a member of the staff. He commenced proceedings on 22 April 2002. The question of limitation was tried as a preliminary point and the judge, in accordance with *Stubbings*, held that the claim against the council on the ground of vicarious liability for the member of staff was barred by section 2. He also tried and dismissed a claim based on allegations of negligence against the council. Both of these rulings were affirmed by the Court of Appeal [2006] 1WLR 2320. I would allow the appeal against the ruling on limitation only and remit the case to the judge to decide whether to exercise his discretion under section 33 to allow it to proceed.

29. In *X and Y v Wandsworth London Borough Council* the appellants both allege that at various times in 1984 and 1987 respectively they were separately sexually abused by the same teacher at a school managed by the council. They commenced proceedings on 13 November 2002 and 23 June 2003. At the trial it was agreed that the abuse had taken place, that the council was (subject to any limitation defence) vicariously liable and that if the claims came within section 11, they were not statute-barred. It was also agreed that, subject to liability, X and Y were entitled to damages in the sums of £57,500 and £70,000 respectively. The judge upheld a limitation defence under section 2 and dismissed allegations of negligence for which the council was said to be liable. The Court of Appeal [2006] 1WLR 2320 upheld that decision. I would allow the appeal and award the appellants the agreed sums of damages.

30. That leaves the appeal in *Young v Catholic Care (Diocese of Leeds) and the Home Office*. The claimant alleges sexual abuse by employees at two separate institutions: first, between October 1974 and July 1976 at a residential Catholic school in Tadcaster and secondly, between April and June 1977 at Medomsley Detention Centre, County Durham, then operated by the Secretary of State for the Home Department. The claimant's allegations were, in respect of the school, that he had been punched, hit with farm implements and forced to masturbate and have oral sex with a member of the staff. In respect of his residence at the detention centre in 1977, he alleges that a member of the staff, for sexual gratification, would tie a ligature round his neck and nearly strangle him, blindfold him and attempt to bugger him and require him to kneel for photographs in various positions. Proceedings were commenced on 11 April 2003. In both cases, in order to avoid the effect of *Stubbings*, the claimant alleged "systemic negligence" in the management of the school and detention centre respectively. The judge tried as a preliminary issue the question of whether these claims were barred by the three-year limitation period in section 11(4). He decided that they were not because in each case the "date of knowledge" within the meaning of section 11(4)(b) was within three years before the commencement of proceedings. He went on to say that if he had found that the date of knowledge was earlier than three years before the issue of the claim form, he would not have exercised his discretion under section 33 to allow the action to proceed. The Court of Appeal (sub nom *Young v South Tyneside Metropolitan Borough Council* [2007 QB 932) reversed the decision on the date of knowledge, holding that it was substantially more than three years before the commencement of proceedings. They refused to interfere with the (hypothetical) exercise of the discretion under section 33.

31. This appeal raises the important point of the meaning of "significant" injury in section 14(2). Section 14(1) provides that the "date of knowledge" is the date upon which the claimant first had knowledge of various facts, including "that the injury…was significant". A "significant injury" is defined by section 14(2):

> "For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment."

32. Section 14(3) then provides that, for the purpose of deciding whether the claimant had knowledge of the various matters listed in section 14(1), including the fact that the injury was significant, one should take into account not only his actual knowledge but also what is usually called his imputed or constructive knowledge. That is defined as:

> "knowledge which he might reasonably have been expected to acquire?
>
> (a) from facts observable or ascertainable by him; or
> (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek…"

33. The question which has arisen is whether the definition of significance in section 14(2) allows any (and if so, how much) account to be taken of personal characteristics of the claimant, either pre-existing or consequent upon the injury which he has suffered. This question was first considered in *McCafferty v Metropolitan Police District Receiver* [1977] 1 WLR 1073, 1081, soon after the 1975 Act had come into force. After reading the then equivalent of subsection 14(2), Geoffrey Lane LJ said:

> "[T]he test is partly a subjective test, namely: 'would this plaintiff have considered the injury sufficiently serious?'

> and partly an objective test, namely: 'would he have been reasonable if he did not regard it as sufficiently serious?' It seems to me that the subsection is directed at the nature of the injury as known to the plaintiff at that time. Taking that plaintiff, with that plaintiff's intelligence, would he have been reasonable in considering the injury not sufficiently serious to justify instituting proceedings for damages?"

34. I respectfully think that the notion of the test being partly objective and partly subjective is somewhat confusing. Section 14(2) is a test for what counts as a significant injury. The material to which that test applies is generally "subjective" in the sense that it is applied to what the claimant knows of his injury rather than the injury as it actually was. Even then, his knowledge may have to be supplemented with imputed "objective" knowledge under section 14(3). But the test itself is an entirely impersonal standard: not whether the claimant himself would have considered the injury sufficiently serious to justify proceedings but whether he would "reasonably" have done so. You ask what the claimant knew about the injury he had suffered, you add any knowledge about the injury which may be imputed to him under section 14(3) and you then ask whether a reasonable person with that knowledge would have considered the injury sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

35. It follows that I cannot accept that one must consider whether someone "with [the] plaintiff's intelligence" would have been reasonable if he did not regard the injury as sufficiently serious. That seems to me to destroy the effect of the word "reasonably". Judges should not have to grapple with the notion of the reasonable unintelligent person. Once you have ascertained what the claimant knew and what he should be treated as having known, the actual claimant drops out of the picture. Section 14(2) is, after all, simply a standard of the seriousness of the injury and nothing more. Standards are in their nature impersonal and do not vary with the person to whom they are applied.

36. In *KR v Bryn Alyn Community (Holdings) Ltd* [2003] QB 1441, 1459 the Court of Appeal ventured even further into subjectivity. That too was a case of claims by victims of sexual abuse. In giving the judgment of the Court, Auld LJ said that victims of such abuse may regard such conduct by persons in authority as normal. It might be

unreal to expect people with such psychological injuries to commence proceedings. Therefore, he said, at para 42, at p 1459:

> "However artificial it may seem to pose the question in this context, section 14 requires the court, on a case by case basis, to ask whether such an already damaged child would reasonably turn his mind to litigation as a solution to his problems?"

37. This approach treats the statute as if it had said that time should run from the date on which it would have been reasonable to expect the claimant to institute proceedings. If it had said that, the question posed in *Bryn Alyn* would have been correct. But section 14 makes time runs from when the claimant has knowledge of certain facts, not from when he could have been expected to take certain steps. Section 14(2) does no more than define one of those facts by reference to a standard of seriousness.

38. The Court of Appeal said that there was some "tension" between the *Bryn Alyn* test and the recent decision of the House of Lords in *Adams v Bracknell Forest Borough Council* [2005] 1 AC 76. I suppose that this is true in the sense that the House in *Adams* said that one had to take words like "reasonable" and "reasonably" seriously and the *Bryn Alyn* test does not. But *Adams* was dealing with section 14(3), which is very different in its purpose from section 14(2). The test for imputing knowledge in section 14(3) is by reference to what the claimant ought reasonably to have *done*. It asks whether he ought reasonably to have acquired certain knowledge from observable or ascertainable facts or to have obtained expert advice. But section 14(2) is simply a standard of seriousness applied to what the claimant knew or must be treated as having known. It involves no inquiry into what the claimant ought to have done. A conclusion that the injury would reasonably have been considered sufficiently serious to justify the issue of proceedings implies no finding that the claimant ought reasonably to have issued proceedings. He may have had perfectly good reasons for not doing so. It is a standard to determine one thing and one thing only, namely whether the injury was sufficiently serious to count as significant.

39. The difference between section 14(2) and 14(3) emerges very clearly if one considers the relevance in each case of the claimant's injury. Because section 14(3) turns on what the claimant ought reasonably to have done, one must take into account the injury which

the claimant has suffered. You do not assume that a person who has been blinded could reasonably have acquired knowledge by seeing things. In section 14(2), on the other hand, the test is external to the claimant and involves no inquiry into what he ought reasonably to have done. It is applied to what the claimant knew or was deemed to have known but the standard itself is impersonal. The effect of the claimant's injuries upon what he could reasonably have been expected to do is therefore irrelevant.

40. In the present case, Dyson LJ [2007] QB 932, para 55 (with whom Sir Peter Gibson and Buxton LJ agreed) said that when the claimant left the detention institution in 1977, he was "obviously aware that he had been seriously assaulted". He went on to say:

> "Viewed objectively and without regard to the fact that the claimant suppressed his memories of the assaults, they were sufficiently serious for proceedings against an acquiescent and creditworthy defendant to be reasonably considered to be justified."

41. I agree. The description of the assaults and indignities which the claimant says he suffered seem to me to put the matter beyond doubt. I think that if the Court of Appeal had not been bound by *Bryn Alyn*, it would have decided that this was the end of the matter. The date of knowledge would have been 1977. Instead, the Court of Appeal fixed on a later date by reference to when the claimant himself could reasonably have been expected to commence proceedings. On the true construction of section 14(2), I do not think that a later date can be justified.

42. Mr Brown QC, who appeared for the appellant, put forward an alternative argument that, even if the test which section 14(2) applied to the injury as known to the claimant was entirely impersonal, the claimant in this case could not be said to have had knowledge of his injury. This was because, according to the evidence of the claimant, supported by an expert witness, he had "blocked out his memory", or, in another metaphor which he used in evidence, put his memories "in a box with a tightly sealed lid in the attic". He was, he said, "in denial" about the psychological injuries which he had suffered.

43. I do not doubt the value of these explanations of the claimant's mental processes when it comes to an assessment of whether he could

reasonably have been expected to commence proceedings. But they are difficult enough concepts to apply in that context and I do not think that section 14(2) was intended to convert them into even more difficult questions of epistemology. If one asked an expert psychologist whether the claimant "really" knew about his injuries, I expect he would say that it depends on what you mean by "know". And he might go on to say that if the question was whether he "knew" for the purposes of the Limitation Act, it would be better to ask a lawyer. In my opinion the subsection assumes a practical and relatively unsophisticated approach to the question of knowledge and there seems to me to have been much sense in Lord Griffiths' observation in *Stubbings v Webb* [1993] AC 498, 506 that he had "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."

44. This does not mean that the law regards as irrelevant the question of whether the actual claimant, taking into account his psychological state in consequence of the injury, could reasonably have been expected to institute proceedings. But it deals with that question under section 33, which specifically says in subsection (3)(a) that one of the matters to be taken into account in the exercise of the discretion is "the reasons for…the delay on the part of the plaintiff".

45. In my opinion that is the right place in which to consider it. Section 33 enables the judge to look at the matter broadly and not have to decide the highly artificial question of whether knowledge which the claimant has in some sense suppressed counts as knowledge for the purposes of the Act. Furthermore, dealing with the matter under section 14(2) means that the epistemological question determines whether the claimant is entitled to sue as of right, without regard at any injustice which this might cause to the defendant. In my view it is far too brittle an instrument for this purpose. There are passages in the judgement of Buxton LJ which suggest that, had he not been bound by *Bryn Alyn*, he would have shared this opinion.

46. This approach would, I think, be in accordance with the recommendations of the Law Commission in the Report (Law Com No 270) to which I have referred: In its Consultation Paper No 151, Limitation of Actions (1998) para 12.44, the Commission had proposed that the test of significance should take into account "the plaintiff's abilities". But they abandoned this position in their final report and recommended (at para 3.24) that the test of significance should be entirely objective: "only claims in respect of which a reasonable person

would have thought it worthwhile issuing proceedings will qualify as 'significant'".

47. In paras 4.27-4.28 of their final report the Law Commission considered whether victims of sexual abuse should be subject to a special regime. It had been submitted that no limitation period should apply to sex abuse claims because victims commonly suffered from 'dissociative amnesia', a recognised mental disorder which produced an inability to recall traumatic events or at any rate an unwillingness to be reminded of them. The Law Commission said that so far as dissociative amnesia was a "mental disability" within a fairly broad definition proposed by the Commission (see paras 3.123-3.124), it would (if their proposals were implemented) stop time running while the disability persisted. But they rejected (in para 3.125) any specific provision for the psychological incapacity suffered by victims of sexual abuse because they said that it would be very difficult to define.

48. If the Commission thought that the "psychological incapacity suffered by victims of sexual abuse" (para 4.28) was too uncertain and indefinite a concept to be used for suspension of the limitation period on grounds of incapacity, I can see no advantage in relying upon the same uncertain concept to give an artificial meaning to the concept of knowledge in section 14. Until Parliament decides whether to give effect to the Commission's recommendation of a more precise definition of incapacity, it is better to leave these considerations to the discretion under section 33.

49. That brings me, finally, to the approach of the judge and the Court of Appeal to the exercise of the discretion. In *Bryn Alyn* [2006] QB 1441 the Court of Appeal said, at para 76, that the judge in that case had gone wrong in giving undue weight to his conclusion that "the claimants' reasons for delay were a product of the alleged abuse…and that, accordingly, it would be unjust to deprive them of a remedy." These matters, said the Court of Appeal, were more appropriately considered under section 14. I am of precisely the opposite opinion, and if your Lordships share my view, the approach to the discretion will have to change. In *Horton v Sadler* [2007] 1 AC 307 the House rejected a submission that section 33 should be confined to a "residual class of cases", as was anticipated by the 20th Report of the Law Reform Committee (Cmnd 5630) (1974) at para 56. It reaffirmed the decision of the Court of Appeal in *Firman v Ellis* [1978] QB 886, holding that the discretion is unfettered. The judge is expressly enjoined by subsection (3)(a) to have regard to the reasons for delay and in my opinion this

requires him to give due weight to evidence, such as there was in this case, that the claimant was for practical purposes disabled from commencing proceedings by the psychological injuries which he had suffered.

50. That, of course, is not the only matter to which he must have regard. As the Law Commission said in para 4.31 of their Report (No 270):

> "We do have some concerns that claims may be brought many years after the events on which the claimant's cause of action is based, at a time when it is difficult for a fair trial to be given to the claimant's allegations. However, subject to the provision on disability, the victim is likely to have immediate knowledge of the relevant facts, so that the primary limitation period expires three years after majority. Although the court will have a discretion to disapply the primary limitation period, it must consider whether the defendant's ability to defend the claim will be prejudiced due to the lapse of time since the events giving rise to the cause of action."

51. Apart from the reference to disability, these observations seem to me as valid in relation to the exercise of the discretion under the present law as under the system proposed by the Commission.

52. In this case, the judge followed the *Bryn Alyn* guideline in saying that if the claimant had not succeeded on the date of knowledge, he would not have exercised the discretion in his favour. For the same reasons, this exercise of discretion was affirmed by the Court of Appeal. But I think that it was exercised on the wrong basis and that the case must be remitted to the judge to consider the matter again. When he does so, I would imagine that the claimant will rely upon the vicarious liability of the defendants for the acts of abuse rather than their systemic negligence. The issues of fact in the case will have become a good deal simpler and this is no doubt a matter to which the judge will have regard in considering whether a fair trial is still possible. I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend Lord Brown of Eaton-under-Heywood. I agree with all of it but I respectfully think that his observations on the exercise of the discretion are particularly valuable. I would therefore allow the appeal

and remit the matter to the judge to reconsider in accordance with the opinions of the House.

LORD WALKER OF GESTINGTHORPE

My Lords,

53. I have had the privilege of reading in draft the opinions of my noble and learned friends Lord Hoffmann and Lord Brown of Eaton-under-Heywood. I am in full agreement with their opinions. I would allow all these appeals and make the orders which Lord Hoffmann proposes.

BARONESS HALE OF RICHMOND

My Lords,

54. Until the 1970s people were reluctant to believe that child sexual abuse took place at all. Now we know only too well that it does. But it remains hard to protect children from it. This is because the perpetrators are so often people in authority over the victims, sometimes people whom the victims love and trust. These perpetrators have many ways, some subtle and some not so subtle, of making their victims keep quiet about what they have suffered. The abuse itself is the reason why so many victims do not come forward until years after the event. This presents a challenge to a legal system which resists stale claims. Six years, let alone three, from reaching the age of majority is not long enough, especially since the age of majority was reduced from 21 to 18.

55. Fortunately, by the time the problem was recognised, some flexibility had been introduced in personal injury cases, albeit to meet the rather different problem of the insidious and unremarked onset of industrial disease. Then along came *Stubbings v Webb* [1993] AC 498, holding that this flexibility did not apply to cases of deliberate assault. For the reasons given by my noble and learned friend, Lord Hoffmann, I agree that *Stubbings* was wrongly decided and have nothing to add on

that point. I would dispose of all the cases which depend upon it in the ways proposed by Lord Hoffmann.

56. More difficult is how that flexibility is to be applied in sex abuse cases. Time does not begin to run until the "date of knowledge": Limitation Act 1980, s 11(4)(b). This is the date when the claimant knew, or ought to have known, that his injury was significant, that it was attributable to the acts or omissions alleged to constitute a breach of duty, the identity of the defendant, and the identity of the alleged wrong–doer if not the defendant and why the defendant should be liable: s 14(1) and (3). For this purpose "an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment": s 14(2). This is not an easy provision to construe.

57. The subsection does not say that "an injury is significant if the person whose date of knowledge is in question could reasonably have been expected to institute proceedings in respect of it..." It does not ask whether the claimant was in such a state of denial about what had happened to him that he could not reasonably be expected to bring proceedings or even to think about them. That was the test adopted by the Court of Appeal in *KR v Bryn Alyn Community (Holdings) Ltd* [2003] QB 1441, at 1459. It recognises the reality of many sex abuse cases, but unfortunately it is not the wording of the subsection.

58. Nor, on the other hand, does the subsection say that "an injury is significant if a reasonable person would consider it sufficiently serious..." How then are we to construe the reference to what this particular claimant would reasonably have thought? I have not found this such an easy question as your lordships have. We are used in other contexts to looking at this particular person, with all his personal characteristics and in the position in which he finds himself, and asking what a reasonable person would expect of him. This is the test which we apply when deciding whether a divorce petitioner could reasonably be expected to go on living with the respondent: see *Livingstone-Stallard v Livingstone-Stallard* [1974] Fam 47. Why, then, should we not look at this particular claimant, with all his personal characteristics and in the situation in which he finds himself, and ask whether a reasonable person would expect him to recognise that his injury was sufficiently serious to justify making a claim against someone who admitted it and was good for the money? This does not deprive the word "reasonably" of all meaning, because the test is still what the reasonable outsider would

expect of the claimant rather than what the claimant would expect of himself. I have also asked myself whether it makes a difference that we are here talking about what the claimant knows rather than what the claimant does or does not do. But that is not a wholly convincing distinction, because the fact known is defined by reference to what the claimant should have done about it in the hypothetical circumstances.

59. I do not, therefore, find it surprising that Geoffrey Lane LJ took the view that he did in *McCafferty v Metropolitan Police District Receiver* [1977] 1 WLR 1073, 1081, or that that view has survived until now. Nor, however, do I find it surprising that the Law Commission has recommended that "the test for significance should be objective: that is, only claims in respect of which a reasonable person would have thought it worthwhile issuing proceedings will qualify as 'significant'" (Limitation of Actions (Law Com No 270), para 3.24). It is much simpler to ask what the claimant knew or ought to have known and then apply an objective test of significance to those facts. Complex epistemological problems are thus avoided. But that is not what the subsection says at present.

60. Nor am I wholly convinced by the policy argument: it may well be more satisfactory to transfer the question into the exercise of discretion under section 33. Then the injustice to a claimant who may be deprived of his claim, perhaps as a result of the very injuries which gave rise to it, can be balanced against the injustice to a defendant who may be called upon to defend himself a long time after the event when important evidence may no longer be obtainable. I fully support the more generous approach to the exercise of discretion which is adopted in particular by Lord Hoffmann. The reasons for the delay are highly relevant to that exercise, as of course are the prospects of a fair trial. A fair trial can be possible long after the event and sometimes the law has no choice. It is even possible to have a fair trial of criminal charges of historic sex abuse. Much will depend upon the circumstances of the particular case. But the policy argument applies just as much to the whole "date of knowledge" provision as it does to the definition of significance with which we are concerned. With a properly directed discretion one should not need the date of knowledge provision at all. Nor are the difficulties faced by a defendant, whose breach of a strict statutory duty may have resulted in some insidious industrial disease, necessarily less deserving of consideration than the difficulties faced by a defendant, whose deliberate and brutal actions towards a vulnerable person in his care may have resulted in immediate physical harm and much later serious psychiatric sequelae.

61. In the result, despite my nagging doubts about the interpretation of section 14(2) adopted by your lordships, I do not think that any interpretation could plausibly result in a date of knowledge within the three years immediately preceding the issue of proceedings by Mr Young. In agreement with your lordships, I would send his case back for the judge to reconsider the exercise of his discretion in the light of the opinions of the House.

LORD CARSWELL

My Lords,

62. I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Hoffmann and Lord Brown of Eaton-under-Heywood. I agree with both so entirely that I share Lord Brown's reluctance to add to the quantum of the views expressed by the members of the Appellate Committee in these appeals. I propose accordingly to add only a few observations, which I venture to hope will be of assistance to judges who have the task of applying the law in this difficult area.

63. On the issue of the construction of the phrase "negligence, nuisance or breach of duty" and the proposal to depart from the decision of the House in *Stubbings v Webb* [1993] AC 498, I agree entirely with the reasons expressed and conclusions reached by Lord Hoffmann. When Parliament passed the Law Reform (Limitation of Actions, etc) Act 1954, inserting a new proviso into section 2(1) of the Limitation Act 1939, it introduced that phrase, which had earlier appeared in section 3(1) of the Personal Injuries (Emergency Provisions) Act 1939. The decision of the Court of Appeal in *Billings v Reed* [1945] KB 11, decided under the latter Act, gave the phrase "breach of duty" a wide meaning, holding that it was comprehensive enough to cover the case of trespass to the person. If it were not for this decision – of which Parliament may be assumed to have taken account when it enacted the 1954 legislation – one might have supposed that "breach of duty" was intended to include breach of statutory duty and breach of duties such as that of an occupier to persons coming on to his premises. In the light of the previous construction of the phrase, however, one may conclude that Parliament intended that it be similarly construed in the 1954 Act, extending to trespass to the person. That conclusion is in my opinion reinforced by the subsequent case-law decided before the enactment of

the Limitation Act 1980. The draftsman of that Act must be taken to have been aware of the decisions of the Court of Appeal in *Letang v Cooper* [1965] 1 QB 232, with its reliance on the Australian case of *Kruber v Grzesiak* [1963] VR 621, and of Cooke J in *Long v Hepworth* [1968] 1 WLR 1299. In the light of these I am satisfied that "breach of duty" must be construed broadly enough to include trespass to the person. For the reasons set out by Lord Hoffmann, I also consider that the House should be prepared to depart from its previous decision in *Stubbings v Webb.*

64. This conclusion governs the disposition of the appeals in *A v Hoare*, *C v Middlesbrough Council, H v Suffolk County Council* and *X and Y v Wandsworth London Borough Council.* I would allow each of these appeals and make the order proposed in each by Lord Hoffmann.

65. The appeal in *Young v Catholic Care (Diocese of Leeds) and The Home Office* poses different problems concerning the correct approach to section 14 of the Limitation Act 1980. Section 11(3) of the Act bars an action brought after the expiration of the period applicable under section 11(4) or (5). The subsection relevant to this appeal is subsection (4), the material part of which provides that the period applicable is three years from:

> "(*a*) the date on which the cause of action accrued; or
> (*b*) the date of knowledge (if later) of the person injured."

The date of knowledge is defined by section 14. The relevant parts for the purposes of this appeal provide:

> "(1) In sections 11 and 12 of this Act references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts –
>
> (*a*) that the injury in question was significant…
>
> (2) For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

> (3) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire -
>
> (*a*) from facts observable or ascertainable by him; or
>
> (*b*) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek;
>
> but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

66. I agree with Lord Hoffmann that this subject has been unnecessarily confused by importing the notion that the test of whether the claimant had the requisite knowledge for the purposes of section 14 is partly objective and partly subjective. In my opinion it should be clearly understood that section 14(1) is subjective, in that it refers to the knowledge actually possessed by the claimant, whereas section 14(2) is objective, the relevant test being, as Lord Hoffmann describes it at paras 39 and 42, an "entirely impersonal" standard. Section 14(3) then relates solely to constructive or imputed knowledge. It may fix the claimant with knowledge of facts which he might reasonably have been expected to acquire in the manner specified by the subsection. Once that knowledge is imputed to him, it becomes part of the corpus of his personal knowledge, the extent of which has to be assessed under subsection (1).

67. An example may help to illustrate these propositions. If a claimant in the course of his employment inhaled fibres of asbestos, which unknown to him set up the physiological process resulting many years later in his developing mesothelioma, he had no knowledge at the time of inhalation that he had suffered an injury. In the course of time he may develop chest symptoms of increasing severity. He may not connect them with his previous exposure to asbestos, but the stage may be reached at which he ought reasonably to realise that something may be wrong and take medical and any other appropriate expert advice. At that stage, if he is advised of the nature and aetiology of his medical condition, he is to be deemed, by virtue of subsection (3), to have the requisite knowledge of those matters. It is at that point in time that subsection (2) has to be considered. If a reasonable person, that is to say, an informed third person who has the knowledge possessed by or attributed to the claimant, would consider the injury significant, as

defined by subsection (2), then the limitation period starts to run from that time.

68. It is in my opinion incorrect to import the circumstances, character or intelligence of the claimant into the determination of reasonableness under section 14(2). It is irrelevant whether the claimant is intelligent or unintelligent or whether his personal characteristics or his circumstances may influence his decision not to sue at that time. Some people are more robust than others and would shrug off the possibility of suing for the injury (a possibility more likely in the case of minor conditions than in the example I have given). Others may be temperamentally averse to making the effort to institute proceedings, or to appearing in court, or may be unable or unwilling to risk incurring the costs. Some may feel too ill to contemplate litigation. What is material in determining if the injury is significant within the meaning of subsection (2) is whether a reasonable person, possessed of the facts known or available to the claimant, would consider the injury sufficiently serious to justify instituting proceedings for damages, assuming that the defendant will not dispute liability and is able to satisfy a judgment. Under this construction of section 14 some claimants with merit on their side will undoubtedly fail, but those characteristics or circumstances to which I have referred can and should be taken into account in the exercise of the discretion under section 33 to disapply the limitation provisions, as I shall explain in more detail below.

69. If these principles are understood, it becomes easier to apply them to the case of Kevin Raymond Young. The medical reports set out the ill-treatment he received, which was so severe that any reasonable person would have regarded it as significant within the meaning of section 14(2). He finally left Medomsley Detention Centre on 17 June 1977, the day before his 18th birthday. In para 55 of his judgment in the Court of Appeal [2007] QB 932 Dyson LJ, with whom Sir Peter Gibson agreed, stated, in my view quite correctly, that he "was obviously aware that he had been seriously assaulted." He accepted that he had the requisite knowledge of his injuries for the purposes of section 14(1) and that they were serious enough to be significant for the purposes of section 14(2). There was no need to resort to section 14(3), for Mr Young had all the necessary subjective knowledge and there was no need to attribute any constructive knowledge to him. The quest should have stopped at that point. Dyson LJ went on, however, to approve of the judge's finding that the claimant's subsequent suppression of his memories of the assaults enabled him to hold that he did not know in the period 1977-80 that the injuries were significant within the meaning of section 14(2). In this approach the judge and the Court of Appeal

applied the wrong test when considering section 14(1) and 14(2). The matters which they took into account were undoubtedly very material in deciding on the exercise of discretion under section 33, and that is the point at which they should have received consideration.

70. If, as I think to be the case, section 14 should be construed in this manner, which is less favourable to a claimant, there requires to be a more liberal approach to the exercise of discretion than has always been the case. For the reasons which my noble and learned friends and I have set out, that less favourable construction of section 14 is correct in principle, but it must follow that the favourable factors which have hitherto been taken into account in reaching a conclusion under section 14 should form a part, and in appropriate cases a very significant part, of the judge's determination in exercising his discretion under section 33.

71. The judge in Mr Young's case indicated that he would, but for his finding under section 14, have exercised his discretion against disapplying the limitation provisions and the Court of Appeal was not prepared to disturb that conclusion. It cannot stand, however, in the light of the decision of the House under section 14, which will require a judge to take into account under section 33 the factors on which he placed some weight in reaching his decision under section 14.

72. There is a further reason why the discretion should be exercised afresh. Since the House has decided to depart from its decision in *Stubbings v Webb,* Mr Young will no longer have to force his case into the Procrustean bed of systemic negligence. He will be able to invoke sections 14 and 33 of the Limitation Act 1980 in respect of a claim for assault by the employees of the respondents, if, as appears to be correct, the respondents are held vicariously liable for them under the principles in *Lister v Hesley Hall Ltd* [2002] 1 AC 215. On this basis, as Lord Brown points out in para 12 of his opinion – with an important qualification in para 13 – the quality of the evidence may not be as adversely affected by the lapse of time and the extent of the factual disputes may be reduced, which would tend to lessen the prejudice to a defendant occasioned by that factor.

73. I would therefore allow the appeal of Kevin Raymond Young and remit the matter to the judge to reconsider in accordance with the opinions of the House.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

74. I have had the privilege of reading in draft the opinion of my noble and learned friend Lord Hoffmann. So completely do I agree with it that I have hesitated long before finally deciding to add a few paragraphs of my own. Nothing that I say is intended to conflict in any way with my Lord's judgment.

75. As will be apparent from Lord Hoffmann's judgment, there have been down the years three main phases with regard to the limitation period governing personal injury actions:

(i) Phase One: until 1954 the six-year limitation period which governed all tort actions applied equally to actions for personal injuries (save claims against public authorities).

(ii) Phase Two: from 1954 to 1975 (by the amendment to section 2 of the Limitation Act 1939 effected by section 2(1) of the Law Reform (Limitation of Actions, etc) Act 1954) personal injuries actions for damages were subject to an unextendable three-year time limit. The actions in question were defined as those "for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision)".

(iii) Phase Three: from 1975 to date (by amendments to section 2 of the Limitation Act 1939 effected by section 1 of the Limitation Act 1975, since consolidated and re-enacted as sections 11, 14 and 33 of the Limitation Act 1980) personal injury actions for damages (defined identically as in Phase Two) have remained subject to a three-year time limit but (a) the three-year period only starts to run from the claimant's date of knowledge (rather than from the date of accrual of the cause of action), and (b) the three-year time limit is extendable at the court's discretion.

(It is unnecessary to complicate this brief summary by reference to the Limitation Act 1963 which introduced an earlier but unsatisfactory date of knowledge provision.)

76. It will at once be obvious from the above summary that during Phase Two a personal injury claim brought between three and six years after the accrual of the cause of action would be time-barred if it fell within the statutory definition, but not otherwise. The amendment, in other words, shortened the time limit. Claimants during Phase Two, therefore, preferred to fall *outside* the definition. During Phase Three, however, claimants mostly benefited from their claim falling *within* the definition: they could then (in appropriate circumstances) take advantage both of the date of knowledge provisions and of the exercise of the court's general discretion to extend time. Only if they happened to issue proceedings between three years and six years after the accrual of their cause of action could they benefit from being outside the definition.

77. Which personal injury actions, however, were encompassed within the statutory definition? The question first arose during Phase Two in connection with claims for trespass to the person. It was consistently held (initially in *Letang v Cooper* [1965] 1 QB 232, a case of accidental trespass to the person, then later in *Long v Hepworth* [1968] 1 WLR 1299, a case of intentional assault) that all such cases fell within the definition: all were actions for "breach of duty." The claims, therefore, having been brought outside the unextendable three-year period, were all statute-barred.

78. That then was the position when Phase Three was introduced by the 1975 Act, only now, of course, that line of authority was ordinarily to the advantage of those claiming damages for assault because the shortened three-year time limit was extendable.

79. And this continued to be everyone's understanding of the position until the House's decision in *Stubbings v Webb* [1993] AC 498 (28 years after *Letang v Cooper* and 18 years after the introduction of Phase Three) when for the first time it was held that an action for damages for personal injuries for an intentional trespass to the person fell, after all, *outside* the statutory definition.

80. As Lord Hoffmann has explained, when the statutory definition was first introduced with Phase Two in 1954 it clearly *was* arguable that Parliament could not have been intending to shorten the limitation period governing claims for damages for intentional assault (even though the period was being shortened for personal injury claims generally). When Phase three was introduced, however, this was

intended to benefit (in the two respects already identified) those claiming damages for personal injuries and Parliament surely cannot have intended to exclude from such benefits (to the advantage of their assailants) those intentionally injured. Rather Parliament must have had in mind the *Letang v Cooper* line of authority (hitherto *dis*advantageous to such claimants) and intended them to benefit along with all the others claiming damages for personal injuries. In other words, whereas it is possible that Parliament, when first introducing the statutory definition in 1954, intended to exclude from it actions for intentional assault, it is inconceivable that it had this intention when introducing Phase Three in 1975.

81. As to whether the House should now depart from its decision in *Stubbings v Webb,* I fully share Lord Hoffmann's view that it should. Perhaps the two most obvious anomalies to which it has given rise are, first, that illustrated by *S v W (Child Abuse: Damages)* [1995] 1 FLR 862 where a claimant suing out of time was held able to pursue a claim against her mother for failing to protect her against sexual abuse by her father but not a claim against the father himself; and, second, the position following *Lister v Hesley Hall Ltd* [2002] 1 AC 215 whereby late claims can be brought against employers of those committing sexual abuse on proof of systemic negligence but not on the more obvious and direct ground of vicarious liability for the abuse itself (the very situation arising in the *Young* appeal before your Lordships).

82. The elimination of these anomalies from the law together with the various artificial types of claim which they have spawned provides an ample reason for invoking the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 so that justice may henceforth be done in these cases as Parliament intended.

83. There is nothing which I wish to add to Lord Hoffmann's discussion and conclusions about the meaning of "significant" injury in section 14(2) of the 1980 Act (at paras 31-48 of his opinion).

84. With regard to the exercise of the court's discretion under section 33 of the 1980 Act, however, I would make just three brief comments— not, let it be clear, in any way to fetter a discretion which the House in *Horton v Sadler* [2007] 1 AC 307 recently confirmed to be unfettered, but rather to suggest the sort of considerations which ought clearly to be in mind in sexual abuse cases in the new era which your Lordships are now ushering in, firstly, by departing from *Stubbings v Webb* and,

secondly, by construing section 14(2) so as to transfer from that provision to section 33 consideration of the inhibiting effect of sexual abuse upon certain victims' preparedness to bring proceedings in respect of it.

85. First, insofar as future claims may be expected to be brought against employers (or others allegedly responsible for abusers) on the basis of vicarious liability for sexual assaults rather than for systemic negligence in failing to prevent them, they will probably involve altogether narrower factual disputes than hitherto. As Lord Hoffmann suggests, at para 52, that is likely to bear significantly upon the possibility of having a fair trial.

86. Secondly, through the combined effects of *Lister v Hesley Hall Ltd* and departing from *Stubbings v Webb*, a substantially greater number of allegations (not all of which will be true) are now likely to be made many years after the abuse complained of. Whether or not it will be possible for defendants to investigate these sufficiently for there to be a reasonable prospect of a fair trial will depend upon a number of factors, not least when the complaint was first made and with what effect. If a complaint has been made and recorded, and more obviously still if the accused has been convicted of the abuse complained of, that will be one thing; if, however, a complaint comes out of the blue with no apparent support for it (other perhaps than that the alleged abuser has been accused or even convicted of similar abuse in the past), that would be quite another thing. 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.

87. Hitherto the misconstruction of section 14(2) has given an absolute right to proceed, however long out of time, to anyone able to say that he would not reasonably have turned his mind to litigation (more than three years) earlier (the *Bryn Alyn* test described by Lord Hoffmann at paragraph 36). It is not to be supposed that the exercise of the court's section 33 discretion will invariably replicate that position.

88. My third and final comment relates most directly to A's appeal and it is this. The definition of "significant injury" in section 14(2)

refers to the justifiability of bringing proceedings against a defendant "able to satisfy a judgment". That surely is unsurprising. It would not ordinarily be sensible to sue an indigent defendant. How then should the court approach the exercise of its section 33 discretion in a case like A where suddenly, after many years, the prospective defendant becomes rich. The House is not, of course, itself exercising this discretion. I would, however, suggest that it would be most unfortunate if people felt obliged (often at public expense) to bring proceedings for sexual abuse against indigent defendants simply with a view to their possible future enforcement. (Judgments, although interest-bearing for only six years, are enforceable without limit of time.)

89. For the purposes of these appeals, my comments are, of course, essentially by the way. Your Lordships were, however, invited by the Bar (indeed, those representing the interests of both claimants and defendants) to give such broad assistance as we felt able to regarding the exercise of discretion under section 33.

90. For the reasons given above and more particularly those given by Lord Hoffmann, I too would allow these appeals and make the orders he proposes.