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Human Rights Act experts: are they necessary in Human Rights Act claims?

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Public authorities have become familiar with the challenges of claims for non-recent abuse, often arising out of care and school environments. But claims alleging that harm has been suffered within a family environment, or as a result of failing to protect individuals from their own risk taking behaviour leading to child sexual exploitation, present novel challenges.

Some claimant lawyers seem intent on advancing these claims in negligence despite the constraints of the decision in CN & GN.

However, we are seeing an increasing number of these claims being brought under the Human Rights Act. The shorter and less accommodating provisions on limitation applicable to the Human Rights Act mean that many of these claims will be out of time before they are presented. There is not yet a canon of case law for practitioners to fall back on as to when the courts will exercise their discretion to let late claims proceed, although it seems that a case addressing this discretion point is likely to be heard in the autumn.

In regard to the substantive Human Rights Act claim, we often see Claimants' solicitors insisting that they need to have full disclosure of all social care files so that they can instruct their liability expert to advise on breach. The purpose of this article is to address whether, in pure Human Rights Act claims, expert evidence is necessary at all, and to link the cost of expert evidence to the crucial issue of proportionality.

On average, claimant solicitors' costs budgets for these types of claims are falling in the range of £150,000 to £250,000. These figures are invariably disproportionate to the value of the claim. It is not unusual for damages to be less than 20% of the budgeted costs.

It is incumbent on all parties to consider the most proportionate way of dealing with these claims, and one of the key features of litigation that can contribute to making them expensive is the cost associated with the use of experts.

In a Human Rights Act claim it is worth taking a moment to pause, think and consider whether an expert is needed at all. If the claim is that a public authority has acted in a way which is incompatible with the claimant's Human Rights what value will a liability expert add? Contrast the position of a claim in negligence where the liability expert can be used to establish what amounts to negligent practice. Last year the Supreme Court concluded, in Commissioner of Police of the Metropolis v DSD and another [2018] UKSC 11 (the 'black cab' rapist case) that it is well settled… "*that the award of compensation for breach of a convention right serves a purpose which is distinctly different from that of an order for the payment of damages in a civil action. As Lord Brown said in Van Colle at para 138:*

"… convention claims have very different objectives from civil actions. Where civil actions are designed essentially to compensate claimants for their losses, convention claims are intended rather to uphold minimum Human Rights standards and to vindicate those rights. That is why time limits are markedly shorter… It is also why Section 8 (3) of the HRA provides that no damages are to be awarded unless necessary for just satisfaction".

In DSD Lord Kerr went on to say that the enquiry into compliance with the article 3 duty is "first *and foremost concerned not with the effect on the claimant, but with the overall nature of the investigative steps to be taken by the State*".

It follows that in Human Rights Act cases, the award of compensation is geared principally to the upholding of standards concerning the discharge of the State's duty to act in ways which are compatible with citizens' rights.

Taking all this into account those dealing with Human Rights Act claims need to be alive to the fact that:

- courts will not always allow late Human Rights Act claims to proceed, particularly if solicitors have been previously engaged to represent the claimant in related matters in the Family courts or the Court of Protection and those solicitors have failed to safeguard the Human Rights Act claim;
- liability expert evidence may add nothing to the assessment of whether minimum Human Rights standards have been breached; and
- since any damages payments under the Human Rights Act are governed by the severity of the breach, not by the impact of the breach on the claimant, there may be no role for medical experts.

Human Rights Act awards are generally modest in comparison to compensation for personal injury damages. Whilst every case will depend on its own facts, it is notable that in DSD the claimants were awarded £22,250 and £19,000 respectively for conspicuous and substantial errors which breached their Human Rights. It is therefore incumbent on all lawyers, whoever they act for, to litigate proportionately. Accordingly, strenuous efforts should be taken to persuade claimant lawyers not to sleep-walk into instructing experts in Human Rights Act cases, and to hold off until it is clear that the expert can add value to the specific issues which Human Rights Act claims present.

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