



Abuse in Care

Royal Commission of Inquiry

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**CIVIL CLAIMS AND CIVIL LITIGATION REDRESS PROCESSES RELATING
TO ABUSE IN STATE CARE**

BRIEFING PAPER:

**LEGAL FRAMEWORKS APPLYING TO LITIGATION OF
CIVIL CLAIMS OF ABUSE IN CARE**

INTRODUCTION

This briefing paper has been produced to provide context or other information that may be relevant to the public hearing into civil claims and civil litigation redress processes relating to abuse in State care to be held in March 2020.

It outlines some key areas that have been in issue in claims against the State for redress for abuse in State care, and developments in these areas.

It does not cover the legislative framework providing for state care, but rather the legislative and other limitations on making claims in the courts for redress.

A. ELEMENTS IN ESTABLISHING LIABILITY OF THE STATE

Duties of state agencies towards children

1. A number of cases were brought against the state as negligence claims, or alternatively claims involving a fiduciary duty, or a statutory duty derived from Child Welfare legislation. These cases touch on the existence and scope of applicable duties.
2. Key cases include:
 - *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 established that there was a common law duty on social workers and the Department of Social Welfare to investigate a complaint of neglect of an adopted child. The case involved a claimant who was placed with an adoptive family, and brought a claim against the Department of Social Welfare in relation to neglect and abuse suffered in his adoptive home. A complaint had been made to social welfare, and no action had been taken to investigate. The Court accepted that social workers and Social Welfare had a common law duty in negligence to consider and respond to specific complaints of neglect of a child that had been brought to their attention, with reasonable skill and care. This reinforced the statutory duty on the Director-General of Social Welfare to protect children at risk.
 - *B v Attorney-General* [1999] 2 NZLR 296 (CA) and *B v Attorney-General* [2004] 3 NZLR 145 (PC) reinforced this duty, and established that it extended to a duty not only to instigate an inquiry,

but also to ensure that it duly proceeded and was adequate to requirements. The case involved claimants who were placed in foster care, following an allegation that one was sexually abused by the father. Police investigated, but no charges were laid against the father. The father and the two daughters sued, alleging that the social worker and psychologist failed to investigate the allegation properly. The Privy Council accepted that the Department, social worker and clinical psychologist owed a duty to the daughters – but not to the father – to instigate an inquiry and also to ensure that the inquiry was carried out and was adequate. However, it noted that this obligation was quite separate from any action in making decisions and assessments on what should be done in light of what the investigation revealed. It had been of concern to the court below that a duty affecting those decisions would cut across the applicable statutory scheme, which among other things included roles for courts and police.

- *S v Attorney-General* (HC Wellington CP 253/96, 1 February 2002) and [2003] 3 NZLR 450 (CA) recognised a continuing duty of the Superintendent of Child Welfare of protection in relation to foster children. The case involved a claimant who was placed in a foster home, and was subjected to sexual molestation and other abuse by his foster parents.¹ The Court recognised a continuing statutory duty of the Superintendent of Child Welfare² to ensure that S was “properly looked after” by the foster parents, even though the Superintendent was not formally made a guardian of S. This was the basis for recognising the vicarious liability for the actions of the foster parents – the foster parents were, at the State’s request, undertaking the State’s responsibility of care for these ‘abandoned’ children.
- *W v Attorney-General* (HC Wellington CP 42/97, 3 October 2002) and (Court of Appeal, CA 227/02, 15 July 2003) elaborated further on the duty in relation to foster children, recognising that the duty included exercising due skill and care in respect of decisions relating to the placement of the plaintiff, but noting that such duty must be assessed by standards of the day. The claimant was subjected to physical and emotional abuse by foster parents, including sexual abuse by the foster father. The High Court held that the Department breached its duty by failing to exercise due skill and care in respect of decisions relating to the plaintiff, in particular the decision to place the plaintiff with a family unable to properly supervise and protect her; failing to maintain connection with her family; and also by failing to investigate complaints of sexual abuse. However the High Court

¹ In this case, it was recognised that the claimant became the state responsibility even without formal committal status.

² Acting under the Child Welfare Act 1925.

and the Court of Appeal both rejected a claim that the Department had breached a duty through failure to recognize or nurture the plaintiff's ethnic and cultural background or ensure her cultural safety failed, noting the Department's duty of care had to be judged by the standards of the day.

- *White v Attorney-General* (HC Wellington CIV 1999-485-85, 28 November 2007) noted that the duty to inquire may arise even when children are looked after by their parents, where the Social Welfare department is aware of a risk of harm. It also recognised an undisputed duty of care in relation to children in institutions, however, reinforced that this was to be assessed against standards of the day. The claim involved two brothers who were abused and neglected by their parents and step-parent, and after a period of supervision and monitoring by the Social Welfare department, were subsequently removed and placed in a number of institutions, where they were further abused, before being placed back with their parent and step-parent. The High Court confirmed that the duty to inquire arose when the Department was made aware of a risk of harm, even when a child had no legal status, for example simply if they were being monitored by the Department. Once on notice, it was a breach of duty when social workers failed to speak with the children on their own. There was no dispute that once they were state wards, and committed to institutions, there was a duty toward them.

Vicarious liability for actions of foster parents and parents

3. It is generally accepted that the Crown is vicariously liable for abuse by its employees where children are in institutional care. Key cases dealt with whether the Crown is vicariously liable for abuse by others in other care settings, such as foster parents or parents. In particular:
 - In *S v Attorney-General* (HC Wellington CP 253/96, 1 February 2002) and [2003] 3 NZLR 450 (CA) it was accepted that the Crown could be vicariously liable for the actions of foster parents – the foster parents were akin to agents as they were, at the State's request, undertaking the State's responsibility of care for children; they were licenced to do so by the Social Welfare Department; and the Superintendent had an ongoing duty to take care of the foster children, including a right of inspection, and a right to remove the child at any time. It was also held that the abuse that occurred was closely enough associated with the parenting role required of the foster parents, that it was in the course of performance of agency duties. However, the Crown was held not to be vicariously liable for abuse by the foster parent's adult son.

- In contrast, in *White v Attorney-General* (HC Wellington CIV 1999-485-85, 28 November 2007), the High Court found that the Crown was not vicariously liable for the actions of the children's parents and stepfather, either during the period while the children and parents were being supervised, or later when the children were placed back with their parents while remaining state wards. It was distinguished from *S v AG* as at that time there was no alternative open to the Social Welfare Department for placement. The Court of Appeal ([2010] NZCA 139) held that it was not necessary to decide whether the Crown could be vicariously liable for actions of parents while the children were wards of the state, as on the facts no breach of duty by the parents had been established.

Causation of damage

4. The *White* case highlighted the challenge that some abuse victims may face in establishing causation of damage in a negligence claim, particularly if they also suffered abuse prior to going into care. In that case it was established that both claimants had been subject to physical abuse and one claimant had been sexually abused on multiple occasions by a staff member in a care institution. Psychiatric evidence was called from both the plaintiffs and the defence. Although the judge accepted that both claimants suffered from psychiatric conditions and problems with addiction, it was held that these difficulties were likely to have substantially been the result of early childhood experiences of neglect and abuse by their parents, as well as potentially containing a genetic element. In particular, although it was established that one of the claimants had been sexually abused on a number of occasions while in a care institution, the judge held that "In my opinion, the sexual abuse ...has not made a material contribution to his difficulties."

B. LIMITATION ACT

Limitation Act 1950

5. Almost all claims for abuse in care have been made relating to abuse that occurred some years in the past, and the Crown has invariably invoked the Limitation Act.
6. The Limitation Act 1950 (**the Act**) applies to, among other things, most actions in tort. Under s 4, it provides a limitation period of 6 years for actions – that is, it provides that an action shall not be brought more than

6 years from the date on which the cause of action accrued.³ In the case of claims for bodily injury,⁴ including psychiatric injury,⁵ there is an additional requirement to obtain either leave of the Court or consent of the defendant for actions that are brought more than 2 years from the date of accrual.⁶

7. The limitation provisions do not prevent a plaintiff bringing an action, but they do provide a defendant with a defence should they choose to use it.
8. Although s 4 of the Act does not apply to actions in equity, such as breach of a fiduciary duty, courts have held that where the pleaded breach of fiduciary duty is substantially the same as a tort duty such as negligence, the tort limitation period applies by analogy.⁷
9. The Limitation Act 1950 does not generally apply to claims under the New Zealand Bill of Rights Act, although the limitation and leave requirements applying to claims for bodily injury under s 4(7) may apply where bodily injury is an element of the claim.⁸
10. Of key relevance to historic abuse cases are factors which may delay the running of the limitation period. These include the doctrine of reasonable discoverability and the provisions relating to disability.

Date of accrual: reasonable discoverability

11. The doctrine of 'reasonable discoverability' has been held to apply in some cases of abuse in care resulting in mental injury: providing that the cause of action does not accrue – and therefore the limitation period does not begin to run – before the plaintiff has either identified or reasonably should have identified the link between the psychological damage and the abuse.

³ Section 4(1)(a).

⁴ Where not prevented by accident compensation legislation.

⁵ Bodily injury is not defined, but case law has used it interchangeably with personal injury, which includes psychiatric injury – see for example *T v H* [1995] 3 NZLR 37.

⁶ Section 4(7). The Court can grant such leave “if it thinks it is just to do so...where it considers that delay in bringing the action was occasioned by mistake...or by any other reasonable cause or that the intended defendant was not materially prejudiced in his defence or otherwise by the delay.”

⁷ See s 4(9), and, for example, *S v G* [1995] 3 NZLR 681 (CA).

⁸ See for example *Harris v Attorney General* (2004) 7 HRNZ 369 (HC), at [37], which held that the requirement to obtain leave under s 4(7) of the Limitation Act 1950 applied in respect of a claim under the NZBORA “when the assessment of any monetary award will involve personal injury as a matter of significance in relation to the defendant’s conduct, even when the award is not directly to compensate for the personal injury”. See also *Reekie v Attorney General* (CRI-2007-404-002652, HC Auckland, 22 December 2008).

12. In general, this doctrine has been applied to negligence claims and not to claims of assault and battery, where damage is not an element of the tort. In claims of assault and battery, the limitation period has been held to run from the date at which the plaintiff understands he or she did not consent to the abuse or that the conduct was wrongful,⁹ and so in historic abuse cases claims of assault and battery have generally been held to be barred by the Limitation Act.
13. Key cases discussing reasonable discoverability in abuse and abuse in care claims include:
 - *S v G* [1995] 3 NZLR 681 (CA) established the applicability of the reasonable discoverability doctrine in a case involving abuse.¹⁰ The case was brought as a claim in negligence and trespass to the person, for sexual, physical and emotional abuse by a medical practitioner, which had led to psychological injury. The claimant provided evidence that it was not until she started counselling that she came to recognise that the psychological damage was causally linked to the abuse she had suffered. The Court of Appeal accepted that she had reasonably not linked her serious psychological harm to the abuse until undergoing counselling, and held that it is only once the harm reasonably should have been identified and linked to the abuse that all the negligence elements are known and the cause of action accrues.
 - The *W v Attorney-General* claim began with an application for leave to bring the action under s 4(7) of the Act: [1999] 2 NZLR 709. The Court of Appeal confirmed the applicability of the reasonable discoverability doctrine in a case of abuse in care. It held that in assessing whether the link ought to have been made earlier, the test is not one of whether a reasonable person would reasonably have made that link, but whether the plaintiff, as they are, should reasonably have made the link. Leave was granted to bring the claim. In the substantive proceedings it was confirmed that the plaintiff had not made the link until much later, when interviewed by a psychiatrist ahead of making the claim. It was noted that remembering abuse was not the same as making the link between that abuse and the current condition.

⁹ The applicability of this to assault and battery claims not involving sexual abuse is still in question. *White* raises a question as to whether this applies beyond sexual abuse cases, but did not need to decide the point as it found that even if it did, the plaintiffs had in fact understood the conduct was wrongful and so the limitation bar applied.

¹⁰ This was not a claim of abuse in State care, but still is of relevance to the doctrine of reasonable discoverability.

- The High Court in *S v Attorney General* (HC Wellington CP 253/96, 1 February 2002) also applied the principle. The court recognised that it may only be possible or reasonable to make the link when the claimant has sufficient information – in that case, it was only after the claimant had obtained their file from Social Welfare and recognised the role Social Welfare had in placing them, that they were able to make the link between the actions of Social Welfare and the damage suffered. It was also confirmed that this principle does not apply to claims of assault and battery: damage is not a required element of that tort, and so the action accrues not when any link is made to the damage, but when the plaintiff reasonably understands that he or she has not given free and considered consent.
- In *White v Attorney-General* [2010] NZCA 139 the doctrine was expressly limited to sexual abuse cases, partly on the basis that there was no evidence that those who suffered other forms of abuse might be unable to make the connection between the abuse and damage in the same way as with sexual abuse. Both the High Court and the Court of Appeal also rejected the argument of reasonable discoverability on the evidence – the court did not accept that the plaintiffs had not made the connection earlier (partly as the court did not accept that the abuse had in fact caused the damage), and rejected an argument that recent access to their files had allowed the plaintiff's to understand the connection between the actions of Social Welfare and their damage, on the basis that the plaintiffs had always known of Social Welfare's involvement in their lives.

Disability or fraud

14. The Act explicitly provides for two situations in which the limitation period may not start immediately upon the accrual of the action: where the claimant is under a disability,¹¹ or where there is fraud or mistake, including fraud that conceals the right of action.¹²
15. Under s 28 of the Act, time may extend if the defendant fraudulently concealed information which prevented the claimant from discovering cause of action. The limitation period does not begin to run until after plaintiff discovered fraud, concealment or mistake, or could reasonably have discovered it. The case of *S v G* [1995] 3 NZLR 681 (CA) recognised that this might be applicable in cases of sexual abuse of a child, where concealing the abusive nature of the conduct. However, this has not been applied to any action against the state as a defendant.

¹¹ Section 24.

¹² Section 28.

16. Under s 24 of the Act, the limitation period is extended where the person was under a disability. A person is deemed to be under a disability when the person is a minor under the age of 20, or is of unsound mind.¹³
17. Key cases discussing the applicability of the disability provision to abuse in care contexts include:
- In *S v Attorney-General* [2003] 3 NZLR 450 (CA), the Court of Appeal recognised that in some cases, survivors of abuse may be considered to have been under a disability. In that case it was accepted that S was under a disability caused by PTSD until 1995, and the proceedings were therefore not barred by the Limitation Act. Significantly, the court recognised that a person could be under a disability for some functionality and not others, and in this case, the release from the disability came through counselling and the death of a relative, and that the evidence of the skill with which he pursued litigation did not detract from that disability.
 - In *Knight v Crown Health Financing Agency* (HC Wellington, CIV-2005-485-2687, 16 November 2007) it was found that the allegations had not been made out, and so it was not necessary to determine the Limitation Act point, however the judge made an obiter comment that the claimant's learning disability and low IQ was not sufficient to inhibit his capacity to bring proceedings. The judge held that it was not necessary to be able to have a detailed understanding of the complexities of civil litigation in order to be capable of suing, but rather a person may be capable of suing if they know that a wrong has been done for which redress can be sought through the courts. In K's case, he had been able to engage and instruct lawyers for other criminal and civil proceedings, and he could not point to anything that had been overcome to enable him to bring the proceedings in 2005, and so it was not established that he was under a disability for the purposes of the Limitation Act.
 - In *White* (HC Wellington CIV 1999-485-85, 28 November 2007) and [2010] NZCA 139 it was accepted that the plaintiffs suffered from PTSD or chronic depression, however, this was not held to be a disability for the purposes of the Limitation Act, partly as they had shown themselves capable of bringing legal actions, and there was no event that triggered a release from the purported disability.

¹³ Section 2(3).

Limitation Act 2010

18. The Limitation Act 2010 (**the 2010 Act**) refined the limitation laws applying to claims made after 31 December 2010, with the purpose of providing a clearer, more comprehensive law on general civil limitation defences. However, the 1950 Act continues to apply in relation to any claim brought that relates to acts or omissions before 1 January 2011 and to which it would have applied prior to the 2010 Act coming into force,¹⁴ and thus continues to govern the majority of historic abuse cases.¹⁵
19. The 2010 Act also introduced a small number of equivalent amendments to the 1950 Act, which apply to claims for acts or omissions occurring prior to 2011, where the actions were brought after 1 January 2011. The key amendments include:
 - The introduction of a “longstop” period of limitation in (s 23B), which provides that no action may be brought for acts or omissions before 1 January 2011 after the later of 5 years ending on 31 December 2015, or 15 years after the date of the act or omission (subject to provisions relating to disability and fraud etc); and
 - Discretion of the court to extend the limitation period, including beyond the longstop, in cases involving sexual abuse of a child or non-sexual abuse of a child by a parent, step-parent or legal guardian, or a close relative or close associate of a parent, step-parent or guardian (s 23C). Close associate is not defined.
20. In determining whether to extend the limitation period, the court must take into account a number of matters, including: hardship to the defendant or the plaintiff; length of and reasons for delay; likely effects of delay on the ability to defend the action and on the evidence; the defendant’s conduct, including responses to requests for information or inspection; steps taken by the plaintiff to bring the action and to obtain relevant medical, legal, or other expert advice (s 23D).
21. The 1950 Act continues to apply, without amendment, to claims made prior to 1 January 2011, including the large number of claims for historic abuse that were commenced during the early 2000s and which have not yet been resolved.

¹⁴ See s 59 of the 2010 Act.

¹⁵ Though note that claims relating to acts prior to 1 January 2011 that would *not* have been covered by the 1950 Act may be subject to the 2010 Act. This could include, for example, claims under the New Zealand Bill of Rights Act to which the Limitation Act 1950 did not apply. The 2010 Act specifically applies the 6 year limitation period to claims for monetary relief under the New Zealand Bill of Rights Act – see s 11 and 12(2)(c).

C. STATUTORY BAR: MENTAL HEALTH ACTS

22. Some cases involving psychiatric care settings have involved additional statutory hurdles, due to immunity provisions and leave requirements under the Mental Health Acts applicable through the 1960s and early 1970s.
23. In particular, s 6 of the Mental Health Amendment Act 1935, and s 124 of the Mental Health Act 1969 provided immunity for “any person who does any act in *pursuance or intended pursuance of any of the provisions of this Act*,...unless the person has acted in bad faith or without reasonable care.” Proceedings for acts in pursuance or intended pursuance of the provisions of the Act required leave of a judge, which could only be granted if the proceedings were brought within 6 months of the relevant act, and only if the judge is satisfied there was a substantial ground for the contention that the person acted in bad faith or without reasonable care.
24. The issue of whether this immunity and limitation could apply to acts of alleged abuse arose in *J v Crown Health Financing Agency* (Wellington HC, CIV-2000-485-876, 8 February 2008), which involved a claim that, amongst other things, the claimant had been given insulin treatment, and been subject to electroconvulsive therapy (**ECT**) and seclusion as punishment whilst a patient in a psychiatric institution in the 1950s and 1960s. The action failed due to the Limitation Act, but the judge made obiter comments that the acts would come within the immunity if they were for the purpose of treatment, care and control done in good faith and without lack of care. However, if they were done or threatened as punishment, then it would be outside the available immunity. He accepted that immunity could not possibly exist for sexual assaults or gratuitous physical assaults, and added that it would not exist where punishment was the motive.
25. Later a test case regarding the applicability of the immunity was brought by patients of Lake Alice and Porirua hospitals in *Crown Health Financing Agency v P* [2009] 2 NZLR 149 (CA); and *B v Crown Health Financing Agency* [2010] 1 NZLR 338 (SC). The plaintiffs claimed they had been subject to physical assaults, sexual abuse, inappropriate use of ECT as punishment, solitary confinement and other mistreatment, while they were psychiatric patients in the 1970s. The case was understood to be a test case for the approximately 280 other claimants in a similar category.
26. The Court of Appeal held that acts “in pursuance” of the Mental Health Act included acts incidental to the care and treatment of patients, including issues of control of patients or protection of others, while “intended pursuance” included acts that are honestly, even if mistakenly, done in

pursuance of the legislation. The Supreme Court upheld this, and noted that the protection extended even where more force was used than reasonably necessary, provided that the officer was purporting to undertake an authorised act in good faith. The Court of Appeal noted that the court was required to ask whether the acts in question were within the purpose of the legislation, or hypothetically could honestly be done for the purpose – if so, the immunity would apply and leave would be required. Justice Glazebrook considered that sexual abuse, serious physical assaults or torture could not be honestly believed to be for the purpose of care, treatment or control of a patient. She also did not consider that a person could honestly think that it was legitimate to administer ECT for punishment or control and not for treatment. However, she did not accept that the motivation to punish will always take the action outside the legislation.

D. ACCIDENT COMPENSATION LEGISLATION

27. Accident compensation legislation has been in force since 1974, making statutory cover available for personal injuries caused by accident, regardless of liability for that accident. Where cover is available, the statutory scheme prohibits civil claims for compensatory damages for those injuries,¹⁶ although other types of damages, including exemplary damages and damages for breaches of NZBORA may still be sought.¹⁷ Where cover is not available, actions may still be brought.
28. The scheme has had various iterations since 1972. The current Accident Compensation Act 2001 provides cover for personal injury caused by accident, including mental injury suffered as a consequence of physical injury or due to being a victim of certain sexual offences.¹⁸ Where cover is requested for injury occurring prior to 1 April 2002, the claim must meet the cover criteria under both the current Act and the accident compensation legislation in force on the date of injury. The date of injury for most personal injury claims is when the accident occurred, but for claims for mental injury the date of injury is defined as being the date on which the person first receives treatment for the mental injury that is the subject of their claim.¹⁹
29. The original Accident Compensation Act 1972 came into force on 1 April 1974 and provided cover for “personal injury by accident”, which was not comprehensively defined, but was interpreted to include physical and

¹⁶ Section 317

¹⁷ Section 319

¹⁸ Section 21.

¹⁹ Section 36.

mental consequences of the accident. It applied to any injury that occurred after 1 April 1974.

30. The Accident Rehabilitation and Compensation Insurance Act 1992, specifically extended cover to mental injury or nervous shock suffered by victims of specified sexual offences, regardless of whether a person was or could be charged with that offence.²⁰ However, it also limited the definition of personal injury to include mental injury only where that mental injury was an outcome of a physical injury, and so no longer covered pure psychological injuries caused other than by sexual offences.²¹
31. The 1998 Accident Insurance Act introduced the definition that the date on which the mental injury is suffered is the date on which treatment was first received.²² This meant that mental injuries for which treatment was first received after 1998 were covered by the scheme – and common law damages claims barred – even where the offence leading to the mental injury may have been historic. This provision is continued in the current 2001 Accident Compensation Act.²³
32. In 2002-2003, the applicability of the scheme to mental injury caused by offences committed prior to 1974 was called into question in *S v Attorney-General* [2003] NZLR 450 and *W v Attorney-General* (CA 227/02, 15 July 2003). The claims were brought in 1996 and 1997, when the 1992 legislation was in place, but both cases involved abuse including sexual abuse of children by foster parents prior to 1974. The question was whether the cover under the 1992 Act applied to mental injuries caused by abuse prior to 1974.²⁴ The Court of Appeal concluded that the cover under the 1992 Act did not extend to mental injury caused by abuse which occurred prior to 1 April 1974, and therefore the claims were not barred.²⁵
33. This led to an amendment to the Accident Compensation Act in 2005, explicitly providing that cover was available – and therefore claims were barred – for any mental injury caused by sexual offending for which treatment was first received between 1992 and 1999, even where the abusive conduct occurred prior to 1 April 1974.²⁶

²⁰ Section 8(3) and (4), Accident Rehabilitation and Compensation Insurance Act 1992.

²¹ Section 4(1).

²² Section 44, Accident Insurance Act 1998. The 1992 Act had a similar deeming provision relating to claims for payment for mental injury in s 63(3). However this was relating to claims for payment rather than more generally for defining what was covered by the scheme – see *S v AG*.

²³ Section 36,

²⁴ Note in *W* also a question about applicability of 1998 Act – see para [29].

²⁵ See *S v Attorney-General*, at [21] – [29].

²⁶ See section 21A.