the application by Portino to set aside the notice of appeal does not arise either. Those, then, are the orders which I would propose.

56 **ALDOUS** and **TUCKEY, JJ.A.** concurred.

Appeal dismissed.

[2010–12 Gib LR 61]

GONZALES v. GRACIA

COURT OF APPEAL (Aldous, Parker, and Tuckey, JJ.A.): September 14th, 2010

Limitation of Actions—tort actions—personal injury—actions for "negligence, nuisance and breach of duty" in Limitation Act 1960, s.4(1) include actions for intentional injuries—three-year limitation period applies

The appellant claimed damages in the Supreme Court in respect of psychiatric injuries suffered by her as a result, she claimed, of the respondent intentionally harassing her with letters, criminal damage and assaults.

The incidents were alleged to have occurred in 2003. The respondent was convicted of criminal damage to the appellant's car in 2004. The appellant obtained a medical report confirming her psychiatric injuries in September 2006 and commenced proceedings in November 2007, having been advised that a six-year limitation period applied to the claim.

The Supreme Court (Pitto, Ag. J.) held that the appellant's action had accrued when she acquired all the material facts in 2003, before the medical report was obtained, and she had, therefore, commenced the proceedings after the expiry of the statutory limitation period of three years (Limitation Act 1960, s.4(1)).

On appeal, the appellant submitted that (a) the limitation period for the claim was six years, as the three-year period for "negligence, nuisance and breach of duty" claims under s.4(1) did not include intentional injuries. English authority that those words included intentional injuries should not be followed, as the Gibraltar court lacked the power to exclude the time limits in personal injury cases available to the courts in England; (b) to hold that intentional torts were subject to a three-year limitation period would cause hardship to the appellant; (c) the application of a three-year period amounted to a change of law that violated the appellant's right to a

fair trial and access to the court, under the Gibraltar Constitution 2006, s.8; and (d) alternatively, accepting that the claim was commenced outside the normal three-year period, that time, by the Limitation Act 1960, s.5(1)(a), should be taken to have commenced when the appellant gained actual knowledge of all the material facts relating to her claim, upon receipt of the medical report in 2006.

The respondent submitted in reply that (a) the limitation period for the claim was three years, as the most recent English authority had interpreted "negligence, nuisance and breach of duty" to include intentional injuries. It was irrelevant that the Gibraltar court lacked the powers possessed by the English courts; (b) a three-year limitation period caused no hardship to the appellant; (c) a three-year period did not violate the Gibraltar Constitution, s.8 and the respondent had a right to the statutory defence of limitation; and (d) time should not, by the Limitation Act 1960, s.5(1)(a), run from 2006, as the appellant had actual knowledge of the letters she had received from the defendant and their effect on her in 2003, and her claim was therefore statute-barred.

Held, dismissing the appeal:

(1) The appellant had brought her intentional injuries claim after the expiry of the statutory limitation period of three years, which had commenced in the summer of 2003, following 2008 House of Lords authority. The period of six years specified in earlier authorities would not be followed. "Negligence, nuisance or breach of duty" in the Limitation Act 1960, s.4(1) included intentional injuries and the construction of the words in Gibraltar and England should be the same. The court would not apply authorities held by the House of Lords to have been wrongly decided, notwithstanding that the Gibraltar court did not share the English courts' general discretion to exclude time limits in personal injury cases if it were equitable to do so. The court would not accept that applying the 2008 House of Lords authority caused any hardship to the appellant (paras. 11–16; para. 22).

(2) Moreover, the law had not changed, only its interpretation, and the appellant had not thereby been denied access to the court in any manner that violated the Gibraltar Constitution 2006, s.8(8). A three-year limitation period provided access to court that was proportionate to the defendant's statutory defence of limitation (para. 17).

(3) Further, the court would not, by the Limitation Act 1960, s.5, allow the three-year period to run from the date the medical report was obtained in 2006, as the appellant had acquired actual knowledge of the material facts necessary for her claim in 2003, having knowledge of the harassing letters from the respondent, the criminal damage to her car, the assaults, and their emotional and psychological effect on her. She had failed to bring her claim within the three-year period and it was therefore statute-barred (paras. 18–24).

Cases cited:
(1) *A* v. *Hoare*, [2008] 1 A.C. 844; [2008] 2 W.L.R. 311; [2008] 2 All E.R. 1; [2008] UKHL 6, followed.
(2) *Stubbings* v. *Webb*, [1993] A.C. 498; [1993] 2 W.L.R. 120; [1993] 1 All E.R. 322, not applied.

Legislation construed:
Gibraltar Constitution 2006 (Unnumbered S.I. 2006, p.11503), Annex 1, s.8(8):

> "Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or authority, the case shall be given a fair hearing within a reasonable time."

Limitation Act 1960, s.4(1): The relevant terms of this section are set out at para. 3.
s.5: The relevant terms of this section are set out at para. 4.
s.6: The relevant terms of this section are set out at para. 5.
s.10: The relevant terms of this section are set out at para. 5.

O. Smith for the appellant;
C. Ramagge for the respondent.

1 **ALDOUS, J.A.:** This appeal against the decision of Pitto, Ag. J. of September 4th, 2009 requires construction of the Limitation Act 1960 so as to decide whether the appellant's cause of action is statute-barred.

2 For the purposes of this appeal, I will assume that the facts are as pleaded in the particulars of claim. The judge set them out in full but it is sufficient at this stage of my judgment to record that the appellant, Kristelle Gonzalez, was born in 1977. She lived in Edinburgh House, as did the respondent, Mr. Jonathan Gracia. It is alleged that between January 2003 and December 2003 the respondent, by a series of letters written and delivered to the appellant and by certain acts of criminal damage, caused the appellant psychiatric illness and injury. The respondent contended that the claim was statute-barred, which prompted the appellant to seek a declaration that the Limitation Act did not provide a defence. The judge held that it did. He held that the relevant limitation period was three years and that as she appeared to have knowledge of the relevant facts, which happened more than three years before the proceedings were started, the claim was out of time. In fact, it was not surprising that she had not issued the proceedings earlier as she had been advised, we were told, that the limitation period was six years.

3 In Gibraltar, the relevant Act is the Limitation Act 1960. Section 4(1) provides:

"Subject to sections 10A and 10B, the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say—

(a) actions founded on simple contract or tort;

. . .

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 sub-section shall have effect as if for the reference to six years there were substituted a reference to three years."

4 Section 5 enables extension of time for certain actions:

"(1) Section 4(1) (which, in the case of certain actions, imposes a time-limit of three years for bringing the action) shall not afford any defence to an action to which this section applies, in so far as the action relates to any cause of action in respect of which—

(a) the court has, whether before or after commencement of the action, granted leave for the purposes of this section; and

(b) the requirements of subsection (3) of this section are fulfilled.

(2) This section applies to any action 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 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 the plaintiff or any other person.

(3) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which was not earlier than three years before the date on which the action was brought . . ."

5 Section 6 and 10 state that—

"6 (1) Any application for leave of the court for the purposes of section 5 shall be made ex parte, except in so far as rules of court

may otherwise provide in relation to applications which are made after the commencement of the relevant action.

. . .

(3) Where such an application is made after the commencement of a relevant action, the Court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if the like evidence were adduced in that action, that evidence would, in the absence of any evidence to the contrary, be sufficient—

(a) to establish that cause of action, apart from any defence under section 4(1), and

(b) to fulfil the requirements of section 5(3) in relation to that cause of action,

and it also appears to the court that, until after commencement of that action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on such a date as (apart from section 5) to afford a defence under section 4(1)."

"10 . . .

(3) In sections 5 to 9 reference to the material facts relating to a cause of action is a reference to any one of a more of the following that is to say—

(a) the facts that personal injuries resulted from the negligence, nuisance or breach of duty consisting that cause of action;

(b) the nature or extent of the personal injuries resulting from that negligence, nuisance or breach of duty;

(c) the fact that personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable.

. . .

(5) Subject to subsection 6 of this section, for the purposes of sections 5 to 9 a fact shall, at any time, be taken to have been outside the knowledge (actual or constructive) of a person if, but only if—

(a) he did not then know that fact;

(b) in so far as that fact was capable of being ascertained by him, he had taken all such action, if any, as it was

reasonable for him to have taken before that time for the purpose of ascertaining it; and

(c) In so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such action, if any, as it was reasonable for him to have taken before that time for the purposes of obtaining appropriate advice with respect to those circumstances . . ."

6 The statute law in Gibraltar lags behind that in the United Kingdom. It reflects the law as amended by the Law Reform (Limitation of Actions) Act 1954. In the United Kingdom, amendments were made in 1963, 1975, and 1980.

7 The advice given to the appellant that the limitation period was six years was based upon the House of Lords decision in *Stubbings* v. *Webb* (2). The leading speech was given by Lord Griffiths. He concluded that the Limitation Act 1980 provided that the limitation period for personal injuries, including psychological disorders, was six years. The holding as stated in the headnote in the *Law Reports* is as follows ([1993] A.C. at 498–499):

"Held, allowing the appeals that section 11(1) of the Limitation Act 1980 was in identical terms to, and bore the same meaning as, section 2(1) of the Law Reform (Limitation of Actions, &c.) Act 1954, which had been intended by Parliament to be limited to actions for personal injury arising from accidents caused by negligence, nuisance or breach of a duty of care; that claims for injuries arising from complaints of deliberate assault, including acts of indecent assault, were subject to a six-year limitation period under the Act of 1980, running in the case of a right of action accruing during a person's infancy from the attainment of that person's majority, without provision for any extension of that time; and that, accordingly, the plaintiff's proceedings were statute-barred . . ."

8 Lord Griffiths reviewed the way the law had developed and said ([1993] A.C. at 508):

"Even without reference to Hansard I should not myself have construed breach of duty as including a deliberate assault. The phrase lying in juxtaposition with negligence and nuisance carries with it the implication of a breach of duty of care not to cause personal injury, rather than an obligation not to infringe any legal right of another person. If I invite a lady to my house one would naturally think of a duty to take care that the house is safe but would one really be thinking of a duty not to rape her? But, however this may be, the terms in which this Bill was introduced to my mind make it clear

> beyond peradventure that the intention was to give effect to the Tucker recommendation that the limitation period in respect of trespass to the person was not to be reduced to three years but should remain at six years. The language of section 2(1) of the Act of 1954 is in my view apt to give effect to that intention, and cases of deliberate assault such as we are concerned with in this case are not actions for breach of duty within the meaning of section 2(1) of the Act of 1954.
>
> The language of section 2(1) of the Act of 1954 was carried without alteration into the Act of 1975 and then into section 11(1) of Act of 1980 where it must bear the same meaning as it had in the Act of 1954."

9 In coming to that conclusion, Lord Griffiths was construing the phrase "negligence, nuisance or breach of duty" which is the same as the phrase in the 1960 Act.

10 In *A* v. *Hoare* (1), four cases were dealt with by the House of Lords. Lord Hoffmann gave the leading speech. Unanimously, their Lordships held that the *Stubbings* case (2) had been wrongly decided. Their speeches are contained in 22 pages of the report and it is sufficient for this judgment to refer to the first paragraph of the holding as stated in the headnote to the case in the *Law Reports* ([2008] 1 A.C. at 845):

> "Held (1), allowing the appeals in the first to fourth cases, that, since the expression 'negligence, nuisance or breach of duty' had been used in section 2(1) of the Law Reform (Limitation of Actions, etc) Act 1954 and in section 1 of the Limitation Act 1975, and since, at the time of the passing of those Acts that expression had been construed by the courts as having a wide meaning capable of applying to claims for intentional injuries, Parliament must have intended the words to bear the same meaning in section 1 of the 1975 Act; that, since the provisions of section 1 of the 1975 Act had been re-enacted in section 11 of the 1980 Act, section 11 extended to claims for damages in tort arising from trespass to the person, including sexual assaults; that the House of Lords authority to the contrary effect had been wrongly decided and, since its application had caused anomalies in the law, would be departed from . . ."

11 If the words that appear in the Limitation Act 1960, s.4, namely "damages for negligence, nuisance or breach of duty" are to be construed as having the same meaning as those words considered in the *Hoare* case (1), the limitation period is three years, not six as decided in the *Stubbings* case (2).

12 Our attention was drawn to the way the UK Act provided the courts with the ability to extend the three years in certain circumstances. That ability has not been introduced into Gibraltar law.

13 Mr. Owen Smith, for the appellant, submitted that the House of Lords would not have overruled the *Stubbings* case (2) had the legislation in England not progressed beyond that which applies in Gibraltar. Thus, as the decisions of the House of Lords are not binding upon the courts of Gibraltar, this court should interpret the statutory words that I have referred to as the House of Lords had interpreted them in the *Stubbings* case (2). The law in Gibraltar is as it was when the *Stubbings* case was decided and the result should be the same.

14 I, like the judge, do not feel able to accede to that submission. The House of Lords in the *Stubbings* case, and in the *Hoare* case (1), were construing the same words as in the Gibraltar Act, namely "damages for negligence, nuisance or breach of duty." The difference in the result did not depend upon changes in the legislation since 1975. To the contrary, Lord Hoffmann drew attention to a continuous theme. It would be wrong for this court to rely upon the *Stubbings* case as providing the correct interpretation of the phrase to which I have referred in the Gibraltar Act when the House of Lords has said it was wrongly decided. For that reason I, like the judge, believe that the phrase that I have quoted should be interpreted in the same way in Gibraltar as in England, and therefore the law as stated in the *Hoare* case should be applied. That being so, the limitation period is three years, not six, for the injury pleaded in this case.

15 Unfortunately for the appellant, she does not have the benefit of provisions such as s.33 of the present UK Act. In Gibraltar, claimants are confined to three years with the limited extension provisions of ss. 5 and 10. Even so, it would be wrong for this court to construe the phrase quoted other than in accordance with the *Hoare* case. I accept that the House of Lords in *Hoare* had in mind that those that were limited to three years had the benefit of possible extension. Even so, that would not be sufficient to require this court to construe the phrase as meaning something different to that which was decided in the *Hoare* case.

16 Mr. Smith also submitted that this court, not being bound by decisions of the House of Lords, should not apply the reasoning in the *Hoare* case (1) to the Gibraltar Act, as to do so meant hardship to the claimant. I disagree for the reasons I have given.

17 Mr. Smith also submitted that the conclusion that I have reached offended the claimant's Constitutional right to a fair hearing, contained in the Gibraltar Constitution 2006, s.8. He submitted that she would be prevented from having a fair hearing because her access to the court had been taken away by a change of the law. I cannot accept that submission. The law stayed the same, but the interpretation of it changed. In any case,

I cannot see that she has been deprived of access to the courts. Further, it is necessary to have in mind the rights of the defendant to the statutory defence of limitation.

18 I turn next to the appellant's submission that the judge should have granted leave under s.5(1)(a), which I have already read. The proceedings were started in November 2007. It follows that the three-year period started in November 2004. The assaults are pleaded as taking place in the summer and autumn of 2003. Mr. Gracia was arrested in March 2004 and was convicted of causing criminal damage to the car and was ordered to pay compensation. A medical report was obtained on September 28th, 2006 from a consultant psychiatrist who, as usual, reported what he had been told by the appellant. The consultant reported:

> "Miss Gonzalez stated that she had been feeling depressed, and that sometimes she gets very depressed, and that this has been going on ever since she was married and not before. When she first became depressed she was crying all the time, just wanting to stay at home, not wanting to do anything. She would then get depressed two or three days a week. She currently feels happy at times and sad at others. She has some substantial difficulties falling asleep and tosses and turns all night long to the point she feels she gets no sleep. She also says she cries a lot, the last time being one week when she was feeling very low and depressed. She was feeling upset about all the things that had happened to her. She denied all other symptoms suggestive of psychiatric physiological difficulties. She was orientated X3, her thought process had appeared intact and she denied ever having experienced hallucinations or delusions.
>
> With respect to her specific reactions to the letters she received, she said that when it started to happen she began to feel scared, thinking someone was going to go into her home, and that she was depressed and thinking about who it could be. She would cry, have problems sleeping, and was constantly thinking that somebody could go up to the house. She would hear somebody come up to the door and ran away and this made her very uneasy. She felt this way until she found out who it was."

19 Later on in the report the consultant set out his diagnosis. The summary and recommendations were as follows:

> "She was a very poor historian and was occasionally confused with respect to important dates, such as her marriage. She had substantial difficulties with mental computations and at times exhibited panic-like symptoms. Ms. Gonzalez appears to have suffered substantial physiological distress as a result of the harassment she was exposed to over a long time period by someone she thought was her friend.

She was made to feel anxious, fearful, and depressed as a result of this. Most of her symptoms have currently subsided."

20 Mr. Smith, on her behalf, accepted that the acts of the respondent occurred outside the three-year period. He submitted that this was not a case of physical assault causing immediate and obvious physical injury. It was a case where expert advice was necessary to provide all the material facts. It was not, he submitted, until the expert had advised that the psychiatric illness was caused by the assault that it could be concluded that the assault had caused injury. Therefore, s.6(3)(a) had been satisfied. That being so, her case fell within s.10.

21 Section 5(1) of the Act provides that s.4 of the Limitation Act should not provide a defence if leave has been given and the requirements of s.5(3) are fulfilled. Put broadly, that sub-section is said to be fulfilled if it is proved that the material facts relating to the cause of action were at all times outside the actual knowledge or consideration of the plaintiff. Material facts are defined in s.10(3). As pleaded, the appellant knew that the letters and criminal damage took place in the summer of 2003. The only evidence that is before the court is the report of the consultant psychologist. That report indicates that the appellant knew in the summer of 2003 of the letters and the alleged acts of criminal damage. She knew of the effect that they had on her. In those circumstances, she had knowledge of all the relevant facts to plead her case.

22 Mr. Smith submitted that even if she knew about all the acts that made her ill, it was not until she was informed by the consultant that she suffered from a psychiatric illness that she was in possession of all the necessary facts. In particular, she did not know that her illness was caused by the assaults rather than some other means. I cannot accept that submission. The appellant knew all the material facts that provided her a cause of action in the summer of 2003. The limitation period is three years and in my view the judge was right to come to the conclusion that he did.

23 The judge also relied upon her first claim form that had been issued on March 28th, 2006. It was not pursued, and we were told that it was issued to maintain her position if needed. In my view, there is no necessity to look at that claim form, although I would have expected it to have been issued upon instructions which provided a good cause of action.

24 The evidence, in so far as there is evidence, is that this appellant knew of all the material facts upon which to start an action for personal injuries prior to the three-year period starting. I would therefore dismiss this appeal.

25 **PARKER** and **TUCKEY, JJ.A.** concurred.

Appeal dismissed.