

Essential PI Updates – *Limitation, Asbestos Liability, Disability & Multipliers*

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Essential PI Updates

-Limitation, Asbestos Liability, Disability & Multipliers-

Topics

This seminar will give you useful updates and guidance in respect of the following:

- **An Update on Personal Injury Limitation Law**
Frank Burton QC will discuss the latest authorities on S.14 and S.33 of the Limitation Act 1980 including the House of Lords decision in A v Hoare [2008] UKHL 6.
- **Asbestos Update**
Allan Gore QC will provide an update on the emerging trends in asbestos litigation with a particular emphasis on issues of liability.
- **Disability & Multipliers for Residual Earning & Capacity**
Nigel Lewers will present a discussion of the meaning of "disability" when reducing multipliers for contingencies under Ogden (6th Edition).

Speakers

- Frank Burton QC, 12 King's Bench Walk
- Allan Gore QC, 12 King's Bench Walk
- Nigel Lewers, 12 King's Bench Walk

Date

Wednesday 12 March 2008, 5.30pm – 8.00pm

CPD

1.5 points.

Reference: AVV/CHRW.

This is a free event!

Venue

Main Hall,
Inner Temple,
Crown Office Row,
London EC4Y 7HL

Programme

Essential PI Updates

-Limitation, Asbestos Liability, Disability & Multipliers-

Wednesday 12 March 2008

5.30pm – 8.00pm

Inner Temple

Main Hall
Inner Temple
London
EC4Y 7HL

5.30 pm	Registration Tea & coffee
6.00 pm	Introduction by Chair Andrew Hogarth QC
6.00 pm	An Update on Personal Injury Limitation Law Frank Burton QC, 12KBW
6.30 pm	Asbestos Update Allan Gore QC, 12KBW
7.00 pm	Disability & Multipliers for Residual Earning & Capacity Nigel Lewers, 12KBW
7.30 pm	Drinks reception and canapés
8.00 pm	Close

To book your place, please complete the attached registration form and return to Amy Hammick, Practice Manager at the address below or by email to hammick@12kbw.co.uk.



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12KBW Seminar: Essential PI Updates
Wednesday 12th March 2008

An Update on Personal Injury Limitation Law

Frank Burton QC

CPD Ref: AVV/CHRW

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Limitation: resume and update: 2008

Policy and history

1

Since the Limitation Act 1623, which imposed a limitation period of 6 years in respect of causes of action essentially concerned with simple contract and tort, the legislature has recognised as a matter of policy that there should be finality and certainty in litigation. The 1623 Act also recognised that a fixed period of limitation could cause injustice and by s 7 of the Act provided that time would not run against a claimant who suffered under a disability. The 6-year period in which to bring an action based on simple contract or tort survived until the Law Reform (Limitation of Actions, etc) Act 1954, when the period for instituting proceedings with respect to personal injuries was reduced to 3 years. The 1954 Act did, however, abolish the limitation period of one year, then in force, in favour of public authorities as instituted by the Public Authorities Protection Act 1893 and the Limitation Act 1939.

2

One effect of the 1954 Act was to aggravate the harshness of limitation law when applied to imperceptible injury where time expired even before the diagnosis of incipient disease was possible. Following criticism of these hard cases¹ the Limitation Act 1963 was enacted which introduced the concept of 'date of knowledge' which allowed a claimant to commence an action after 3 years if it could be demonstrated that material facts of a decisive character were outside his knowledge within the primary 3-year period. The 1963 Act allowed a claim to be initiated with leave if proceedings were started within 12 months of a claimant's date of knowledge. This period was extended to 3 years by the Law Reform (Miscellaneous Provisions) Act 1971.

3

The 1975 Limitation Act, following recommendations made by the Report on Limitations of Actions in Personal Injury Claims, Cmnd S630 (1974), invested the court for the first time with a discretion to disapply the primary limitation period if in all the circumstances of a case it was thought equitable to do so. The thinking behind the Committee's recommendations was to empower the court to investigate actual hardship arising from the operation of strict periods imposed both by the primary limitation period and by the claimant's date of knowledge.

4

The Limitation Act 1980, in force on 1 May 1981, consolidated all limitation legislation and now contains the total legislative code in respect of personal injury actions. Accrued defences that existed before the coming into force of the 1954 Act

¹ Cf *Cartledge v Jopling & Sons Limited* [1963] AC 758.

on 4 June 1954 are not affected by the 1963 and 1975 Acts (see *Arnold v Central Electricity Generating Board*,² reaffirmed in *McDonnell v Congregation of Christian Brothers Trustees*.³ To date, attempts to establish that aspects of the English law of limitation are in breach of convention rights or contrary to the Human Rights Act 1998 have been unsuccessful (see *Stubbings v United Kingdom*,⁴ *Dobbie v United Kingdom*,⁵ *Young v Western Power Distribution(South West)*⁶ and *Horton v Sadler*⁷).

5

The Consumer Protection Act 1987, which created a statutory cause of action for damages including those arising out of personal injury due to unsafe products, has caused a further amendment to the Limitation Act 1980, ss 14(1A) and 11A. Actions brought under the Act for damages arising out of the use of unsafe products may be brought within 3 years of the cause of action accruing or 3 years from the date when the claimant knew or could with reasonable diligence have discovered the existence of his cause of action. However, no such action under the Act may be brought after 10 years from when the product in question was last supplied. In *Horne-Roberts v Smithkline Beecham*⁸ the Court of Appeal confirmed that s 35 of the Limitation Act applied to a s 11A case and permitted the substitution of the manufacturers of a batch of MMR vaccine outside of the 10-year period on the basis that the claimant had made a mistake in suing, within the 10 years, the wrong defendant.

The primary limitation period

6

Section 11 of the Limitation Act 1980 imposes a primary limitation period for actions in respect of personal injuries of 3 years from the date of the accrual of the cause of action, or 3 years from the date of knowledge of the person injured, if later. In cases brought on behalf of an estate following the death of the injured person, the limitation period is 3 years from the date of death or 3 years from the date of the personal representative's knowledge, whichever is later (s 11(5)). In fatal cases brought on behalf of a dependant under the Fatal Accident Act 1976, the dependants have 3 years to initiate an action from the date of death or 3 years from the date of knowledge of the person for whose benefit the action is brought, whichever is later (s 12). Further, in fatal cases under the Fatal Accidents Act 1976 where the action is brought for the benefit of more than one person, the limitation period is to be applied separately to each of the dependants with respect to their dates of knowledge.

7

² [1998] AC 228.

³ [2003] UK HL 63.

⁴ (1997) 23 EHRR 213.

⁵ 28477/95.

⁶ [2003] 1 WLR 2868.

⁷ [2006] UKHL 27.

⁸ [2002] 1 WLR 1662.

There is no long-stop provision for personal injury actions except those brought alleging a breach of the Consumer Protection Act 1987 which prohibits any claim brought after the expiry of 10 years (s 11A).

8

In tort, a cause of action accrues when damage which is more than minimal occurs (see *Cartledge v Jopling*;⁹ *Hopkins v MacKenzie*¹⁰ *Johnson v NEI International Combustion Ltd*¹¹). Time stops running when proceedings are issued and not from when they are served. In calculating the period of limitation, the day upon which the cause of action arose is excluded (see *Marren v Dawson Bentley & Co*¹²). Similarly, pursuant to Civil Procedure Rules 1998 (CPR), r 7.4(2) a claim form must be served within four months *after* the date of issue, which effectively ignores the day of issue in calculating the 4-month period. Conversely, the Particulars of Claim, if not served with the Claim Form, must be served within 14 days. If process cannot be issued because the court office is closed, as on a weekend or on a public holiday, the limitation period is effectively extended until the next date upon which the court is open for business (see CPR, r 2.8(5) and *Pritam Kaur v S. Russell & sons Limited*¹³). The relevant date for the issuing of proceedings is the date entered on the form by the court pursuant to CPR, r 7.2(2). If, however, a claim form is sent by post to the County Court office and it is received before the date of issue the proceedings will be deemed to have been brought on the date of receipt, not the date of issue. CPR 5PD5.1 requires that particulars of the date of delivery of any document delivered at court for filing must be entered on the court record. If a defendant learns that a Claim Form has been issued against him he can serve a notice on the claimant requiring him either to serve the form or to discontinue. If after 14 days from that notice the claimant has not complied the defendant may issue an application to the court, which may dismiss the claim or make any order it thinks fit.

In *St Helens MBC v Barnes* [2006]¹⁴ the Court of Appeal confirmed the date that proceedings are brought is when they are delivered to the court during open hours. The Claimant delivered a claim form for damages for a failure to treat dyslexia to the county court on the day prior to the expiry of limitation with a request that the claim be issued. However, the claim form was not issued until 4 days later due to industrial action. The Defendant sought to rely upon a limitation defence, arguing that under CPR 7.2 proceedings were not started until the claim form was issued. The judge, with reference to CPR 7 PD 5, held that proceedings were “brought” pursuant to the Limitation Act 1980 and “started” pursuant to the CPR simultaneously when C delivered the claim form to the court. D appealed. The Court of Appeal agreed holding that provided a claimant took any necessary step to enable proceedings to be started, he did not take the risk that the court might be closed or would not process the claim properly. The court staff who received it were not performing a judicial function and had no power to reject it. The date

⁹ [1963] AC 758.

¹⁰ [1995] 6 Med LR 26.

¹¹ [2007] UKHL 39

¹² [1961] 2 QB 135.

¹³ [1973] QB 336.

¹⁴ EWCA Civ 1372

stamp of receipt on the claim form will indicate when the proceedings were brought. The proper construction was that proceedings were “brought” when C’s request was for the issue of the claim form was delivered to the court during its opening hours. Different considerations might apply if delivery of the claim form was made to the wrong place or outside office hours.

9

Time does not run for a minor until the age of 18 is reached, and accordingly a minor has 3 years from the age of 18 to bring an action for personal injury (s 28(6)). Similarly a person suffering from a mental disability within the meaning of the Mental Health Act 1983, and who is thereby incapable of managing and administering his property and affairs, has 3 years to bring a claim after the cessation of the disability (ss 28 and 38(4)). There is therefore no limitation period in respect of a permanently brain-damaged claimant minor or adult who sues in respect of the incident which caused the brain damage, if he is a patient or likely to be one when his minority ends. Such a person may have a claim brought in his name at any time including up to 3 years after his death. (See *Bull v Devon Health Authority*,¹⁵ *Headford v Bristol and District Health Authority*.¹⁶)

Negligence, nuisance and breach of statutory duty

10

Section 11 of the Limitation Act 1980 provides:

‘11(1) 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 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 the Plaintiff or any other person’.

11

Probably all personal injury claims now fall within the scope of this section as having been caused by negligence, nuisance or breach of duty. The major exception prior to the decision by the House of Lords in *Av Hoare*¹⁷ had been those personal injuries resulting from deliberate assaults including sexual assault and rape following the ruling in *Stubbings v Webb*¹⁸. The primary limitation period for such causes of action was held in *Stubbings* to be 6 years under s 2 of the Limitation Act 1980. This 6-year period was not subject to a claimant’s date of knowledge nor was the court invested with any discretion to disapply the period. The European Court of Human Rights held in *Stubbings and others v UK*¹⁹ that the House of Lords decision did not amount to a breach of Arts 6, 8 or 14 of the Convention. This decision raised a significant issue as to what was the appropriate

¹⁵ [1993] 4 Med LR 117.

¹⁶ [1995] 6 Med LR 61.

¹⁷ [2008] UKHL6

¹⁸ [1993] AC 498.

¹⁹ [1997] 1FLR 105.

limitation period in that class of action brought against medical practitioners based upon an allegation of failing to obtain consent for treatment. In *Dobbie v Medway Health Authority*²⁰ the then Master of the Rolls indicated that s 11 of the Limitation Act 1980 did not apply to actions in trespass for which no extension of time in law was permissible. It was therefore possible to have a claim with two causes of action, one alleging no consent for medical treatment based on trespass, which would have a limitation period of 6 years, and another based upon negligent treatment, which would have a 3-year period but subject to a date of knowledge provision and a possible extension under s 33 of the Limitation Act 1980. It might have been thought that in cases of so-called unintentional trespass the court would have construed the cause of action as essentially being based in negligence and apply the provisions of s 11 (see *Letang v Cooper*²¹); however the scope for doing so was limited by the court's decision in *Dobbie*.

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Claimants in sexual abuse cases sought to avoid the effects of *Stubbings* if they had a collateral claim based upon negligence. In *Seymour v Williams*²² a child's claim against an abusive father was held statute barred under s 2 but the common law claim against the mother for failing to protect her child was held to be governed by s 11 and therefore sections 14 and 33 were applicable. Similarly in *KR v Bryn Alyn Community (Holdings) Limited*²³ the court held that most of the sexual and physical assaults on the inmates of the Defendants children's homes fell within the principles of vicarious liability as set out in *Lister v Hesley Hall Limited*²⁴ and as such the claims against the employers were governed by s 11 even though the claims against the individual perpetrators were governed by s 2. In *Bryn Alyn* the Court of Appeal endorsed the Law Commission's recommendation that claims for personal injury arising from trespass to the person should be included in the core regime governing personal injury within s 11 (see para 100 per Lord Justice Auld and Law Com 151.) A number of cases applying the reasoning in *Bryn Alyn* such as *C v D*,²⁵ *H v N* and *T*²⁶ and *C v Middlesborough Council*.²⁷ demonstrated the highly artificial state the law had taken in this area of limitation.

In *A v Iorworth Hoare, H & Y v Various Defendants*²⁸ the Court of Appeal again called for *Stubbings* to be revisited by the House of Lords as it produced deficiency and incoherence. The Claimant A was sexually assaulted by Hoare in 1988. He was convicted and imprisoned in 1989. In 2004 he won £7 million on the national lottery and was released from prison on licence. The Claimant then commenced proceedings as Hoare was now able to satisfy a judgment. The master struck the claim out on the basis that, as a claim for assault it was subject to a strict 6 year time limit under s.2 of the 1980 Act, which had passed by some 10 years. The Claimant appealed unsuccessfully to the High Court and then renewed

²⁰ [1994] 4 All ER 450.

²¹ [1965] 1 QN 232.

²² [1995] 1FLR 862.

²³ [2003] 3 WLR 107.

²⁴ [2001] 1AC 215.

²⁵ [2004] All ER(D) 92.

²⁶ LTL 29 April 2004.

²⁷ [2004] EWCA Civ 1746.

²⁸ [2006] EWCA Civ 395.

her appeal to the Court of Appeal. H, X and Y appealed against orders striking out as statute barred their claims for psychiatric harm suffered as a result of sexual abuse suffered in their schooldays whilst in the care of the Defendants. The Court of Appeal with overt reluctance held that the acts complained of were caught by s.2 and *Stubbings v Webb* was binding on that point. Only the House of Lords could depart from it. It was not distinguishable on the basis that the Defendant was a public body rather than an individual. Further because in the instant cases the accrued right to plead limitation arose before the Human Rights Act 1998 came into force the Claimants could not rely upon the Act to enable departure from the House of Lords' reasoning (*Yew Bon Tew alias Yong Boon Tiew v Kenderaan Bas Maria*²⁹ and *Rowe v Kingston upon Hull CC* [2003]³⁰ applied). There was no logical basis for direct abuse by a teacher falling under s.2 but failures on behalf of the employer for such abuse falling under s.11. This distinction provided a more relaxed limitation regime from the less serious breaches of duty and a more serious regime for the less serious breach of duty. Unconstrained by authority, the Court would have held that s.11 applied to cases where there was both intentional and unintentional harm. However, *KR v Bryn Alyn and C v Middlesbrough Council*³¹ required that this concurrent duty approach be rejected. The claims were therefore statute-barred. Given the deficiencies and incoherence in the current state of the law, it would be appropriate for the House of Lords to revisit these issues.

The House of Lords acceded to the torrent of adverse judicial and academic criticism of *Stubbings* and invoked its Practice Statement on judicial precedent and concluded *Stubbings* was wrongly decided and should be reversed. Personal injuries caused by intentional assaults now have the benefit of the regime set out in s.11-14 and s. 33.

Pleural Plaques

In *Grieves and 9 others v F T Everard & Sons and British Uralite plc*,³² the court at first instance confirmed that pleural plaques constituted an injury and time would accordingly run from the date of knowledge when a claimant knew that he had the pleural plaques and would not be postponed until he developed a more serious asbestos induced injury such as asbestosis or mesothelioma. However, in the same test cases in *Rothwell v Chemical Insulating Company Ltd*³³ the Court of Appeal and the House of Lords *Johnson v NEI International Combustion Ltd*³⁴ have held that pleural plaques were not an actionable injury and time will not therefore run in asbestos induced disease cases until an actionable injury occurs. There is currently doubt over whether this includes symptomless pleural thickening and symptomless asbestosis cf *Owen Esso Exploration and Production UK Ltd and Haymills Holdings/Hopol Ltd*, HHJ Stewart QC, Liverpool County Court, 16 November 2006). However, with proper medical evidence a court would be most likely to conclude that more than minimal damage has occurred to a Claimant with symptomless pleural thickening or asbestosis and they would be "worse off" in the terms indicated by Lord Hoffman in *Johnston supra*.

²⁹ [1983] 1 AC 553

³⁰ EWCA Civ 1281

³¹ [2004] EWCA Civ 1746

³² [2005] EWHC 88.

³³ [2006] All ER (D) 187.

³⁴ [2007] UKHL 39

There are potential limitation issues with the House of Lords *obiter* suggestion in *Johnston* that there could be a valid claim for pleural plaques under breach of contract. This would turn on whether plaques are a personal injury within the meaning of S.11, even if they were not an actionable injury in tort, or whether alternatively they fall to be considered under simple contract s.5 with a straight 6 year period and no date of knowledge or s.33 provision. If the latter then all pleural plaque actions based on breach of contract would be statute barred because their latency period means they never present within 6 years from exposure that is from the breach of contract to provide a safe place and system of work. Additionally s.14A Limitation Act which provides for a date of knowledge provision in non-personal injury negligence actions would be of no relevance as it does not apply to contractual claims. The court may well take the position that a contractual cause of action for pleural plaque is one in “**respect** of a personal injuries” not least because damages would be sought for the risk of future malignant and non-malignant asbestos induced diseases. (See Walkin and the cases involving dyslexia in paras 15 -16 below)

‘Consists of or includes damages in respect of personal injuries to the plaintiff or any other person’

13

Section 38 of the 1980 Act defines personal injuries to include:

‘Any disease and any impairment of a person’s physical or mental condition and “injury” and cognate expressions shall be construed accordingly’.

This definition will **not** include professional negligence actions against solicitors who fail to launch personal injury actions in time or who fail to prevent a claim being struck out for want of prosecution (see Nicholls LJ in *Howe v David Brown Tractors (Retail) Limited*;³⁵ *Ackbar v Green*;³⁶ and *McGahie v Union of Shop Distributive and Allied Workers*.³⁷ However, if such a professional negligence action includes a claim for personal injury in the form of an anxiety and stress condition caused by the solicitors’ failure to handle a claim properly then the professional negligence action will be a personal injury claim and will be subject to the provisions of s 11 of the Limitation Act 1980. A claimant may not be allowed merely to jettison the personal injury claim in an attempt to obtain a longer period of limitation under s 2 or s 5 of the 1980 Act as in *Bennett v Greenland Houchen & Company*³⁸ and *Oates v Harte Reade*.³⁹ However, in *Shade v Compton Partnership*⁴⁰ the Court of Appeal said it found the reasoning in *Oates* as ‘less than fully satisfactory’ and took a more pragmatic view towards severing off a time barred personal injury claim, which was not very substantial, to permit a very substantial economic loss claim based on professional negligence to continue.

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³⁵ [1991] 4 All ER 30.

³⁶ [1975] QB 582.

³⁷ [1966] SLT 74.

³⁸ [1999] PIQR P120.

³⁹ [1998] PNLR 458.

⁴⁰ [2000] Lloyd’s Rep PN 81.

A claimant cannot avoid the provisions of s 11 of the 1980 Act by putting forward a claim as an economic loss of a partnership, firm or company if in fact the true nature of the loss is a loss of income or profit arising out of a personal injury occasioned to a partner or director. In *Howe* (above) the Court of Appeal held that an attempt by the claimant to add his father and his firm to an action so as to claim for the whole of the firm's loss of profit arising from the claimant's inability to work due to a personal injury, if such a claim existed as a matter of law at all, did not avoid the provisions of s 11 because the claim was for damages in respect of personal injuries to the claimant or to *any other person*.

15

A similar approach was taken by the Court of Appeal in *Walkin v South Manchester Health Authority*⁴¹ where it was held that a failed sterilisation resulting in an unplanned pregnancy was a claim based on personal injury even if the mother did not bring a claim for the impairment to her health which the pregnancy created or for the pain and suffering of the birth. In *Walkin* the mother's claim was for the economic loss resulting from bringing up the unplanned child. The court held that the unwanted pregnancy was an impairment of the mother's physical condition within the definition of s 38 of the 1980 Limitation Act and damage was said to have occurred at the moment of conception. The court therefore would not allow the claimant to obtain the benefit of a 6-year limitation period by simply jettisoning her own personal claim for personal injury. Different considerations might, however, apply to a failed vasectomy (see *Pattison v Hobbs*;⁴² *Naylor v Preston Area Health Authority*;⁴³ and *Allen v Bloomsbury Health Authority*⁴⁴). In such cases, there obviously is no physical injury to the father when a claim is based upon the economic loss of bringing up a child as a result of a failed vasectomy. However, Auld LJ doubted this proposition and expressed a view that he could see no reason why a failed vasectomy was not a personal injury because it related to damages in respect of injury not to the claimant but to '*any other person*', namely the 'injury' to the mother. A failure to ascertain whether an unborn child had rubella and which thereby resulted in the birth of a disabled child may give rise to a personal injury cause of action on behalf of a mother on the basis that her continued pregnancy was a personal injury (*Das v Ganju*⁴⁵). *Walkin* was followed in *Godfrey v Gloucester Royal Infirmary*,⁴⁶ a case where a mother sued in respect of the death of her daughter due to brain damage which was apparent from birth. The claimant alleged that a pre-natal ultrasound showed abnormalities and she was not properly advised of their significance and therefore elected to continue the pregnancy rather than undergo an abortion. *Walkin* was found to have survived both the House of Lord's decision in *McFarlane v Tayside Health Board*,⁴⁷ which held that a claim for the upkeep of a *healthy* child born as a result of a failed vasectomy was invalid, and remarks made upon it in the Court of Appeal in *Greenfield v Flather*.⁴⁸ Leveson

⁴¹ [1995] 4 All ER 132.

⁴² (1985) *The Times*, November 11.

⁴³ [1987] 2 All ER 353.

⁴⁴ [1993] 1 All ER 651.

⁴⁵ [1999] Lloyd's Rep Med 198.

⁴⁶ [2003] Lloyd's Rep Med 398.

⁴⁷ [2002] 2 AC 59.

⁴⁸ [2001] Lloyd's Rep Med 143.

J held that Mrs Godfrey's claim was in respect of a personal injury and that he was bound by *Walkin*. (See also *Farraj and Farraj v Kings Healthcare NHS Trust*.⁴⁹)

16

In *Anderton v Clywyd and Phelps v Hillingdon London Borough Council*⁵⁰ the House of Lords has held that a failure to mitigate or reduce the constitutional effects of dyslexia amounted to a personal injury. A claimant suffering from dyslexia which is not recognised and dealt with by an educational authority and who subsequently failed to achieve his full potential would have a potential claim 'in respect of personal injuries'. Of particular interest in this respect is that the courts have further held that the injury does not have to amount to a psychiatric condition. A negligent failure to improve the consequences of dyslexia by appropriate treatment causes the continuation of the injury and is analogous to a failure to treat a physical injury (per Lord Hoffman in *Adams v Bracknell Forest Borough Council*⁵¹). In *Robinson v St Helens Metropolitan Borough Council*⁵² the Court of Appeal confirmed that emotional and psychological upset resulting from a failure to deal with dyslexia was a personal injury even though it fell short of psychiatric injury. Such claims, however, are still frequently held to be statute barred and may often face difficulty in obtaining a s 33 dispensation (see, for example, *Rowe v Kingston Upon Hull City Council*,⁵³ *Smith v Liverpool CC*⁵⁴).

Date of knowledge: Limitation Act 1980, s 11(4), s 14

17

Section 14(1) provides:

'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; and
- (b) that the injury was attributable in whole or in part to the act of omission which is alleged to constitute negligence, nuisance or breach of duty; and
- (c) the identity of the defendant; and
- (d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant'.

⁴⁹ [2006] EWHC 1228.

⁵⁰ [2001] AC 619.

⁵¹ [2004] UKHL 29.

⁵² [2002] EWCA Civ 1099.

⁵³ [2003] ELR 771.

⁵⁴ [2006] EWHC 743.

'The date on which he first had *knowledge* of the following facts ...' (s 14(1))

18

The limitation period does not begin to run against a claimant until he has knowledge (i) that his injury was significant, (ii) that it was attributable to an act or omission either on the part of the defendant, or some other person for whom the defendant is liable, (iii) of who the identity of the defendant is, and (iv) where the act or omission is of someone other than the defendant, the identity of that person and the factual basis upon which the defendant is vicariously liable.

What constitutes **knowledge** was extensively discussed in the product liability case of *Nash v Eli Lilly & Co and others*.⁵⁵ This action concerned preliminary trials on limitation arising from reactions to the drug Oprelvekin such as skin sensitivity, abnormal hair growth and liver and kidney failure. Knowledge for the purposes of the section is now defined by the court as a condition of mind which imports a degree of certainty which might reasonably be regarded as sufficient to justify the claimant embarking upon the preliminaries to the making of a claim such as taking legal or other advice. Knowledge does not therefore mean knowing for certain and may amount to no more than a reasonably firmly held belief which would warrant a claimant taking steps to investigate the claim. Investigating whether the claimant had such a degree of certainty would involve the court looking at not only the intellectual capacity of the claimant to understand information but also considering, as a matter of fact, whether the claimant did comprehend the information obtained. The Court of Appeal in *Nash* also stipulated that time was not suspended or interrupted because an expert opinion contradicted the claimant's firmly held belief that the injury sustained was due to the defendant's act or omission. Providing that a claimant has a firm enough belief that the defendant's act or omission did in fact cause his injury then time runs irrespective of what an expert says. Alternatively, if a claimant has a suspended belief but feels the need for confirmation of that belief by an expert then time would not run until the expert's positive opinion was obtained. The Court of Appeal has subsequently reaffirmed the approach in *Nash* by emphasising that all a claimant had to know was the essence of the complaint, not the full details required to plead a case, and that all the court had to inquire into was how far the claimant had knowledge in broad terms of the facts upon which the complaint was based (see also *Whitfield v North Durham Health Authority*,⁵⁶ *Gregory v Ferro (GB) Limited*,⁵⁷ *Spargo v North Essex District Health Authority*,⁵⁸ *O'Driscoll v Dudley Health Authority*,⁵⁹ *Roberts v Winbow*,⁶⁰ *Irshad Ali v Courtaulds Textiles Limited*,⁶¹ and *Snizek v Bundy(Letchworth)*⁶²).

19

Spargo v North Essex District Health Authority (above) concerned knowledge of attribution within the meaning of s 14(1)(b). The court sought to distil some of the

⁵⁵ [1993] 1 WLR 782.

⁵⁶ [1995] 6 Med LR 32.

⁵⁷ [1995] 6 Med LR 321.

⁵⁸ [1997] PIQR P235.

⁵⁹ [1998] Lloyd's Rep Med 210.

⁶⁰ [1999] PIQR P77.

⁶¹ [1999] 8 Lloyd's Rep Med 301.

⁶² [2000] PIQR P13.

principles to be found in *Nash* and subsequent cases. Lord Justice Brooke said this:

‘What, then, does the law require in order that actual knowledge is established?’

This branch of the law is already so grossly over-loaded with reported cases, a great many of which have been shown to us or cited by Counsel, that I see no reason to add to the overload by citation from early decisions. I have considered the judgments of this Court in *Halford v Brookes* [1991] 1WLR 443; *Nash v Eli Lilly & Co* [1993] 1WLR 782; *Broadley v Guy Clapham* [1993] 4All ER 439; *Dobbie v Medway Health Authority* [1994] 1WLR 1234; *Smith v Lancashire Health Authority* [1995] PIQR 514; and *Forbes v Wandsworth Health Authority* [1996] 7MED LR175. From these decisions I draw the following principles:

- (i) The knowledge required to satisfy s14(1)(b) is a broad knowledge of the essence of the causally relevant act or omission to which the injury is attributable;
- (ii) "Attributable" in this context means "capable of being attributed to", in the sense of being a real possibility;
- (iii) A plaintiff has the requisite knowledge when she knows enough to make it reasonable for her to begin to investigate whether or not she has a case against the defendant. Another way of putting this is to say that she will have such knowledge if she so firmly believes that her condition is capable of being attributed to an act or omission which she can identify (in broad terms) that she goes to a solicitor to seek advice about making a claim for compensation;
- (iv) On the other hand, she will not have the requisite knowledge if she thinks she knows the act or omission she should investigate but in fact is barking up the wrong tree: or if her knowledge of what the defendant did or did not do is so vague or general that she cannot fairly be expected to know what she should investigate; or if her state of mind is such that she thinks her condition is capable of being attributed to the act or omission alleged to constitute negligence, but she is not sure about this, and would need to check with an expert before she could be properly said to know that it was’.

20

Ali v Courtaulds Textiles (above) illustrates a case where a two-judge Court of Appeal determined that time did not run against a claimant in a deafness case until he received an expert opinion that his deafness was noise induced rather than constitutional and due to the ageing process. This was so even though the claimant had been told by a community worker to consult a solicitor, which he did, as he might have a claim against his employers. The Court of Appeal thought that the case fell within category (iv) of the *Spargo* exception.

21

However, in *Sniezek v Bundy (Letchworth) Limited* (above) a differently constituted three-judge court doubted *Ali* and reaffirmed that firm belief in attribution which

takes a claimant to a solicitor for advice is likely to be regarded as actual knowledge (*O'Driscoll v Dudley Health Authority* affirmed; see Simon Brown LJ, para 10 of his judgment, p 23). Whether a case falls within category (iii) or category (iv) of *Spargo* will require a close factual analysis. Simon Brown LJ said this in *Snizek*:

- '6. Now it seems to me one thing to say that a mere believer in attribution who "realises that his belief requires expert confirmation" does not have knowledge of that attribution; arguably another to say that a firm believer who, for example, nevertheless wants legal advice (say to reassure him that he has reasonable prospects of success) is not to be regarded as having the requisite knowledge. Why should not time have started running in the case of the latter? Why should he be entitled to his solicitor's reassurance before the three year limitation period ever begins? I do not think that he is and nor do I think that the Court in *Nash v Eli Lilly* were intending to suggest otherwise: and that surely is evidenced from the final sentence in paragraph 5.
7. In short, it seems to me that the real contrast being struck in *Nash v Eli Lilly* is between on the one hand the mere believer whose situation is described in the first passage in the judgment, and on the other hand the firm believer sufficiently certain of his case to have clearly in mind (although always, of course, subject to the taking of appropriate advice and the preparation of evidence) the making of a compensation claim ...
8. Having regard to these considerations and having regard to the underlying purpose of this legislation – to postpone the three year period allowing for the investigation and institution of a specified claim until the claimant knows enough to make it reasonable to set time running – I find it difficult indeed to imagine a case where, having consulted a solicitor with a view to making a claim for compensation, a claimant could still then be held lacking in the requisite knowledge.
9. In short, I adhere to what I said in *O'Driscoll* and in the result confess to some difficulty both with the reasoning and, I have to say, with the result in the subsequent case of *Ali*. True it is that when Mr *Ali* went to his solicitor he knew only that his deafness might have been caused by his conditions of work in a cotton mill rather than (as he had earlier assumed) by a natural aging process. That seemed to me sufficient knowledge of attribution given, as stated in the second of the *Spargo* principles, that in this context a real possibility of establishing causation constitutes attribution. ... Mr *Ali*, therefore, seems to me to have come strictly within the second category outlined in *Nash v Eli Lilly*; he was someone "obtaining advice about making a claim for compensation"; he had, indeed, already obtained a legal aid certificate for the purpose, albeit one initially limited to obtaining the necessary ENT report'.

In summary, time will run against a claimant if he has a firm enough belief to warrant the taking of preliminary steps for the institution of proceedings. If those steps fail at first to confirm his belief but subsequently his belief is confirmed, time will have run from the first date at which he had belief irrespective of the initial non-confirmation. If, however, a claimant has a suspicion or a relatively uncertain belief which requires expert or other opinion to establish whether he has suffered any injury and if so whether it was due to any act or omission of a possible defendant time may not run until that belief is confirmed. In cases concerning injury to the claimant during birth, the court has emphasised that the knowledge in question is the knowledge of the claimant himself and not the knowledge, actual or constructive of his parents (see *Appleby v Walsall Health Authority*,⁶³ *Parry v Clwyd Health Authority*,⁶⁴ *Bates v Leicester Health Authority*,⁶⁵ *Mirza v Birmingham Health Authority*⁶⁶). Obviously, however, if the parents discuss the birth with the claimant the claimant may have actual knowledge or the court may impose constructive knowledge (see *O'Driscoll v Dudley Health Authority* above).

23

The court, having refused to define “knowledge”, has created a pragmatic theory of knowledge based upon a condition of mind which would warrant the initiation of preliminaries to making a claim. The practical effect of this approach is to require a detailed examination of the claimant's state of mind in the light of the information he has available to him and his intellectual capacity to comprehend it. For actual knowledge, as opposed to constructive knowledge, the test is subjective. The personal characteristics of the claimant, the effects, if any, of the injury upon him, will be relevant in considering what facts were observable and ascertainable by him given his intellect and other characteristics. (see also para 51 below and the House of Lords decision in *Haward v Fawcetts*⁶⁷)

Significance: s 14(1)(a) s14(2)

24

‘Significant’ is defined by s 14(2) in the following terms:

‘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’.

25

This test makes even relatively trivial matters significant because it might well be worth suing over minor injuries if a defendant is able to pay damages and does not

⁶³ [1999] Lloyd’s Rep Med 154.

⁶⁴ [1997] PIQR P1.

⁶⁵ [1998] Lloyd’s Rep Med 93.

⁶⁶ 31 July 2001, unreported, 1998 A No 04592.

⁶⁷ [2006] UKHL 9.

put liability in issue. The courts have emphasised that significance is to be determined by looking at the first injury and its manifestations not by looking at a subsequent deterioration (see *Bristow v Grout*⁶⁸). The court had taken a similar position under the 1963 Act, see *Goodchild v Greatness Timber Company Limited*,⁶⁹ *Miller v London Electrical Manufacturing Company Limited*⁷⁰. In *Miller*, the claimant developed dermatitis in 1967 and needed some time off work but by 1971 the condition had deteriorated to eczema all over his body. The court held that his significant injury ran from the development of the dermatitis and not from the deterioration. Similarly, in *Brooks v J & P Coates*⁷¹ a claimant who had left his place of work at a cotton mill in 1965 because of wheezing, coughing and shortness of breath was fixed with a significant injury at that date and not when a later diagnosis of byssinosis was made in 1979.

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26

The test of reasonableness was said in *McCafferty v Metropolitan Police Receiver*⁷² to be both subjective and objective. The court was permitted to examine whether the particular claimant in question subjectively considered the injury sufficiently serious but must also look objectively as to whether he was acting reasonably if he did not regard it as sufficiently serious (see *Stephen v Riverside Area Health Authority*⁷³). However, in *Dobbie v Medway Health Authority*⁷⁴ the Master of the Rolls indicated that the question of significance was to be directed solely to the quantum of the injury namely whether he would reasonably have accepted it as a fact of life or not worth bothering about. Sir Thomas Bingham stated in *Dobbie*:

‘The requirement that the injury of which a Plaintiff has knowledge should be “significant” is, in my view, directed solely to the quantum of the injury and not the Plaintiff’s evaluation of its cause, nature or usualness. Time does not run against the Plaintiff, even if he is aware of the injury, if he would reasonably have accepted, as a fact of life, [?] were not worth bothering about. It is otherwise if the injury is reasonably to be considered to be sufficiently serious in the statutory definition: Time then runs (subject to the requirement of attribution) even if the Plaintiff believes the injury to be normal or properly caused’.

27

⁶⁸ (1987) *The Times*, November 9.

⁶⁹ [1968] 2 All ER 255.

⁷⁰ [1976] 2 Lloyd's Rep 284.

⁷¹ [1994] ICR 158.

⁷² [1977] 1 WLR 1073.

⁷³ [1990] 1 Med LR 261.

⁷⁴ [1994] 4 All ER 450.

In *Briggs v Pitt-Payne and Lias*⁷⁵ the Court of Appeal emphasised that the assessment as to whether an injury caused by a drug regime was significant did not require a fine analysis of whether the side effects outweighed the beneficial effects of the drug. In *Roberts v Winbow*⁷⁶ the court found that time ran against the claimant when he knew that a lesser part of his injuries from a drug regime, namely a Stevens Johnson Syndrome, was caused by the drugs he had been given although he did not know that a more significant injury, namely a oesophageal stricture, was also the result of the medication. Hale LJ noted that the court's approach in emphasising the low threshold of significance was in accord with the Law Commission Report No 151, Consultation Paper on Limitation of Accidents 1998 (see para 3.38-43, 12-39-41). There are cases where the court has been willing to postpone the running of time where a claimant has adopted a wait-and-see attitude, particularly in back cases where it might be reasonable to wait a little while to see if the back complaint was merely a strain or an ache and might soon settle (see *Devonport v A v Wright (Builders) Limited*⁷⁷ and *Pacheco v Brent and Harrow Area Health Authority*⁷⁸).

28

Conversely the 'wait and see' approach did not avail the claimant in *Collins v Tesco*.⁷⁹ The claimant hurt her shoulder using a metal cage to move stock in 1996. In January 1998, physiotherapist told her that her injury was caused by heavy lifting and proceedings issued in 2001. At trial the court found that the injury was not significant until the meeting with the physiotherapist and the wait and see attitude as to whether the pain would settle was reasonable. The Court of Appeal disagreed and found the injury was significant before that meeting and the claim was statute-barred:

'13. The test is not an easy one to apply. It is set out in section 14 (2) of the Act ... That definition must be read, in my judgment, and the context of the purpose of the statute. The limitation period for an action such as this is normally one of 3 years. The Act provides relaxations with one of which the Court is concerned. It allows a claimant with a lack of knowledge to bring a claim beyond the 3 year period from when the cause of action arose. At the same time it must be borne in mind that the defendant is entitled to the protection of the limitation defence which the statute provides and that Section must, in my judgment, be read as striking a balance between fairness to a claimant who may lack knowledge and fairness to a defendant who, because of the statute and in the public interest, is entitled to be free of claims unless they are brought within an appropriate time

14. In my judgment, an over elaborate approach to the question is inappropriate. A possible elaboration is introduced with the "no risk" litigation contemplated in the section. That does not introduce into the test the consideration of readiness with which particular injured person may resort to litigation. Such elaboration is, in my judgment, inimical to

⁷⁵ [1999] Lloyd's Law Rep 1.

⁷⁶ [1999] PIQR P77.

⁷⁷ Lexis, 23 April 1985.

⁷⁸ Lexis, 17 April 1984.

⁷⁹ [2003] EWCA Civ 1308, LTL 24/7/2003.

the intention of the statute in this respect. The word “significant” has to be approached in a common sense way, and a common sense way based upon the evidence in a particular case. While in some circumstances the effect on a particular Plaintiff may be a factor, the test appears to me to be an objective test as, in my judgment, Lord Justice Geoffrey Lane in effect recognised. If, by introducing the concept of wait and see, the Judge was suggesting that a relevant consideration when considering the significance of the injury is the degree of robustness or stoicism which a claimant has, in my judgment, it is an elaboration which is not appropriate to the test and I would respectfully disagree with this approach. However sympathetic one would wish to be to a claimant who may be slow to resort to the courts and who is prepared to adopt the wait and see attitude as to whether an injury is significant, those factors cannot be crucial to whether an injury is significant, although in some circumstances, they may throw light on whether or not it is’. (Per Lord Justice Pill.)

29

The reference to Lane LJ in *Collins* refers to the test that was espoused by him in *McCafferty v Metropolitan Police Receiver* (above):

‘... it is clear that the test is partly a subjective test, namely: Would this Plaintiff have considered the injuries sufficiently serious? And partly an objective test namely: Would he have been reasonable if he did not regard it sufficiently serious? It seems to me that “the” subsection ... is directed at the nature of the injuries known to the Plaintiff at the 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’.

30

The Court of Appeal in *Nash v Eli Lilly*, above, confirmed the *McCafferty* test and made a distinction between the normal or expected side effects of a drug and the unacceptable consequences which may not have been immediately apparent in any particular plaintiff. The limit of that approach for drug induced injuries was further explained and clarified in *Briggs v Pitt Payne*, above. That the test for significance has a degree of subjectivity within it was confirmed by the Court of Appeal again in *K R V Bryn Alyn*.⁸⁰

31.

The move towards objectivity

However a significant retreat from *McCafferty* was given impetus by the House of Lords decision in *Adams v Bracknell Forest Borough Council*⁸¹ judgment concerning the test for constructive knowledge under S.14(3) as being objective.

Following *Adams* the *McCafferty* test was doubted by the Court of Appeal in *Catholic Care (Diocese of Leeds) and another v Young*⁸².

⁸⁰ [2003] 3 WLR 107.

⁸¹ [2005] 1 AC 76 [2004] UKHL 29,

⁸² [2006] EWCA Civ 1534 [2007] QB 932

The Claimant alleged that as a teenager whilst under Defendants' care he had been subject to physical and sexual abuse by staff. During the first 3 years after leaving care in 1977 the Claimant suffered post-traumatic stress disorder but did not seek help and was able to suppress his memories. Thereafter from 1980-1996 he led a successful life until he unexpectedly came across one of the alleged abusers in January 1996 which triggered a recurrence and aggravation of his psychiatric problems. In December 2000 the police contacted him for assistance with criminal investigations of his alleged abusers, some of whom were subsequently convicted. Proceedings were issued on 11 April 2003 following a letter of claim on 6 March 2003. Limitation was heard as a preliminary issue. The judge found that Claimant, as was often the case with child sexual abuse victims, was understandably reluctant to turn his mind to litigation and that his curiosity had not been stimulated until the police investigation. Therefore, applying *Byrn Alyn*, the Claimant had not had knowledge of a significant injury under s.14(2) until less than 3 years before the issue of proceedings. The judge indicated that, if he had to consider s.33, he would not have exercised his discretion in the Claimant's favour.

On appeal the court held that the test for reasonableness under s.14(3) was objective. As the concept of reasonableness was common to both s.14(3) and s.14(2), an objective test applied equally to the latter (*Adams v Bracknell Forest BC supra* applied, *Byrn Alyn* not followed in part).

In view of the wide discretionary power conferred by s.33 there was no need to construe s.14 narrowly in favour of Claimants. If a person who suffered a particular type of injury would reasonably be inhibited by the injury itself from instituting proceedings, this was a factor to be taken into account. The standard to be applied was that of the reasonable behaviour of a victim of child abuse who had suffered the degree of injury suffered by the Claimant in question and of which he had knowledge. This was a question of fact in each case as whether, having regard to (a) the Claimant's knowledge of the seriousness of the injury and (b) the inhibiting or other consequences of the injury for the Claimant, he would reasonably have considered the injury sufficiently serious to justify instituting proceedings. Quantum was important but not necessarily determinative. The more serious the Claimant knew the injury to be, the less likely it would be that the Court would regard inhibiting and other factors as justifying not instituting proceedings. The evidence in the instant case demonstrated that C had been aware from 1977-1980 that he was suffering a serious injury as a result of the abuse.

However, the judge was entitled to hold that as a result of suppressing his memories the Claimant did not know that the injury was significant within the meaning of s.14(2) (Buxton LJ doubting that *Byrn Alyn* was correctly decided on this point but holding himself bound by it). The judge had wrongly applied the test of "reasonable curiosity" in *Adams*, which related solely to s.14(3) and not s.14(2). It related to curiosity about the origins of the injury, which Claimant already knew. Once such knowledge was satisfied, curiosity was irrelevant. The judge also erred by allowing the issue of the inhibiting effect of the injury to be determinative on s.14(2). Mr Young was aware that he was suffering a significant psychiatric injury as a result of the abuse within a short time of the chance encounter with the alleged abuser. The judge should have considered whether a reasonable person in his position would have turned his mind to litigation. Applying an objective test the Claimant had the requisite knowledge more than 3 years before the issue of

proceedings. However, there was no basis for impugning the judge's decision on s.33. His case was and therefore remained statute barred.

This objective approach was also used by the Court of Appeal in *McCoubrey v MOD*⁸³. The Defendant appealed against a decision that the Claimant soldier had brought his personal injury claim in time. The Claimant had suffered an impairment to his hearing in 1993, when he was on a training exercise and a thunderflash exploded near him. He noticed immediate ringing in his ears and within a day or two the hearing in his left ear deteriorated. A consultant who saw C in early 1994 noted that he had marked sensorineural hearing loss. Audiograms over the years showed that the damage to his hearing remained consistent. But did not affect his career until 2001, when he was temporarily downgraded. In 2003 he was told by his colonel that he was likely to be permanently excluded from active service.

In 2004 proceedings were started and the Claimant sought to rely on both s.11(4)(b) and s.33. The judge held that, in evaluating the seriousness of the injury, the court must look not only at the severity of the injury itself but also at the effect of the injury on the claimant's quality of life and ability to participate in his chosen career. On this basis that the effect of the injury did not have a significant impact on him until his downgrading in 2001. The case was brought in time and there was no need to invoke s.33.

The issue for determination on appeal was the proper approach to the meaning of when an injury was "significant". The Court of Appeal held that the law as it had previously been understood and applied had changed. The test under s.14(2) was substantially objective, and not the mixture of subjective and objective in the way in which interpreted by Geoffrey Lane LJ in *McCafferty v Metropolitan Police District Receiver* [1977] 1 WLR 1073. The question of whether an injury was "significant" within s.14(1)(a), as expanded by s.14(2), was to be decided by reference to the seriousness of the injury, and not by reference to its effect on the claimant's private life or career, and still less by reference to its subjectively perceived effect on the claimant's private life or career, *Catholic Care (Diocese of Leeds) v Young* [2006] EWCA Civ 1534 and *Adams v Bracknell Forest BC* [2004] UKHL 29 applied, *KR v Bryn Alyn Community (Holdings) Ltd (In Liquidation)* [2003] EWCA Civ 85, (2004) 2 All ER 716 doubted in part.

Accordingly, s.14(2) had a comparatively limited application. Given that a claimant who could rely on s.11(4)(b) and s.14 could extend his limitation period, possibly by many years, as of right, it should be relatively narrowly construed, considering that such a claimant would always have a fall back position under s.33. It seemed unlikely to have been the intention of Parliament that there would be many cases where both s.14 and s.33 would be available to a claimant seeking to bring proceedings outside the three-year period.

The person contemplated in s.14 was a person who was in the same position, in objective terms, as the Claimant. That test was objective, but it did not prevent the objective circumstances of the claimant being taken into account, as opposed to personal characteristics like intelligence, ambitions and personality, which could not be taken into account. The proper approach to the question raised by s.14(2)

⁸³ [2007] EWCA Civ 17

was to consider the reaction to the injury, as opposed to its possible consequences, of a reasonable person in the objective circumstances of the actual claimant, while disregarding his actual personal attributes. The judge below had erred in taking into account the Claimant's subjective attitude to the effect of his injury, and his personal reasons for not pursuing or contemplating a claim against the Defendant in 1993. The fact that the injury did not lead to any setback in the Claimant's career until 2001 was not an appropriate reason for holding that time did not start running under s.11(1)(b) until 2001. The Claimant had all the information he needed about the injury by early 1994. The requirements of s.14(2) had not been satisfied. The case was remitted to the judge below to determine whether Mr McCoubrey could bring his claim under s.33 of the Act as the discretion had not been exercised at first instance as the judge thought the action had been brought in time.

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32 The Demise of McCafferty.

The abolition of the rule in Stubbings v Webb (see para 12 supra) disposed of all but one of the appeals namely the case of Young v Catholic Care (Diocese of Leeds) and The Home Office. The House of Lords was required to determine the meaning of significant injury within Section 14(2).

As discussed above in considering the decision of the Court of Appeal Mr Young was subject to abuse between October 1974 and July 1976 at a residential Catholic school in Tadcaster and then again between April and June 1977 at a detention centre and County Durham. These were extremely serious abuses having been punched and hit with farm implements and forced to masturbate and have oral sex with a member of staff at the school. At the detention centre Mr Young was subjected to having a ligature tied around his neck and nearly strangled and being blindfolded and subject to attempts to bugger him. Proceedings were commenced on 11 April 2003 and in both cases the claimant alleged systemic negligence in the management of the school and the detention centre. At first instance the Judge found that the claimant did not have knowledge within the meaning of Section 11 outside the three year period before he commenced proceedings and the claim was not statute barred. The trial Judge did, however, indicate that had he been required to exercise his discretion under Section 33 he would not have done so. The Court of Appeal as discussed in para 32 above reversed the decision on the date of knowledge and said that they would not interfere with the exercise of the Judge's discretion.

33

Lord Hoffman, on appeal to the House of Lords, reviewed in *Young*, the test as laid down in *McCafferty v Metropolitan Police District Receiver* and described the notion of the test being partly objective and partly subjective as somewhat confusing (para 34).

Lord Hoffman said that as Section 14(2) contains the words that "*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*" this meant that the test was entirely an impersonal standard. The Court simply has to ask what the claimant knew about the injury he had suffered, add to it any

knowledge about the injury which may be imputed to him under Section 14(3), (constructive knowledge), and then ask whether a reasonable person with that knowledge would have considered the injury sufficiently serious to justify his instituting proceedings.

It was not necessary to consider the intelligence of the claimant in question once the Court has ascertained what the claimant knew and what he should be treated as having known the actual claimant dropped out of the picture and Section 14(2) was simply a standard of the seriousness of the injury and nothing more. Standards by their very nature are impersonal and do not vary with the person who may have applied.

Lord Hoffman criticised the Court of Appeal in *KR v Bryn Alyn Community (Holdings) Limited* as it ventured even further into subjectivity. Section 14(2) was simply a standard of seriousness applied to what the claimant knew or must be treated as having known and it involved no enquiry into what the claimant ought to have done. An investigation as to why the particular claimant in question did not initiate proceedings is inappropriate when considering the significance within the meaning of Section 14(2). To this extent the test or tests between section 14(2) and 14(3) were different. Section 14(3) turns on what the claimant ought reasonably to have done and the court must therefore take into account the injury which the claimant has suffered. Lord Hoffman stated (para 39):

“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 enquiry 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”.

Lord Hoffman accordingly agreed with the Court of Appeal in *Young* that the claimant was obviously aware that he had been seriously assaulted and viewed objectively he had a significant injury. The claimant’s date of knowledge was therefore in 1977. Lord Hoffman further agreed with the observations of Lord Griffiths in *Stubbings v Webb* supra 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”***. Lord Hoffman concluded that this approach was in accordance with the Law Commission report No 270 which in its final report considered that the test of significance should be entirely objective.

Baroness Hale expressed some nagging doubts about the interpretation of Section 14(2) but did not think that any interpretation could plausibly result in the date of knowledge falling within the three years immediately preceding the issue of proceedings in Mr Young’s case.

Lord Hoffman stated that the law did not regard 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. However this question should be dealt with under Section 33 which

specifically says in sub section 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 claimant. To this extent Lord Hoffman contended that the Judge had wrongly exercised his discretion because of the erroneous approach laid down by the Court of Appeal in *Bryn Alyn* [2006] QB 1441. The Court of Appeal indicated at paragraph 76 that the Judge in *Bryn Alyn* had gone wrong in giving undue weight to his conclusion that the “claimant’s reasons for delay were a product of the alleged abuse and that accordingly it would be unjust to deprive him of a remedy”. The Court of Appeal in *Bryn Alyn* said that these matters were more appropriately considered under Section 14. Lord Hoffman said that he was of precisely the opposite opinion and that the approach to the discretion will have to change. At paragraph 49 Lord Hoffman said:

“In Horton v Sadler [2007] 1 AC 307 the House rejected a submission that Section 33 should be confined to residual class of cases ... 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 sub section 3(a) to have regard to the reasons for delay and in my opinion this required 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”.

Because the first instance Judge had followed *Bryn Alyn* he had concluded that he would not have exercised his discretion in the Claimant’s favour. However that exercise of discretion was on the wrong basis and the matter should be remitted to the Judge. Lord Hoffman indicated that on such a re-hearing the claimant would probably rely upon the vicarious liability of the defendant for the acts of abuse rather than their systemic negligence given the abolition of the rule in Stubbings v Webb. That would make the issues of fact much simpler and no doubt the Judge would have regard to this in considering whether a fair trial on this quite different evidential basis was still possible.

Baroness Hale stated that she gave full support to the more generous approach to the exercise of discretion which was adopted in particular by Lord Hoffman. Lord Brown at paras 84 - 88 also emphasised the unfettered nature of the Section 33 discretion giving particular emphasis as to whether a fair trial was still possible.

It can accordingly be seen that for the second time in two years the House of Lords has invoked the practice statement on judicial precedent firstly in Horton supra and now in Hoare. The House of Lords’ judgment that “significance” within the meaning of Section 14(2) is entirely objective has the benefit of creating a degree of simplicity and consistency. It will result however in more claims being determined as statute barred and it remains to be seen whether a more lenient exercise of discretion under Section 33 results in those cases barred under Section 14(2) and (3) being permitted to proceed.

Significance and the ‘injury in question’

34

In some cases where an initial injury has occurred before a later more serious injury or deterioration, the courts have circumvented the low threshold of significance within s 14(2) by permitting time to run from the later manifestations on the basis that the latter constituted 'the injury in question' within s 14(1)(a). The two classes of cases where this has been considered are disease and sexual abuse actions.

35

In *McManus v Manning Marine*⁸⁴ the claimant developed vibration white finger in his left hand in the 1980s and made a claim to the Department of Social Security (DSS) in 1992. His condition was due to working in the ship building industry including a short period with the defendants in 1989 and 1990. The claimant was told in 1993 that his condition would deteriorate. His application to the DSS was rejected in September 1982. The claimant resumed employment from August 1993 to November 1999 with the defendants. His condition did worsen and spread to both hands. He issued proceedings in September 2002. At first instance, the judge held, conventionally, that the claimant's claim was statute-barred, his date of knowledge being in 1992. The Court of Appeal reversed this decision, stating that 'the injury in question' was the injury for which the action was brought, namely the exacerbation of his condition since 1993. The question, therefore, with respect to significance, was when was this exacerbation significant? In the Court of Appeal, it became common ground that the judge should have not have dismissed the claim in respect of any exacerbation within the 3-year period from 2 December 1996 to the 2 December 1999 (when proceedings were issued) as this would have been in time because the tort was a continuing one. Lady Justice Hale said this:

'12. In my judgment, the Judge did take the wrong approach to this question. Section 14 (1) clearly refers back to Section 11 which refers to an action for "damages in respect of personal injuries". When, therefore, Section 14 (1)(a) talks about "the injury in question" it must mean the injury in respect of which the action is brought. This appellant is not bringing an action in respect of any injury that he may have suffered in the 2 very short periods of employment with this respondent before 1993. This action is in respect of exacerbation since then. The respondent accepts that there was a continuing cause of action arising day by day as and when the appellant continued to be affected by any negligence or breach of duty which may eventually been proved against the respondent.

13. I conclude that the Judge must have approached this matter wrongly. He should have asked himself when, within the meaning of the Act, did this claimant know that the injury in question, that is the exacerbation of his condition in this employment, was significant?'

36

The case was remitted back for a final hearing on both liability and limitation. No authorities were cited in the judgment. This case is of interest because the court is

⁸⁴

[2001] EWCA Civ 1668.

not saying that the initial injury was insignificant (the claimant went to a solicitor and made a claim for benefit) but that the exacerbation was the significant injury in question. The claimant was, therefore, permitted to abandon part of his personal injury as statute-barred, but was able to continue to sue in respect of the exacerbation. This case is perhaps best understood as one where a fresh injury is caused during the post-1992 employment and where a fresh cause of action was arising daily (Keene LJ).

37

The second class of case to adopt this approach was in the sexual abuse action in *K R V Bryn Alyn*.⁸⁵ This case concerned a consolidated action by 14 claimants for damages arising out of physical and sexual abuse suffered by them when residents at children's homes run by the defendant. The abuse was substantial and included buggery and unlawful sexual intercourse with respect to some of the children. The Court of Appeal found, however, that the so-called impact injuries of the initial assaults were not significant within the meaning of s 14 and were not, in any event, the 'injury in question'. The significant injury in question was the long-term psychiatric harm created by the abusive experiences rather than the immediate assaults. At first instance, the court had found that all claims were statute-barred but a s 33 discretion was exercised. The Court of Appeal's decision is remarkable because none of the claimants, except one, sought to challenge the judge's findings with respect to their date of knowledge on their cross-appeals. It was not until the Court of Appeal had started to write its judgment that it effectively took the point of its own motion :

'26. As we have said, when this Court began to hear this Appeal, only MCK challenged that ruling and then only contingently on the success of her Appeal as to liability in negligence and on the success of the second defendant's Cross-Appeal on the Section 33 point. However, after hearing all the original submissions on Appeal, having reserved judgment and having begun to write it, we began to feel unease at the Judge's concentration for the purpose of determining the date of knowledge under Section 14, on the immediate effects of the abuse which, for the reasons we have given, appeared not to be the injuries for which they sought damages. We consider that the true question for the judgment for us was, as Croom-Johnson J put it in *Ackbar v C F Green & Co* [1975] QV582,587, in the slightly different context of whether a claim consisted of or included damages for personal injuries, "what is the action all about?", a test approved and applied by Stuart Smith LJ in *Harvey Brown Tractors (Retail) Limited* [1991] 4 All ER 30,6 and Auld J in *Walkin v South Manchester Health Authority* [1995] 1LLR1543,1152B-G.

27. This case was all about long-term post-traumatic, psychiatric injury.'

38

The claimants, no doubt, accepted that the trial judge's findings that the children has sustained a significant injury as soon as they were assaulted. This was in accordance with authority (see, for example, the Master of the Rolls Sir Thomas

⁸⁵ [2003] QB 1441.

Bingham' judgment in *Dobbie v Medway Health Authority*⁸⁶). Further, Lord Griffith, in *Stubbings v Webb*,⁸⁷ had stated:

'I have the greatest difficulty in accepting that a woman who knows she has been raped does not know that she has [?] suffered a significant injury. ... In my view, the same applies to a young person who knows that he or she has been assaulted on a regular basis, or has been buggered or masturbated or fondled in an inappropriate way. Of course the realisation of the extent of the injury may grow with time, as may the injury itself; but in every case, I conclude that these unhappy victims had the relevant knowledge before they had left the community'.

39

The Court of Appeal, however, held in *Bryn Alyn* that Lord Griffiths' remarks were obiter and revisited the Court of Appeal's judgment in *Stubbings v Webb* particularly where it had stated (at p 208):

'Recognition that these acts have caused her serious long-term mental impairment could reasonably be seen by the Plaintiff as importing a new order of gravity. To distinguish between the immediate impairment of the Plaintiff's mental condition caused by these acts, apparently minor and transient, and a much more serious long-term impairment of the Plaintiff's mental condition, the attribution of which to the Webbs' conduct was appreciated later, is not, in my judgment, to defeat the intention of the legislature but to promote it'.

As discussed in para 33 above the House of Lords has now specifically approve in *Hoare* Lord Griffiths comments.

40

The Court of Appeal in *Bryn Alyn* went on to state that the issue as to whether each claimant had the required knowledge was a fact sensitive question requiring a determination of the individual's history, circumstances, nature, severity and duration of the abuse and its physical and mental effects. The court expressed the view that such an exercise would lead to a finding that the immediate injury caused by the abuse was of such a disabling character as to prevent the claimant from obtaining knowledge within the 3 year period after their majority. The court found that it was not until the receipt of a psychiatric report that the injury was known to be significant:

'41. Application of the Section 14(2) meaning of "significant" to child victims of abuse is often the more difficult because many of them, as in the case of these claimants, come to it already damaged and vulnerable because of similar ill-treatment in other settings. For some, such behaviour is unpleasant, but familiar ... some victims of physical abuse may believe, to some extent, they deserved it and, in the case of serious sexual abuse unaccompanied by serious physical injury of any

⁸⁶ [1994] 1WLR 1234.

⁸⁷ [1993] AC 498.

permanent or disabling kind, it is not surprising, submitted Mr Owen, that they did not see the significance of the conduct in Section 14 (2) terms, and simply tried to make the best of things.

42. 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. The same applies to those, as in the case of many of these claimants who, subsequently abused, progress into adulthood and a twilight world of drugs, further abuse and violence and, in some cases, crime. Some would put the abuse to the back of their mind: some might, as a result or a symptom of an as yet undiagnosed development of psychiatric illness, block or suppress it. Whether such a reaction is deliberate or unconscious, whether or not it is a result of some mental impairment, the question remains whether and when such a person would have reasonably seen the significance of his injury so as to turn his mind to litigation in the sense require of Section 14(1)(a) and (2) to start the period of limitation running. At this stage the Section 14(1)(b) issue of actual or constructive knowledge of attributability becomes more of a live issue than it would have been at, or shortly after the abuse, because in some cases it might only be after the intervention of a psychiatrist that a claimant realises that there could have been a cause or link between the childhood abuse and the psychiatric problems suffered as an adult, an argument accepted by the Court of Appeal, but which Lord Griffiths found difficult to accept in *Stubbings v Webb*'.

41

As indicated, the court found that the initial injuries were not significant within the meaning of the section and the claimants could sue for both the impact injury and the later psychiatric consequences:

'57. The narrow question to which the courts are confined when a Section 14 issue arises is as to the knowledge of the claimant at any material time for the purpose of starting a limitation period. If, as provided by Section 11, an action for negligence, nuisance or breach of duty "includes" a claim for damages for personal injury which, at the material time, he knew to be "significant" so as to bring it within the limitation period, he may proceed with that claim. He may also proceed with any other claim for damages arising out of the same cause of action – whether previous or subsequent to the injury of which he had significant knowledge, and whether or not for personal injury. But where an action includes a claim for damages for personal injury which he did not, within the limitation period, know to be significant, that claim would be statute-barred unless the action "includes" another claim for damages for personal injuries of which he first had significant knowledge within the period. Thus in the same action, Section 14 depending on the circumstances, may preserve or bar the recoverability of damages for the later of two injuries however late the date of knowledge of it, or enable recovery for the earlier of the two injuries which, but for the claim for the second, would have been statute-barred.

58. Thus here, if the Judge correctly found in the case of any claimant that he or she had the requisite knowledge within 3 years after the majority, that knowledge would operate to bar not only the claim for damages for the immediate injuries caused by the abuse, but also the long-term psychiatric injury of which he or she first acquired knowledge must later. If the Judge was wrong in that finding, the operative date of knowledge would be that of the long-term psychiatric abuse which, within the limitation period, would enable the claim for both the earlier immediate injuries caused by the abuse and the long-term psychiatric injuries. It is thus necessary to consider the case of each claimant individually against the general conclusion of the Judge, at paragraph 30 of his judgment, that “a young person who knows that he or she has been assaulted on a regular basis, who has been buggered, masturbated or fondled in an inappropriate way” has the relevant knowledge and that each of these claimants had it “before they left the community”.’

42

This approach was followed in subsequent sexual abuse cases concerning children as f *H V N and T*.⁸⁸ but was roundly rejected by the House of Lords in *Hoare*.

43

Given the extended criticism of the Court of Appeal’s decision in *Bryn Alyn* by the House of Lords in *Av Hoare* (see para 33above) both on the construction of significance and the exercise of discretion it is difficult to see the analysis of the “injury in question” posed by the Court in *Bryn Alyn* as surviving further judicial scrutiny. The House of Lords in imposing an objective test for significance has overruled the major reasoning by the Court of Appeal and although the House did not deal with “the injury in question” point in its speeches the logic in *Hoare* is probably fatal to this line of reasoning.

In any event the Court of Appeal’s approval in *Bryn Alyn* of the principles in *Bristow v Grout* supra (see paras 37-40 of the judgment), suggests that the extension of the ‘injury in question’ approach for other cases of deterioration or aggravation, was limited. *McManus* supra appears not to have been considered by the Court of Appeal in *Bryn Alyn*.

Attribution: s 14(1)(b)

44

Section 14(1)(b) provides:

‘... that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty ...’

45

The concept of attribution has generated a great deal of case-law. In *Dobbie v Medway Health Authority*,⁸⁹ the Court of Appeal reviewed a number of leading

⁸⁸ LTL 29 April 2004.

⁸⁹ [1994] PIQR P353.

authorities on attribution and came to conclusions that resulted in bringing forward claimants' dates of knowledge *closer* to the act or omission giving rise to the injury. Mrs Dobbie was admitted for a biopsy on a lump in her breast on 27 April 1973 and the surgeon considering that the lump was pre-cancerous carried out a left mastectomy without microscopic examination and allegedly without the claimant's consent. On 14 May 1973 it was found that the lump was in fact benign and the claimant was told this on 11 June 1973. The claimant developed a significant psychiatric reaction to the loss of her breast but did not issue proceedings until 1989 following hearing about a similar case reported in a newspaper and on a local radio. The trial judge found that time ran against the claimant as soon as she was informed about the laboratory analysis of the lump and the Court of Appeal concurred with that view. The court held first, that attribution meant 'capable of being attributed to' and not caused by. Secondly, the court emphasised that the claimant did not need to know that the defendant's act or omission was capable of being attributed to fault because that was specifically excluded on the clear words of the statute indicating that knowledge that any act or omission as a matter of law involved negligence, nuisance or breach of duty was irrelevant. Thirdly, the court confirmed that all that the claimant needed for knowledge was a broad understanding of the essence of the act or omission and confirmed the reasoning in *Nash v Eli Lilly & Co*⁹⁰ and *Broadley v Guy Clapham & Co.*⁹¹ Earlier authorities that indicated that knowledge of detailed acts or omissions such as would be necessary to draft particulars of negligence were not correct. The court concluded that Mrs Dobbie knew within hours of the operation that she had suffered a significant injury, and knew from the beginning that the injury was capable of being attributed to an act or omission of the Health Authority. What she did not know was whether the act or omission was blameworthy, but knowledge of fault did not stop time beginning to run. (For cases which have followed *Dobbie* see *Whitfield v North Durham Health Authority*,⁹² *Gregory v Ferro (GB) Limited*,⁹³ *Brady v Wirral Health Authority*,⁹⁴ *Spargo v North Essex District Health Authority*,⁹⁵ *O'Driscoll v Dudley Health Authority*⁹⁶ *Roberts v Winbow*.⁹⁷)

46

Attribution must, of course, relate even in general terms to the act or omission complained of, that is it must be causally relevant.

⁹⁰ [1993] 4 All ER 383.

⁹¹ (1993) *The Times*, July 6.

⁹² [1995] 6 Med LR 32.

⁹³ [1995] 6 Med LR 321.

⁹⁴ 25 June 1996 CCATF 95/1502/C.

⁹⁵ [1997] PIQR 235.

⁹⁶ [1999] Lloyd's Rep Med 210.

⁹⁷ [1999] PIQR P77.

- In *Ogunsanya v Lambeth Health Authority* the claimant was rendered paraplegic following a gallstone operation which resulted in extensive internal bleeding. The cause of the paraplegia was thought to be attributable to a low dose of subcutaneous heparin which caused the bleeding. It was not until a medical report from a neurologist indicating that the paraplegia was due to a delay in treating the bleeding that attribution was established.
- Similarly in *Scuriaga v Powell*⁹⁸ time was held not to run against the claimant in respect of a claim arising out of a failure to terminate a pregnancy, until she received a medical report indicating that it was a lack of care on the part of the surgeon which had caused the failure. The treating surgeon had in fact told the claimant that his failure to terminate the pregnancy was due to a structural defect in her which she believed until a medico-legal expert contradicted it.
- In *Khan v Ainslie*⁹⁹ a claimant's blindness was thought by him to have been caused when his medical practitioner administered eye drops which resulted in him experiencing pain. Nearly 6 years later he finally received a medical opinion indicating that the cause of his blindness was in fact delay in treating his condition of glaucoma. The receipt of this report was held to be the date of attribution and the claimant's date of knowledge.
- In *Stephen v Riverside Health Authority*,¹⁰⁰ although a claimant suspected she was at an increased risk of cancer following an overdose of radiation, she was not fixed with actual knowledge until nearly 8 years later when in conference with her own counsel and her medical expert she learned that the overdose might not have been in the order of only 30 roentgen, as claimed by the defendant, but could possibly have been in the order hundreds or thousands of roentgen. This case was of added interest in that the claimant herself had some experience of radiology having been an unqualified radiographer years before her own x-rays. The judge found that that in itself was not sufficient to constitute making her an expert to set off against the chorus of negligent expert advice she had received until that stage concerning attribution.

47

It remains, therefore, important to realise that attribution may be delayed in cases where it is by no means clear whether the persisting problems a claimant has are extensions of a pre-existing condition or whether in fact there has been a medical mishap.

- In *Forbes v Wandsworth Health Authority*,¹⁰¹ the Court of Appeal held, in a clinical negligence action, that there must be knowledge of some causative link between the treatment or lack of it and the claimant's condition. Mr Forbes was operated on in 1982 for a by-pass; the operation failed and a second operation was carried out the next day. The operation was unsuccessful and the claimant was told that he needed to have his leg amputated to prevent gangrene and this was done on 5 November 1982.

⁹⁸ (1979) 123 SJ 406.

⁹⁹ [1993] 4 Med LR 319.

¹⁰⁰ [1990] 1 Med LR 261.

¹⁰¹ [1999] PIQR P77.

Subsequently, the claimant obtained a report in 1992 which alleged that the practitioners had been negligent not to perform the second operation sooner. The defendant contended that all that was needed was knowledge that there was a period of time between the first and second operations, that the second operation was not successful and as a result the claimant had his leg amputated. The Court of Appeal found, however, that the claimant did not know that the loss of his leg was capable of being attributed to the act or omission of the defendant until the receipt of an opinion by a vascular surgeon. The court held that in many medical negligence cases the claimant would not know that his injury was attributable to the omission of the defendant until he also learned that there had been negligence. That, however, did not mean that there was no distinction between causation and negligence, the first being relevant to s 14 and the second irrelevant.

- A similar approach was taken in the case of *Smith (Michael John) v West Lancashire Health Authority*.¹⁰² Mr Smith injured his right hand on 12 November 1981 and attended hospital for emergency treatment where a diagnosis of any uncomplicated fracture to the ring finger was made. In January 1982, an operation was necessary as the conservative treatment had not worked. In 1989, Mr Smith was dismissed from his job as a labourer due to loss of function in the right hand. In 1991, an expert medical report said that there had been a failure in November 1981 to treat the finger properly which had resulted in degenerative changes which now meant loss of function in the hand. The Court of Appeal held that the claimant did not have the requisite knowledge on which to found his claim until 1991, because although he was aware that the first treatment had not worked that did not imbue him with a knowledge of an omission on the part of the treating physicians. (See also *Ostick v Wandsworth Health Authority*,¹⁰³ *Hallam-Eames v Merrett Syndicates*;¹⁰⁴ *Hind v York*.¹⁰⁵)
- In *Irshad Ali v Courtaulds Textiles Limited*¹⁰⁶ the Court of Appeal allowed an appeal in a deafness case holding that the claimant did not know whether his deafness was due to the ageing process or to industrial noise until an expert informed him of that fact.
- For other cases where knowledge of attribution has been postponed because it was unclear whether the persisting problems facing a claimant were extensions of a pre-existing condition or due to a medical mishap see *Jones v Liverpool Health Authority*,¹⁰⁷ *O'Driscoll v Dudley Health Authority*,¹⁰⁸ *Rowbotham v the Royal Masonic Hospital*,¹⁰⁹ *Skitt v Khan*,¹¹⁰ and *Smith v NHSLA*.¹¹¹

¹⁰² [1995] PIQR P514, CA.

¹⁰³ [1995] 6 Med LR 338.

¹⁰⁴ [1995] 2 CL 304.

¹⁰⁵ [1998] PIQR P235.

¹⁰⁶ [1999] 8 Lloyd's Rep Med 301.

¹⁰⁷ [1996] PIQR P 251.

¹⁰⁸ [1999] Lloyd's Rep Med 210.

¹⁰⁹ [2003] PIQR 1.

¹¹⁰ [1997] Med LR 105.

¹¹¹ [2001] Lloyd's Rep Med 90.

48

Similar principles were adopted by the Court of Appeal in *Oakes v Hopcraft*,¹¹² a case of professional negligence concerning a medical expert's alleged incompetence which led to an under-settlement of a personal injury claim. The court was concerned with the provisions of s 14A of the Limitation Act 1980 but applied the principles derived from personal injury cases under s 14 and as also set out in the case of *Hallam Eames v Merrett Syndicate*.¹¹³ In *Hallam*, Hoffmann LJ had emphasised the need for the causal relevance of the act or omission (p 125-6):

'... If all that was necessary was that a plaintiff should have known that the damage was attributable to an act or omission of the defendant, the statute would have said so. Instead, it speaks for the damage being attributable to "the act or omission which is alleged to constitute negligence". In other words, the act or omission of which the plaintiff must have knowledge must be that which is causatively relevant for the purposes of an allegation of negligence.'

49

In *Oakes v Hopcraft* Clarke LJ considered in detail *Hallam-Eames v Merrett Syndicates*, and other personal injury authorities and concluded:

'52. ... If one asks what is it that the claimant is essentially complaining about, it is that the defendant failed to diagnose her condition correctly and to advise her that the accident had caused a severe traction injury to the brachial plexus and damage to the radial artery and that her condition would not improve. It was only when she knew both what injuries had been caused by the accident and, importantly, that they would not improve so that she would not (as it were) get better, that to my mind it can fairly be held that she knew that the omission of the defendant to give her that advice caused her damage. The damage was the loss she sustained because she settled for too little. The claimant could not know that she had settled for too little as a result of any failure on the part of the defendant until she knew that she would not get better because it was that fact, namely that her condition would not improve, which essentially caused the settlement to be too low. That is because the essential reason that the settlement is said to have been too low is that it did not include anything to compensate her for not being able to work in future as a result of the accident'.

50

The decision of the Court of Appeal in *Spargo v North Essex District Health Authority*¹¹⁴ has been referred to, and quoted from, in detail above. In *Sniezek v Bundy*,¹¹⁵ also referred to above, the court in considering the question of attribution

¹¹² CA 27/7/2000.

¹¹³ [1995] 7MED LR122.

¹¹⁴ [1997] PIQR P235.

¹¹⁵ [2000] PIQR P123.

discussed the difficulties which can arise concerning the last sub-category of point (iv) in *Spargo*, namely knowledge that required expert confirmation, and doubted whether the decision in *Ali v Courtauld* had been correct in this respect.

51

In *Haward v Fawcetts*¹¹⁶ the House of Lords, in a s 14A case concerning an action in negligence against an accountant, indicated that its observations on knowledge and attribution applied equally to s 14 and it approved *Halford, Hendy, Nash, Spargo, Broadley* and *Hallam –Eames*. The Claimant had been advised by his accountants in relation to a business interest acquired in 1994. This business failed in 1998. In May 1999 the Claimant for the first time began to question the soundness of the Defendants advice. Proceedings were issued in December 2001. The Defendants pleaded that the claim in respect of the initial investment in 1994/1995 was statute barred. This was heard as a preliminary issue. At first instance and before the Court of Appeal the Claimant was successful in contending that he did not have the requisite actual knowledge under s.14A. The House, in allowing the appeal held that its observations made in relation to s.14A applied equally to the corresponding provisions of s.14. Knowledge entailed knowing with sufficient certainty to embark upon preliminary enquiries; it did not entail knowing for certain beyond all possible conviction (*Halford v Brookes* [1991] 1 WLR 428 approved). It was not necessary for the Claimant to have sufficient knowledge to support a fully particularised statement of case (*Wilkinson v Ancliff* [1986] 1 W.L.R. 1352 approved). A broad knowledge of attribution may suffice even if the precise mechanism of what went wrong is not known (*Hendy v Milton Keynes HA* [1992] 3 Med LR 114 approved). This could be described as a broad knowledge of the essence or essential thrust of the relevant acts or omissions (*Nash v Eli Lilly & Co* 1993] 4 All ER 383, *Spargo v North Essex District HA* [1997] PIQR P235 approved). To the same effect one should look at the way the Claimant puts his case, distil what he is complaining about and ask whether he had in broad terms knowledge of the facts upon which the complaint is based (*Broadley v Guy Clapham & Co* 1993] 4All ER 383 approved). The criterion of attribution was met by a real rather than fanciful possibility that the damage was attributable in whole or in part to the relevant act or omission. It thus need only be a possible rather than a probable cause (*Nash v Eli Lilly & Co* approved). Therefore time does not begin to run against a Claimant until he knows that there is a real possibility that his damage was caused by the act or omission in question.

Although knowledge of negligence itself was irrelevant, describing the act or omission in terms suggesting culpability was often unavoidable and not objectionable providing there was no blurring of the necessary distinction between the relevant and irrelevant. The facts themselves were relevant, the legal consequences of the facts irrelevant (*Hallam-Eames v Merrett Syndicates Ltd* [1995] C.L.C. 173 approved, *Dobbie v Medway HA* [1994] 1 W.L.R. 1234 doubted in part).

In the present case the Claimant knew all the material facts – the terms of the retainer, the fact of the Defendant's advice, his reliance upon the Defendant's advice and the consequential losses - as they occurred. He therefore had the requisite knowledge.

¹¹⁶

[2006] UKHL 9.

52

In summary, attribution will be established when the essence of the case against the defendant is known by a claimant so that the act or omission complained of is possibly capable of being attributed to the defendant in broad terms; there is no need for the degree of precision which a pleaded Particulars of Claim would require. In some circumstances often arising out of negligent omissions in clinical cases attribution may be postponed until a cause or connection between the injury and the act or omission said to constitute negligence is established. This is not the same as waiting for the Claimant to have knowledge of fault which is not required. In such cases attribution may be delayed until an expert opinion establishes a cause or connection between the injury and the act or omission. Difficulties may arise in determining whether in any particular case the extent (whether certainty or otherwise) of the belief of attribution is sufficient to start the running of time and/or the effect of a belief remaining uncertain until expert confirmation.

Identity: s 14(1)(c) and (d)

53

Under s14(1)(c) and (d) the claimant must know:

- ‘(c) The identity of the defendants;
- (d) If it is alleged the act or admission was that of a person other than a defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant’.

54

The final fact that a claimant must know for his date of knowledge to be established is the identity of the defendant (and, where the defendant is alleged to be vicariously liable for another’s act or omission, the identity of that other and the factual basis upon which the defendant is said to be so liable). These provisions are designed to deal with cases where a claimant cannot ascertain immediately who was responsible for the injury, such as in a road traffic accident where a driver might fail to stop, or where there might be a complex division of labour and division of responsibility on a building site and it is not clear which sub-contractor was responsible for a particular act of negligence. In addition, where a third party is blamed in a defence, the claimant may have an extended period of time to sue on the basis of not knowing before then that the third party was responsible (see *Davies v Reed Stock & Company Limited*,¹¹⁷ *Foster v Mall Builders Limited*,¹¹⁸ and *Lead Bitter v Hodge Finance Limited*¹¹⁹).

55

Similar problems can arise where the precise legal identity of a defendant is difficult to ascertain because of a complex corporate structure which might have connected companies with similar names. Time may not run until the claimant had knowledge of the actual name of his employer in such circumstances (see *Simpson v Norwest*

¹¹⁷ Lexis, 26 July 1984.

¹¹⁸ Lexis, 17 March 1983.

¹¹⁹ [1982] 2 All ER 167.

Holst Southern Limited,¹²⁰ *Eidi v Service Dowell Schlumberger SA*,¹²¹ and *Stevens v Nash Dredging and Reclamation Company Limited*¹²²).

56

In *Cressey v E Timm & Son Limited and E Timm & Son Holding Limited*,¹²³ the Court of Appeal affirmed *Simpson v Norwest Holst Southern Limited*. The claimant had worked as a fork-lift truck driver for the second defendant but his pay slips were in the name of an associated company, the first defendant, who he believed he was employed by. The claimant was injured on 2 December 2000 and sued the first defendant within time on 27 November 2003. The claim form was not, however, served in time and a second claim form against both companies was issued on 30 March 2004. The second defendant alone sought to strike out the second claim. The court confirmed the first instance decision that the claimant did not know, within the 3-year period prior to 30 March 2004, who the identity of his employers were, the earliest possible date being 30 April 2000 when the solicitors learnt of the existence of the second defendant (per Lord Justice Rix):

‘28. On the particular facts of this case, I do not think that the right answer is hard to reach. It is likely that in most cases in an accident at work, the employee will there and then have knowledge of the identity of his employer, and therefore, the defendant. However, in a minority of cases, where the identity of the employer is uncertain, as in *Simpson*, or even wrongly stated to the employee, as here, the date of knowledge may well be postponed. How long it will be postponed by will depend on the facts of such cases. In general I do not believe it can be postponed for long: only as long as it reasonably takes to make and complete the appropriate enquiries. But if such enquiries are met by mis-information or a dilatory response, again as in *Simpson*, then it is not possible to be dogmatic about the right conclusion. In *Simpson*, the Court only had to cover a period of about 2 weeks after the accident and therefore did not have to go further into the facts.

In the present case, I agree with the submission that the facts are in their way stronger than in *Simpson*’.

57

In *Nash v Eli Lilly*¹²⁴, the Court of Appeal indicated that a claimant might be fixed with constructive knowledge in respect of the names of different companies in a group structure as the law applicable to the operation of such corporations provides for information as to the true position of the individual members of the corporate structure:

‘It is also a clear requirement of Section 14(1)(c) that the Plaintiff must have knowledge of the identity of the defendant. However, in a case of corporate entity, such as those with which these appeals are concerned, the law as applicable to the operation of such corporations may be expected to provide, and do provide, that the true position of the

¹²⁰ [1980] 1 WLR 968.

¹²¹ [1990] CLY 2961.

¹²² Lexis, 27 July 1982.

¹²³ [2006] PIQR P9.

¹²⁴ [1993] 4 All ER 383.

individual members of the corporate structure are ascertainable. These details as facts would therefore fall within Section 14(3)(c)'.

Constructive knowledge: s 14(3)

58

Section 14(3) provides:

'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 sub-section 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.'

59

This important subsection may provide a good deal of protection to prospective defendants. A claimant is required to act reasonably in using information he has and in obtaining information which he could get to establish knowledge of (i) the significance of his injury, (ii) to whom the injury might be attributed and (iii) the identity of the defendants. When a court is examining a claimant's date of knowledge it will first inquire as to what the actual claimant's knowledge was and then, if necessary, ask what the claimant could reasonably have known if he had applied his mind to the matter and if he had sought assistance. If both his actual and his constructive knowledge, as fixed by the court, are within the 3-year period prior to the issue of proceedings, then his action will not be time barred. The subsection, therefore, requires that the claimant is both mentally active in comprehending the facts of his accident and injury and also physically active in obtaining expert and other advice and opinions. It is for the claimant to establish that his actual date of knowledge is within time but if a defendant contends for an earlier constructive date of knowledge then the evidential burden may shift to the defendant to establish that fact (see *Crocker v British Coal Corporation*;¹²⁵ *Smith v NHSLA*;¹²⁶ *K R v Bryn Alyn*¹²⁷).

60

In construing what is reasonable, the courts initially adopted the same approach used in construing whether a claimant reasonably felt his injury was significant. This was to qualify the objective criteria of reasonableness with the particular qualities of the actual claimant (see *Davis v City and Hackney Health Authority*¹²⁸). Thus in *Nash v Eli Lilly*¹²⁹ it was held:

¹²⁵ (1986) 29 BMLR 159.

¹²⁶ [2001] Lloyd's Rep Med 90.

¹²⁷ [2003] 3 WLR 107.

¹²⁸ [1991] 2 Med LR 366.

¹²⁹ [1993] 4 All ER 383.

'The standard of reasonableness in connection with the observations and/or the effort to ascertain are therefore finally objective but must be qualified to take into consideration the provision and circumstances and character of the Plaintiff ... In considering whether or not the inquiry is, or is not, reasonable the situation, character and intelligence of the Plaintiff must be relevant'.

(See also Widgery LJ's judgment in *Newton v Cammell Laird & Co Limited*¹³⁰ and the House of Lords decision in *Smith v Central Asbestos Company Limited*¹³¹ per Lord Reid at 530.)

61

This approach is illustrated in *Davis v City & Hackney Health Authority* (above) where a claimant suffering from cerebral palsy had an actual date of knowledge of attribution fixed on the receipt of the medico-legal report nearly 23 years after his birth and approximately 2 years outside the primary limitation period. Jowitt J had to consider whether that actual date of knowledge ought to be replaced with the constructive date of knowledge based upon the claimant's failure to take legal advice earlier than he did. The judge held that, taking into account the claimant's age, his disability and his dependence upon his parents, who had discouraged him from making a claim, the claimant had not acted unreasonably in delaying.

62

However, in *Forbes v Wandsworth Health Authority*,¹³² the Court of Appeal emphasized the primarily objective nature of the test to be applied in s 14(3). Mr Forbes received surgery in 1982 for a heart bypass operation which was unsuccessful so a second operation was carried out the next day. That operation was also unsuccessful and the claimant's leg had to be amputated. He later received in October 1992 a medical opinion alleging negligence against the surgeon for not performing the second operation sooner than it was. Proceedings were issued on 10 December 1992. Part of the delay was due to the implicit trust the claimant had for his doctor. The judge said that the claimant's claim was not statute-barred as he had neither actual nor constructive knowledge until 1992. The Court of Appeal agreed with the judge on actual knowledge as the claimant did not know, until he was told by an expert, that the loss of his leg was capable of being attributed to an act or admission of the defendant. The Court of Appeal did, however (Roch LJ dissenting), fix him with constructive knowledge, saying that it was reasonable to allow the claimant 12–18 months (only) to get over the shock of the amputation, take stock of his situation and then take advice. The court therefore considered that the claimant had constructive knowledge in 1984. The court went on to express the view that the claimant's individual characteristics were not relevant to s 14(3) and doubted *Nash v Eli Lilly* on this point (Roch LJ dissenting, holding that *Nash* was binding). Stuart-Smith LJ had considered the quotation from Purchas LJ as quoted above in *Nash v Eli Lilly*, but said this (p 19/20):

'... I have difficulty in seeing how the individual character and intelligence of the Plaintiff can be relevant in an objective test ... it does

¹³⁰ [1959] 1WLR 415.

¹³¹ [1973] AC518.

¹³² [1997] QB 402.

not seem to me that the fact that the Plaintiff is more trusting, incurious or indolent, resigned or uncomplaining by nature can be a relevant characteristic, since this too undermines any objective approach.’

63

Lord Justice Evans agreed, stating that the claimant’s situation is relevant but not his character and intelligence. *Forbes* was followed in *Parry v Clywyd Health Authority*.¹³³

64

However, the difficulties of having two conflicting Court of Appeal decisions soon arose. In *Smith v Leicester Health Authority*¹³⁴ the Court of Appeal considered the conflicting decisions in *Nash* and *Forbes* and felt free to decide which to follow. They opted for the objective *Forbes* approach:

‘We are prepared to accept, for the purposes of this Appeal, that the proper approach to this question is “What would the reasonable man have done, placed in the situation of the Plaintiff?” and that the answer in each case must depend on its own facts ... we accept that the Plaintiff’s individual characteristics which might distinguish her from the reasonable woman should be disregarded. Therefore her fortitude, a lack of any bitterness at becoming a tetraplegic and the determination and devotion she has shown to making herself as independent and a useful member of her family and society as she can, which has surpassed what might be expected, are to be put on one side’.

65

The court in *Smith* did, however, state that *Forbes* was not authority for the proposition that when a patient is severely disabled following an operation they have 12–18 months to decide whether to investigate the claim. The court in *Smith* reversed the first instance decision on constructive knowledge and found that the claim was not statute-barred. Whether it is reasonable for a claimant to seek advice was held to depend on the facts and circumstances in each case, excluding the character traits of the individual claimant.

66

However, in *Ali v Courtaulds Textiles Limited*¹³⁵ the Court of Appeal relied on *Nash v Eli Lilly* to find that:

‘The temporal and circumstantial span of reasonable enquiry will depend on the factual context of the case and subjective characteristics of the individual (claimant) involved’.

67

In *Fenech v East London Health Authority*¹³⁶ the claimant experienced severe perineal pain following the birth of her child in 1960. This pain continued and was apparent after sexual intercourse but she did not mention that fact to her male GP

¹³³ [1997] PIQR P1.

¹³⁴ (1997) 36 BMLR 23.

¹³⁵ [1999] Lloyd’s Rep Med 301.

¹³⁶ [2000] Lloyd’s Rep Med 35.

due to embarrassment. Investigation of her hips eventually found a needle fragment in the perineum in 1991 and she was told about this in 1994. She issued proceedings on January 1997. The court fixed the claimant with constructive knowledge by the early 1960s. Lord Justice Brown stated:

‘For my part I think it unnecessary on the present Appeal to attempt any final reconciliation of the authorities or solution of the difficulties presented by the Section. It is sufficient to recognise that some degree of objectivity at least must be required determining when it is reasonable for someone to seek advice – otherwise the proviso could never apply save only when a person acts out of character – and to conclude, as I do, that on any sort of objective approach ... this claimant should have sought medical advice on her injury long before she did, indeed in the early 1960’s at latest’. (see also *O’Driscoll v Dudley Health Authority*.¹³⁷

68

In *Bates v Leicester Health Authority*¹³⁸ Dyson J after reviewing the disparity between Nash and Forbes approached the question of constructive knowledge:

‘... by asking what knowledge it was reasonable to expect to be acquired by a Plaintiff of average intelligence and without unusual personal characteristics. The personal characteristics which I believe the Court of Appeal in Forbes were saying should be left out of account were personality traits such as those mentioned at the end of the passage that I quoted from the judgment of Stuart-Smith LJ (trusting, incurious, indolent, resigned and complaining). I do not think that the Court of Appeal was saying that in applying the objective test, one should ignore the fact that as in the present case, a Plaintiff has great difficulty in communication, and that the potential source of knowledge is a parent who is trusted and is heavily relied upon by the Plaintiff in all the important areas of her life. As Evans LJ said, (in Forbes): “the reasonable man must be placed in the situation that the Plaintiff was”.’

69

The conflict between the authorities received the House of Lords’ attention in the case of *Adams v Bracknell Forest Borough Council*.¹³⁹ The House determined that *Forbes* should be preferred over *Nash* and the test was objective. Mr Adams suffered from severe dyslexia and sued an education authority for negligent failure to ameliorate his condition whilst at school between 1977 and 1988. He issued proceedings in 2002 after having spoken to an Educational Psychologist at a social event in 1999. At first instance the Judge found he did not have constructive knowledge and the Court of Appeal rejected the defendant’s appeal. The defendant’s further appeal to the House of Lords was however successful. The test for constructive knowledge was found to be objective. There was no evidence in Mr Adams’ case to support the judge’s finding that the claimant because of his dyslexia could not reveal his problems to his doctor nor was it established that extreme reticence about the problem of dyslexia was standard behaviour for dyslexics. The claimant was found to be of normal intelligence and there was no

¹³⁷ [1998] Lloyd’s Rep Med 210.

¹³⁸ [1998] Lloyd’s Rep Med 93.

¹³⁹ [2005] 1 AC 76.

reason why the normal expectation that a person suffering from a significant injury should not be curious about its origins should not apply to dyslexics. Constructive knowledge was fixed well before the 3-year period immediately prior to the start of proceedings .

70

The route which led Lord Hoffmann to this decision was partially based on the recognition that the court did have a discretionary power to extend the primary limitation period. Lord Hoffmann noted the subjective element in the test as set out in *Newton v Cammell Laird* and *Smith v Asbestos*, but preferred the reasoning of the Court of Appeal in *Forbes*:

‘45. I find this reasoning persuasive. The Court of Appeal did not refer to the decisions of the 1963 Act which had taken a more subjective view. While it is true that the language of Section 7(5) of the 1963 Act was not materially different from that of Section 14(3) of the 1980 Act, I think that the Court of Appeal in *Forbes* was right in saying the introduction of the discretion under Section 33 had altered the balance. As I said earlier, the assumptions which one makes about the hypothetical person to whom a standard of reasonableness is applied will be very much affected by the policy of the law in applying such a standard. Since the 1975 Act, the postponement of the commencement of the limitation period by reference to the date of knowledge is no longer the sole mechanism for avoiding injustice to a Plaintiff who could not reasonably be expected to have known that he had a cause of action. It is, therefore possible to interpret Section 14(3) with a greater regard to the potential injustice for the defendant if the limitation period should be indefinitely extended.

46. I, therefore, think that Lord Reid’s dictum in *Smith v Central Asbestos Co Limited* [1973] AC518, 530 that the “test is subjective” is not a correct interpretation of Section 14(3). The same is true of the dictum of Purchas LJ in *Nash v Eli Lilly & Co* [1993] 1WLR782, ...

47. It is true that the Plaintiff must be assumed to be a person who has suffered the injury in question not some other person. But, like Roch LJ in *Forbes* [1997] QB 402, 425 I do not see how his particular character or intelligence can be relevant. In my opinion, Section 14(3) requires one to assume that a person who is aware that he has suffered a personal injury, serious enough to be something about which he would go and see a solicitor if he knew he had a claim, will be sufficiently curious about the causes of the injury to seek whatever expert advice is appropriate’.

71

Baroness Hale, although concurring with the decision, took ‘a slightly different view’ and emphasised that she would not want to rule out that a claimant’s personal characteristics may be relevant to what knowledge can be imputed to him under s 14(3). Baroness Hale reviewed the leading authorities and the Law Commission Report 151 and expressed the opinion that:

'88. I wonder, therefore, how much difference there is in practice between the two approaches. We are not here concerned with knowledge that the claimant might reasonably have been expected to acquire from facts observable or ascertainable by him. We are concerned with knowledge that he might reasonably be expected to acquire with the help of medical or other advice which it is reasonable for him to seek. The question is when is it reasonable to expect a potential claimant to seek such advice? Objectively, it will be reasonable to seek such advice when he has good reason to do so. This will depend upon the situation in which the claimant finds himself, to include the consequences of the accident, illness or other injury which he has suffered. Rarely, if ever, will it depend upon his personal characteristics. If, faced with the situation in which it is reasonable to seek advice, a person fails to do so, then the fact that he was reluctant to make a fuss, or embarrassed to talk to his doctor, while understandable, does not take him outside this sub-section.

89. Mr Forbes was faced with the amputation of his leg after an unsuccessful by-pass operation. This was clearly a significant and unexpected injury connected with the medical treatment he had been receiving. It is not clear why he took no further action at the time, although in the end he did so reluctantly later. But it was reasonable to expect him to seek a second opinion then and there. Mrs Fenech was faced with years of pain after giving birth to her first child, when she was told that the needle used to stitch up an episiotomy had broken. She was embarrassed to talk about these matters, even to her doctor. But of course it was reasonable to expect her to do so. In contrast, Miss Smith underwent numerous operations during her childhood because of her Spina Bifida, one of which resulted in her becoming tetraplegic. There was no reason for her to think that this was anything other than a consequence of her disability (another example is *Mellors v Perry* [2003] EWCA CIV89, where the claimant had endured a childhood of renal problems with three kidney transplants but had no reason to think that this was anything other than a consequence of her congenital disability).

91. In my view, all the cases to which we have been referred are explicable on the basis that the law expects people to make such enquiries or seek such professional advice as they reasonably can when they have good reason to do so. Their motive for not doing so will generally be irrelevant. But I would not want to rule out that their personal characteristics may be relevant to what knowledge can be imputed to them under Section 14(3). There is a distinction between those personal characteristics which affect the ability to acquire information and those which affect one's reaction to what one does now. A blind man cannot be expected to observe things around him, but he may sometimes be expected to ask questions. It will all depend upon the circumstances in which he finds himself. As McGee & Scanlan have suggested, in an attempt to reconcile the authorities, a factor or attribute which is connected with the ability of the claimant to discover facts which are relevant to an action, should be taken into account; but a factor in his make-up which has no discernable effect upon his ability to discover relevant facts should be disregarded: see "Constructive knowledge

within the Limitation Act (2003) 22 Civil Justice Quarterly 8, and 260. They go on to suggest that qualifications, training and experience may have such an affect whilst intelligence may not. It will all depend upon the facts of the case”.

72

Lord Walker also expressed caution about any simple formula put forward to cover every case that might occur (see paras 76–78).

73

The test for constructive knowledge within s 14(3) is accordingly objective. However, this will require the court to consider the objective situation in which the claimant finds himself in, including the effects of the injury itself. If the injury itself would reasonably inhibit him from seeking advice then that is a factor which must be taken into account (per Lord Hoffmann para 41 Adams above). The test should be by reference to the norms of the behaviour of persons in the situation in which the claimant finds himself (per Lord Scott, Adams supra). For example if a brain injury to the frontal lobe, not sufficient to make a claimant a patient, inhibits the claimant from making decisions, being able to concentrate or being able to comprehend information, that would be relevant to what was objectively reasonable for him to discover. If, however, the same claimant was constitutionally stoical, or forbearing, or too embarrassed to ask questions, that would not be relevant. Lady Hale, however, might go further and include those pre-accident characteristics which affect one’s ability to discover and comprehend facts. To this extent a pre-accident subjective characteristic may be pertinent as in the case of the blind man, as Lord Hoffman’s comment in *Hoare* (para 39):

“You do not assume that a person who has been blinded could reasonably have acquired knowledge by seeing things.

74

Given the claimant’s situation he will be fixed with facts that are observable and ascertainable by him. In the Opren litigation certain claimants were fixed with knowledge which they had been exposed to and comprehended from newspaper and television coverage of the drugs’ withdrawal and its possible side effects (see the cases of Eaton and Higgins in *Nash v Eli Lilly*). A claimant may also be fixed with knowledge which would have been easily ascertainable from a witness to his accident. In *Napper v National Coal Board*,¹⁴⁰ an action brought by a son in 1988 in respect of his father’s death in a coal mining accident in 1957 was dismissed at statute-barred on the basis that the statement taken in 1985 from a material witness could reasonably have been taken much earlier. In *Leadbitter v Hodge Finance Limited*,¹⁴¹ the claimant was also fixed with a constructive date of knowledge by the court as to when he ought, through his solicitors, have learned of the identity of a further defendant by ascertaining facts from a full police report. A claimant is most likely to be fixed with facts ascertainable with the help of his solicitor. In determining when such facts might have been available the date when it was reasonable for a solicitor to have been consulted will be evaluated. In

¹⁴⁰ Lexis, 1 March 1990.

¹⁴¹ [1982] 2 All ER 167.

Henderson v Temple Pier Co Limited¹⁴² a claimant was fixed with constructive knowledge in circumstances where her solicitor acted dilatorily in acquiring the name of the owner of a ship upon which she slipped as this did not require any particular expertise and the proviso in s 14(3)(d) did not apply (see below). Henderson was followed in Copeland v Smith.¹⁴³

The approach of the House of Lords in *Adams v Bracknell Forest* has been exercised by the Court of Appeal in a number of cases. In *Kew v Bettamix Ltd and others*¹⁴⁴ the Claimant sued for damages for vibration white finger against his employers. In the early 1990s he had experienced numbness in his fingers but attributed it to age. By the late 1990s he had appreciated that age might not have been the only cause. Following a routine occupational health assessment in March 2000, the Claimant's doctor informed him that his symptoms might be attributable to work. This was confirmed in July 2000. Proceedings were issued in April 2004. Limitation was heard as a preliminary issue. The judge identified the relevant date of knowledge as being July 2000 but exercised her discretion to disapply the limitation period, finding that Defendants would not be overly prejudiced by the delay and that it was equitable to allow the claim continue taking into account the financial value of the claim to Mr Kew and the potential cost his employers. She also ordered the Defendants to pay he costs of the limitation issue notwithstanding their success on primary limitation. On appeal it was held that an injured person had to have sufficient knowledge to make it reasonable for him acquire further knowledge of the link between his injury and his prior working conditions (*Haward v Fawcetts* considered). In the early 1990s there was no basis for suggesting that the Claimant had considered, or should have considered, that his symptoms were attributable to anything other than ageing. In the late 1990s there was no evidence that Claimant had any idea of the link between his working conditions and his condition. His concession that he knew that his condition might not have been caused solely by age did not constitute evidence that he knew what the other cause might have been. However, the Claimant did had constructive knowledge from March 2000 following the discussion with his doctor. Although Mr Kew was not expressly told of the link, the doctor's conclusions demonstrated that there was a real possibility that working conditions caused his injury and, for a reasonable man, required investigation (*Adams* considered). Nevertheless the judge's exercise of her s.33 discretion had been open to her. Proportionality was a relevant factor (*Robinson v St Helens MBC*¹⁴⁵, *McGhie v British Telecommunications plc*¹⁴⁶ [and *Adams* considered). There was no reason for the Defendants to bear the entire costs of the preliminary issue. The hearing had largely been concerned with the issues of knowledge and the identity of the employers, both of which the Claimant lost. The order would be varied to one requiring the Defendants to pay 65% of the Claimant's costs of the limitation issue. (See also *Norton v Corus UK Ltd*¹⁴⁷ and *McCoubrey v MOD*¹⁴⁸ [

¹⁴² [1998] 1WLR 1540.

¹⁴³ [2001] 1WLR 1371.

¹⁴⁴ [2006] EWCA Civ 1535

¹⁴⁵ [2002] EWCA Civ 1099

¹⁴⁶ [2005] EWCA Civ 48

¹⁴⁷ [2006] EWCA Civ 1630

¹⁴⁸ [2007] EWCA Civ 17).

'Medical or other appropriate expert advice' (s 14(3)(b))

75

Section 14(3)(b) refers specifically to:

'... facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek'.

76

In *Fowell v National Coal Board*,¹⁴⁹ the Court of Appeal held, obiter, that a claimant's solicitor was not an expert in the meaning of this subsection. Hidden J, at first instance, in *Nash v Eli Lilly*¹⁵⁰ concluded after detailed analysis of *Fowell* that there was no binding authority on the point as to whether solicitors came within the ambit of s 14(3)(b) but he doubted whether in most ordinary circumstances they did. Hidden J did emphasise however, that (at P182):

'... suffice it to say that I am satisfied for the purposes in Section 14, a Plaintiff's knowledge of facts include knowledge which he might reasonably have been expected to acquire from facts ascertainable by him through the services of a Solicitor.'

77

The Court of Appeal in *Nash v Eli Lilly* saw no reason to depart from Hidden J's approach but also emphasised (at P344-400):

'Of course, as advice from the Solicitor as to the legal consequences of the act or omission is not relevant, his contribution can only consist of factual information. Moreover, where constructive knowledge is under consideration through the channel of the Solicitor this can only be relevant where it is established that the Plaintiff ought reasonably to have consulted a Solicitor at all. Thus it is for the defendant to establish not only that a Solicitor whom the Plaintiff might consult but have the necessary knowledge but also that it was reasonable to expect the Plaintiff to consult him.'

78

In *Henderson v Temple Pier & Co Limited*, above, the Court of Appeal decided that advice given by a solicitor could only fall within s 14(3)(b) if it related to a matter of fact on which expert advice was required. In that case the obtaining of the identity of the owners of the ship upon which the claimant fell was a relatively simple matter not requiring expert advice (per Bracewell J 1545):

'Having given her Solicitors general responsibility for the conduct of her claim, actions are taken and knowledge is acquired on behalf of the Plaintiff. If Solicitors fail to take appropriate steps to discover the person against whom that action should be brought, she cannot take refuge under Section 14(1)(c) because on the face of it the occupier of the St.

¹⁴⁹ (1986) *The Times*, May 28.

¹⁵⁰ [1991] 2 Med LR169 at 182.

Katherine and the gangway was knowledge which she might reasonably have been expected to acquire from facts obtainable or ascertainable by her. Even if the Solicitor is to be regarded as an appropriate expert, the facts were ascertainable by him without the use of legal expertise. The proviso is not intended to give an extended period of limitation of the person whose Solicitor acts dilatorily in acquiring information which was obtainable without particular expertise.'

79

In *Copeland v Smith & Goodwin*, decided four and a half months after *Henderson*, the latter was applied and the claimant was, in principle, to be fixed with the action and inaction of her legal advisors.

80

It is of course frequently the case that experts are only instructed after a solicitor is instructed. The type of solicitor that is instructed may well, therefore, be relevant. Invidious as it may seem, a claimant who consults a specialist firm in personal injury with expertise in spinal, brain injury or disease work might be fixed with an earlier date of constructive knowledge than one who seeks the advice of a non-specialist.

81

Whether it is reasonable for a claimant to seek the advice of a solicitor or another expert will also depend on the precise circumstances of the case (see *Adams v Bracknell Forest Borough Council* above). In *Bates v Leicester Health Authority*¹⁵¹ a claimant was born with tetraplegia due to cerebral palsy in 1968. The claimant alleged his birth had been mis-managed. His parents told him that he could not sue the hospital. In 1993 he instructed a solicitor after his care worker suggested, following his father's death, that he might have a claim. The judge found that the claimant did not have actual knowledge of an omission of failing to intervene in the birth until receipt of an expert's report in 1994. The court also refused to fix the claimant with constructive knowledge as the defendant had not demonstrated that if the claimant had pressed his parents it would have made any difference to the knowledge he received. Relevant to this claimant's particular situation was his difficulty in communication and his substantial reliance on his parents.

82

In *Khan v Ainslie*¹⁵² Waterhouse J refused to fix the claimant with constructive knowledge in respect of the cause of his blindness in the circumstances where his solicitor had received a negative medical opinion. Given the tenor of that report, the solicitors had not acted unreasonably in failing to put supplementary questions to the medical expert. Similarly, in *Jeffrey v C & B Speciality Packaging UK Limited*¹⁵³ the Court of Appeal allowed a claimant's appeal against the finding of constructive knowledge by the trial judge who found that a claimant, in a deafness case, should have made further enquiries of medical staff who provided him with the results of his hearing test. The claimant was told that a natural cause of his tinnitus was

¹⁵¹ [1998] Lloyd's Rep Med 93.

¹⁵² [1993] Med LR 319.

¹⁵³ [1999] 9 CL 49.

being investigated by his consultant. The Court of Appeal found that it was not reasonable to require the claimant to go behind this until 1991 when concern was expressed in a further report over his hearing loss.

83

Section 14 does not define who is an expert but singles out, appropriately, medical experts who can range from a general practitioner to treating hospital physicians or medico-legal experts instructed by his solicitors. In *Nash v Eli Lilly* (above) the Court of Appeal held that certain claimants would be fixed with the knowledge of their GPs provided that it was reasonable for the claimant to have sought the advice of the doctor and reasonable to ask him what information the doctor had concerning the drug and its negative side-effects. In *Stephen v Riverside Health Authority*¹⁵⁴ a claimant with a limited knowledge of radiography was held not to be an expert in her own case particularly when much medical expertise directly conflicted with her own suspicions concerning the possible consequence of a radiation overdose.

84

If a claimant fails to take expert advice but relies on non-expert opinion he may nevertheless escape being fixed with constructive knowledge that would have been available from an expert if his action in going to non-experts was reasonable. In *Smith v Central Asbestos Limited*¹⁵⁵ the House of Lords indicated that workmen had acted reasonably in relying on erroneous advice given by their Works Manager. Similarly in *Howell v West Midlands Passenger Transport Executive*¹⁵⁶ the Court of Appeal held that the claimant in her circumstances had acted reasonably in relying on the opinions of unqualified people. Both these cases arose under the 1963 Act and concerned advice over a matter of law which is no longer relevant under the 1980 Act. However, the cases do indicate the approach the Court is likely to take, as it did in *Knipe v British Railways Board*¹⁵⁷ where it was considered reasonable that a claimant took advice from his trade union.

The proviso (s 14(3))

85

Section 14(3) concludes as follows

‘... but a person shall not be fixed under this sub-section 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’.

86

This proviso helps the claimant who instructs an expert who through oversight or incompetence, or even in the case of a treating doctor on therapeutic grounds, fails to provide the claimant with relevant facts concerning significance, attribution or identity.

¹⁵⁴ [1990] Med LR 261.

¹⁵⁵ [1973] AC 518.

¹⁵⁶ [1973] 1 Lloyd’s Rep 199.

¹⁵⁷ [1972] 1 Lloyd’s Rep 122.

87

This principle is well illustrated in the case of *Marston v British Railways Board*¹⁵⁸ where an engineer had been instructed by the claimant's solicitors to examine a hammer which had caused Mr Marston's carotid artery to be severed when a chip from the hammer flew off whilst he was striking a metal sett. Both Mr Marston, before his death, and other employees believed that the hammer was in fact new. The expert reported that the hammer was satisfactory in terms of its hardness, but he failed to mention the fact that the hammer was neither new nor in good condition. At the trial, one expert thought the hammer fractured because of poor manufacturing while another thought it was due to previous misuse. The fact that the hammer was in poor condition did not emerge until cross-examination of the claimant's experts. Croom-Johnson J held that the claimant, the widow, was not to be fixed with the knowledge of the hammer's defect, because all reasonable steps had been taken to obtain that knowledge which the expert had not in fact revealed.

88

The proviso itself would rarely avail a claimant who relies upon a solicitor's advice not to pursue a witness or avenue of enquiry and, thereby, fails to uncover some relevant knowledge, because as indicated a solicitor is normally not an expert within the meaning of s 14(1)(b) (*Fowell v National Coal Board*, *Nash v Eli Lilly*, *Hallford v Brooks*, *Henderson v Temple Pier Co Limited* above). If, of course, a solicitor in possession of relevant knowledge advises a claimant that he has no case in law, that is entirely irrelevant on the clear wording of the section and time will continue to run against a claimant with the relevant knowledge of significance, attribution and identity.

89

In *Jones v Bennett*,¹⁵⁹ Widgery LJ held that the claimant had constructive knowledge from the date when it was reasonable for her to seek advice. That case concerned the claimant's inability to pay for her solicitor's advice so no detailed advice was given. Many other cases, however, have indicated that the date of constructive knowledge would, in fact, be when the advice was actually received or was likely to have been received following the instruction of the solicitor or of an expert (see *Guidera v NEI Projects (India) Limited*;¹⁶⁰ *Nash v Eli Lilly* above; *Bentley v Bristol & Western Health Authority (No 1)*¹⁶¹). This approach appears to be eminently reasonable because frequently when a report is commissioned from an expert, substantial time will elapse before the report is produced and delivered to the solicitors and its details are disclosed to the actual claimant.

90

The tenor of recent authorities is towards fixing a claimant with both an earlier date of actual knowledge and an earlier date of constructive knowledge. This process

¹⁵⁸ [1976] ICR 124.

¹⁵⁹ [1976] 1 Lloyd's REP484.

¹⁶⁰ CA Independent 19 2 1990

¹⁶¹ [1991] 3 Med LR 1.

has led to an increasing reliance on the provisions of s 33 of the Limitation Act 1980.

Limitation Act 1980, s 33: discretion, prejudice and ‘all the circumstances of the case’

91

The court has a power in personal injury actions to allow a statute-barred claim to proceed if it appears equitable having regard to the respective prejudices likely to be suffered by each party. The discretion within s 33 of the Limitation Act 1980 to disapply a period of limitation is entirely unfettered. In most personal injury actions there is no ‘out of time’ long-stop beyond which a case is statutorily too stale and this includes those classes of cases where the claimant has an irresistible claim over against negligent legal advisers who permitted a claim to become statute barred.

The position 1979–2006 prior to *Horton v Sadler*¹⁶²

92

The major class of action excluded from s 33 discretion between 1979 and 2006 were those governed by the rule in *Walkley v Precision Forgings*,¹⁶³ where a second writ has been issued because the first writ was never served or lawfully renewed, or where the first action was struck out for want of prosecution or was otherwise discontinued (see *Whitfield v North Durham Health Authority*,¹⁶⁴ *Young v Western Power Distribution (South West)*¹⁶⁵). Unless in such cases it could be established that the date of knowledge occurred within 3 years prior to the issue of the second writ, this class of case was held to be statute-barred as the court had no power to apply the provision of s 33 of the 1980 Act.

93

This was because the House in *Walkley* held that the prejudice to the claimant was caused not by the provisions of the Limitation Act (then s 2D of the 1975 Act) but by the failure to prosecute the first action. The result of *Walkley* was to produce a series of cases where the courts strained to distinguish it on unprincipled grounds. Exceptions to the rule first arose where the initial action having been brought in time was discontinued due to misrepresentation or improper conduct on the part of the defendant (per Lord Diplock in *Walkley, Deerness v John Keeble & Sons (Brantham) Limited*,¹⁶⁶ *Forward v Hendricks*,¹⁶⁷ see also *Re: Philip Powis Limited*¹⁶⁸).

94

¹⁶² [2006] UKHL 27.

¹⁶³ [1979] 2 All ER 548.

¹⁶⁴ [1995] PIQR P 361.

¹⁶⁵ [2003] 1 WLR 2868.

¹⁶⁶ [1983] 2 Lloyd’s Rep 260.

¹⁶⁷ [1997] 2 All ER 395.

¹⁶⁸ [1997] 2 BCLC 481.

A further class of exceptions occurred where an invalid writ had been issued such as against a company in compulsory liquidation so that the writ was wholly ineffective. If subsequent leave was given to issue proceedings then s 33 of the 1980 Act was permitted to apply (*Wilson v Banner Scaffolding Limited*;¹⁶⁹ *Rose v Express Welding Limited*;¹⁷⁰ *Re Workvale Limited No.2*¹⁷¹; *White v Glass*¹⁷²).

95

Neither did the rule in *Walkley* apply if a different party was sued in the second action (*Shaplund v Palmer*¹⁷³) or when the first action was against the estate of a deceased but no personal representatives had been appointed and the second action was against a named personal representative (*Piggott v Aulton*¹⁷⁴).

Horton v Sadler

96

The anomalies which *Walkley* created were swept away in *Horton* by the House of Lords departing from its previous decision in *Walkley*, as affirmed in *Deerness v Keeble and Thompson v Brown*, by invoking its Practice Statement on Judicial Precedent.¹⁷⁵ The House found that *Walkley* was simply wrong as a matter of statutory construction because the claimant was prejudiced by the Limitation Act in the second action. *Walkley* was said to have conflated the first action, where there was no prejudice caused by the Act as it was brought in time, with the second action where the claimant clearly was prejudiced. The House also said the decision had created distinctions not based on principle and restricted the Act's discretion which on proper construction was entirely unfettered (see Lord Bingham, paras 22–28). In *Richardson v Watson and anor*¹⁷⁶ the Court of Appeal has subsequently held that it was not an abuse of process to issue a second set of identical proceedings out of time to rectify a failure to comply with the notice requirements of the MIB in a fatal road traffic action. The MIB in its previous practice had often taken no objection to such a course of action, and the prejudice to the MIB would normally be met by the Claimant giving timely notice in respect of the second set of proceedings. A s.33 discretion was given to allow the action to proceed.

The exercise of discretion

97

In exercising its discretion the court looks at:

¹⁶⁹ (1982) *The Times*, June 22.

¹⁷⁰ Lexis, 21 January 1986.

¹⁷¹ [1992] 2 All ER 627.

¹⁷² (1989) *The Times*, February 18.

¹⁷³ [1999] 1 WLR 2068.

¹⁷⁴ [2003] PIQR P22.

¹⁷⁵ [1966] 1 WLR 1234.

¹⁷⁶ [2006] EWCA Civ 1662

- (a) the balance of prejudice to each party;
- (b) the six specific factors contained in s 33(3); and
- (c) 'all the circumstances of the case' (s 33(3)).

98

There are very many cases involving the application of s 33 of the Limitation Act 1980 and they cannot be treated as precedents because of the varied factual circumstances they give rise to and because judicial conceptions of discretion and equity vary. Certain principles, however, do arise and some of the following illustrations indicate the current judicial attitude to both questions of prejudice and discretion. More recently the hardening of the Court's attitude to s.14(2) (significance) and s14(3)(constructive knowledge) should result in a more flexible exercise of discretion under s.33

Prejudice

99

In *Hartley v Birmingham District Council*¹⁷⁷ Parker LJ became one of the first appellate judges to make some general observations on the nature of s 33 prejudice, although like other appellate judges before him he refused to lay down guidelines. In *Hartley*, the claimant issued a writ only a matter of hours out of time but no s 33 discretion was granted at first instance notwithstanding the minimal delay. Parker LJ held that in all or nearly all cases the prejudice in terms of refusing or allowing an action to proceed was equal and opposite because the stronger on liability the claimant's case was the greater the prejudice to him was if the claim was barred and the greater the prejudice would be to a defendant if the limitation period was disapplied. Alternatively, the weaker the claimant's case was the less the claimant would be prejudiced by being shut out because his claim was likely to fail and equally the defendants would suffer less prejudice in that they would be likely still to be able to defeat what was by definition a weak case.

100

This line of reasoning led the court to express the view that the most important question concerning prejudice was evidential prejudice as specified in s 33(3)(b) which dealt with the effect of the delay on the defendant's ability to defend the case on its merits. The court went on to state that if it was legitimate to consider, as it was, whether a claimant had a claim over against his solicitors, it was also legitimate to consider whether the defendant was insured. The court expressed the opinion that suing one's previous solicitors always created prejudice because the original wrong-doer may know very little about the weaknesses of the claimant's case particularly on quantum whereas the previous solicitor could well be appraised of them. Further, the court indicated that if the delay resulted in a windfall defence only and did not seriously affect the evidence then the power within s 33 would generally be exercised in the claimant's favour. This case was approved in 2006 by the House of Lords in *Horton v Sadler*.

101

¹⁷⁷ [1992] 2 All ER 213.

Approximately a year after *Hartley* a differently constituted Court of Appeal remarked in *Nash v Eli Lilly*¹⁷⁸ that Lord Justice Parker's remarks were not of universal application. In *Nash*, the court emphasised that if a claimant's claim lacked merit then there might well be significant prejudice in allowing an action to proceed particularly where the claimant was legally aided and where a defendant would be put to great expense in defeating an unmeritorious claim. In those circumstances the claimant was in a position to extract a nuisance value settlement. Such considerations are likely to be more relevant to high cost complex pharmaceutical or product liability actions or clinical claims where public funding is still available. In *Nash*, several claimants were denied s 33 dispensations primarily on the weakness of their case on the merits (eg *Eastern, O'Hara and Jenkins*). In *Kelly v Bastible*¹⁷⁹ the Court of Appeal held that whereas *Hartley* could permit a claim under s 33 where a short delay occurred which did not affect the defence and where there had been early notification of the claim it did not preclude insurers from relying on any evidential points which demonstrated prejudice. The proper approach in such a case should be to consider the insurer and the insured as forming a composite whole when considering prejudice.

102

In *Donovan v Gwentys Limited*,¹⁸⁰ the House of Lords determined that prejudice which occurred before the expiry of the limitation period was a relevant matter for the Court to consider in deciding whether to grant a s 33 dispensation. The date of a letter before action in this context can be an important matter. In *Donovan*, the defendants were not put on notice as to the nature of the claimant's claim until more than 5 years from the date of her accident. The claimant, being a minor, had an extended period of limitation but even so issued proceedings five and a half months outside her primary limitation period.

103

Economic prejudice arising out of changes in the payment of damages in clinical negligence actions which arose due to restructuring of the National Health Service (NHS) with effect from 1 January 1990 might also constitute prejudice within a s 33 application. In *Whitfield v North Durham Health Authority*¹⁸¹ the trial judge accepted that if the claim had been prosecuted in time damages would have been paid by Medical Defence Organisations but because the claim was brought late the Health Authority would need to fund any claim with respect to damages below £300,000. The trial judge took the view that any patients who might have to wait for treatment because a claimant was awarded damages would be probably willing to do so. The Court of Appeal reversed the trial judge's exercise of his discretion in allowing the case to proceed and found that an assumption of altruism on the part of patients who may be kept waiting longer for the treatment was something which was too speculative for the judge properly to consider.

104

¹⁷⁸ [1993] 4 All ER 344.

¹⁷⁹ [1997] 8 Med LR.

¹⁸⁰ [1990] 1 WLR 472.

¹⁸¹ [1995] 6 Med LR 32.

In *Dobbie v Medway Health Authority*,¹⁸² the claimant's case was not allowed to proceed following a 16-year delay on a number of grounds including one that the surgeon and hospital would be prejudiced by having the action hanging over them indefinitely. In the Court of Appeal, Beldam LJ remarked that he could not see how Damoclean sword type prejudice could apply to a doctor who did not know that any action was being contemplated against him. The fact that a defendant has had a number of claims brought against him in the past for example concerning industrial deafness which have been settled or compromised does not mean that a defendant may not be prejudiced by the delay in any particular case (*Price v United Engineering Steels Limited*,¹⁸³ *Barrand v British Cellophane plc*¹⁸⁴ disapproving *Buck v English Electric Company Limited*¹⁸⁵).

105

In cases concerning failures to deal with the effects of dyslexia the House of Lords in *Adams v Bracknell Forest Borough*¹⁸⁶ endorsed the Court of Appeal's remarks on the exercise of s 33 discretion made in *Robinson v St Helens Metropolitan Borough Council*¹⁸⁷ which emphasised the need for proportionality (per Sir Murray Stuart-Smith at P139):

'32. ... These cases are very time consuming to prepare and try and they inevitably divert resources ... Under Section 33 the onus is on the Claimant to establish that it would be equitable to allow the claim to proceed having regard to the balance of prejudice.

33. The question of proportionality is now important in the exercise of discretion, none more so than under section 33. Courts should be slow to exercise their discretion in favour of a claimant in the absence of cogent medical evidence showing a serious effect on the claimant's health or enjoyment of life and employability. The likely amount of an award is an important factor to consider, especially if, as is usual in these cases, they are likely to take a considerable time to try'.

106

Such an approach was applied in *McGhie v British Telecommunications plc*¹⁸⁸

107

In *KR v Bryn Alyn Community Holdings Ltd*¹⁸⁹ the Court of Appeal was concerned with the exercise of discretion to cases of long standing psychiatric injury from sexual and physical abuse in children's homes. The court recognised that given the width of discretion available only general guidance could be given but derived a number of principles from the decided cases:

¹⁸² [1994] PIQR P353.

¹⁸³ [1998] PIQR P407.

¹⁸⁴ (1995) *The Times*, February 16.

¹⁸⁵ [1997] 1 WLR 806.

¹⁸⁶ [2004] UKHL 29.

¹⁸⁷ [2003] PIQR P128.

¹⁸⁸ [2005] EWCA Civ 48.

¹⁸⁹ [2003] QB 1441.

1. The discretion is fettered only to the extent that s 33 provides a non-exhaustive list of circumstances to which to have regard.
2. The matter is not determined simply by assessing comparative scales of hardship: rather the overall question is one of equity, namely whether it would be equitable to disapply the limitation period having regard to the balance of prejudice.
3. An appellate court should not intervene save where the judge was so plainly wrong that his decision exceeded the ambit within which reasonable disagreement is possible, this includes the exercise of wrong principles, taking into account irrelevant matters, ignoring relevant matters or making a decision that is palpably wrong.
4. In multiple claimant cases each claim should be considered separately.
5. The claimant has a heavy burden in showing that it would be equitable to disapply the limitation period and the dispensation is an exceptional indulgence to be granted only where equity demands it.
6. Depending on the evidence and the issues generally the longer the delay the more likely and greater will be the prejudice to the defendant.
7. Where a judge is minded to grant a long extension he should take meticulous care to give his reasons.
8. A judge should not decide the matter on any one circumstance in s 33(3) but he should conduct a balancing exercise taking all the relevant circumstances into account.
9. Where feasible a judge should decide the matter as a preliminary issue so as to avoid the decision on liability affecting the reasoning on limitation. If limitation is decided at trial it should be done before determining the substantive issues.
10. In cases such as sexual abuse actions the date of knowledge test will extend time to favour claimants and therefore limited weight should be given to the reasons for the delay.
11. In assessing the cogency of the claimant's evidence the judge should bear in mind that the more cogent the claimant's evidence the greater the prejudice to the defendant in depriving him of the limitation defence. What is of paramount importance is the effect of the delay on the defendant's ability to defend the case.

However, in *A v Hoare*¹⁹⁰ the House of Lords specifically disapproved point 10 above and indicated that because significance was to be construed objectively and sexual abuse cases would accordingly be more frequently time barred a different approach to the exercise of discretion was required. Lord Hoffman said this:

“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

¹⁹⁰ [2008]UK HL 6

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 claimant’s reasons for the 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 precisely of the opposite opinion, and if your Lordships share my view then 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 residual class of cases ... 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 sub section 3(a) to have regard to the reasons for delay and in my opinion this required 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”.

The rest of the House did agree. Baroness Hale said she fully supported the more generous approach to the exercise of discretion (para 60) and Lord Carswell said there needed to be a more liberal approach to the exercise of discretion (para 70). Lord Brown also reaffirmed the unfettered nature of the discretion and emphasized the significance of whether there could be a fair trial as a key factor in determining whether to allow a claim to proceed (paras 84-90).

It would therefore seem clear that the Court of Appeals contention in Bryn Alyn that the exercise was an exceptional indulgence (point 5, para 107 above) does not survive the house of Lords’ decision in *Hoare*.

Discretion generally

108

Section 33(3) provides:

‘In acting under this section the court shall have regard to all the circumstances of the case and in particular to:

- (a) the length of, and reasons for, the delay on the part of the plaintiff;
- (b) the extent to which having regard to the delay the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 ... or as the case may be by section 12;
- (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff’s cause of action against the defendant;
- (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

- (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
- (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received’.

109

The six factors contained within s 33 are exemplary only, and not exclusive, and cannot be analysed in isolation from each other. Trial judges tend, however, to look at each factor in turn in exercising their discretion.

110

In *Nash v Eli Lilly*¹⁹¹ the Court of Appeal indicated that it would be very slow to interfere with the exercise of discretion under this section but would do so where a judge either took into account factors which he should have ignored or ignored factors which he should have taken into account. The court expressed the view that, provided that it was relevant, the judge may take into account a factor not specifically listed in the sub-paragraphs of s 33(3) but alternatively, if it was established that he failed to take into account any of the matters mentioned in s 33(3) which were relevant to the carrying out of the balancing exercise then his judgment would be susceptible to attack.

111

A powerful illustration of intervention by the Court of Appeal with the exercise of discretion is found in the case of *Whitfield v North Durham Health Authority*,¹⁹² where the court allowed the defendant’s appeal against the exercise of the discretion in the claimant’s favour. In analysing the judge’s exercise of his discretion, the Court of Appeal said, first, that the judge ought to have taken into account that it was by mere oversight that the practitioner sued was excluded from the first writ which had been issued and accordingly it was relevant to consider whether the claimant should have such a windfall advantage from the incompetence of her own first solicitors. Secondly, the court indicated that the judge gave way to inappropriate speculation as discussed above. Thirdly, the court felt that the claimant should not for this purpose be treated as separate from her advisers, and any delay by the legal advisers was a relevant matter in considering the defendant’s prejudice. Fourthly, the court indicated that the trial judge had given insufficient weight to the prejudicial effect of a doctor having to rely on his powers of recollection with the increasing passage of time.

112

Waite LJ said this:

‘The outcome of the balancing exercise under Section 33 is not to be determined on comparative scales of hardship (although hardship can never be irrelevant in a jurisdiction where all circumstances are to be taken into account). The overriding question is one of equity. Would it be

¹⁹¹ [1993] 4 All ER 383.

¹⁹² [1995] 6 Med LR 32.

equitable for the action to be allowed to proceed on the balance of prejudice weighted with due regard to all the circumstances and specific facts mentioned in the section? In determining such a question there can be no severance of the Plaintiff's conduct from that of her advisers.'

(See also *Brady v Wirral Health Authority*,¹⁹³ *Skitt v Khan and Wakefield Health Authority*,¹⁹⁴ *Farthing v North East Essex Health Authority*.¹⁹⁵)

113

For a case where the Court of Appeal interfered with the exercise of discretion to the benefit of the claimant see *Davis v Jacobs and Camden and Islington Health Authority*.¹⁹⁶ See also *Long v Tolchard and Sons Ltd*¹⁹⁷ *Coad v Cornwall and Isles of Scilly Health Authority*¹⁹⁸ *Margolis v Imperial Tobacco Ltd*¹⁹⁹ *Mold v Hayton, Newsom*.²⁰⁰

Section 33(3)(a): 'The length of and reasons for the delay on the part of the Plaintiff'

114

The reference to delay here is to delay since the expiry of the limitation period.

115

Cases of extreme delay of over 20 years have been allowed to proceed but principally when they involve the contraction of insidious diseases due to exposure to substances arising out of allegations of negligence concerning a system of work rather than from a specific injury in a particular accident. (See *Buck v English Electric*²⁰¹ and *McClaren v Harland & Wolf Limited*.²⁰²) Generally speaking, however, the shorter the delay the more likely the court is to allow an action to proceed. In *Hendy v Milton Keynes Authority*²⁰³ a 9-day delay which gave rise to no evidential prejudice was excused by the court in respect of an action for damages arising out of injury sustained during a hysterectomy. Even when there has been extensive delay and prejudice the court on occasions does allow a claim to proceed. In *Doughty v North Staffordshire Health Authority*²⁰⁴ an action was brought some 25 years after the removal of a port wine stain on the claimant's face and some 13 years after the claimant's date of knowledge. The judge found the delay was due to discouraging advice and problems with legal aid. The action was allowed to proceed notwithstanding the fact the treating surgeon had had a stroke

¹⁹³ Judgment, 25 June 1996 CCRTF 90/ 1502/C.

¹⁹⁴ [1997] 8 Med LR.

¹⁹⁵ [1998] 9 Med LR 38.

¹⁹⁶ [1999] Lloyd's Law Rep Med 72.

¹⁹⁷ [2001] PIQR P18.

¹⁹⁸ [1997] 1 WLR 189.

¹⁹⁹ [2000] MLC 204.

²⁰⁰ [2000] MLC 207.

²⁰¹ [1977] 1 WLR 806.

²⁰² [1991] SLT 85.

²⁰³ [1992] 3 Med LR 114.

²⁰⁴ [1992] 3 Med LR 81.

and was unable to testify (see also *Kidd v Grampian Health Board*²⁰⁵ and *Baig v City and Hackney Health Authority*²⁰⁶). The court is obviously influenced by what is an acceptable reason for the delay and the claimant's prospects are enhanced if there is no direct criticism of the claimant himself as occurred in *McCafferty v Metropolitan Police District Receiver*.²⁰⁷ Mr McCafferty was a police officer who had delayed in bringing an action because of a combination of his liking his job, feeling insecure with respect to his tenure and his desire to preserve good relations with his employer. Similarly, cases where a claimant's initial minor injury has triggered a severe exacerbation are likely to be looked upon favourably.

The understandable reluctance of a victims of sexual abuse to challenge the abusers was an obvious reason for delay in such cases as victims frequently may seek to suppress their experiences until an aggravation of their psychological problems occurs as *A v Hoare* supra.

116

The position may be otherwise where there has been no development and no good reason for the delay as in *Buckler v Sheffield Forest Borough Council*.²⁰⁸ In *Das v Ganju*²⁰⁹ inaccurate and misleading advice given by lawyers was held not to be a fault attributable to the Claimant and in the absence of substantial prejudice to the Defendants a claim was allowed to proceed in respect of the birth of a child suffering from rubella syndrome. In *Corbin v Penfold Metalising*²¹⁰ a judge was held to be wrong to attribute to the Claimant the solicitors delay and the court held there was no such rule (see also *Whitfield v North Durham Health Authority* ibid and *Steeds v Peverel Management Services Ltd*²¹¹). However in *Horton v Sadler* supra Lord Carswell expressed doubt as to whether *Das* and *Corbin* should be construed so as to prevent the court from taking into account the failings of the claimant's solicitors. Lord Carswell's speech stated that the claimant must bear responsibility for delays which have occurred whether caused by him or his solicitors (para 53b). It is now clearly the case that the existence of a potential claim over by a Claimant against his own lawyers is a relevant factor to go in the balance but the weight given to it will vary and did not count for much in the cases of both Horton and Richardson supra.

117

In *Skitt v Khan*²¹² the relative poverty of a claimant during his lifetime was held not to be a good enough reason for a failure to obtain a medical report.

118

²⁰⁵ [1994] SLT 265.

²⁰⁶ [1997] 5 Med LR 221.

²⁰⁷ [1997] 1 WLR 1073.

²⁰⁸ LTL 21/6/04, CA.

²⁰⁹ [1999] Lloyd's Med 198.

²¹⁰ [2000] Lloyd's Rep 247.

²¹¹ (2001) *The Times*, May 16.

²¹² [1997] 8 Med LR 165.

In *Coad v Cornwall and Isle of Scilly Health Authority*²¹³ the Court of Appeal held that in considering the length of and reasons for the delay the test was a subjective one and ignorance of legal rights was a factor to be considered.

Section 33(3)(b): 'The extent to which having regard to the delay the evidence adduced or likely to be adduced by the Plaintiff or the Defendant is or is likely to be less cogent than if the action had been brought within the time allowed by Section 11'

119

Again the delay referred to in this subparagraph is delay since the expiry of the limitation period.

120

This consideration was stated in *Hartley v Birmingham District Council*, *KR v Bryn Alyn* and *Horton v Sadler* to be the most significant matter in the exercise of the Court's discretion. Few cases are likely to be allowed to proceed where the defendants establish significant evidential prejudice such as the death of a witness or the destruction of written or other evidence. (See *Bater v Newbold*,²¹⁴ *Wilding v Lambeth*, *Southward and Lewisham Area Health Authority*,²¹⁵ and *Pilmore v Northern Trawlers Limited*.²¹⁶)

121

Accordingly, clinical negligence actions primarily based upon expert opinion where the written medical and nursing notes have been preserved are more likely to be allowed to proceed if time barred than those which raise issues concerning consent and warning as to risks which will turn upon oral recollection. In *Baig v City and Hackney Health Authority*²¹⁷ the trial judge refused to allow a statute-barred action to proceed partly on the basis that it would not be possible to have valuable recollections of the warnings given with respect to an operation performed some 17 years earlier. (See also *Farthing v North Essex District Authority*,²¹⁸ *Smith v Leicester Health Authority*,²¹⁹ *Gregory v Ferro (GB) Limited*,²²⁰ *Brady v Wirral Health Authority*,²²¹ *Whitfield v North Durham Health Authority*,²²² *Roberts v Winbow*,²²³ *Coad v Cornwall*,²²⁴ *Briody v St Helens and Knowsley Area Health Authority*.²²⁵)

²¹³ [1997] 1 WLR 189.

²¹⁴ Lexis, 30 July 1991.

²¹⁵ Lexis, 10 May 1982.

²¹⁶ [1986] Lloyd's Rep 552.

²¹⁷ [1994] 5 Med LR 221.

²¹⁸ [1998] Lloyd's Rep Med 37.

²¹⁹ [1998] Lloyd's Rep Med 77.

²²⁰ [1995] 6 Med LR 320.

²²¹ Judgment, 25 June [1996] CCRTF 90/1502.C.

²²² [1995] 6 Med LR 32.

²²³ [1999] PIQR P77.

²²⁴ [1997] 1 WLR 189.

²²⁵ [1999] Lloyd's Rep Med 185.

Section 33(3)(c): 'The conduct of the Defendant after the cause of action arose including the extent (if any) to which he responded to requests reasonably made by the Plaintiff for information or inspection for the purposes of ascertaining facts which were or might be relevant to the Plaintiff's cause of action'

122

Refusals by potential defendants, insurers or solicitors to deal with a claim quickly or at all will not stop running against a claimant. However, if such activity can be shown to have slowed down the progress of the claim such behaviour might be relevant for the exercise of the court's discretion.

123

In *Atkinson v Oxfordshire Health Authority*,²²⁶ the court held that it had been required to exercise its discretion under s 33 it would have done so in the claimant's favour because a large part of the delay was a failure by the defendant to tell the claimant's mother precisely what had happened during an operation to evacuate a tumour on the claimant which had resulted in injury to him.

124

A similar approach was adopted by the court in *Scuriaga v Powell*²²⁷ where the claimant was told that a failed abortion was due to structural defect in her rather than a practitioner's own negligence. In *Snizek v Bundy (Letchworth)*²²⁸ the defendants obstructed pre-action disclosure in a case where the claimant's action for exposure to chemical dust became statute barred. The Court of Appeal upheld the exercise of the judge's discretion partly based upon the defendant's behaviour.

125

In *Marshall v Martin*²²⁹ the Court of Appeal held that the defendant's conduct need not be discreditable or unsatisfactory and the fact that the defendant had made an interim payment would be relevant in considering how that operated on the claimant's mind in respect of a belief that the case was likely to be settled.

Section 33(3)(d): 'The duration of any disability of the Plaintiff arising after the date of the accrual of the cause of action'

126

Disability here refers to unsoundness of mind pursuant to the definition contained in s 38(2) of the Limitation Act 1980 as the only other form of disability namely infancy cannot arise after the accrual of a cause of action.

127

Dicta which treated disability within the meaning of this subsection as a physical disability as in *Bater v Newbold*²³⁰ and *Pilmore v Northern Trawlers Limited*²³¹ are

²²⁶ [1993] 4 Med LR 18.

²²⁷ [1979] 123 SJ 406.

²²⁸ [2000] PIQR P213.

²²⁹ Lexis, 10 June 1987.

²³⁰ Lexis, 30 July 1991.

²³¹ [1986] 1 Lloyd's Rep 552.

wrong, see the Court of Appeal's decision in *Yates v Thakenham Tiles Limited*²³² and *Thomas v Plaistow*.²³³

128

Nevertheless such physical disability not amounting to disability within the meaning of s 38(2) of the Limitation Act 1980 is frequently relevant when considering the reasons for the delay in s 33(3)(a) and in considering all the circumstances of the case.

Section 33(3)(e): 'The extent to which the Plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the Defendant, to which the injury was attributable, might be capable at that time as giving rise to an action for damages'

129

One of the major reasons for recommending a discretionary power to disapply the limitation period was to mitigate the effect that ignorance of the law should not stop time running against a claimant. Once, however, a claimant has personal knowledge that he has a cause of action upon which he can sue the court will inquire into how expeditiously the action was progressed before the issue of proceedings.

130

The claimant will be fixed with the action and behaviour of his lawyers as well as himself (*Thompson v Brown*,²³⁴ *Horton v Sadler* above) but not necessarily blamed for his lawyer's delays (see *Steeds v Peverell Management* above).

131

In *Doughty v North Staffordshire Health Authority*²³⁵ the court was willing to excuse the delay of the claimant's lawyers and exonerated the claimant from any personal blame in respect of failing to insist that her lawyers prosecuted the claim more quickly.

132

In *Davis v Jacobs and Camden and Islington Health Authority*²³⁶ the Court of Appeal was of the view that in construing s 33(3)(e) the court was concerned only with the conduct of the claimant (at p86 col 2). This analysis is contrary to the speech of Lord Diplock in *Thomas v Brown* and Lord Carswell in *Horton v Sadler*.

133

In *Obembe v City and Hackney Health Authority*²³⁷ parents sued in 1988 for alleged malpractice occurring at the birth of their son in 1979. They included a claim for damages in respect of themselves which was statute-barred and the court rejected the contention put forward that because they had 21 years to sue in

²³² [1995] PIQR 135.

²³³ [1997] PIQR P540.

²³⁴ [1981] 2 All ER 296.

²³⁵ [1992] 3 Med LR 81.

²³⁶ [1999] Lloyd's Law Rep Med 72.

²³⁷ Lexis, 9 June 1989.

respect of their son that was a reasonable excuse for not bringing their own action earlier.

Section 33(3)(f): 'The steps if any taken by the Plaintiff to obtain medical, legal or other advice and the nature of any such advice he may have received'

134

Negative legal or medical advice is frequently a problem for claimants and can delay the prosecution of an action because of difficulties over negligence or causation. In some publicly funded cases it led to the discharge of the certificate. (See *Bentley v Bristol and Western Health Authority*,²³⁸ *Halford v Brooks*;²³⁹ *Das v Ganju*.²⁴⁰)

135

The wording of the subparagraph indicates that it is relevant for the court to consider what the advice was. In *Jones v G D Searle & Co Limited*²⁴¹ the defendants wanted to know what previous legal advice had been given in a case where the claimant claimed that new developments in science had made previous advice, which was negative, out-dated. The defendants sought leave to administer an interrogatory to ascertain whether the prior advice was favourable or not, but the claimant said that that would amount to offend against legal professional privilege. The Court of Appeal found that giving the answer to the interrogatory, which limited itself to seeking to know whether the previous advice was negative or not, did not have the consequence that Counsel's Opinions were liable to discovery.

136

In *Tatlock v G P Worsley & Co Limited*²⁴² the defendants sought disclosure of the contents of an allegedly negative medical report together with correspondence with medical experts which meant that a claim was not proceeded with earlier than it was. The Court of Appeal held that s 33(3)(f) did not override the rules of legal professional privilege save in the restricted sense of a requirement for a claimant to indicate the nature of the advice only. As a matter of tactics and evidence the claimant might need to waive privilege if he was to rely effectively on the contents of the documents in issue.

'All the circumstances of the case'

137

As indicated in *Donovan v Gwentys Limited*²⁴³ the House of Lords stipulated that although s 33(3)(a) and (b) required the court to look at the delay after the expiry of the limitation period the injunction to look at all the circumstances of the case

²³⁸ [1991] 2 Med LR 359.

²³⁹ [1991] 1 WLR 428.

²⁴⁰ [1999] Lloyd's Rep Med 198.

²⁴¹ [1978] 3 All ER 654.

²⁴² Lexis, 22 June 1989.

²⁴³ [1990] 1 All ER 1018.

allowed the court to consider what prejudice had occurred within the primary limitation period. The court is also likely to consider the strength of the claimant's case, the likely size of the award, the strength of the defendant's case on the merits, whether a claimant is legally aided or not, whether a defendant is insured, whether there is an alternative remedy such as a good claim over against the claimant's solicitors or perhaps the possibility of a judgment being satisfied by the Motor Insurers' Bureau (see *Horton v Sadler* above, paras 52-550).

Procedure

138

A district judge or a master in addition to a judge is empowered to exercise discretion under s 33 of the Limitation Act 1980 pursuant to CPR, r 2.4. If the defendants believe that they have an extremely strong case they may issue an application to strike out the claimant's claim but this is unlikely to be successful if the claimant has any arguable merit at all. The normal procedure adopted is to issue an application to determine the limitation issue at an interlocutory hearing. If, however, it is desirable to call evidence or where there is a need for extensive discovery of documents it is better to have a preliminary trial on the issue of limitation. Any such preliminary trial may take place immediately before the trial of the main action or it may be at an earlier date. If the preliminary trial requires a rehearsal of many or most of the issues likely to be raised in the main trial then there is no great saving in costs by having the preliminary issue on limitation tried on a different date to the substantive hearing. However in *Bryn Alyn* the Court of Appeal emphasised that limitation issues should be decided as preliminary issues if practicable. If the limitation issue is tried at the main trial it should be done before determining the substantive issues.

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A pertinent distinction between having an interlocutory trial and having a trial on limitation immediately before the trial of the main action was thought at one stage to be that if a claimant failed on an interlocutory hearing leave was required to appeal to the Court of Appeal, but if a claimant failed at trial of the preliminary limitation point immediately before the substantive hearing no leave was required. However, the Court of Appeal in *Dale v British Coal Corporation (No 1)*²⁴⁴ stipulated that whatever procedure is adopted a Judge's determination is deemed to be a final one and at the time of that ruling pursuant to the then RSC Rules no leave was required. Under the CPR provisions the distinction between an interlocutory and a final Order is not pertinent to the issue of permission as permission is now required pursuant to CPR, r 52.3. The destination of an appeal is now determined by the Destination of Appeals Order 2000 as amended by Civil Procedure (Modification of Enactment) Order 2003 and Practice Direction 52PD. The general principle is that an appeal lies to the next level of judge in the court's hierarchy. However the normal rule will not be followed in a case where the Court's decision is a final one in multi-track claims. In these cases s 14 and s 33 appeals would lie to the Court of Appeal (see *Tanfern Limited v Cameron-MacDonald*).²⁴⁵ This does not apply to those cases not in the multi-track.

²⁴⁴

[1992] 1WLR 964.

²⁴⁵

[2000] 1WLR1311.

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The onus of persuading the court to disapply the primary limitation period lies on the claimant (*Thompson v Brown Construction (Ebbw Vale) Limited*²⁴⁶).

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Practitioners have been divided as to whether the proper pleading practice is for a claimant to particularise the facts and circumstances which he intends to rely on in seeking to persuade the court to exercise s 33 in his favour in the Particulars of Claim or whether it should be pleaded in a reply following the defendant raising limitation in the defence. While the onus is on the claimant to persuade the court, the fact that limitation is not a bar to a case but (rather) a defence suggests that there is no need to anticipate the defence, and that it might be preferable to wait and see if the defendant takes the point (see *Ogunsanya v Lambeth Area Heath Authority*).²⁴⁷ Alternatively in a clear case where the claimant is obviously out of time it may be sensible for the claimant to plead the particulars intended to be relied upon for a s 33 dispensation so to assist the court in fulfilling the overriding objective and clarifying the issues between the parties pursuant to the spirit of the CPR. A limitation defence must be pleaded and if a s 33 application is required and has not been pleaded in the Particulars of Claim there must be a reply.

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Appeals to the Court of Appeal are not infrequent as the number of cases referred to illustrates. Because, however, the discretion of the judge is unfettered the Court of Appeal has indicated that it will be slow to overturn a first instance decision recognising that judgments over what is equitable in all the circumstances will necessarily lead to a variation of judicial opinion (*Conry v Simpson*²⁴⁸). Where, however, the judge has failed to exercise his discretion at all or has exercised it erroneously or on wrong principles the Court has not infrequently reversed a trial judge's decision. The Court of Appeal will not interfere merely because its own discretion might have been exercised in a different way (*Bradley v Hanseatic Shipping Co Limited*,²⁴⁹ *Carlisle v Associated British Ports*²⁵⁰). In *Nash v Eli Lilly*²⁵¹ Lord Justice Purchas stated:

'Subject to acting judicially the discretion of the Court is unfettered. The specific matters set out in sub-section (3) are exemplary not definitive. Thus the Court of Appeal will be very slow to interfere with the exercise of that discretion under this section: See *Conry v Simpson* [1983] 3 All ER 369. Where, however, it is established that the judge either took into account factors which he should have ignored or ignored factors which he should have taken into account, or was plainly wrong, then this court is under a duty to interfere and in appropriate cases to substitute a decision based upon its own discretion. On the other hand, provided that it is relevant to the circumstances of the case, the judge may take into account a factor not specifically mentioned in the sub-paragraphs of

²⁴⁶ [1981] 1 WLR 744.

²⁴⁷ Lexis, 3 July 1985.

²⁴⁸ [1983] 3 All ER 369.

²⁴⁹ [1986] 2 Lloyd's Rep 34.

²⁵⁰ Lexis, 18 November 1987.

²⁵¹ [1993] 4 All ER 383 at 402.

sub-section (3), but on the other hand, if it is established that the judge failed to take into account any of the matters in sub-paragraph (3) which were relevant to the carrying out of the balancing exercise, then his judgment is susceptible to attack. It should however be mentioned that a judge is not under a duty specifically to refer to each and every fact which he has found and upon which he has exercised his discretion’.

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In *Bryn Alyn*(supra) the Court of Appeal confirmed this approach by indicating that a judge’s s 33 discretion could only be disturbed if it was outside the ambit of reasonable disagreement. This included the exercise of wrong principles, taking into account irrelevant factors, ignoring relevant factors or making a decision that was plainly wrong. If the appeal court intervened on any such ground the matter should be treated as at large and the discretion exercised afresh.

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Where a claimant restores a dissolved company to the Register in order to bring proceedings under s 651 of the Companies Act 1985 the restoration order should not usually include a provision that the period of dissolution should not count for limitation purposes. In *Smith v White Knight Laundry*²⁵² the Court of Appeal held that such an order that the period of dissolution was to be discounted should only be made where notice of the restoration was served on all parties that could be expected to oppose it, the court was satisfied that it had all the evidence that the parties would wish to adduce for an application under s 33 and any such application was bound to succeed. Otherwise, as will be the case in most proceedings the claimant should seek relief under s 33 in the normal manner.

Special time limits

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Section 39 of the 1980 Limitation Act provides a saving for those periods of limitation prescribed in other statutes:

‘This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by or under any other enactment (whether passed before or after the passing of this Act) ...’

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Accordingly, practitioners should be alert to the different time limits imposed by many statutes governing transport such as ss 183 and 190 of the Merchant Shipping Act 1995 (2-year limitation period), the Carriage by Air Act 1961 (2-year limitation) the International Transport Convention Act 1983 (3-year period but a 5-year long-stop), the Carriage of Passengers by Road Act 1974 (3-year period but with a long-stop of 5 years), the Consumer Protection Act 1987 (3-year period but with a 10-year long-stop), the Nuclear Installations Act 1965 (30- or 20-year long-stops depending on the circumstances).

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Claims brought under s 3 of the Protection from Harassment Act 1997 are specifically excluded from the personal injury limitation regime by s 11(1A) of the

²⁵²

[2002] 1 WLR 616.

Limitation Act 1980 and accordingly have a 6-year period as a statutory cause of action pursuant to s 9 of the 1980 Act.

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Under the Foreign Limitation Periods Act 1984 a foreign limitation period may be imposed with respect to a tort committed overseas but litigated in England.

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The Court of Appeal in *Aerlingus v (1) Gildacraft Ltd (2) Sentinel Lifts Ltd*²⁵³ held that the 2 year time limit for claims under **Civil Liability (Contribution) Act 1978** did not start to run until there was a judgment or award that ascertained the quantum, and not merely the existence, of the tortfeasor's liability.

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Wednesday 12th March 2008

Disability & Multipliers for Residual Earning & Capacity

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Disability and multipliers for residual earning capacity

Nigel Lewers
6 March 2008

- ❑ Tables A-D of the 6th Edition of the Ogden Tables
 - Introduce discount factors for contingencies other than mortality depending on educational attainment, disability and employment.
 - The discounts for the residual earnings of disabled claimants can be significant and are a new departure from the old *Smith v Manchester* approach
 - But to qualify they must be “disabled”
- ❑ What does this mean?
- ❑ How has this reduction been applied in practice?

Introductory Notes to Ogden 6

- ❑ The claimant must
 - have a progressive illness or one which has lasted or expected to last over a year, and
 - be disabled within the meaning of the Disability Discrimination Act 1995, and
 - have a condition which affects the kind or amount of paid work he can do.

Disability Discrimination Act 1995

- ❑ Section 1(1): “Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a **physical or mental impairment** which has a **substantial and long-term adverse effect** on his ability to carry out **normal day-to-day activities**.”
- ❑ Section 3: Guidance on meaning of these terms issued by Secretary of State.
- ❑ S.3(3): “A tribunal or court determining, for any purpose of this Act, whether an impairment has a substantial and long-term adverse effect on a person’s ability to carry out normal day-to-day activities, shall take into account any guidance which appears to it to be relevant.”
- ❑ So the meaning is derived from Schedule 1 of the Act and the Guidance.

Physical or mental impairment

- “Physical or mental impairment”:
 - Used to include mental illness only if it was clinically well recognised.
 - Abolished by s.18 of the DDA 2005.
 - Whilst this requirement remains for the condition to be compensated (*Bourhill v Young* [1943] AC 92) it is not necessary in order to qualify as disabled under the Act.
 - But certain conditions are excluded: addiction to alcohol, nicotine or any other substance, a tendency to set fires, steal, to physical or sexual abuse, exhibitionism and voyeurism (Disability Discrimination (Meaning of Disability) Regulations 1996 regs.3 and 4)

- Includes disfigurement (sched.1 para 3).
- Functional overlay included, as long as it causes disabling symptoms: *Dr. Hobbs v College of Ripon & York & St. John* [2002] IRLR 185 EAT.
- Consistent with Guidance at A7 and A8 which focuses on the effect of the impairment and not its cause.

“Normal day-to-day activities”

- ❑ “Normal day-to-day activities”:
 - Ogden Explanatory Notes: “those which are carried out by most people on a daily basis”
 - Sched. 1 para 4: one of the following must be affected: mobility, manual dexterity, physical co-ordination, continence, ability to lift, carry or otherwise move everyday objects, speech, hearing or eyesight, memory or ability to concentrate, learn or understand, or perception of the risk of physical danger.
 - Guidance, D4: examples are shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities.

- Does not include activities which are normal for one person or a small group (D5) but not necessary that it is carried out by the majority of people (D6).
- Does not include a particular or specialised form of work (D7) e.g. a pianist, because this is not a normal daily activity (Goodwin v Patent Office, Morison J, EAT, 21.10.98 p.11).
- But this particular disability may indicate others which would qualify, e.g. using a computer keyboard or lifting (D9).
- And consider a warehouseman moving heavy stock at work. Not a day-to-day activity, but he is also unable to lift heavy items around the home, such as chairs, which is.

Substantial and long-term adverse effects

- “Substantial and long-term adverse effects”:
 - An effect is long-term if it has lasted or is likely to last at least 12 months or is likely to last for the rest of the life of the person affected (sched.1 para 2)
 - Where the effect of an impairment ceases, it will be treated as continuing if it is likely to recur.
 - “Likely” means more probable than not. (Guidance, C2)
 - “Substantial” is more than minor and trivial. (Guidance, B1)
“The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is greater than the effect which would be produced by the sort of physical or mental conditions experienced by many people which have only “minor” or “trivial” effects.”

- Examples of substantial adverse effect:
 - Ogden notes, para 35
 - Guidance D20 – D25

- ❑ Effects of medical treatment
 - “An impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities, but for the fact that measures are being taken to treat or correct it, is to be treated as having that effect.” (Sched. para 6(1))
 - “Measures” include medical treatment and a prosthesis or other aid. (Sched. para 6(2))

- Known as the doctrine of deduced effect. The effects of the condition but for the treatment received.
- Impairment of sight is excluded where it is correctable by spectacles or lenses.
- The doctrine applies even if the measure results in the effects being completely controlled or not appearing.
- So deafness cured by a hearing aid is still a disability.
(Guidance B13)

- But the doctrine does not apply if the treatment is not continuing.
- *Carden v Pickering's Europe Ltd.* [2005] IRLR 720, EAT – fractured ankle – plated and pinned – no ongoing disability but for the doctrine of deduced effect – issue was whether the pins and plates amounted to continuing medical treatment – they could if they were aids continuing to support or assist the functioning of the ankle within Sched. Para 6(2) – case remitted for further consideration.

- ❑ Continuing medical treatment leading to permanent improvement or complete recovery:
 - Account should be taken where the effect of the treatment is to create a permanent improvement rather than a temporary one, where outcome of the treatment is known. (Guidance B15)
 - For example, physiotherapy to a spinally injured claimant has led to some permanent improvement. That must be taken into account. If the outcome of further treatment is unknown, the ongoing treatment can be disregarded. *Abadeh v BT plc* [2001] IRLR 23, Nelson J, para 32.
 - If the treatment is likely to lead to a complete recovery, it is taken into account. (Guidance, C9)
 - Applies equally to psychiatric illness: long-term depression treated with ongoing antidepressants; if the effects of the medication are not known, they are to be ignored. (Nelson J in *Abadeh*)

- ❑ Cumulative effects of impairment:
 - An impairment might not affect any one activity substantially, but its cumulative effect could be substantial: Guidance, B4.
 - Example: lung disease – breathing difficulties – minor effect on wide number of activities such as dressing, washing, preparing a meal or travelling are, together, substantial.

- ❑ Account should be taken of how a person can reasonably be expected to modify their behaviour to prevent or reduce the effects of their impairment. Guidance B7.
 - For example, back pain – reasonable to avoid extreme activities such as parachuting, but not to give up or modify more normal activities such as moderate gardening, shopping or using public transport.
 - The effects could be modified so that they are no longer substantial.

Recurring or fluctuating effects

- ❑ If an impairment ceased to have a substantial adverse effect but is likely to recur, then it is treated as continuing. Sched. Para 2(2).
 - Provision protects people with intermittent conditions such as arthritis and epilepsy.

Time taken to carry out an activity

- ❑ A person may only be able to complete a normal day-to-day activity slowly and with fatigue. This is a factor to be taken into account and could amount a substantial adverse effect. Guidance B2.
 - For example, a claimant may have ongoing physical pain which prolongs but does not prevent his every-day physical activities.

Hunter v MOD [2007] NIQB 43 (Stephens J)

- C fell rupturing most of the ligaments in his right knee, discharged from army and not worked since
- 36 years old at trial
- Wore knee brace, knee still gave way, constant aching, pain worse on activity and on driving for any length of time, muscle wasting, depression
- Medically fit for light delivery work or sedentary job where could get up and move around. Judge found should be in work
- Would have earned £268,290 but for the accident
- Table B discount factor = 0.20 where not in work, 0.39 where in work. Judge rejected both, because C in work but not so disabled to justify a discount factor of 0.39.
- Judge started with the 0.80 factor (table A) for a 36 year old, unemployed not disabled man and reduced it to 0.60.
- No mention of the DDA or Guidance.

- ❑ Conner v Bradman and Company [2007] EWHC 2789 (HHJ Peter Coulson QC)
 - C aged 51 at trial, ruptured right cruciate ligaments and tore meniscus in right knee in a motorcycling accident
 - Underwent arthroscopic surgery with considerable improvement but left with constant pain limiting ability to squat, climb stairs, jog, kneel, bend
 - Returned to job as mechanic but knee replacement surgery within a year would prevent this and he would then work as a taxi driver
 - Judge quoted DDA section 1 and schedule 1 and the Guidance notes. He ignored the previous surgery and the future knee replacement and held C was disabled.

- Correct to ignore the benefits of the arthroscopic surgery when considering disablement? The treatment was not ongoing so why apply schedule 1 para 6(1) and ignore it.
- Future knee replacement = prosthesis so correct to ignore it.
- Multiplier for pre-accident earnings was $11.4 \times 0.82 = 9.34$ (qualified, employed)
- Residual earnings multiplier under table B = $11.4 \times 0.49 = 5.58$

- Judge said: "... the figure of 0.49 should be adjusted in this case. I consider that, on all the evidence, it is very likely that the Claimant will work as a taxi driver for more than half of his remaining working life. Indeed, I consider that he has made the move to becoming a taxi driver precisely because he considers that he will be able to work for much of the next decade or more in that capacity. There is no medical reason why he will not be able to do so. Indeed, as I have said, even after the second revision surgery, which might not take place until the Claimant's mid-60's anyway, there is no real reason to believe that he could not continue working as a taxi driver if that is what he chooses to do."
- He therefore took the middle course between 0.49 and 0.82 of 0.655 giving a multiplier of 7.467.

- ❑ Leesmith v Evans [2008] EWHC 134 (QB) (Cooke J)
 - C was 29 warehouse technician, serious motor cycling accident, amputation of left leg above knee and injury to right hand affecting ability to grip and carry
 - Would have had successful career as a lighting engineer in the entertainment industry with earnings rising to £50,000 pa
 - Residual earning capacity was £10,000 pa
 - Table A adjustment was 0.92 and the table B adjustment 0.54 (disabled, employed)
 - “Disability” not contested but D submitted that the degree of disability must be taken into account given wide definition in para 35 of the Ogden notes
 - Judge applied a discount factor of 0.6 to residual earnings

- ❑ Garth v Grant and MIB, QBD, HHJ Hickinbottom, 25.5.07 (unreported).
 - Female aged 48 at trial
 - Obese pre-accident, weighing 28-30 stone
 - D submitted that she was disabled pre-accident therefore reduce earnings multiplier by factor of 0.6 (table D) and not 0.87 (table C)
 - Claimant able to perform vast majority of every day functions and function fully at work
 - Obesity did not have substantial adverse effect on ability to carryout everyday activities.
 - DDA and Guidance not analysed.
 - Discount factor was 0.87.

□ Conclusion

- The DDA and Guidance requires careful attention in order to decide whether someone is disabled
- Discount tables B and D are a “ready reckoner” and several features can be used to depart from its strict application:
 - Future improvement in medical condition (*Conner*)
 - Nature of future employment
 - Sector – public or private?
 - Size of employer – likelihood of alternative job?
- In *Hunter* and *Conner* the judge effectively split the difference equally between the table A and table B discounts to reflect the degree of disability.
- In *Leesmith* the judge came close to applying table B because the claimant was so seriously injured.
- Table B/D give a useful starting point, but thereafter is still a matter of impression.