

Limitation

Dicing with procedural death

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What we are talking about

- ▶ Section 33: the court's discretion to disapply the limitation period
- ▶ Section 35: amendments after the expiry of the limitation period

Section 33

Exercise of the court's discretion



Where to start?

1. Section 33 itself
2. Court of Appeal's judgment in Greater Manchester Police v Carroll [2017] EWCA Civ 1992 at para 42

Section 33(1)

The limitation period will be disapplied “*If it appears to the court that it would be **equitable** to allow an action to proceed having regard to the degree to which –*

- (a) the provisions of section 11 [or 11A] or 12 of this Act **prejudice the plaintiff** or any person whom he represents*
- (b) Any decision of the court under this subsection would **prejudice the defendant** or any person whom he represents”*

Section 33(3)

The court shall have regard to **all the circumstances** of the case and in particular to **six factors**:

- a) The **length of and reasons for the delay**
- b) The extent to which, having regard to the delay, the evidence is likely to be **less cogent**
- c) The **conduct of the defendant** after the cause of action arose
- d) The duration of **any disability** of the plaintiff
- 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 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

Carroll [2017] EWCA Civ 1992

- ▶ At para 42, Sir Terence Etherton MR summarised the most important general principles to be derived from the authorities
- ▶ For a summary of Etherton's summary, see Young v Downey [2019] EWHC 3508 (QB) at para 35
- ▶ Subsequent cases refer to the helpfulness of the summary in Carroll:
 - ▶ Pearce v The Secretary of State for BEIS [2018] EWHC 2009(QB) per Turner J
 - ▶ Carr v Panel Products [2018] EWCA Civ 190 per McCombe LJ: Carroll "*will no doubt now form the starting point for any court's consideration of issues arising under s.33*"

Reasons for delay vs. cogency of evidence

Balancing exercise

Weigh up:

- a) How good the reasons are for the delay (s.33(3)(a))
- b) How much the evidence has been degraded by the passing of time (s.33(3)(b))

Balancing exercise

The symbiotic relationship between these factors:

The reason for delay is relevant and may affect the balancing exercise. If it has arisen for an excusable reason, it may be fair and just that the action should proceed despite some unfairness to the defendant due to the delay. If, on the other hand, the reasons for the delay or its length are not good ones, that may tip the balance in the other direction: Cain's case, para 73. I consider that the latter may be better expressed by saying that, if there are no good reasons for the delay or its length, there is nothing to qualify or temper the prejudice which has been caused to the defendant by the effect of the delay on the defendant's ability to defend the claim. (Carroll supra at [42])

Balancing exercise

Gregory v Haynes [2020] EWHC 911 (Ch)

Facts

- ▶ A pleural thickening claim brought by C versus his former employer
- ▶ Period of exposure to asbestos was between 1959 and 1972
- ▶ C's date of knowledge was not until 2008, so LP expired in 2011
- ▶ Claim was brought nearly 6 years out of time, in 2017

Balancing exercise

Gregory v Haynes [2020] EWHC 911 (Ch)

- ▶ Decision at FI: Trial judge declined to exercise s.33 discretion in C's favour - no good reason for 6 year delay
- ▶ C's argument on appeal: there was a good reason for the first 3 years of delay, albeit not the last 3 years
- ▶ Held by Mr Justice Mann
 - ▶ It would be equitable to exercise the s.33 discretion in C's favour
 - ▶ There was no good reason for the last 3 years of delay, but this culpable delay had no impact on the cogency of the evidence

Balancing exercise

Gregory v Haynes [2020] EWHC 911 (Ch)

C got lucky for 2 reasons:

- ▶ 1st reason
 - ▶ RE v GE [2015] EWCA Civ 287
 - ▶ MG v (1)Thomas Street (2) Governors of St Augustine of Canterbury RC (unreported, 25th July 2018, Manchester County Court)
- ▶ 2nd reason
 - ▶ Carroll principle 8: *“The disappearance of evidence and the loss of cogency of evidence even before the limitation clock starts to tick is also relevant, although to a lesser degree: Collins v Secretary of State for Business Innovation and Skills [2014] PIQR P19 , para 65”*
 - ▶ Catholic Welfare Society v CD [2018] EWCA Civ 2342

Balancing exercise

Gregory v Haynes [2020] EWHC 911 (Ch)

However, there was a judicial warning:

32...In my view it can be said that it will normally behove a claimant who discovers a late claim to get on with its pursuit. Even if things are so delayed already that additional delay does not cause any identifiable prejudice, a claimant cannot expect to be able to delay as long as he/she likes on that basis. There will come a point at which the claimant's own delay, in those circumstances, will make it unfair to extend the period. Apart from anything else, the good discipline which delays in a claim really requires would be compromised if parties and their solicitors could just become lazy on the footing that it does not really matter any more in terms of prejudice to the defendant.

33 In my view this case comes close to that, but not quite close enough.

Balancing exercise

EXE v Governors of Royal Naval School [2020] EWHC 596 (QB)

- ▶ C alleged being sexually abused by a kitchen porter employed at her school while she was a pupil there (and thereafter)
- ▶ Issues: s.33, consent, vicarious liability, negligence, causation, quantum
- ▶ Claim brought c. **24 years** out of time
- ▶ Held: it would not be equitable to disapply the LP

Balancing exercise

EXE v Governors of Royal Naval School [2020] EWHC 596 (QB)

- ▶ C had good reasons for the delay, which arose from shame and anxiety [65]
- ▶ But the cogency of the evidence as to the issues in the case had suffered too much due to the passing of time such that a fair trial was no longer possible [67-71]

Burden of proof

- a) The burden is on **C** to show that it would be equitable to disapply the limitation period (albeit the burden is not necessarily a heavy one)

- b) The evidential burden is on **D** to show that the evidence is less cogent due to the delay

(Carroll at para 42)

The importance of evidence

Advice for **claimants**

Fail to evidence properly the reasons for C's delay at your peril:

- ▶ Kimathi v FCO [2018] EWHC 2066 (QB)
- ▶ EF v Catholic Child Welfare Society [2016] EWHC 3336 (QB)
- ▶ F and S v TH [2016] EWHC 1605 (QB)

The importance of evidence

Advice for **defendants**

Fail to explain what steps have been taken to obtain evidence at your peril:

- ▶ FZO v Adams [2018] EWHC 3584 (QB) upheld by Court of Appeal [2020] EWCA Civ 180: *“The judge was right...to take into account that the Appellant had done little or nothing to make up the evidential deficiencies about which they then vigorously complained. The Appellant protests too much, given its inactivity in this respect”* [115]
- ▶ Carroll (supra)
- ▶ Alseran & Others v Ministry of Defence [2017] EWHC 3289 (QB)

Some examples from the last year

Claim **succeeded** under s.33

- ▶ Gregory v Haynes [2020] EWHC 911 (Ch)
- ▶ Haringey LBC v FZO [2020] EWCA Civ 180
- ▶ DSN v Blackpool FC [2020] EWHC 595 (QB) (permission to appeal has been sought)
 - ▶ Claim against football club arising out of sexual abuse of C in 1987 by talent scout and convicted sexual abuser Frank Roper
 - ▶ Brought c. **22 years** out of time

Some examples from the last year

Claim **succeeded** under s.33

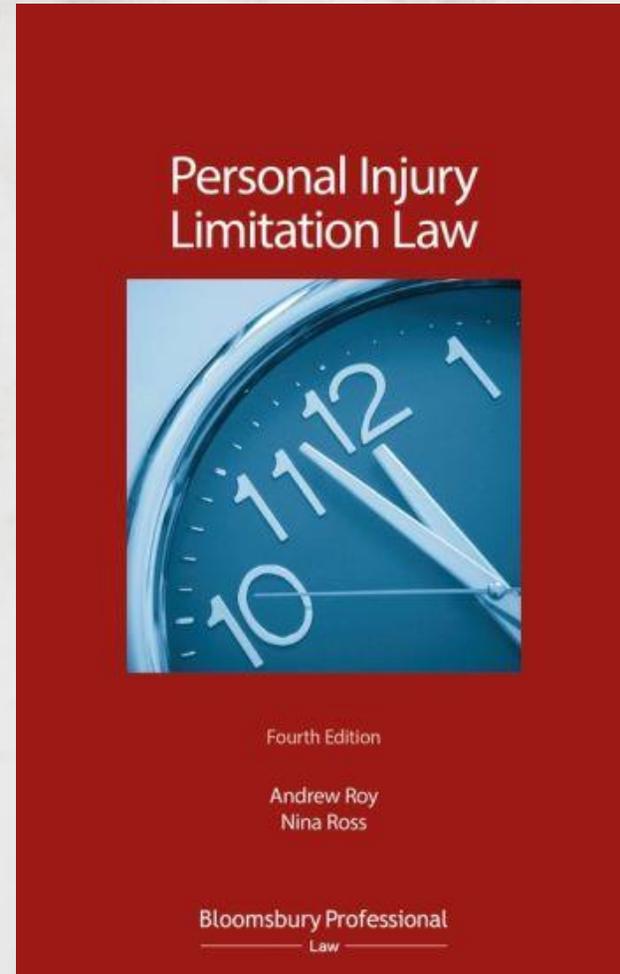
- ▶ BXB v Watchtower [2020] EWHC 156 (QB) (appeal outstanding)
 - ▶ Claim arising out of rape of C in 1990 by a ministerial servant of the Jehovah's Witnesses
 - ▶ Brought c. **24 years** out of time
- ▶ Young v Downey [2019] EWHC 3508 (QB)
 - ▶ Claim arising out of the death of C's father in an IRA bombing in London in 1982
 - ▶ C's personal claim brought up to **18 years** out of time

Some examples from the last year

Claim **failed** under s.33

- ▶ EXE v Governors of the Royal Naval School [2020] EWHC 596 (QB)
- ▶ FXF v Ampleforth Abbey Trustees [2020] EWHC 791 (QB)
 - ▶ Claim arising out of sexual abuse of C by a Catholic priest when C was a child
 - ▶ Brought c. **32 years** out of time

Conclusion (and shameless plug)



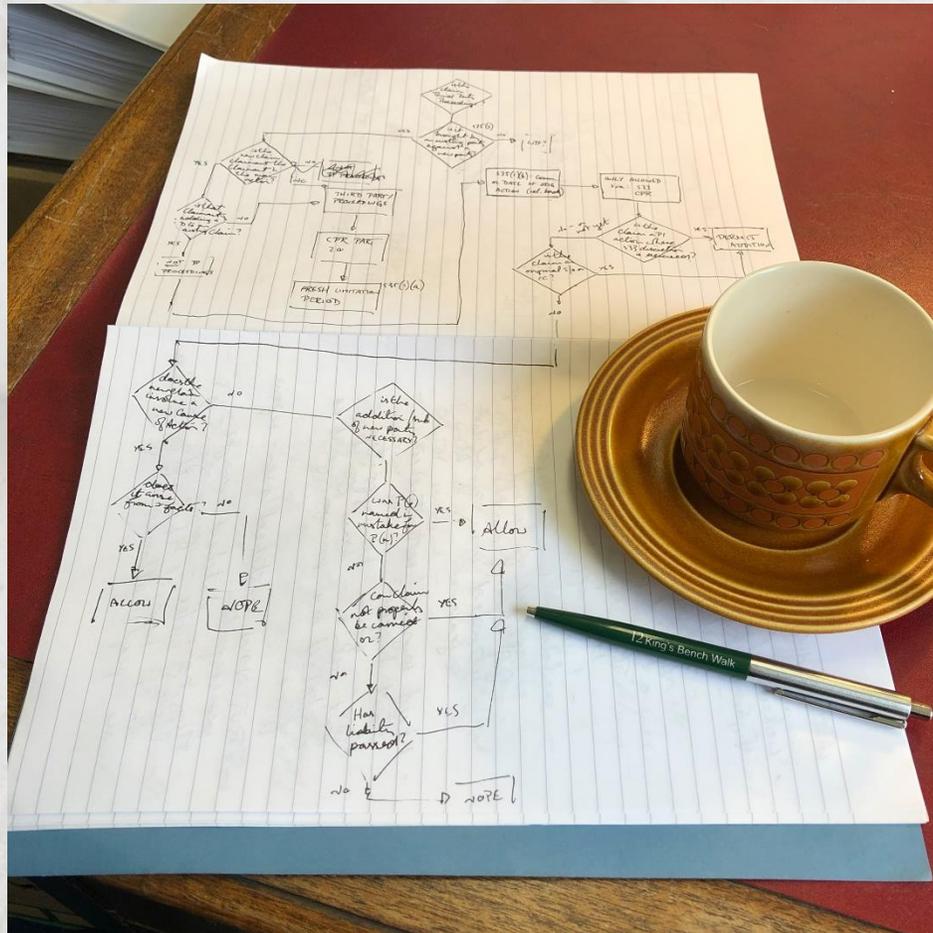
Section 35

Amending



What does s35 say?

Hideously complicated



What does s35 say?

- ▶ New claim means (s35(2)):
 - ▶ Against a new party; or
 - ▶ Introducing a new cause of action
- ▶ S35(1)(b): new claims deemed commenced *on the same date as the original action*
- ▶ The “relation back” rule
- ▶ Robs the Defendant of a limitation defence at trial
- ▶ So: stringent requirements for amendment

When are amendments allowed?

- ▶ For a new cause of action (s35(5)(a)): it must *arise out of the same facts or substantially the same facts as are already in issue on any claim previously made*
- ▶ For a new party, it must be **necessary** (s35(5)(b))
- ▶ Necessary means:
 - ▶ Substituting for a party whose name was given **by mistake** (s35(6)(a))
 - ▶ A claim **cannot be maintained** against an original party, unless the new party is joined or substituted (s35(6)(b))
- ▶ CPR r19.5 implements this section

What kind of mistake?

- ▶ *The Sardinia Sulcis* [1991] 1 Lloyd's Rep 201, CA
- ▶ Must be possible to identify the intended party by description, even if the name is wrong
- ▶ *"...if...the plaintiff gets the right description but the wrong name, there is unlikely to be any doubt as to the identity of the person intended to be sued. But if he gets the wrong description, it will be otherwise"*



Mistake

- ▶ *Powis Street Estates (No 3) Ltd v (1) Wallace LLP (2) Cradick Retail LLP* [2020] EWHC 1692 (Ch)
- ▶ C wanted to sue surveyor for negligence/breach of contract in inspecting etc. the building
- ▶ Breach was in 2012
- ▶ D2 – LLP – started trading in 2014
- ▶ Work *in fact* done by partnership with the same name and personnel, at an earlier point



What was the mistake?

- ▶ *Insight Group Ltd v Kingston Smith (a firm)* [2012] EWHC 3644 (QB):
 - ▶ Similar: partnership replaced by LLP, C sued the LLP
 - ▶ **But C knew** about the change
 - ▶ C believed the LLP had taken over the liabilities of the firm
- ▶ Leggatt J: there are two categories of mistake:
 - ▶ C sues the LLP thinking it did the negligence, and doesn't know it was actually the firm that provided the advice
 - ▶ C knows the firm provided the advice, but believes liability has passed
- ▶ 1 is a mistake of fact; 2 is a mistake of law



Back to *Powis Street*

- ▶ Master Shuman examined:
 - ▶ POC
 - ▶ Witness statements of solicitors
 - ▶ Contemporaneous correspondence
- ▶ Consistently showed that C thought D2 – the LLP – had done the surveying; but the firm had
- ▶ i.e. a mistake of **fact**
- ▶ The label identified D2 (LLP)
- ▶ The description identified the firm; D2 should have corrected



If a mistake is made

- ▶ S35(5) is “may”, not “must”: court ultimately has discretion even if the mistake is a qualifying mistake
- ▶ Name **and** describe parties in pleadings
- ▶ Name **and** describe parties in pre-action correspondence
- ▶ Invite confirmation that the other side is correctly identified
- ▶ Correct mistakes as to party early – especially if e.g. same insurer acts for multiple parties
- ▶ Focus amendment applications on the nature of the mistake
- ▶ Invite and give agreement where qualifying mistakes are made

New causes of action: s35(5)(a)

- ▶ Arising out of the same facts or substantially the same facts as are already in issue on any claim previously made
- ▶ *Samba Financial Group v Byers and others* [2019] EWCA Civ 416
- ▶ Original claim went to SC on a preliminary issue, and failed
- ▶ Birss J allowed amendment: “*facts in issue*” includes the pleadings, but also facts engaged by D’s positive case in Defence
- ▶ CA: no: “*the same or substantially the same*” requires comparing the new pleadings with the old



Or...

- ▶ ...use s33!
- ▶ Expressly permitted (s35(3)) as an alternative to s35(5)-(6)
- ▶ S35(5) discretion \approx s33 discretion: both about balance of prejudice
- ▶ **But** avoids the “gateway” issue of mistake/necessity/same facts
- ▶ No worse, but considerably better, than using s35(5)

But beware

- ▶ S33 does not apply to all claims
- ▶ Protection from Harassment Act 1997
- ▶ Product liability claims under Consumer Protection Act 1987, where the 10-year “long stop” operates
- ▶ Certain foreign law claims
- ▶ In such claims: s35(5) is the only vehicle for amendment

