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LIMITATION OF ACTIONS

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Date of Knowledge

Introduction

1. Because most injuries resulting from clinical negligence involve people who are ill and because the effect of the negligence is not always immediately obvious, the limitation period in most such cases starts to run with what the statute calls 'the date of knowledge' as opposed to the date when the injury was suffered. Although the words are defined at length in the statute, the wording is convoluted and has been subject to judicial interpretation both at first instance and in the appellate courts.
2. This brief talk focuses on 'date of knowledge' but this issue cannot be considered in isolation from the section 33 discretionary longstop. The important distinction is that while in the section 14 cases there is no discretion and the case can potentially be commenced 'late' as of right, in the section 33 cases the court has to be persuaded following a balancing exercise that it is 'equitable' to do so, before allowing the case to proceed. In the first case, a judgment has to be made; in the second, a discretion has to be exercised.

The Limitation Act 1980

Special time limit for actions in respect of personal injuries

11:--(5) ... the period applicable is 3 years from:

- a. the date on which the cause of action accrued; or
- b. the date of knowledge (if later) of the person injured.

c.

14 (1) ... 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 or omission which is alleged to constitute negligence, nuisance or breach of duty; and
- c. the identity of 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.”

(2) 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.

(3) 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 subsection 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.”

S14(2):Significant Injury

3. An injury is significant for the purposes of s14(2) if the Claimant “*would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages*” This is a seriousness threshold test – was the damage sufficiently substantial? The threshold is set very low. Significant does not in this context mean serious or severe – it connotes an

injury that is not *de minimis*. This can be an aggravation of a previous condition (provided the aggravation is not *de minimis*.¹)

4. A recent CA authority is the case of *McCoubrey v MOD [2007] EWCA CIV 17*. On October 1993 the Claimant suffered injury to his hearing when on a training exercise. He noticed the impairment, was investigated, was told he had moderate impairment and got on with his career entirely as before. In 2001, however, his operational status was downgraded on account of his partial deafness and his career came to a standstill. He would never see active service again. He started proceedings in 2004, by which time his physical condition was just the same as it had been in 1993. First, the case was important because it re-established clearly and forcefully that the 'seriousness test' is substantially objective. Several older cases had suggested that the test was subjective and that is what judge at first instance decided here. But her decision was overturned. The Court said that section 33 is where subjective matters come to the fore. Second, the CA declared that the question whether an injury is significant must be decided by reference to the injury itself and not to its effect, let alone its subjectively perceived effect, on the Claimant's private life or career.

5. The approach of the Court of Appeal was reaffirmed by the House of Lords in the Hoare cases: *A v Hoare*, [2008] 2 All ER 1. Four of the cases before their Lordships involved the overturning of the earlier House of Lords authority of *Stubbings v Webb* [1993] 1 All ER 322 that claims for intentional assault carried a non-extendable 6 year limitation period. The final case before them was *Y v Catholic Care (Diocese of Leeds)*, a historic sex abuse case. In that case the judge at first instance and the Court of Appeal had grappled with issues under section 14(2) [and (3)] as to when the abused and damaged Claimant could be regarded as "knowing" about abuse, the effects of which he had sought to suppress, and when he ought reasonably to have sought advice about it. The House of Lords dismissed the relevance of mixed subjective-objective standards, finding that the test under s14(2) for what counted as a significant injury was an entirely impersonal standard: would a claimant reasonably have considered the injury sufficiently serious to justify proceedings; not would this claimant would himself have done so.

¹ See *McManus v Mannings Marine Ltd* [2001] EWCA Civ 1668

6. Their Lordships also declared the constructive knowledge test under s14(3) to be equally objective, considered below. Once you have ascertained what the Claimant knew and what he should be treated as having known, the actual claimant drops out of the picture.

The other facts - attributability

7. It is vital to point out that it is not necessary for time to start running for the Claimant to know or even suspect that there has been negligence. The knowledge is of attributability of the factual matters underlying the claim to an act or omission of the Defendant.
8. Where there is an omission to treat, the simple and obvious point is that the Claimant needs to know that his/her problem is more than just the natural disease or progression thereof. This means s/he must know that there was a missed chance of better treatment. In *Smith v West Lancashire HA [1995] PIQR P514*, the CA held that even though the Claimant had been aware from the outset that the Defendant hospital had not operated on his finger, it was only with the obtaining of a report that he knew that his continuing problems were because prompt surgery had not been performed.²
9. The more difficult question is what degree of precision of knowledge is required. Where, for example, an operation results in problems 12 months down the line, does the Claimant need to know that it was the operation or a particular aspect of it, rather than, e.g. the failure to give prophylaxis or the failure to provide proper after care that is the cause of the ongoing problems?
10. There are again many authorities on the point but the seminal cases are *Broadley v Guy Clapham and Co [1993] 4 MLR 328* and *Dobbie v Medway HA [1994] 5 MLR 160*.
11. In *Broadley*, the Claimant had foot drop after a knee operation, plainly an unexpected outcome. It was not unreasonable to expect her to investigate. Balcombe LJ said that

² See also *Forbes v Wandsworth HA [1996] 7 Med LR 177*, *Hayward v Sharrard [1998] JPIL 326* and *James v East Dorset HA [1999]*

what would be necessary was 'specific' knowledge that the operation had been carried out in such a way as to cause nerve damage and therefore foot drop. For Legatt LJ, probably more correctly, it was sufficient that she knew that something was wrong with her foot that was not an inevitable consequence of the surgery.

12. In *Dobbie*, the Claimant's left breast was removed unnecessarily on the basis of the mistaken belief that it was cancerous. The trial judge found that **'In my judgment, she had broad knowledge of sufficient facts to describe compendiously that her breast had been unnecessarily removed, that something had gone wrong and that this was due to the defendants' negligence and further (or in the alternative) that it had been removed without her consent.'**

13. So this 'broad knowledge of sufficient facts' is the test for attributability.

14. Recent cases have nevertheless highlighted the need for the Claimant to link the known facts with attributability to an act or omission of the Defendant for time to begin to run:

- Field v BCC [2008] EWCA Civ 912: C suffered from hearing impairment; he believed that this was attributable to recurrent infections and a build-up of wax, and had not been advised of any link with his employment. The Court of Appeal found that he neither knew nor had reason to know of a significant injury attributable to the Defendant
- TCD v Harrow, Worcestershire & Birmingham CC [2008] EWHC 3048 (QB), 10.12.08, Eady J:
A claim against 3 local authorities for failing to intervene to protect the Claimant from sexual abuse from her adoptive father in the 1970s. C had complained to police and the abuser had been convicted of criminal offences during this period. Eady J found that she was aware that the Crown Court judge had expressed anger at the response of social services in this case at the time. He found that by age 15 she thus had an awareness of the authorities' child welfare responsibilities and that "*her unhappy circumstances could not be ascribed solely to H's misbehaviour*"

Time thus began to run against her from the age she reached her majority

- Rogers v East Kent Hospitals NHS Trust [2009] EWHC 54 (QB), 22.1.09 Griffith Williams J:

A clinical negligence claim arising from a toe amputation in 1997, proceedings not being issued until 2006. The judge found that C knew that the operation had not worked, that she remained disabled and in pain, and she was angry about the outcome. However, she had been told pre-operatively that there was a 10-15% risk of the operation not working, and on several post-operative consultations she was not given any indication that there had been alternatives to surgery. She moved area in 2003 and told her new clinician that she felt she had been well looked-after by her previous team. It was only then that she was advised that there had been alternatives and that amputation may not have been necessary. Proceedings issued within 3 years thereafter.

On a successful appeal from a County Court finding that she should be fixed with constructive knowledge from 1997, Griffith William J found that the trial judge had overlooked the advice C was receiving from her doctors, and that she felt she was in their hands, with no reason to question their advice. In other words, she did not attribute – and had no reason to attribute – her ongoing debility to any act or omission of the Defendant.

- Whiston v London Strategic Health Authority [2009] EWHC 956 (QB) 78.5.09, Eady J

Trial of limitation in a cerebral palsy claim, C being born in 1974.

The judge found that C knew that the root of his injury was that he had been born by forceps delivery and that there had been a lack of oxygen at the time of his birth. He was not told by his parents of any concerns about the delivery. Eady J considered the facts that he knew to be “neutral”, not suggesting that he attributed them to acts or omissions surrounding his birth.

Knowledge

15. Leaving aside questions of constructive knowledge, the limitation period starts to run when C first 'knows' that he has suffered a significant injury that is attributable to the act that is alleged to have been negligent.
16. Whether C did know this is a question of fact, although often a difficult question of fact to resolve. The verb 'to know' is an ordinary word of the English language. In common parlance it is sometimes understood to apply only to a set of circumstances that are certain. 'I know that the Judge had his eyes closed throughout the evidence because I saw it with my own eyes'. However, we know that there are other situations in which we use the word to express a conviction, or a convinced state of mind, that a particular set of circumstances is true, even though they may not be certain. 'I know that the judge has not given me a fair hearing because he was asleep during my evidence.' As with many areas of law in which there is an abundance of authority, the lawyers treat a question of fact as a complex question of law, which it is not. The question is 'When in fact did the knowledge arise.'
17. What the words should and probably do connote, therefore, is 'a firm belief or conviction.' This is the effect of the dicta in *Sniezek v Bundy* [2000] PIQR P213. Consider also however dicta in the Nash decision: In *Nash v Eli Lilly* [1993] 1 WLR 782 CA, the Court of Appeal said;
- 'Knowledge is a condition of mind which imports a degree of certainty and ... the degree of certainty which is appropriate for these purposes is that which, for the particular claimant, may reasonably be regarded as sufficient to justify embarking upon the preliminaries to the making of a claim for compensation such as the taking of legal or other advice.'**
18. Standing alone this is neither helpful, enlightening nor probably accurate – there is a blurring and confusion of the state of mind of the person and of the facts to which that state of mind applies. Also, people go to see a solicitor for advice on just such matters.³

³ Sniezek

However, it cannot be ignored since this is the CA and, more helpfully the Court went on then to say as follows;

‘Whether or not a state of mind for these purposes is properly to be treated by the Court as knowledge seems to us to depend, in the first place, upon the nature of the information which the Claimant has received, the extent to which he pays attention to the information as affecting him and his capacity to understand it. There is a second stage at which the information, when received and understood is evaluated. It may be rejected as unbelievable. It may be regarded as unreliable or uncertain. The Court must assess the intelligence of the Claimant; consider and assess his assertions as to how he regarded such information as he had; and determine whether he had knowledge of the facts by reason of his understanding of the information.’

19. In other words – all the attendant circumstances need to be considered to decide whether – as a question of fact – this Claimant had a firm belief or conviction that his problems were a result of the act or acts suggested to have been negligent.

20. In some cases it may be necessary for expert evidence to be obtained on the issue before such knowledge can be established. Where it is a single act that is complained about that is less likely to be so but where there is a series of acts – or especially where there is an ongoing failure to treat – it is more likely to be so.⁴

21. It is worth mentioning briefly the case of *Spargo v North Essex DHA [1997] MLC 0651*. The Claimant brought her action when she was in her mid sixties complaining that 20 years earlier she had been wrongly detained in a mental hospital on account of brain damage that was wrongly diagnosed. She had had the conviction of the wrong diagnosis from day one. The judge, according to the CA, was wrong to say that her belief could only have amounted to knowledge after a supportive expert report was obtained.

⁴ Rowbottom v Royal Masonic Hospital [2002] Lloyds Law Reports Medical page 173, Mirza v Birmingham HA [2001] MLC 0412 and Burton v St Albans [2002] MLC 0856 and see below.

Constructive Knowledge

22. Nevertheless, there are many cases in which it will be found that actual knowledge only arose with the obtaining of an expert report. This means that there would without some specific further provision be the inevitable risk of stale cases being brought. - so we have section 14(3).

(3) 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;

23. So the nature and the extent of the information on which his actual knowledge is to be founded is extended so that it includes knowledge that s/he may not in fact have had at all but is knowledge that s/he might reasonably have been expected to acquire. So, looking backwards in time, you need to ask not only what did s/he know but also what knowledge can reasonably be imputed to him/her on account of the facts set out in (a) and (b).

24. In *Nash v Eli Lilly*, Purchas LJ described constructive knowledge in this sense as **'the state of mind which might have existed had the Claimant, acting reasonably, acquired knowledge from the facts observable or ascertainable by him or which he could have acquired with the help of medical or other appropriate advice which it was reasonable for him to obtain.'** This was unintelligible.

25. There are several important points to note.

We are creating a fiction. In fact he did not have the knowledge at the time but such knowledge is going to be ascribed to him. That knowledge is knowledge that he might (by an objective bystander – say, the Judge) have been expected to acquire – we might say *'looking back on it I would have expected him'* to have taken this or that step.

The potential sources of that information are;

1. facts that he could have observed;
2. facts that he could have ascertained, if necessary with the help of such expert advice as it is reasonable to expect him to have obtained BUT
3. in a case where s/he can show that s/he took all reasonable steps to take and act on such advice, s/he will not have any extra knowledge attributed to him/her.

26. Next, the question is what a particular Claimant can be said to be expected to have done.

27. The test is wholly objective, but is based upon a reasonable Claimant with the same disability as the Claimant. In Hoare, Lord Hoffman, with whom the majority agreed, stated:

“34. The test itself is an entirely impersonal standard: not whether the claimant himself would have considered the injury sufficiently serious to justify proceedings but whether he would “reasonably” have done so. You ask what the claimant knew about the injury he had suffered, you add any knowledge about the injury which may be imputed to him under section 14(3) and you then ask whether a reasonable person with that knowledge would have considered the injury sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

“35. It follows that I cannot accept that one must consider whether someone “with [the] plaintiff’s intelligence” would have been reasonable if he did not regard the injury as sufficiently serious. That seems to me to destroy the effect of the word “reasonably”. Judges should not have to grapple with the notion of the reasonable unintelligent person. Once you have ascertained what the claimant knew and what he should be treated as having known, the actual claimant drops out of the picture. Section 14(2) is, after all, simply a standard of the seriousness of the injury and nothing more. Standards are in their nature impersonal and do not vary with the person to whom they are applied. ...

“39. Because s14(3) turns on what the Claimant ought reasonably to have done, one must take into account the injury which the Claimant has suffered. You do not assume that a person who has been blinded could reasonably have acquired knowledge by seeing things. In s14(2) on the other hand, the test is external to the Claimant and involves no inquiry 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”

28. Note, that in Whiston v London Strategic Health Authority [2009] EWHC 956 (QB) Eady J proceeded on the assumption that the burden of proof lay on the Claimant in respect of the issues of both actual and constructive knowledge

Post Hoare

29. There have been several decisions of the Queen’s Bench Division Court of Appeal since Hoare which deal with actual and constructive knowledge. All appear grateful to adopt the new regime under section 14 and certainly make somewhat easier reading:

- Khairule v NW Strategic Health Authority [2008] EWHC 1537, Cox J: Claimant, born with athetoid cerebral palsy, intellect preserved: claim brought 27 years after birth. Held: Whilst the test of knowledge was objective, that did not prevent K’s objective circumstances being taken into account in asking when a reasonable person in his circumstances, suffering from athetoid cerebral palsy and with the same level of disability and intellect, would have had the curiosity to begin investigating with expert help whether his injury could be considered capable of being attributed to something the hospital staff did or did not do at the time of his birth. When assessing the extent to which someone was reasonably to be expected to be curious as to the cause of his particular disability, it was appropriate to distinguish between someone who had lived with disability from birth and someone who suffered injury in his later years. K’s condition could not be regarded as a trigger for fixing the date of knowledge of attributability. His cerebral palsy was part of him and he had lived with it for as long as he could remember. He gradually, in adulthood, acquired some knowledge of the circumstances of his birth and of the possibility of compensation claims. At that

point, Cox J found that a reasonable adult sufferer of athetoid cerebral palsy with preservation of intellect and with this Claimant's disabilities and in the situation that this Claimant would have had the curiosity to begin investigating with expert help the cause of his condition, and whether his injury could be considered capable of being attributed to something that the hospital staff did or did not do at the time of his birth.

- Whiston v London Strategic Health Authority [2009] EWHC 956 (QB), 7.5.09 Eady J: A similarly old clinical negligence claim where Eady J found that the Claimant had neither actual nor constructive knowledge sufficient to start time running. As with Mr Khairule, he knew that his injury was associated with the circumstances of his birth but had not been told of anything to lead him to suspect attributability to an act or omission of the Defendant, and it was not therefore reasonable to fix him with constructive knowledge.

Possibly a surprising decision in contrast to Khairule, demonstrating perhaps most clearly the fact- and judge-specific nature of many of these decisions. Seeking for a distinction however, there is perhaps this: in Khairule C had learned in early adulthood from a friend of the possibility of compensation claims for cerebral palsy cases, and knew also from about that time that his accommodation difficulties were substantially caused by lack of finance. The evidence in Whiston by contrast suggested that Claimant to have been very forward looking and successful, reluctant to focus at all on his disability until a deterioration in his condition caused him to take stock in adulthood, after which proceedings were issued. It remains however a decision somewhat out of line with other post-Hoare considerations of constructive knowledge.

- White v Eon & others [2008] EWCA Civ 1463, 26.11.08 VWF case – the judge at first instance had asked himself whether, having regard to the symptoms the Claimant was experiencing when clearly aware of them (1996) it would have been reasonable to have expected him to seek advice from his doctor. CA found this the correct question to have asked and the appeal was dismissed.

- Albonetti v Wirral MBC [2008] EWCA Civ 783: it would be difficult to accept that a person who had been raped, vaginally and anally, did not know that she had suffered a significant injury for the purposes of s14.
- TCD v Harrow, Worcestershire & Birmingham CC [2008] EWHC 3048 (QB), 10.12.08, Eady J:
Claim against local authorities for failing to protect C from abusive adoptive father. Found that C knew of the abuse, its illegality, and the child welfare role of the authorities by the age of 18. The fact that she may have been in denial of its effects was not relevant to the question of constructive knowledge.
- Pierce v Doncaster CC [2008] EWCA Civ 1416, 12.12.08
An appeal by the Defendant against findings of negligence arising from its failure to take C into care as an infant in 1977 to protect him from a neglectful and abusive home situation. The appeal on the merits was dismissed, but succeeded on limitation, the Court of Appeal finding that for many years C had been complaining that he had been failed by the local authority. Whilst he may have needed access to his records to investigate the claim fully, those had been offered to him by the authority and he had failed to take up the offer.

Raggett v Governors of Preston Catholic College [2009] EWHC 909 (QB) 5.5.09,
Swift J

Trial on preliminary issue of claim of abuse by Jesuit Priest in 1970s, on the issues of whether the abuse occurred and on limitation.

Judge satisfied that the abuse occurred. Also satisfied that C, who later became a litigation lawyer, had suppressed much of the memory and its emotional impact until his late 30s. Nevertheless, found that he should be fixed with constructive knowledge from the age of his majority: he was at all times able to remember many of the incidents of abuse. Applying the *"practical and relatively unsophisticated approach to the question of knowledge"* advocated by the court in Hoare, he had to be taken to have "known", from the time the acts of sexual abuse were committed, the nature and extent of those acts of abuse and the immediate effects they had had upon him.

Whilst it may be right that the victim of minor or relatively trivial acts of abuse may not “know” that he had sustained injury, but that could not be said to be the case here where, although not penetrative, the abuse was persistent and sustained, causing him acute anxiety at the time.

Section 33: The discretion to disapply the limitation period

1. If a Claimant seeks to bring a claim outside the limitation period (either the primary period running from the date the cause of action accrued, or the extended period of knowledge under section 11), s/he will need to persuade the court to disapply that primary limitation period under s33 of the Limitation Act 1980.
2. S33 empowers the court to disapply the period in a personal injury or Fatal Accidents Act case "*if it appears to the court that it would be equitable to do so* ", having regard to the degree to which:
 - a. The date of knowledge provisions operate to prejudice the claimant;
 - b. Disapplication of the limitation period would prejudice the defendant.
3. In making its decision on a section 33 application the court "*shall have regard to all the circumstances of the case*" and in particular to 6 specified factors:
 - a. The length of, and reasons for, the delay on the part of the Claimant;
 - b. The extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the Claimant or the Defendant is or is likely to be less cogent than if the action had been brought within the limitation period;
 - c. The conduct of the Defendant after the cause of action arose;
 - d. The duration of any disability of the Claimant arising after the date of the accrual of the cause of action;
 - e. The extent to which the Claimant acted promptly and reasonably once s/he knew whether or not the act or omission of the Defendant might be capable at that time of giving rise to an action for damages;
 - f. The steps if any taken by the Claimant to obtain medical, legal or other expert advice, and the nature of any such advice s/he may have received.

The 6 factors

4. Lord Diplock described the six factors under s33(3) as a “curious hotchpotch”⁵, and although they need to be addressed in each case (the burden being on the Claimant), the more important question is the equity of the case. See for example Cox J:

“The question is not determined ... simply by assessing comparative scales of hardship. The overall question ... is one of equity, namely whether it would be equitable to disapply the limitation provisions having regard to the balance of potential prejudice in all the circumstances of the case.” Khairule v NW Strategic Health Authority [2008] EWHC 1537 at para 72; also Leeson v Marsden & United Bristol Healthcare NHS Trust [2008] EWHC 1011

5. Nevertheless, the 6 factors are a useful starting point, if only to demonstrate their relatively limited value:

S33(3)(a) The length of, and reasons for the delay

6. Following the decision in the conjoined appeals of A v Hoare⁶ the reasons peculiar to the Claimant as to delay in commencing proceedings are irrelevant to the question of actual or constructive knowledge under ss11 and 14 and fall to be considered under s33. The test here is wholly subjective, considering this Claimant and his/her reasons for failing to act sooner.
7. In abuse cases it is now clearly recognised by the courts that the abuse itself may inhibit the victim’s ability to complain, report or litigate, for many years, and this is an appropriate factor to consider under s33(a). See for example AB and others v Nugent Care Society [2009] EWHC 481 (QB), Irwin J, 30.1.09.

⁵ Thompson v Brown [1981] 1 WLR 744.

⁶ [2008] UKHL 6

8. The court will nevertheless differentiate between a true inability to face up to the abuse and its implications, and a conscious decision to defer litigation until, for example, the Claimant's children had grown up – see for example TCD v Harrow, Worcestershire and Birmingham CC [2008] EWHC 2048 (QB).
9. It is important to note that the period in question under s33(3)(a) is not the entirety of the period since the cause of action accrued, but the period since the expiry of limitation: Donovan v Gwentoyes [1990] 1 WLR 472 at 478g. This may have little actual bearing on the overall period of delay where, for example the Claimant's date of knowledge accrued decades after the tortious act, or where the Claimant's delay involved a short period of time occasioned by a technical procedural slip. Accordingly, the overall length of the delay needs to be considered at a more general level, in considering the overall question of equity – see below.

S33(3)(c) The conduct of the Defendant after the cause of action arose

10. S33(3)(3) adds *"...including the extent (if any) to which he responded to requests reasonably made by the Claimant for information or inspection for the purpose of ascertaining facts which were or might be relevant to the Claimant's cause of action against the Defendant"*.
11. Note that Defendant's failures to respond to protocol letters of claim have been held to be a material factor of relevance (in the Claimant's favour): Leeson (ibid) and Hall v Laing, Bishop Auckland County Court, 22.12.08, HHJ Briggs.
12. Note also that Cox J in Leeson also found it relevant – in the Claimant's favour – that the GP and NHS Trust Defendant had opted to take a technical limitation point and object to late service of proceedings, when they had in fact been notified of the claim within the primary period and had been able to deal with it on its merits.

S 33(3)(d) The duration of the Claimant's disability after the accrual of the cause of action

13. It is clear that "disability" here refers to a Claimant's minority or mental incapacity: Yates v Thakeham Tiles [1995] PIQR 135, CA. More general issues relating to the Claimant's injury are to be considered under sub para a.

S33(3)(e): The extent to which the Claimant acted promptly and reasonably

14. This applies to conduct once the Claimant knows that his injury might be capable of giving rise to a claim for damages. It is, in contrast to the test under sub para (a), to be considered on an objective basis: what would a reasonable man in the position of the Claimant have done?

S33(3)(f): The steps taken by the Claimant to obtain medical, legal or other advice

15. It may be that the Claimant has been let down by his legal team, failing expeditiously to prosecute the claim, failing to serve in time etc. It is clear that in such cases the Claimant will have a strong professional negligence claim against his lawyers, and it has been held that this can be a material factor - against the exercise of the s33 discretion.
16. However, there is no rule which necessarily requires a Claimant to be visited with responsibility for his lawyers' errors: Thompson v Brown [1981] 1 WLR 744, Das v Ganju [1998] Lloyds Med LR 198. The Courts have accepted that Claimants cannot necessarily simply and easily substitute the principal defendant for their former solicitor: the merits of the primary claim may not have been established, the Claimant would inevitably have to take some discount on their damages in relation

to the secondary professional negligence claim, they may prefer to continue to seek to hold the primary tortfeasor to blame, or not be able to face the additional difficulty involved in a secondary claim, particularly if in ill health. This was considered fully in Cain v Francis, McKay v Hamrani, discussed below.

The overall question and the court's approach

17. It is clear now that the exercise of the s33 discretion is no longer to be regarded as an “*exceptional indulgence*”, which is how the Court of Appeal had described it in KR v Bryn Alyn Community (Holdings) Ltd [2003] QB 1441, at para 74. Although the burden of proof remains on the Claimant, the result of Hoare is that it is now to be approached more neutrally, even liberally – see AB v Nugent Care Homes, per Irwin J.
18. Nevertheless, how should the court consider, for example, cases such as these?
 - The Claimant who held off from any notification of his claim until the 11th hour of the 11th month, before issuing proceedings “out of the blue”, and then failing to serve them in time?
 - The Claimant who promptly initiated proceedings but whose solicitors let them lapse due to technical oversight, not reissuing for a year thereafter?
 - The abused claimant whose abuse caused him to be unable to contemplate litigation for decades?
19. The statutory factors do not particularly assist here. Further, whilst there is judicial recognition that there is an overarching question, namely that of equity, there can be considerable variation in judicial approach.
20. Faced recently with conjoined appeals where different judges had taken diametrically opposed views of the relevance of the same factors, Smith LJ sought to distill the principle at the heart of the question, in the hope of clarification in future

cases. This, it is submitted, rather than the technically arid reach of s33(3) is where real understanding of the discretion is to be found:

Cain v Francis, McKay v Hamrani [2009] EWCA Civ 1451, 18.12.08

21. In separate RTA claims, Defendant insurers had accepted liability and made interim payments. By oversight the Claimants' solicitors had failed to serve proceedings in time. The delay in the respective cases was 1 year and 1 day respectively. At first instance in the former case the s33 discretion had been exercised, in the latter refused. The key questions under s33 in each case had been the same, namely the extent of prejudice to the Claimants, who had a strong claim against their solicitor, and the extent of prejudice to the Defendant in their loss of a cast-iron limitation defence. The trial judges had reached opposing conclusions.

22. Smith LJ sought the principle underlying s33 and its precursor, concluding as follows:
 - a. At common law:
 - i. There was a fundamental precept that a tortfeasor should compensate the victim of his tort;
 - ii. There were no time limits;
 - iii. However, there was a further fundamental precept, namely that a Defendant should have a fair opportunity to defend himself.

 - b. Limitation laws were introduced to protect Defendants from stale claims; they did not provide a defence on the limits, but barred the remedy. The statutory periods chosen were Parliament's best estimate of when it would be unfair or unjust to a Defendant to allow a Claimant to enforce his right of action.

 - c. Any limitation bar will be arbitrary, and thus can only ever do rough justice.

 - d. Accordingly, the introduction of the predecessor to s33 can only have had this rationale: a desire to refine the rough justice of the arbitrary bar; *"instead of a limitation rule of thumb, the courts would be required to consider what was fair and just in all the circumstances of the case"*

23. It was against that background that s33 needed to be construed:

“The context is that the Claimant had the right to pursue his cause of action which he has lost by the operation of s11. The Defendant, on the other hand, had an obligation to pay the damages due; his right was the right to a fair opportunity to defend himself in the claim. The operation of s11 has given him a complete procedural defence which removes his obligation to pay. In fairness and justice, he only deserves to have that obligation removed if the passage of time has significantly diminished his opportunity to defend himself (on liability and/or quantum). So the making of a direction, which would restore the Defendant’s obligation to pay damages, is only prejudicial to him if his right to a fair opportunity to defend himself has been compromised.”

24. A Defendant’s **financial** prejudice in the loss of a limitation defence could then not taken into account under s33 because *“in fairness and justice, the Defendant ought to pay the damages if, having had a fair opportunity to defend himself, he is found liable.”* .
25. What of the Claimant’s position, and his secondary professional negligence claim? Smith LJ found that if the Claimant lost the ability to sue the primary Defendant, he had been prejudiced. That prejudice was however greatly reduced if he had a good claim against his solicitor. Therefore, *“in a case where the Defendant has suffered some forensic or procedural prejudice, which will diminish his ability to defend himself, it will be relevant to consider that the Claimant has another remedy.”*
26. Note however that whilst a relevant factor, it was not necessarily determinative, Smith LJ finding that it may still be fair and just that the primary Defendant remain in the frame – he was the tortfeasor after all, his insurer has received premiums with regard to the risk. *“So, the fact that the Claimant will not suffer financially in the end is relevant but not determinative”* para 72⁷.
27. Her conclusion: the basic question to be asked was: *“whether it is fair and just in all the circumstances to expect the Defendant to meet this claim on the merits, notwithstanding the delay in commencement.”*
28. In answering this question, the following were material:

⁷ See further on this Hall v Laing: Claimant with asbestos wishing to conclude the litigation against primary defendant and as quickly as possible, not wanting to have to foist ongoing secondary professional negligence claim onto his widow. Bishop Auckland County Court, 22.12.08, HHJ Briggs

- a. The length of delay was obviously important. However, it was important to note, this was not so much for itself but for the effect it has had, in other words, to what extent the Defendant had been disadvantaged in investigation of evidence, liability and quantum.
- b. The reasons for the delay – also an important factor. There may have been some unfairness to the Defendant due to delayed issue, but it may have been for so excusable a reason that, looked at in the round, it was fair and just that the action should proceed; alternatively, there may have been procedural or evidential disadvantage to Defendant, or there may not have been good reason for or length of the delay.
- c. Notification of the claim: whilst post limitation delay is what is referred to in s33(3) *“it will always be relevant to consider when D knew that a claim was to be made against him and also the opportunities he has had to investigate the claim and collect evidence.”*. She considered that if the Defendant has had early notification and every opportunity to investigate and collect evidence, some delay after expiry of 3 years will have had no prejudicial effect.⁸

29. This comprehensive judgment covers almost all of the ground occupied by section 33. The only remaining factors to mention are the strength of the claim, and two further points arising from the historic abuse case of AB v Nugent Care Society : [2009] EWHC 481 (QB).

Strength of the claim:

30. Whilst the court will not embark on a detailed assessment of the issues of breach of duty and causation, a manifestly weak claim will be a factor of relevance against the Claimant on a section 33 application. See eg Nash v Eli Lilly [1993] 1 WLR 782.

⁸ By contrast, consider the dyslexia case of Adams v Bracknell Forest BC [2005] 1 AC 76, HL where it was extremely damaging for the Claimant’s application under s33 that he did not notify his former LEA of a claim in respect of his secondary education for more than a decade after he left school; his records had been destroyed and staff had no recollection of him.

AB v Nugent Care Society

31. Following the decision of the House of Lords in Lister v Hesley Hall which permitted vicarious liability claims to be made against employers in respect of certain classes of abuser such as residential carers, Claimants no longer need to prove systemic negligence on the part of the employer; proof of the abuse itself will suffice. Accordingly, in AB v Nugent Care Society Irwin J stated that criminal convictions of the abuser, either against the Claimant or against others in similar circumstances would be likely to be relevant factors in the exercise of the s33 discretion – a Defendant would generally find it difficult to argue that the passage of time had affected its ability to defend on the issue of abuse in such circumstances.

32. Another factor he considered was the evidence of earlier complaints of abuse against the home. Whilst these would not be relevant under s33(b), they nevertheless may affect the exercise of the discretion in considering whether the Defendant was prejudiced by a lack of evidence about the allegations in the case.

33. As this case amply demonstrates however, the crux of applications under s33 will always be the possibility of a fair trial. Irwin J had to consider the discretion in 4 lead cases in a group action involving care home abuse in the 1970's. He took each case separately, considered the reasons for delay, the issues between the parties – extent of abuse, causation of injury etc, and assessed the impact of the delay on the prospect of a fair trial on those specific issues.

34. In conclusion, Smith LJ's exegesis as to the remit of s33 does not establish new precedent, but clearly illuminates its core principles, and should, it is submitted, lead to greater predictability as to the exercise of this famously unfettered discretion.

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