BRIEFING

MEDICAL LAW

October 2021

CONTRIBUTORS

David Thomson

Francesca O'Neill

INTRODUCTION

LISA DOBIE
Head of the 1 Chancery Lane Medical Law Group

There have been a number of recent decisions on limitation; it is fertile ground for argument. One such recent decision is the case of *Wilkins v University North Midlands NHS Trust* [2021] EWHC 2164 (QB) 30/7/21, in which Paul Stagg of 1CL represented the claimant, who was successful at the preliminary hearing on limitation.

Below, David Thomson will give you a whistle stop tour of the Limitation Act 1980 and review some of the recent cases. Francesca O'Neill will then look at 'Date of Knowledge' and the court's approach on strike out.

David and Francesca will be hosting a limitation webinar on 4th November 2021 where hints and tips for managing such applications will be covered.

LIMITATION IN CLINICAL NEGLIGENCE ACTIONS – WHY ARE CLAIMANTS CHEERFUL AND DEFENDANTS DESPONDENT? EXPLANATIONS, RECENT CASES AND OPPORTUNITIES...

DAVID THOMSON

Introduction

Claimants have good reasons for optimism that a properly prepared application under section 33 of the Limitation Act 1980 (LA 1980) will persuade a court to exercise its discretion to set aside the 3-year limitation period for a clinical negligence action (an action of personal injuries under the LA 1980) in many circumstances. The LA 1980 repays careful review and analysis. There has been a procession of decided cases in claimants' favour in recent past without much for defendants to take succour from. All of which is in contrast to the decisions concerning fundamental dishonesty and the development of emphasis on all aspects of the over-riding objective in interpretation and application of the Civil Procedure Rules.

The relevant sections of the Limitation Act 1980 are set out here - Limitation Act 1980. The recent caselaw is discussed below.

Application of the Limitation Act to Clinical Negligence actions

There is a good deal of detail in the relevant provisions of the LA 1980 and a wide scope for engagement of it in clinical negligence proceedings.

Remember to consider whether the clinical care provision was under NHS or private care, because allegations concerning aspects of private care can be raised in contract. There is a different limitation period for tort and contract. In contract claims, the cause of action accrues on the date of the breach of contract. The limitation period is six years from that date. With the current increase in private medical treatment (now in 2021 up to 10 to 20% of investigations and treatments, depending upon area of healthcare and part of the country) breach of contract may become more relevant.

The limitation period in tort

Almost all clinical negligence claims all include personal injury. The Section 2 time-limit of 6 years does not apply because of section 11, which disapplies the time limits elsewhere in the LA 1980, and sets out a "period applicable" of 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.

The 3 year [limitation] period applies except where section 11(5) applies, which is where the person dies before the expiration of the period, and so provides the "period applicable" (for an action by the estate under section 1 of the Law Reform (Miscellaneous Provisions) Act 1934) is three years from (a) the date of death; or (b) the date of the Personal Representative's knowledge; whichever is the later.

Just a reminder that other claims, which may or may not involve clinical negligence, have different limitation periods. Examples are accidents when travelling by air or by sea (2 years), accidents and injuries on package holidays (2 years), or claims alleging breaches of human rights (1 year).

For "persons under a disability", so children (whether somehow disabled or not) and protected persons, the time limit is three years, but the three year period does not start until the child reaches the age of 18. But note (above) the exception in the previous paragraph that have limitation periods not mandated by the LA 1980 and that the limitation period for child dependants under the Fatal Accidents Act 1976 is different (see below). As per Section 38(2), "a person shall be treated as 'under a disability' while he is *an infant*..." (or a child, so under 18 years of age).

Protected persons have lost capacity, but if the person had capacity, even if only for a short period, within the limitation period, then the 3 year limitation period will

likely apply.

Three further pitfalls should also be borne in mind. Firstly, defendants should recognise that an action is brought on the date the Claim Form is received by the court, not the date the court staff actually get around to issuing the Claim Form. Secondly, defendants should be astute not to submit to the jurisdiction on the acknowledgment of service form (of the Claim Form) without checking carefully that the Claim Form was served within the 4 month period, because there is occasionally a correlation between missing limitation dates and also missing dates for service of valid Claim Forms.

Thirdly, child claimants have a different limitation period in Fatal Accident actions if they are alive and dependants, but not if the child dies. Section 12(3) of the Limitation Act 1980 refers to the time limit and Section 28. On review Section 28(1) appears to provide that for a child (ie a person under a disability) to whom an action accrued (say as a dependant), the action may be brought at any time before the expiration of *six years* from the date when she or he ceased to be under a disability (so reached 18 years old) or died (whichever first occurred) notwithstanding that the period of limitation has expired. But Section 28(6) provides that if the action is one to which section 11 or 12(2) applies, then subsection (1) above shall have effect as if for the words "six years" there were substituted the words "*three years*". Section 11 is an action in respect of personal injuries and section 12 is for Fatal Accidents Act actions.

Section 12(2) provides that the limitation period runs from the date of death and "None of the time limits given in the preceding provisions of this Act shall apply to an action under the Fatal Accidents Act 1976, but no such action shall be brought after the expiration of three years from— (a) the date of death, or (b) the date of knowledge of the person for whose benefit the action is brought; whichever is the later." So the limitation period remains usually 3 years from the date of death for an action, usually by the child's parent.

Date of knowledge - Section 14

This is the date on which the claimant first had knowledge that: the injury in question was significant, that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, and the identity of the defendant.

If negligence was that of a person other than the defendant, the person has knowledge of the identity of that person and the additional facts supporting the bringing of an action against the defendant, for example the tortfeasor was an employee of the defendant.

Note that knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant.

Whether an injury is "significant" is subjective. Section 14(2): ".... if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings ..."

Section 14(3) is more objective, so a person's knowledge "...includes knowledge which he might reasonably have been expected to acquire from facts observable or ascertainable by him; or .... ascertainable by him with the help of medical or other appropriate expert advice ..." However it continues that "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."

Francesca O'Neill gives a perspective on 'date of knowledge' issues in this briefing, below.

Exclusion by the Court of the 3 year time limit in respect of actions for personal injury or death - section 33

The usual circumstance is that a person does not issue a Claim Form in time, then serves the Claim Form and Particulars of Claim. The Defendant then indicates that the action is time barred and not brought within the limitation period. The claimant may or may not serve a formal Reply. The action may proceed to a trial of a

preliminary issue on limitation by the court (or may be determined at trial). The Claimant is seeking to persuade the court to exercise its discretion to set aside the limitation period in Section 11 or 12 with regard to the action as a whole of any specified cause of action.

Section 33(1) provides that

- If it appears to the court that it would be equitable to allow an action to proceed

- and, considering section 11 or 12, the prejudice the claimant or defendant suffers

- the court may direct the provision shall not apply

Be aware of the exceptional provision Section 33(2). This section, somewhat atypically in the light of recent caselaw (see below), prohibits the court setting aside or disapplying the limitation period in Section 12, if a prior limitation period under another cause of action, such as, the example given, Schedule 1 to the Carriage by Air Act 1961 and where the deceased had not brought proceedings under that Act/provision in time. This is to be compared with the more permissive sections 33(4) and 33(5).

Section 33(3) states that the court should have regard to all the circumstances and then gives a range matters (a) to (f) that the Court should in particular look to, which of course are the matters that the parties will focus their submissions. These are (in summary):

- (a) the length of, and the 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 plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within time;
- (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 claimant for information *which were or might* be relevant to the cause of action against the defendant;
- (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 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 he may have received.

The court has a wide discretion. The Civil Procedure Rules on relief from sanctions does not apply, however the Overriding Objective has yet to be addressed.

Note in particular section 33(3)(d). If a claimant loses capacity before the three-year limitation period, then the limitation period is not arrested, but the duration of any disability arising after the accrual of the cause of action is a relevant consideration in the exercise of discretion. The same approach is taken in Sections 33(4) and 33(5) to action where the person has died.

New claims added to pending action – Section 35

Section 35 is detailed and in places difficult. It does not just address new claims, but also substitution of claims and parties. Such matters frequently occur and are the object of much dispute. The starting point is that the court *shall not allow* a new claim in respect of the original action after the expiry of any limitation period.

Section 35(3) is key. "Except as provided by section 33 of this Act or by rules of court, *neither the High Court nor the county court shall allow a new claim* within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act *which would affect* a new action to enforce that claim. For the purposes of this subsection, a claim is an original set-off or an original counterclaim if it is a claim made by way of set-off or (as the case may be) by way of counterclaim by a party who has not previously made any claim in the action.

Then section 35(4) Rules of court (ie the CPR) may

provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, *but only if the conditions specified in subsection (5) below are satisfied*, and subject to any further restrictions the rules may impose.

The conditions in section 35(5) are the following—

(a) in the case of a claim involving a *new cause of action*, *if the new cause of action arises out of the same facts or substantially the same facts as are already in issue* on any claim previously made in the original action; and

(b) in the case of a *claim involving a new party*, if the *addition or substitution of the new party is necessary* for the determination of the original action.

Note – section 35(6) The addition or substitution of a new party shall *not be regarded for the purposes* of subsection (5)(b) above *as necessary* for the determination of the original action *unless* either—

(a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name; or

(b) any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action.

Section 35 needs to be read in conjunction with the relevant sections of the CPR 17 and 19.

CPR 17.4 is for amendments to statements of case after the end of a relevant limitation period. The Court may allow an amendment: whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as the existing. And to correct a mistake as to the name of a party, where the mistake was genuine.

CPR 19.5 contains provisions about adding or substituting parties after the end of a relevant limitation period. The court may add or substitute a party *only if* the relevant limitation period was current when the proceedings were started and the addition or substitution is *necessary*.

The addition or substitution of a party is only necessary if: the new party is to be substituted for a party who was named in the Claim Form in mistake for the new party; the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant; or the original party has died or had a bankruptcy order made against him and his interest or liability has passed to the new party.

So the strictures of adding or substituting parties after expiry of the limitation period pursuant to Sections 11 or 12 are several and tight. The court should order either that Sections 11 or 12 of the LA 1980 shall not apply to the claim by or against the new party or that, depending on the exact circumstances, the issue of whether the section(s) apply shall be determined at the trial/TPI.

Contribution claims

If a defendant is found liable to a Claimant, the defendant can seek a contribution from another party who is liable to the Claimant for the same damage - Section 1, Civil Liability (Contribution) Act 1978.

The limitation period is two years from the date the person seeking a contribution is held liable to the Claimant. That could be the date of a judgment on quantum, not just liability for a sum to be determined, or the date he agrees to make or makes payment, whichever is the *earlier*.

Caselaw

There is a great amount of decided cases since the 1980 Act. Here are recent cases illustrating the contemporary approach to the Act.

Blackpool Football Club v DSN [2021] EWCA Civ 1352

The Court of Appeal (CA) overturned a finding that the professional football club was vicariously liable for the sexual abuse inflicted on a 13-year-old youth player in 1987 by a volunteer football talent scout (R) during an

.

overseas tour of New Zealand.

R was an unpaid scout for the club in England. His role was to spot promising players below the minimum schoolboy signing age of 14 years, coach them and encourage an allegiance with the club until they were old enough to be formally signed up.

The respondent, DSN, was introduced to the club by R in 1985 when he was aged 11. At that time, R had four convictions of indecent assaults on males. In June 1987, R took a squad of young players, including the respondent, on tour in Thailand and New Zealand. Save for a modest financial contribution of £500 from the club, R carried the costs of the tour, estimated to be around £25,000 or more. There was no evidence that the club endorsed the tour.

DSN alleged that the abuse occurred during the New Zealand leg and that the club was vicariously liable. The limitation period expired in 1995. R died in 2005.

The Court at first instance decided it was equitable to allow the case to proceed and that, whilst the delay was long, the cogency and abundance of evidence on both sides and the narrow scope of the factual dispute meant that it had caused no real risk of substantial prejudice.

Regarding vicarious liability, the judge concluded that the relationship between R and the club was akin to one of employment because he was as dependent on the club as an employee would have been and that the tour was "as close to an official trip as made no difference".

The Club appealed. The CA allowed the appeal on the issue of vicarious liability but not upon limitation.

On the issue of limitation, the CA found that the judge had been entitled to conclude that no real risk of substantial or significant prejudice had been caused by the club receiving notice of the claim, or in the issue of proceedings, so long after the primary limitation period. That conclusion was not perverse. There was “ample material” from which under Section 33 the judge could reasonably exercise his discretion in favour of disapplying the limitation period.

Whilst this judgment of the CA was not concerning a Clinical Negligence action, it is a good, very contemporary, exposition of the support for the discretion, if exercised diligently, to set aside the 3 year limitation period now being deployed by courts of first instance pursuant to Section 33.

Wilkins v University North Midlands NHS Trust [2021] EWHC 2164 (QB)

C was represented at the limitation hearing by Paul Stagg of 1CL.

C alleged that the failures of the staff of the defendant’s hospital to treat a post-operative infection led to his leg being amputated.

C underwent a total knee replacement in March 2009. He developed pain, swelling, redness and oozing from the wound. He was treated for suspected infection. He was discharged from hospital and reviewed by his GP for pains in 2009.

In June 2012 he instructed solicitors (H) on a CFA because of continuing pain. He expressed a general concern about his treatment in hospital. He instructed an orthopaedic expert who provided an expert report in March 2013 concluding that the standard of orthopaedic care in hospital was of a reasonable standard. H subsequently ceased acting for C in July 2013.

C's knee continued to deteriorate. In June 2016, C underwent an amputation of his left leg because of his ongoing severe pain. Shortly before the amputation, C instructed new solicitors (S).

The Claim Form was served on D in October 2019 alleging negligence for failing appropriately to treat an earlier significant infection.

D asserted that the claim was issued beyond the 3 year limitation period after his actual or constructive, knowledge, because the claimant had knowledge on each occasion after he had complained about pain post-

surgery, beginning from his visit to the GP in June 2009 when he stated his belief that he had a post-operative infection.

The court held on a trial of preliminary issue on limitation that for a claimant to have knowledge for the purposes of s.11(4) and s.14, he did not need to appreciate all the details of the claim that he might later formulate against the defendant for time to begin. He was not required to know there had been an actionable breach. It was sufficient that he understood in general terms the essence of the factual case upon which a later claim might be based.

In a clinical negligence claim, it was not necessary that a claimant appreciated the precise mechanism by which he had sustained an injury. It was sufficient if he had an understanding in broad terms that the lacking medical care might be a possible cause of injury.

By June 2012 at the latest, C was in broad terms ascribing his ongoing knee pain to the treatment he had received from the defendant's staff. A potential claim for substandard medical care was discussed. Importantly, even if his understanding of a claim in 2012 might have been different to his case in 2019 – criticism of surgical technique rather than a failure to treat and/or control an infection - he knew that his ongoing difficulties could be due to the substandard care by the defendant. This was broad knowledge for section 11. By June 2012 he had requisite knowledge. So, the claim was brought seven years after time began to run, and four years after it was statute-barred.

The court turned to the exercise of its discretion under section 33 to permit the claim to proceed. The court decided the relevant matters were:

- As to the merits of C's pleaded claim, the court explained that save in the very clearest of cases, a court should exercise real caution before conducting a merits assessment as part of the Section 33 balancing exercise. C's case could not be properly classified as so weak that the court could properly take the merits into account in the exercise of its discretion under s.33.
- As to delay by C in bringing proceeding, whilst there was delay between instructing S and another orthopaedic expert and beginning his action, C could not be criticised for his delay after receiving a negative expert report in 2013. He was not to blame for the majority of the delay.
- Prejudice – the defendant adduced little concrete prejudice. The court decided that a fair trial of the dispute remained not only possible but unimpacted by the passage of time.
- The Court accepted the seriousness of the underlying claim and its importance to the claimant.

Therefore, the court decided it was equitable in all the circumstances to disapply the time limit and permit the claim to proceed. A fair trial remained possible.

Oluseye Aderounmu (a protected party acting by his LF John Edun) v Dr Colvin [2021] EWHC 2293 (QB) Master Cook.

C brought a clinical negligence claim against a GP for failing to refer him for urgent investigations for a possible stroke.

In November 2009, C had a consultation with D, a GP, who noted that he had difficulty talking and that further tests were required. Four days later C suffered a stroke which caused neurological injury.

In November 2011, the claimant applied for leave to remain in the UK. That application was refused. He appealed and the immigration proceedings were not concluded until 2017.

In January 2017, C contacted solicitors about a possible clinical negligence claim. On 10/11/17, almost eight years after the stroke, C issued proceedings alleging negligence by D in failing to exclude a stroke and to refer him for investigations. D raised a limitation defence. C claimed that the three-year limitation period had not started to run because since the date of the accrual of the cause of action he had lacked capacity to conduct the litigation within the meaning of the Mental Capacity Act 2005. He was therefore to be considered to be under a disability for the purposes of the LA 1980 Section 38(2).

C advanced a secondary position - if he was found to have capacity - he did not have the requisite knowledge for the purposes of section 14 of the LA 1980 Act from a date more than three years prior to 10/10/17.

Alternatively, C sought the disapplication of the LA 1980 under section 33.

The parties served expert psychiatric and neuropsychiatric evidence as reports and joint statements in which the experts disagreed on the extent to which C's impairment affected his ability to use or weigh information as part of the process of decision-making. The neuropsychologists disagreed as to whether the claimant's impairment affected his ability to understand information relevant to his case and to retain information.

Master Cook decided the preliminary issue in favour of C. As to C's capacity to litigate - when considering capacity the court was not bound by the expert evidence alone; it could take into account all the available evidence. C could deal with the issues and make decisions in the litigation. He was able to give instructions about his losses and weigh the pros and cons of any offer of settlement that might be made. He had made considerable improvement since his stroke between 2009 and 2011 and there was no evidence of any deterioration in his condition since that time. Master Cook found that C had current capacity to litigate and had had capacity to litigate at all material times.

C's date of knowledge for section 14 of the LA 1980 – the clinical records indicated that C knew in December 2010 that his injury was significant. He knew that his injury was attributable to an omission by his GP and that it was probably a breach of duty. Therefore he had acquired actual or constructive knowledge for the purpose of section 14 .14A by no later than 20/12/10.

As to C's section 33 LA 1980 application, Master Cook found that the delay in C contacting solicitors concerning the alleged clinical negligence until January 2017 was explained by the fact that C required appropriate help and support to make relevant decisions, and that he had primarily been preoccupied with conducting his immigration litigation. The clinical records from 2009 were all available and the defendant GP had an independent recollection of the consultation. Therefore, considering all the circumstances and balancing the prejudices to C and to D, the balance fell in favour of C. It was possible to have a fair trial and it was equitable to allow the action to proceed.

David Ellis v (1) Heart of England NHS Foundation Trust (2) University Hospitals Birmingham NHS Foundation Trust (3) Dr Swayam Iyer [2018] EWHC 3505. 27/11/18

C developed a cerebral abscess and was seen by Dr Iyer (D3), a GP, in February 2013 who recorded a history of acute numbness and weakness of the left leg and on examination there was impaired sensation below the knee and C was unsteady on both feet. He later suffered a witnessed seizure. He attended Solihull Hospital (D1). A CT scan was taken which showed an abscess or a tumour. C's case was discussed with the neurological team at the Queen Elizabeth Hospital Birmingham (D2), and they requested further imaging and blood tests.

C was transferred to the Queen Elizabeth Hospital on 1/3/13 where he underwent drainage of an intracranial abscess via a right frontal-parietal craniotomy. He was left with relative weakness on the left side, with a severe weakness of the left foot and a left foot drop. He had reduced cognitive and behavioural functioning and epilepsy. These were permanent. The claim was expected to have a substantial financial value.

C instructed solicitors on 1/10/13. He had obtained what was considered to be a supportive report, but from a neurosurgeon. Letters of claim were sent to all three Defendants on 6/5/15. D3 served a denial Letter of Response on 15/3/16, after agreed extensions of the limitation period to 27/6/16. Partial admissions on breach of duty were made by D1 and D2.

On 15/3/16 the C's Solicitors received a GP expert's report, but it was not supportive of the claim against D3, so a decision was taken by C not to pursue the

claim against D3. On 21/9/16 the C's solicitors stated D3 was "released from this matter and we are satisfied for you to close your file".

C changed counsel, who was not satisfied with his GP expert evidence. A second opinion GP expert was instructed.

On 20/1/17 C's Solicitors contacted D3's solicitors to alert them to the fact that D3 would after all be made a party to the proceedings and to invite D3 not to take any Limitation point. Proceedings were commenced. On 5/10/17 D3 served a defence denying breach of duty and causation and raising limitation as a defence.

His Honour Judge McKenna, sitting as a High Court Judge, found that

- Consideration of Section 33 LA 1980 allowed the court unfettered discretion
- The issue had to be considered broadly
- Up to C to prove that his prejudice outweighed that to D3
- D3 had been notified and aware of the matter before the expiry of the limitation period
- D3 had produced a detailed letter of response
- D3 had previously agreed to extend limitation, which J took to indicate a lack of prejudice to D3 with this passage of time.
- There was a lack of prejudice to D3 in allowing the action to proceed against D3

HHJ McKenna stated, indicating that a lack of prejudice to D3 was a decisive factor, that "Very significantly, D3 has not been able to identify any prejudice that he has suffered or will suffer in the investigation, preparation or presentation of his defence. No documentation has been lost nor has contact with any potential witness been lost. D3 has the benefit of his contemporaneous record of his consultation and his own recollection of the consultation given the contents of his defence. Moreover D3 was notified about the family's concern within a very short period after the consultation and had the opportunity to discuss the issues with his advisers and to record his recollections well within the primary limitation period. His position is not in any way adversely affected as a result of the delay."

He found that C would be clearly prejudiced if the action was not allowed to proceed against D3 "By contrast, the prejudice to C, should he not be able to pursue his claim against D3 would be profound. He would lose the opportunity to pursue a potentially significant claim against D3 and be left with a possible, but by no means, certain claim for the loss of a chance against his Solicitors and/or Counsel. On any view, the successful pursuit of a negligence claim against Solicitors and/or Counsel in the face of an unsupportive expert report from a reputable expert would be fraught with difficulty."

HHJ McKenna did not look to the relief from sanctions provisions under the CPR. He stated "…no justification for importing into the interpretation of Section 33 of the [Limitation] Act the case law relating to relief from sanctions."

Conclusions

Where a claimant approaches a section 33 application with careful thought and evidence, covering all of the factors relevant to section 33, they can be very difficult to oppose. Where the section 33 application is strong and very likely to succeed, there is a good argument for leaving the issue to be dealt with at trial, rather than a preliminary issue.

The recent cases re-emphasise the importance of illustrating prejudice. Defendants need to consider the prejudice that the delay has caused them (if any) and to cover this as fully and clearly as possible in their evidence.

As Francesca O'Neill discusses below, the overall merits of the claim can be a factor that can defeat a claim summarily, but only in the clearest of cases.

DATE OF KNOWLEDGE: GETTING IT RIGHT IS VITAL

FRANCESCA O'NEILL

I have noticed a continuing trend in which I am asked to advise on striking out clinical negligence claims brought out of time for limitation purposes. Several of these have centred around a defined factual dispute: the date of knowledge ("DOK").

In some circumstances, the nature of that factual dispute means that it cannot be resolved by way of a strike out application (remembering that the court will not undertake a "mini-trial" within that process) but instead should be pleaded in the Defence for determination at a trial of a preliminary issue. However, there are circumstances in which it can be said that the facts are so clear as to the correct date of knowledge that there is no scope for a factual dispute of the sort requiring more: strike out is the proportional response.

It's worth considering then the correct approach to the formulation of a date of knowledge that won't cause problems — or indeed how to spot when there's a weakness to the claim.

The DOK is the vital date for the calculation of limitation periods. The 1980 Act provides a general framework governing the operation of limitation periods across a range of legal claims. It includes specific provisions pertaining to claims for personal injuries such as in clinical negligence disputes. These provide a general rule that for cases in which it is alleged that a negligent act or omission has caused personal injury, the claim must be brought within three years of injury.

This is subject to exceptions designed to ameliorate the unfairness that might result from an inflexible application of the time limit. One such exception, relevant to this claim, is that generally time will not run until the date at which a claimant is deemed to have 'knowledge' of his/her injury.

This is provided for by s.11(3) read with s.11(4) which state:

"(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below.
(4) Except where subsection (5) below applies, the period applicable is three years from—
(a) the date on which the cause of action accrued; or
(b) the date of knowledge (if later) of the person injured."

Section 14 of the 1980 Act sets out the test for what amounts to the date of knowledge within the meaning of s.11(4)(b) . The relevant parts of section 14 provide:
(1) "Subject to subsections (1A) and (1B) below, 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 or 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.
(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." [**my emphasis added**]

The leading judgment remains that of the House of Lords in *Haward & Other v Fawcetts* [2006] 1 WLR 682. *Haward* concerned s.14A of the 1980 Act — although that case was about financial advice — but is equally applicable to clinical claims.

The Court examined the degree of knowledge required for time to run under s.14 and the degree of certainty that a party must possess. As to the degree of certainty necessary to establish 'knowledge', Lord Nicholls (endorsing the approach of Lord Donaldson MR in *Halford v Brooks*) stated (at §9):

- "…. knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence: "suspicion, particularly if it is vague and unsupported, when indeed not be enough, but reasonable belief will normally suffice." **In other words, the claimant must know enough for it to be reasonable to begin to investigate further ." [Emphasis added]**

As to the question of the degree of detail required to have knowledge that the injury was attributable to a 'act or omission', Lord Nicholls (at §10) cited with approval the approach of trial judge in the clinical negligence claim of *Hendy v Milton Keynes Health Authority* [1992] 3 Med LR 114 :

- "…. Blofeld J said a plaintiff may have sufficient knowledge **if she appreciates "in general terms " that her problem was capable of being attributed to the operation, even where the particular facts of what specifically went wrong or how or where precise error was made is not known to her….** To the same effect Hoffmann LJ said [in *Broadley v Guy Clapham*] section 14(1)(b) requires "one should look at the way the plaintiff puts his case, distil what he is complaining about and asked whether he had in broad terms , knowledge of the facts on which that complaint is based play." **[Emphasis added]**

What then if you are faced with a claim where the DOK appears to be different from that asserted and where you think there may be a good limitation defence? Always bear in mind that any application to strike out or to dismiss the claim as time-barred is likely to be met with a cross-application to extend the limitation period under s.33 of the 1980 Act. The most authoritative and comprehensive source of guidance to the proper exercise of the court's discretion is contained in the judgment of Sir Terence Etherton MR in *Carroll v Chief Constable of Manchester* [2017] EWCA Civ 1992 . He sets out 13 separate principles governing the application of s.33 each advanced by reference to earlier authority.

This was very recently considered in the very recent (and useful) case of *Wilkins v University Hospital North Midlands NHS Trust* [2021] EWHC 2164 (QB), Richard Hermer QC sitting as a High Court Judge handed down a detailed and thoughtful judgment. In particular, he considered the extent to which the merits of the underlying claim should be considered by a judge concluding the balancing exercise in a trial on limitation as a preliminary issue. He said:

- "70. Secondly this cautious approach to the assessment of merits, save in the clearest of cases, is borne out of both principled and practical concerns as to how it could be fairly and transparently integrated into the s.33 balancing exercise. If a claim is so weak that it is bound to fail, then the Court has relevant powers to dispose of it under the strike out and summary judgment provisions. The CPR , and the considerable body of case law that has built up around summary disposal powers, provide very clear legal tests that enable the court to apply a transparent and consistent approach to the assessment of merits. Where at a limitation trial is it obvious that the claim is bound to fail, then it either should be struck out, or the Court (applying the same strike out/summary standards) would be very likely refuse to disapply limitation to permit a hopeless claim to proceed.

However, any additional approach that requires the assessment of the merits of a claim that is robust enough to withstand strike out/summary judgment, but is nevertheless is said to be 'weak', runs the risk of arbitrary application. That is because it is far from clear what the applicable legal standards actually are by which the merits of such a claim can be calibrated at an interlocutory stage. If the test is not that of strike out/summary judgment then what, I posit rhetorically, is it? It runs the risk of applying little more than an impressionistic view of merits at an early stage of proceedings, making it difficult, even for the most experienced judges, to apply fair, consistent and transparent standards across all cases. This concern is all the greater in cases such as this, in which it is contended by the Defendant that the 'merits' argument should be effectively determinative of the whether the claim proceeds or not."

Clearly, careful thought is required before taking a limitation point to a hearing. We are always happy to provide initial advice on these points, where the balance of prejudice is requires candid objective consideration — while keeping a tactical hat on!

ABOUT US

1 Chancery Lane offers one of the largest, specialist medical law and clinical negligence teams in the sector.

Acting on large, multi-party actions as well as individual cases, members of 1 Chancery Lane specialise in:

- claims relating to organ retention
- cervical screening
- human growth hormone
- cardiac surgery
- HIV/haemophilia
- fatal accidents and catastrophic injuries (particularly those involving the spine or birth trauma)
- mental illness, as well as those concerning consent and safeguarding
- human rights
- difficult causation and quantum issues
- inquests
- inquiries
- GMC and GDC regulatory cases and other professional disciplinary tribunals.

1 Chancery Lane, London, WC2A 1LF
Tel: +44 (0)20 7092 2900
Email: clerks@1chancerylane.com
www.1chancerylane.com