

LIMITATION

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Background

The limitation period for a PI claim is either:

- the date of the accrual of the cause of action OR
- if later, the date of knowledge.

If the claim falls outside this period consideration has to be given to section 33.

Knowledge of What?

LA 1980 s 14(1)

- That the injury was significant.
- The injury was attributable to the act or omission alleged to constitute negligence.
- The identity of the defendant (including the facts which make him vicariously liable).

NOTE: C does NOT need to know that the act or omission constitutes negligence.

How do we determine knowledge?

s14(3) - A person's knowledge includes knowledge which he might reasonably be expected to acquire

(a) From facts observable by him

(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 evidence so long as he has taken all reasonable steps to obtain (and where appropriate act on) that advice

How do we determine knowledge?

What is reasonable?

- Recent cases mark a tightening of s14 and shift away from a subjective approach
- Heightened curiosity often expected
- *Forbes* – surgical accident resulting in eventual amputation – C would have been allowed 12 to 18 months to take stock and seek advice

What is a significant injury?

- The injured party would “*reasonably have considered it sufficiently serious to justify instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy judgment*” (s 14(2))
- Not whether C personally thought the injury justified proceedings but whether he would reasonably have done so.

What is a “significant injury”?

Roberts v Winbow [1999] Lloyd’s LR Med 31

- Injury worth less than £2000
- Insidious onset

McCoubrey v MOD [2007] EWCA Civ 17

- “significance” judged by ref. to the injury itself not the impact on private life or career

Injury attributable to the act or omission alleged to constitute negligence

How much knowledge?

- Knowledge or belief?
- Certainty or suspicion?
- The precise cause or gist?
- Knowledge of the “essence” or knowledge of the evidence necessary to prove the claim?

How much knowledge?

- Broad knowledge of the essence of the causative act or omission
- Attributable to means “capable of being attributable to” i.e. “a real possibility”
- Reasonable belief - *“the belief must be held with sufficient confidence to justify embarking on the preliminaries to the issue of a writ”*
(i.e. to investigate whether the act or omission involved negligence)

North Essex CHA v Spargo [1997]

Examples – Knowledge of acts/omissions

- *Dobbie v Medway HA* [1994] 1 WLR 1234

“usually the claimant knows he has suffered PI as soon as or almost as soon as he does so”

Examples – Knowledge of acts/omissions

Forbes v Wandsworth HA [1997] QB 402

- It is NOT enough to establish that C's lack of investigation was reasonable.

Examples – Knowledge of acts/omissions

“It may be perfectly reasonable for a person who is not cured when he hoped to be to say, “oh well it is just one of those things. I expect the doctors did their best”. Alternatively the explanation for the lack of success may be due to want of care ... in which case it would be perfectly reasonable to take a second opinion. And I do not think that the person who adopts the first alternative can necessarily be said to be acting unreasonably. But he is in effect making a choice, either consciously by deciding to do nothing or unconsciously by in fact doing nothing. Can a person who has effectively made this choice, many years later, and without any alternation of circumstances, change his mind and then seek advice which reveals all along that he had a claim? I think not”

Examples – Knowledge of acts/omissions

Driscoll-Varley v Parkside HA [1991] 2 Med LR 346

- C thought leg injury caused by surgical negligence
- in fact caused by premature removal from traction
- *“a rather marginal example of barking up the wrong tree”*

Examples – Knowledge of acts/omissions

Smith v West Lancashire HA [1995] PIQR P
514 CA

“one cannot know of an omission without knowing what it is that is omitted”

Examples – Knowledge of acts/omissions

Whiston v London Strategic HA [2010] EWCA
195

- CP case
- C knew born by forceps
- Essence of case = delay and wrong forceps
- No actual knowledge
- BUT constructive knowledge
- BUT section 33

The Identity of the Defendant

- Likely to be uncontroversial.
- Query whether C needs to know the full legal title of the Defendant.
- Likely to be met by constructive knowledge in any event.

Conclusion

- Identify the essence of your case?
- When did C reasonably believe that to be the case?
- Why the delay in achieving this belief?
- An objective change of circumstance or a subjective change of heart?

Section 33: the last refuge of the negligent

- What does the Act say?
- Test is whether equitable to allow action to proceed having regard to the degree to which S 11 prejudices the Claimant and any decision to allow the action to proceed would prejudice the Defendant (S 33(1))
- NB Clearly a balancing exercise: on the face of it *Mitchell*-style whipcracking not appropriate.

- The statutory criteria to be considered - “all the circumstances of the case and in particular”:
- *(a) the length of, and the reasons for, the delay on the part of the Claimant;*

- b) *Effect of delay on cogency of evidence called by either side;*
- c) *Defendant's conduct (including responding to requests);*
- d) *Duration of Claimant's disability;*
- e) *Extent to which Claimant acted promptly and reasonably once knew that act/omission might be capable of giving rise to claim;*

(f) Steps taken by Claimant to obtain expert advice/nature of that advice.

- **NB** - The above criteria do not stand alone, but are factors to be taken into account when looking at the test in S 33(1).

Special Cases - a warning FAA

- Fatal Accidents Act: remember -
- If the injured person died at a time when his action was statute barred (ignoring S 33), then the FAA claim is automatically out of time (S 12(1)).
- Any subsequent S 33 application by dependants will result in scrutiny of the reason and length of delay by the deceased (S 33(4))

- If the injured person's claim was in time at the date of death, the time limit is 3 years from death/date of knowledge of the dependant(s)
- S 33 available to dependants thereafter, but will this be more difficult because of the lapse of time?

Special cases – product liability

- S 33 applies, but
- In product liability cases (under the Consumer Protection Act 1987) 10 year “longstop” after date of supply of product (S 11A(3))
- Longstop cannot be overridden by S 33 (CPA Sch 1 paragraph 6)
- NB Neither disability nor “discoverability” overrides the longstop.

The general approach

- *Cain v Francis* [2008] EWCA Civ 1451
- *“It seems to me that, in the exercise of the discretion, the basic question to be asked is whether it is fair and just in all the circumstances to expect the Defendant to meet this claim, notwithstanding the delay in its commencement.... The length of the delay will be important, not so much for itself as to the effect it has had.”*

- *“But it will also be important to consider the reasons for the delay. Thus, there may be some unfairness to the Defendant due to the delay in the issue but the delay may have arisen for so excusable a reason that, looking at the matter in the round, on balance it is fair and just that the action should proceed.”*

- **NB** - While the statutory considerations of length/reasons for delay and effect on cogency relate to the post expiry delay, the court can take into account pre-expiry prejudice in the balancing exercise: *Donovan v Gwentoy* [1990] 1 WLR 472 HL.
- For this reason, the Claimant who notifies his claim at an early stage is much more likely to succeed.

Short delay

- The shortness of a delay may not protect the Claimant.
- *Cairns-Jones v Christie Tyler* [2010] EWCA Civ 1642: refusal to allow action to proceed where the delay between expiry and issue was relatively limited, and caused no prejudice to D upheld by Court of Appeal.

Will the courts get tougher?

- Will Mitchell/Jackson change the approach of the courts to S 33? Two answers:
 1. It should not.
 2. It probably will.

Aktas v Adepta [2011] QB 894

- Conjoined appeals: two second actions (both struck out as abuse at first instance).
- Section 33 employed to extend time for second action, where first failed due to not serving claim form within time.

- *“There is no reason to think that the Defendant will be more prejudiced where the second action is out of time than where the first action is out of time, rather the contrary. And the claimant’s or his solicitor’s fault , generally speaking, is liable to be greater where the first action is out of time than where the second action is, at any rate where the second action is only lost by reason of an error over service.” Rix, LJ.*

Davidson v Aegis Defence Services [2013] EWCA 1586: claim form error

- Failure to serve claim form within 4 month period (technical failure because photocopy).
- Fresh claim form issued with S 33 application, dismissed at first instance.
- First instance decision upheld on appeal.
- Defendant had investigated claim for insurance purposes within a month of incident.
- Defendant had had long time to investigate claim.

- Further, Defendant had had 15 months to investigate claim between Letter of Claim and date of failure to serve Claim form.
- But loss of evidence (through theft) post expiry: unclear whether evidence relevant.
- Defendant had been dilatory, but likewise the Claimant.

Jackson/Mitchell: any effect?

- The drivers of Jackson/Mitchell include:
 - use of court time;
 - speeding up litigation;
 - reduction of costs
 - imposition of sanctions pour encourager les autres
- These factors are not easy to fit into S 33/*Cain v Francis*.

But

- Most S 33 decisions are fact sensitive and “soft” (e.g. memory fading, etc.)
- Long-standing reluctance of appellate courts to interfere in S 33 cases.
- General culture of intolerance to delays likely to affect courts’ approach both at first instance and on appeal.

Lessons?

- Claimants should contact Defendants at earliest possible stage, even if only expressing general concerns.
- Get service of claim form right.
- If doubt about validity of proceedings, reissue immediately.

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