LIMITATION – running the defence

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SECTION 11 (4) LIMITATION ACT 1980

…the period applicable is three years from –

(a) date on which cause of action accrued; or

(b) date of knowledge (if later) of person injured.

- Two types of knowledge – actual and constructive
- Issues relating to date of knowledge are issues of fact not law

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SECTION 14 (1) – KNOWLEDGE REQUIRED

… references to a person's date of knowledge are references to date on which first had knowledge of following facts —

(a) that injury in question was significant; and

(b) that 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

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SECTION 14 (1) (cont'd)

(c) the identity of D; and

(d) if it is alleged that act or omission was that of a person other than the defendant, identity of that person and additional facts supporting bringing of an action against the D;

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.

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SECTION 14 (2)

an injury is significant if:

person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a D who did not dispute liability and was able to satisfy a judgment.

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SECTION 14 (3) – CONSTRUCTIVE KNOWLEDGE

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 help of medical or other appropriate expert advice reasonable for him to seek;

but not fixed with knowledge of fact ascertainable only with help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

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FURNISS v FIRTH BROWN TOOLS LTD [2008] EWCA Civ 182

- Demonstrated need for Judge to address and make findings on each of elements under s.14
- Failed to address when injury arising from D's negligence was "significant"
- Actual knowledge was within 3 years
- Burden of proof on D to establish later constructive knowledge but failed to do so as impossible from evidence to determine answer to question not addressed

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KNOWLEDGE OF THE ACT OR OMISSION

- "knowledge of the essence of the act or omission to which the injury is attributable" (*Dobbie v Medway Health Authority* [1994] 1 WLR 1234)
- Not necessary for C to know all details of D's acts or omissions on which relies as constituting negligence (*Wilkinson* v *Ancliff B.L.T. Ltd* [1986] 1 WLR 1352)
- Accepted in *Whiston* v *London Strategic Health Authority* [2010] EWCA Civ 195

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ADAMS v BRACKNELL FOREST BC [2005] 1 AC 76

- House of Lords resolved issue of correct approach to constructive knowledge
- Test is objective
- What a reasonable man in the Claimant's position should have done – the Claimant's particular characteristics and intelligence are irrelevant

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WHISTON v LONDON STRATEGIC HEALTH AUTHORITY [2010] EWCA Civ 195

- Examined judgments in *Adams*
- Emphasised test objective
- Did not form part of ratio of *Adams* that there was an "obligation of curiosity"
- Knowledge of significance of injury is not determinative of constructive knowledge
- But, *Adams* requires Ct "to expect a heightened degree of curiosity"

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WHISTON v LONDON STRATEGIC HEALTH AUTHORITY (cont'd)

- Distinction between someone who has been suffering injury since born and someone who suffers injury in adulthood
- But relevant to curiosity that disability had become more serious and knew related in some way to circumstances of delivery
- Appeal allowed on constructive knowledge but also under s.33: action allowed to proceed

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A v HOARE [2008] UKHL 6

- Test in s.14(2) was entirely impersonal
- It is not whether C would have considered the injury sufficiently serious to justify instituting proceedings but whether he would "reasonably" have done so

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A v HOARE (cont'd)

- Correct approach: ask what C knew about injury, add any "objective" knowledge imputed under s.14(3) and then ask whether reasonable person with that knowledge would have considered injury sufficiently serious to justify instituting proceedings
- Effect of C's injuries upon what could reasonably have been expected to do was irrelevant under s.14(2) (but is relevant to s.33)

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SECTION 33 (1)

If it appears to Ct that it would be equitable to allow action to proceed having regard to degree to which:

(a) provisions of section 11 …of this Act prejudice plaintiff or any person whom he represents; and
(b) any decision of the court under this subsection would prejudice D or any person whom he represents;

Ct may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.

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SECTION 33 (3) (a) & (b)

In acting under this section Ct shall have regard to all circumstances of case and in particular to –

(a) length of, and reasons for, delay on part of plaintiff;
(b) extent to which, having regard to delay, evidence adduced or likely to be adduced by plaintiff or D is or is likely to be less cogent than if action had been brought within time allowed by section 11…

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SECTION 33 (3) cont'd (c) & (d)

(c) conduct of D after cause of action arose, including extent (if any) to which he responded to requests reasonably made by plaintiff for information or inspection for purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against D;

(d) duration of any disability of plaintiff arising after date of accrual of cause of action;

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SECTION 33 (3) (e) & (f)

(e) extent to which plaintiff acted promptly and reasonably once he knew whether or not act or omission of D, to which injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) steps, if any, taken by plaintiff to obtain medical, legal or other expert advice and nature of any such advice he may have received.

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KR v BRYN ALYN [2003] EWCA Civ 85 -

Starting points in exercise of discretion:

1. In multiple abuse claims consider discretion separately for each one
2. Burden on C to show equitable to disapply limitation period is a heavy one
3. Longer delay greater the prejudice
4. Judge should take meticulous care in giving reasons if minded to grant a long "extension"
5. Balancing exercise

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KR v BRYN ALYN (cont'd)

6. Wherever feasible preliminary hearing by reference to pleadings, statements and disclosure
7. If s.33 determined along with substantive issues should take care not to determine substantive issues first
8. Where assessed likely cogency of evidence keep in mind more cogent C's case greater prejudice to D

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CAIN v FRANCIS [2008] EWCA Civ 1451

- Review of application of s.33 in respect to two RTA claims
- Discretion is wide and unfettered. To be applied to the facts of individual cases, but exercise should be consistent
- Loss of limitation defence is not head of prejudice
- Prejudice is that which affects ability to defend
- Question to be asked: whether it is fair and just in all the circumstances to expect D to meet claim on its merits notwithstanding delay in commencement

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CAIN v FRANCIS (cont'd)

- Length of delay is not deciding factor in itself – what is the effect of delay?
- Has D suffered any evidential or other forensic prejudice?
- Delay is delay after expiry of limitation period, but…
- Always relevant to consider whether D knew claim was to be made and opportunities had to investigate claim and collect evidence

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AB & ORS v NUGENT CARE SOCIETY [2009] EWCA Civ 827

- Consideration of correct approach to s.33 in abuse cases in light of *A v Hoare* [2008] UKHL 6
- Two critical points of distinction between questions considered in *KR v Bryn Alyn* and *A v Hoare*:
  - Evidence relevant to breach of duty is now more limited – system not relevant
  - Exercise of discretion under s.33 "significantly different": C's psychological state relevant to reasons for delay not s.14

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AB & ORS v NUGENT CARE SOCIETY (cont'd)

- Changes likely to make it easier for C under s.33
- Starting points in *KR* v *Bryn Alyn* remain valid subject to considerations following *A v Hoare*
- More likely to be desirable that oral evidence should be heard – strength of evidence relevant to way discretion should be exercised
- Every effort should be made to ensure C doesn't have to give oral evidence again on liability
- Endorsed view in *Cain v Francis* that loss to D of limitation defence is not head of prejudice

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MCDONNELL v WALKER [2009] EWCA Civ 1257

- Further review of s.33 – "landscape has changed"
- Waller LJ emphasised "two obvious points" from *Bryn Alyn*:
  (i) depending on issues and nature of evidence going to them, longer the delay the more likely and greater prejudice to D; and
  (ii) balancing exercise at end of analysis of all relevant circumstances and with regard to all issues, taking them all into account
- Importance of D establishing forensic prejudice

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MCDONNELL v WALKER (cont'd)

- If delay caused forensic prejudice to D then must consider cause of delay.
  - If excusable and still possible to have fair trial then may be just and fair to allow to proceed
  - If caused unfairness to D and no excuse then should not allow to proceed
- It was unfair for D to face large claim (damages over £500k) from "standing start" where delay extensive (7 years) and largely inexcusable
- Although liability admitted prejudice to D outweighed prejudice to C (c.f. *Cain*)
- Claim against negligent solicitors.

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CPR 7.6 v S.33

- *Horton* v *Sadler* [2006] UKHL 27 abolished rule in *Walkley v Precision Forgings* [1979] 1 WLR 606 - s.33 could be used for second set of proceedings
  - The Court's discretion should be unfettered
  - The rule in *Walkey* produced arbitrary anomalies and unprincipled distinctions.
- CPR 7.6 stringent terms not entitling Ct to extend time
- Tension between CPR 7.6 and s.33 recognised in *McDonnell*

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CPR 7.6 v S.33 (cont'd)

- Since *Horton* cases in which s.33 used where r.7.6 prevented extension (e.g. *McKay v Hamlami* considered with *Cain v Francis*)
- Waller LJ in *McDonnell:* Cannot be said in r.7.6 cases that extension under s.33 should never be granted but is relevant context and at least show that should not be easy for C to commence second action and obtain disapplication of s.33
- But…Abuse of process?

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IS SECOND SET OF PROCEEDINGS AN ABUSE OF PROCESS?

- Yes, according to HHJ Mitchell in *Dixie v British Polythene* 8.7.09, Central London CC, where had been breach of CPR 7.5
- *Horton* distinguished as decision about notification to MIB – did not answer question
- Either abuse or not – not discretion (*Aldi Stores v WSP Group [2008] 1WLR 748*)
- *Leeson v Marsden* [2008] EWHC 1011 (QB) was distinguishable and/or wrongly decided
- Appeal "leapfrogged" to Court of Appeal
- Heard on 15 March 2010 - judgment awaited

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FURTHER PRACTICAL CONSIDERATIONS

- Establishing Prejudice
  - Witness evidence as to:
  - The effect on the investigation of the claim and/or assembly of evidence
  - Availability of: witnesses and documents and difference delay might have made to availability of evidence
- Preliminary Issue?
  - Proportionality
  - Save on damages and costs?
  - Evidence needed again on liability
  - Tactically worth keeping in issue

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COSTS OF PRELIMINARY ISSUE

- Issue-based Order?
- *Kew v Bettamix* [2006] EWCA Civ 1535
  - Overriding duty not to run unarguable points
  - S.11 argument "simply could not succeed"
  - C won on s.33
  - C awarded 100% costs at first instance
  - Appeal on costs order: C 65% costs

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CONCLUSION: DEVELOPMENT OF LIMITATION LAW

- Restrictive approach to knowledge - more scope for D to argue statute barred

But

- Broader approach to exercise of discretion - more generous to C
- Flexibility and fairness v certainty and protection against stale claims

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