

PERSONAL INJURY BAR ASSOCIATION  
LIMITATION: AN UPDATE

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**Introduction**

1. In Donovan v Gwentoy's Ltd [1990] 1 WLR 472 at 479, HL, Lord Griffiths observed that the primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim; that is, a claim with which he never expected to have to deal. Several recent appellate decisions have shown a rather different judicial stance – an inclination to allow claimants to bring forward apparently deserving claims, sometimes many years out of time, so long as there is a prospect of a fair trial.

**Claims for damages for intentional trespass to the person**

2. In A v Hoare and other appeals [2008] AC 1 ('the Lottery rapist case') the House of Lords overruled its own anomalous decision in Stubbings v Webb [1993] AC 498 that deliberate acts, such as indecent assault, were subject to a final six-year limit from the date of the act by virtue of section 2 of the 1980 Act.
3. In Hoare the House held that claims for damages for intentional trespass to the person fell within section 11, like other actions for personal injuries. It reasoned that Parliament could not have intended to exclude those who had been intentionally injured, as opposed to those injured through neglect or negligence, from the benefit of the date of knowledge provisions in section 14 or of the court's general discretion to extend time under section 33.

### **Knowledge of ‘significant’ injury**

4. In Young v Catholic Care (Diocese of Leeds) and the Home Office, one of the conjoined appeals heard with Hoare, the House went on to consider the test under s 14(2) for what counted as a “significant” injury. At para 34 Lord Hoffmann, with whom all other members of the House agreed, said that section 14(2) applied an entirely impersonal standard:

*“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.”*

5. In so holding the House of Lords disapproved KR and others v Bryn Alyn Community (Holdings) Ltd (in liquidation) and another [2003] EWCA Civ 85, [2003] QB 1441 in which the Court of Appeal held that the question of what was “significant” under section 14(2) was partly subjective and partly objective. The Court had included in their consideration the fact that the claimants had repressed their memories of the abuse which founded their claims.
6. Following Hoare, those sorts of factor will only fall to be considered under section 33 and not section 14, as illustrated by several subsequent decisions this year. In A v Wirral Metropolitan Borough Council [2008] EWCA Civ 783; [2008] All ER (D) 61 (Jul), the claimant brought proceedings for alleged sexual abuse in 1970, when he was aged 15, suffered in a care home managed on the defendant’s behalf. The claimant claimed that at the time of the abuse (which included anal rape) he had not known that he had suffered a significant injury because he had no serious physical ill-effects and was unaware that he had suffered or was likely to suffer serious psychiatric harm as a result of the abuse. He relied on a psychiatric report of September 2001 to the effect that he was suffering from post-traumatic stress disorder caused by the abuse.

7. McKinnon J found (pre Hoare), applying the mixed objective/subjective test adopted by the Court of Appeal in Bryn Alyn, that in the circumstances the claimant had not known that his injury was significant and attributable to the abuse until 2001. The Court of Appeal (May, Keene and Smith LJ) held that on the assumption that the claimant's allegations were true, and applying Lord Hoffmann's "impersonal standard" in Young v Catholic Care, the claimant had known at all times after it had occurred that the abuse amounted to a significant injury. A person who had been raped whether vaginally or anally had to know that she or he had suffered not only a grave wrong but also significant injury. The claimant would not have known of his own knowledge whether it was worth bringing an action, but he would at least have known enough to make it reasonable to expect him to consult a solicitor. Had he done so, he would have discovered from a reasonably competent solicitor that substantial damages could in theory be awarded for such abuse. Thus time had begun to run from the date of his majority and ran out in 1976. The case was remitted to the judge to consider the exercise of his section 33 discretion.

### **Constructive knowledge**

8. You will recall that in Adams v. Bracknell Forest Council [2005] 1 AC 76 (a claim for negligent failure to diagnose and manage the claimant's dyslexia) the House of Lords had already decided what amounted to constructive knowledge for the purposes of section 14(3). The House endorsed the objective test favoured by the Court of Appeal in Forbes v Wandsworth HA [1997] QB 40 rather than the subjective test adopted by a different division of the Court in Nash v Eli Lilly & Co [1993] 1 WLR 782. Lord Hoffman (with whom Lord Phillips and Lord Scott agreed) considered that although the claimant had to be assumed to be a person who had suffered the injury in question and not some other person, his particular character or intelligence could not be relevant. Section 14(3) required the court to assume that a person who was aware that he had suffered a personal injury, serious enough to be something about which he would go and see a solicitor if he

knew he had a claim, would be sufficiently curious about the causes of the injury to seek whatever expert advice was appropriate.

9. Lord Hoffmann acknowledged in Young v Catholic Care that the claimant's individual characteristics might nevertheless have a greater bearing on his ability to gain constructive knowledge than on whether his injury was "significant" (para 39):

*"The difference between section 14(2) and 14(3) emerges very clearly if one considers the relevance in each case of the claimant's injury. Because section 14(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 section 14(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."*

10. In Khairule v North West SHA [2008] EWHC 1537 (QB), in considering constructive knowledge under section 14(3) Cox J held that the relevant question was when a reasonable person in the circumstances of the claimant, suffering (as in his case) cerebral palsy 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. In asking that question personal, subjective characteristics such as shyness, embarrassment, aggressiveness, ambition, or aspirations were to be disregarded, save to the extent that any such characteristic was a direct result of the injury itself. Cox J was thereby applying Neuberger LJ's analysis in McCoubrey v Ministry of Defence [2007] EWCA Civ 17 (although the main focus in that case was on section 14(2) and it was not referred to in the

Lords' speeches in Young v Catholic Care). In the event, Cox J held that the claimant had constructive knowledge more than three years prior to issue of his claim, but she exercised her section 33 discretion in his favour.

11. The different questions to be asked under section 14(2) and 14(3) are also illustrated in Field v British Coal Corporation [2008] EWCA Civ 192. The claimant worked in various jobs for the defendant from 1982. He had since 1985 had problems with wax and infections in his ears, for which he consulted his doctors and had his ears syringed. In 1989 he was provided with ear protectors at work, which he wore most of the time. In 1995 the defendant disposed of the business. In March 1998 the claimant had a hearing problem which he had ascribed to build-up of wax, but his doctor found nothing abnormal and reassured him. The claimant had an audiogram which showed a right-sided hearing loss, but he was not told the result (although he was aware of the loss). He was reassured he was fit to continue work. In early 2003, the claimant began to notice a slight ringing in his ears when he left work. His wife also complained that he had the television on too loud. He was referred to a consultant ENT surgeon in November 2003 who diagnosed mild noise-induced hearing loss. He began proceedings in August 2006. The defendant contended that he had knowledge of a significant injury in 1998 and that the claim was statute-barred.
  
12. The judge at first instance (HHJ Bullimore) found that the claimant was unaware that he had suffered an injury until seeing the consultant in November 2003; before that he had no reason to attribute his hearing problems to anything other than wax and infections. However the judge held that when considering whether the injury was "significant" within the meaning of section 14(2), the claimant's individual history and circumstances were irrelevant. Applying that principle he held that the claimant must be taken to have known in 1998 that the injury was significant as he had a hearing problem that could not at that time be ascribed to wax, and so his claim was out of time.

13. The Court of Appeal reversed that decision, reasoning (per Moore-Bick LJ at para 23, with whom May and Lawrence Collins LJ agreed) that:

*“it was difficult to accept that [the claimant] could reasonably have been expected to seek further medical advice in March 1998 while he still had reason to ascribe his symptoms to recurrent problems with wax and infections, especially when those who carried out the test gave him to understand there was nothing much wrong with his hearing and that he was fit to continue work.”*

### **Burden of proof**

14. In Furniss v. Firth Brown Tools Ltd [2008] EWCA Civ 182, another hearing loss case, Smith LJ (with whom Laws and Buxton LJ agreed) treated as axiomatic that the burden of proof under section 14 lies on the defendant (paragraph 27 of the judgment).

15. This is at variance with decisions such as Crocker v British Coal [1996] 29 BMLR 159 (Mance J). In Nash v Eli Lilly the Court of Appeal held (at 796) that if the claim was not issued within three years of the date when the cause of action arose, the onus was on the claimant to prove a date of knowledge within the three years previous to issue; but if the defendant wished to rely on a date prior to the three years, the onus of proof lay on him to prove actual or constructive knowledge at that date. In Khairule Cox J proceeded on the basis that the overall burden was indeed on the defendant, but that it had discharged it.

### **Disability**

16. Section 28 of the 1980 Act provides, in sum, that time does not run against a person under a disability provided he was under a disability at the time his cause of action accrued. “Disability” for these purposes is defined in section 38(2) (see annexes). With effect from 1st October 2007 this definition has been amended by the Mental Capacity Act 2005: a person is under a disability if he lacks litigation capacity within the meaning of that Act.

17. Given the presumption of capacity in the 2005 Act and its enshrinement of individual rights, the new definition is likely to prove slightly more demanding for claimants.
18. Section 28 does not of course preclude an action being started by a person under a disability, acting with the assistance of a litigation friend; but it means that there is no obligation for him to do so, even where all the requisite information is available. Prejudice to the defendant is irrelevant, as the claimant has a right to bring proceedings at any time for as long as he remains under a disability. In Eidha v Toropdar [2008] EWHC 1219, the driver of a car which hit and injured a 10 year old boy, causing injuries which mean that he is likely never to regain full mental capacity, sought a declaration that he was not liable for injury or loss sustained as a result of the accident (on the driver's account, the boy ran out in front of him from behind a bus). Despite indications that a claim would be brought on behalf of the boy, none had been by four and a half years post-accident. The defendant (the injured boy) applied for a preliminary hearing as to whether a claim for negative declaratory relief is available in an action in respect of personal injuries. That application failed and the judge (McCombe J) upheld the Master in giving directions for a trial on liability, noting that the negative declaration procedure was appropriate given the long delay, the unfulfilled threats of proceedings and the danger that a trial of the action would become less and less satisfactory as time passed.
19. Such declaratory relief claims may become more common. They potentially enable the insurers of prospective defendants to litigate liability issues at a time when recollections are fresher.

### **The section 33 discretion**

20. In Horton v Sadler and another [2007] 1 AC 307 the House departed from its anomalous decision in Walkley v Precision Forgings Ltd [1979] 1 WLR 606,

which barred a second personal injury claim brought out of time when a previous claim was brought in time. In so doing it emphasised that the section 33 discretion was broad, unfettered and to be guided by fairness, having regard to all the circumstances of the case and in particular the six matters listed in subsection 33(3) (see in particular per Lord Bingham at para 32).

21. The unfettered nature of the discretion was underlined in Hoare. Lord Hoffmann, Baroness Hale and Lord Brown all referred to the need for the judge to look at the matter broadly, consider whether or not it will be possible for defendants to investigate allegations and ask him/herself whether a fair trial will still be possible; or, as Lord Brown expressed it, whether there is "a reasonable prospect of a fair trial" (see paragraph 86).
22. The speeches did not expressly address the burden of proof under section 33, but it seems clear that the claimant still bears it, as decided in a number of previous appellate decisions. In the Bryn Alyn case Auld LJ, giving the judgment of the Court at para 74(ii), summarised the law as placing on the claimant the "heavy burden" of showing that it would be equitable to disapply exceptionally the primary limitation period. In Khairule at para 80 Cox J doubted that the references to weight and exceptionality in this passage survived Horton and Hoare; she was surely correct to do so.
23. The House of Lords having remitted Hoare's case back to a Queen's Bench judge for consideration under section 33, that issue was tried by Coulson J ([2008] EWHC 1573 (QB)). The chronology of events is relevant. On 22nd February 1988, Hoare subjected the claimant to a serious sexual assault. He was subsequently convicted of attempted rape, having accumulated six previous convictions for rape, attempted rape and indecent assault. He was sentenced to life imprisonment for the attack on the claimant. He was released from prison on licence on 10th May 2004. On 4th August 2004 he won £7m on the National Lottery. The claimant learnt of Hoare's release from prison as a result of the

publicity surrounding his lottery win. On 22nd December 2004, the claimant brought her claim against him for assault and battery. There was thus a delay of 16 years 10 months between cause of action and claim. Nevertheless Coulson J exercised the section 33 discretion in the claimant's favour. He concluded that a lack of misconduct by the defendant was not a positive factor in the balance for the defendant under section 33(3)(c) [conduct of the defendant after the cause of action arose], but merely a neutral one (para 63). He also relied on the fact that Hoare was impecunious and not worth suing previously because of the assault on the claimant and his imprisonment for it. However, it is not easy to see why impecuniosity not arising out of the particular tort should be treated as of lesser weight.

24. In Leeson v Marsden and United Bristol Healthcare [2008] EWHC 1011 (QB), the defendants were faced with a fresh claim, following the decision in Horton v Sadler, after the expiry of the limitation period. A previous claim form had been issued but not served (and was subsequently struck out). The first defendant clinician argued that she was entitled to believe that she was no longer going to have to face the stress and anxiety of a claim for damages against her for professional negligence. It was said that she therefore sought to erase the memory of the events from her mind, only to be faced with the fresh claim. However, she had pleaded in her Defence to the new claim a detailed response to the allegations. Moreover she did not serve any witness statement detailing how she thought she was prejudiced, or outlining any areas where factual disputes could no longer be fairly resolved. Absent any such statement, the judge (Cox J) found that the cogency of the evidence was unlikely to be affected and allowed the claim to proceed.

25. The judge also held that the appropriate allocation of court resources was a valid consideration under section 33 (applying the Court of Appeal's reasoning in Securum Finance Ltd. v Ashton and another [2001] Ch 291 that a second claim may amount to an abuse of process as a misuse of court resources). It was argued

for the defendants that the claimant had already had a share of those resources in advancing the first claim, so the second claim should not be allowed to proceed. But as no substantive step had in fact been taken in the first claim, Cox J held that the claimant could not be accused of attempting to re-litigate a case which had already been unsuccessfully advanced. The previous use of the court's resources was thus held of no significant weight (particularly when resources would otherwise have been allocated to proceedings against her former solicitors).

### **Francovich claims**

26. In Spencer v Secretary of State for Work and Pensions [2008] EWCA Civ 750 the Court of Appeal held that Francovich claims against the UK Government (claims for damages for failing to implement Community law domestically), including those which relate to personal injuries, are claims in tort to which section 2 of the 1980 Act applies and therefore there is a non-extendable 6 year limitation period from the date on which the cause of action accrues. The claimants brought a claim for failure to implement article 6(2) of Council Directive 89/391/EEC into the Management of Health and Safety at Work Regulations 1992. The Court of Appeal held that the cause of action accrued in a Francovich claim at the same time it accrues in respect of the claim which could have been brought if it were not for the failure to implement Community law. It does not start to run only when the original claim has been litigated and failed. Accordingly, the claims were out of time under section 2.

### **Claims against the Motor Insurers' Bureau**

27. As regards claims against insured or untraced drivers, there is no provision under the relevant MIB agreements for an extension of time or for time not to run whilst a person is under a disability. However, EU Directives require that domestic

provisions in relation to untraced drivers be equivalent to those for insured and untraced drivers. In Byrne v MIB and Secretary of State for Transport [2008] EWCA 574, [2008] PIQR P14 the claimant was injured in a hit and run accident in 1983 when he was three years old. The driver was never traced. His parents became aware of the possibility of claiming under the Untraced Drivers Agreement eight years later and submitted a claim to the MIB. It was rejected as outside the three year time limit from the date of the accident. The Court of Appeal found this to be non-compliant with the Directives as it is less favourable to a minor than the limitation period in a civil claim against an insured and traced driver. The Court upheld the judge's decision at first instance to make a declaration that the UK was in sufficiently serious breach of Community law to give rise to the right to Francovich damages.

28. It remains to be seen whether the MIB Agreements will be amended or whether late claims will simply be accepted. The MIB is currently awaiting Government proposals over amendments to the Untraced Drivers Agreement, which are expected in the next couple of months.
29. The question of effective domestic implementation concerns whether the MIB rules are not less favourable than those applicable to a claim by someone who is injured by an insured and traced driver. There is clearly scope for argument that the MIB rules are also less favourable in containing no section 33 equivalent.

### **Case management**

30. Predictably, in AB and others v The Nugent Care Society [2008] EWCA Civ 795 the Court of Appeal refused an invitation to give guidance as to when limitation should be considered as a preliminary issue, holding that it was a matter for individual case management.

# Limitation Act 1980

1980 CHAPTER 58

*An Act to consolidate the Limitation Acts 1939 to 1980*

[13th November 1980]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows

[.....]

## *Actions founded on tort*

### **2 Time limit for actions founded on tort**

An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

[.....]

## *Actions in respect of wrongs causing personal injuries or death*

### **11 Special time limit for actions in respect of personal injuries**

(1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

[(1A) This section does not apply to any action brought for damages under [section 3](#) of the Protection from Harassment Act 1997.]

(2) None of the time limits given in the preceding provisions of this Act shall apply to an action to which this section applies.

(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.

(5) If the person injured dies before the expiration of the period mentioned in subsection (4) above, the period applicable as respects the cause of action surviving for the benefit of his estate by virtue of [section 1](#) of the Law Reform (Miscellaneous Provisions) Act 1934 shall be three years from—

- (a) the date of death; or
- (b) the date of the personal representative's knowledge;

whichever is the later.

(6) For the purposes of this section “personal representative” includes any person who is or has been a personal representative of the deceased, including an executor who has not proved the will (whether or not he has renounced probate) but not anyone appointed only as a special personal representative in relation to settled land; and regard shall be had to any knowledge acquired by any such person while a personal representative or previously.

(7) If there is more than one personal representative, and their dates of knowledge are different, subsection (5)(b) above shall be read as referring to the earliest of those dates.

[....]

#### **14 Definition of date of knowledge for purposes of sections 11 and 12**

(1) [Subject to subsection (1A) 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.

[....]

### **Part II Extension or Exclusion of Ordinary Time Limits** ***Disability***

#### **28 Extension of limitation period in case of disability**

(1) Subject to the following provisions of this section, if on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date when he

ceased to be under a disability or died (whichever first occurred) notwithstanding that the period of limitation has expired.

(2) This section shall not affect any case where the right of action first accrued to some person (not under a disability) through whom the person under a disability claims.

(3) When a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to another person under a disability, no further extension of time shall be allowed by reason of the disability of the second person.

.....

(6) If the action is one to which section 11 or 12(2) of this Act applies, subsection (1) above shall have effect as if for the words "six years" there were substituted the words "three years".

[.....]

### **33 Discretionary exclusion of time limit for actions in respect of personal injuries or death**

(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—

(a) the provisions of section 11 [or 11A] or 12 of this Act prejudice the plaintiff or any person whom he represents; and

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;

the court 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.

.....

(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(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 the time allowed by section 11 [, by section 11A] or (as the case may be) by section 12;

(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 plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

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

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

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

....

### **38 Interpretation**

(2) For the purposes of this Act a person shall be treated as under a disability while he is an infant, or [lacks capacity (within the meaning of the [Mental Capacity Act 2005](#)) to conduct legal proceedings].