

Limitation Practice in Clinical Negligence Cases After Azam

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Author: Jason Cox

Clinical negligence cases can be complex enough without the added difficulty of delay in bringing proceedings resulting in a limitation defence. When it is raised by Defendants it is currently common for cases to be managed so that limitation will be tried as a preliminary issue, perhaps because of the possibility of a major costs saving if a full trial can be avoided.

The recent case of *Azam v University Hospital Birmingham NHS Foundation Trust* [2020] EWHC 3384 (QB) involved an appeal from a first instance decision of HHJ Rawlings in the County Court at Birmingham. The result - that will doubtless have surprised and disappointed the Defendant Trust - gives rise to a number of interesting practice points.

Decision of HHJ Rawlings

In 1996, Mr Azam had gynaecomastia surgery at Selly Oak Hospital, performed by a surgeon, Mr Duncan Campbell. In proceedings brought in 2017, Mr Azam made two main complaints that (a) the surgeon used the wrong technique and negligently performed that technique; and (b) that his informed consent was not obtained for the operation, in particular, because he was not informed of possible adverse outcomes, including scarring.

Mr Campbell died in 2014, 18 years after the alleged negligence and three years before proceedings were commenced.

Unsurprisingly in such circumstances, the defendant Trust sought and obtained an order for limitation to be tried as a preliminary issue, no doubt intending to argue that the combined effect of delay over about two decades and the death of the surgeon amounted to the epitome of forensic prejudice in a clinical negligence case involving criticisms of surgical technique and the consent process.

At first instance, HHJ Rawlings found that Mr Azam had the necessary knowledge of a significant injury under sections 11 & 14 of the Limitation Act 1980 almost immediately after the surgery when he had expressed dissatisfaction with his appearance post-surgery and the records referred to consideration of a revision procedure. The judgment can be read [here](#).

As regards section 33 of the Limitation Act 1980, the Judge reached different conclusions in relation to the individual allegations of negligence and specifically:

- As regards consent, the Judge refused to exercise his discretion to allow the claim to proceed. Consent was an issue where in addition to the consent form, it would be expected that had a claim been brought in time whilst Mr Campbell was still alive, he could have given evidence as to his usual practice in completing consent forms. This was important in a case where Mr Azam disputed that he had been told of the other options or possible downsides of the operation, notwithstanding that they were recorded on the consent form. The Judge accepted that in relation to this allegation, there may well be significant prejudice to the defendant since Mr Campbell could no longer give evidence.
- As regards surgical technique, the Judge exercised his discretion to allow the claim to proceed. This was essentially on the basis that there were good records of the procedure, that the way it was performed can be seen (in the enduring appearance of Mr Azam's chest) and it was a matter for experts on each side to give an opinion as to whether what happened in 1996 was or was not compliant with surgical standards at that time. On this issue, Mr Campbell's evidence as to his standard practice at the time was unlikely to have been of much assistance to the court so his inability to give evidence did not amount to real prejudice to the Trust in defending this aspect of the claim.

The Appeal

The Defendant Trust appealed HHJ Rawlings' exercise of his discretion to allow the surgical technique part of the claim to

proceed. There were no cross-appeals by Mr Azam in respect of the date of knowledge ruling or in respect of the consent issue.

Saini J dismissed the appeal and his judgment emphasises the practical importance of 'getting it right first time' in any limitation hearing. In particular, the judgment emphasises the difficulty which any appellant will have in seeking to reverse the Court's exercise of its discretion under section 33 of the Limitation Act 1980.

First, Saini J analysed the judgment below to see whether there was any indication that the judge had misunderstood the law. Having summarised the legal analysis in the judgment below at [54] of his judgment, Saini J concluded that *"before one comes to assess the discrete complaints about the exercise of the discretion (and the Judge's assessment of the individual factors), one starts from the position that the Judge's directions in relation to the approach to the legal test upon which the discretion rested were impeccable."*

From that starting point, Saini J acknowledged that his task was *"heavily circumscribed"* and limited to considering whether the decision below was *"plainly wrong"*, meaning a decision which has exceeded the generous ambit within which reasonable disagreement is possible (*Tanfern Ltd v Cameron-MacDonald* [2000] 1 WLR 1311). Thus, the bar is set very high indeed for an appellant who is challenging the exercise of the Court's section 33 decision, unless it is genuinely possible to identify that the Court below has misdirected itself on the law.

Saini J went on to engage with the Trust's substantive arguments on the appeal but in doing so he highlighted two limitations on the evidence before the Court which appear to have been significant when considering the conclusion he reached.

- The Trust argued that the Judge had been wrong to ignore the collateral forensic prejudice faced by the Trust as a result of the general *"staling"* of the evidence over two decades (over and above the specific prejudice arising from Mr Campbell's death). Saini J rejected this assertion commenting that the Trust had not adduced any evidence at all of any steps it had taken to try to trace any other witnesses it had identified (but which it could not trace), let alone any issue with their likely recall of events, if traced. The witness statement filed by the Trust's Legal Officer, prepared four years after the first notification of a claim, made no mention of any untraced or untraceable witnesses. Saini J noted that these are matters which mandate evidence if a party wishes to assert prejudice given the evidential burden is on the party asserting prejudice: *LB Haringey v FZO* [2020] EWCA Civ 180 at [114]-[115].
- As regards alleged prejudice to the Trust on the surgical issue arising from Mr Campbell's death, Saini J again made clear that *"prejudice is not self-proving by reason of the death of the clinician"*. He commented that the Trust's assertions about what assistance Mr Campbell's evidence would have provided to any Trust expert were *"a matter of speculation upon which the Trust called no evidence and cannot make out the evidential burden"*. The Court had before it the Claimant's expert medical report asserting that the surgery had been carried out very badly and Saini J commented that even if a full blown responsive expert report was not called for at this stage (on grounds of proportionality), a report *"explaining even in outline terms how the evidence of the operating surgeon would be relevant to the claim could have been commissioned."*

Practice Points

This case demonstrates that:

- Even in a case with a long period of delay and the death of a key clinician, a defendant in a clinical negligence claim cannot simply assume that inferences of significant forensic prejudice will be made by the Court when it comes to consider the *"check list"* under section 33(3) of the Limitation Act 1980.
- Absent a genuine error of law there is no appellate 'second bite of the cherry'.
- Hence, it is necessary for the parties – particularly a Defendant asserting forensic prejudice – to consider very carefully what evidence to adduce at the trial of the limitation issue.
- In appropriate cases, it may be necessary to produce positive evidence of steps taken to trace witnesses and what effect the delay has had on the recollection of any witness who can be traced.
- In appropriate cases, it may be necessary to adduce some expert evidence from a Part 35 expert which addresses how

the delay and the absence of any witness evidence on specific issues may affect the expert's ability to give an opinion to the Court.

- Finally, these practice points may in time undermine the current common practice of trying limitation as a preliminary issue in clinical negligence cases. The more evidential legwork that has to be done to get a case ready for a limitation trial, the less attractive a preliminary issue might be to a Court as a proportionate means of managing such cases.

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