

Limitation in Clinical Negligence Claims

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Civil practitioners dealing with personal injury claims are generally familiar with the three-year limitation period imposed by section 11 of the Limitation Act 1980. Put simply, claims for personal injury (whether arising from negligence, nuisance or breach of duty) must be brought within three years of the date on which the cause of action accrued (section 11(4)(a)) or the date of knowledge (if later) of the person injured (section 11(4)(b)). A person's "*date of knowledge*" for the purposes of section 11(4)(b) is defined in section 14 of the Limitation Act 1980.

If a personal injury claim is found to have been brought out of time, the Claimant can seek to rely upon the court's discretion under section 33 of the Limitation Act 1980 where "*it would be equitable to allow an action to proceed*".

Whilst it is generally easy to determine when a cause of action in relation to a claim in personal injury arose, determination of the claimant's date of knowledge is often contentious and will likely involve consideration of the date on which the claimant had knowledge of the factors set out in section 14(1) of the Limitation Act 1980. In appropriate circumstances, a Claimant can also be fixed with constructive knowledge based on the matters that were reasonably observable or ascertainable by him/her with or without appropriate expert evidence (section 14(3) of the Limitation Act 1980).

Each aspect of the tests under sections 14 and 33 of the Limitation Act 1980 have been analysed in detail in a long line of authorities. In this blog, I will consider the application of the relevant tests in the context of clinical negligence litigation, in the light of the recent decisions of the High Court in *Wilkins v University Hospital North Midlands NHS Trust* [2021] EWHC 2164 (QB) and *Aderounmu v Colvin* [2021] EWHC 2293 (QB).

The Facts

The brief factual background to the case of *Wilkins v University Hospital North Midlands NHS Trust* is as follows:

1. The Claimant underwent right knee replacement surgery on 18 November 2008 followed by left knee replacement surgery on 17 March 2009, both performed by Mr Shaylor, Consultant Orthopaedic Surgeon. His left knee failed to recover/improve following surgery, which led to revision surgery performed by Mr Shaylor on 22 June 2010.
2. The Claimant was referred to Mr Gregson, Consultant Orthopaedic Surgeon, in November 2010. Mr Gregson performed an arthroscopy of the Claimant's left knee and medial meniscectomy on 19 July 2011, followed by a further operation on 17 January 2012.
3. Unhappy with the treatment that he had received from Mr Shaylor, the Claimant contacted Harvey Ingram LLP and entered into a Conditional Fee Agreement with them on 18 June 2012. In March 2013, Harvey Ingram LLP (by then rebranded as 'Lime Personal Injury') obtained a breach of duty report from Mr Radford, which was not supportive of a claim against the Defendant (who was vicariously liable for the actions of Mr Shaylor). The Claimant decided not to pursue the claim any further on advice from his solicitors.
4. The Claimant's left knee continued to deteriorate such that he was eventually referred to the Pain Clinic at St Thomas' Hospital London. A decision was made to amputate his left leg, which took place on 22 June 2016.
5. The Claimant entered into a Conditional Fee Agreement with Shoosmiths solicitors on 23 September 2016 and instructed them to bring a claim in clinical negligence. Shoosmiths obtained supportive breach of duty evidence in May 2019. Proceedings were issued on 30 June 2019.
6. The focus of the Claimant's pleaded case against the Defendant was on the care provided at Cannock Chase Hospital under Mr Shaylor. The gist of his complaint was that Mr Shaylor and his team were negligent in not appropriately treating what was allegedly to have been significant infection between 28 March 2009 and 22 June 2010.

Less than a month after handing down judgment in *Wilkins*, the High Court considered a number of issues at the preliminary trial in *Aderounmu v Colvin*, including whether the Claimant had capacity to conduct litigation by reference to the provisions of the Mental Capacity Act 2005. After hearing expert evidence, the court determined that the Claimant had capacity to litigate at all material times. The factual background against which the court then considered the Defendant's limitation defence was as follows:

1. The Claimant suffered a stroke on 23 November 2009, as a result of which he was left with serious neurological injury.
2. Four days before his stroke, the Claimant had a consultation with his GP, the Defendant. It was the Claimant's case that the Defendant negligently failed to exclude a stroke and/or refer him for urgent investigations on 19 November 2009.
3. The claim was issued on 10 October 2017, just under eight years from the date of the injury.

Date of Knowledge

In both of the aforementioned cases, the Claimant relied upon section 11(4)(b) of the Limitation Act 1980 and contended that their claims were brought within three years of their respective dates of knowledge.

In *Wilkins*, the court considered the history leading up to the Claimant's instruction of Shoosmiths, including the effect of the negative advice that he had been given in 2013. Applying previous authorities in *AB v Ministry of Defence* [2013] AC 78 and *Howard v Fawcetts* [2006] 1 WLR 682, Richard Hermer QC held at [51] that:

"... in order for a claimant to have the requisite knowledge for the purposes of ss.11 and 14, it is not necessary that they appreciate all the details of the claim that they may later formulate against the defendant, let alone that there has been an actionable breach of a legal obligation, before time begins to run. Rather, it is sufficient that they understood 'in general terms' the 'essence' of the factual case upon which a later claim might be based. In the context of a clinical negligence claim it is not necessary that the claimant appreciates the precise mechanism by which s/he has sustained an injury but rather it suffices that there is an understanding in broad terms that the medical care may be a possible cause of injury ..."

Whilst the fact that the Claimant had obtained legal advice in 2012 does not automatically fix him with the requisite knowledge for the purposes of limitation, the finding of the court in *Wilkins* was that by the time the Claimant approached solicitors in June 2012, he had suspected with sufficient certainty that his ongoing pain could be broadly attributed to his care under Mr Shaylor.

With regard to the negative breach of duty evidence that he had obtained in 2013, the court held that *"the mere fact that Mr Radford's report concluded that liability could not be established cannot act to 'cancel out' pre-existing knowledge (see Nash v Eli Lilly [1993] 1 WLR 782)"*. Once knowledge was acquired, it could not be "lost" simply because the Claimant was then told that his claim was unlikely to succeed.

In *Wilkins*, the Claimant was fixed with knowledge seven years before the claim was brought.

In *Aderounmu*, the Claimant was fixed with knowledge in December 2010, over six years before the claim was brought.

Section 33 Discretion

Where a personal injury claim is found to have been brought out of time, the court has a discretion under section 33 of the Limitation Act 1980 to disapply the limitation period where it is equitable to allow the action to proceed. In determining an application under section 33, the court is directed to the specific matters set out in section 33(3) and must have regard to all the circumstances of the case.

The judgment in *Carroll v Chief Constable of Manchester* [2018] 4 WLR 32 provides a helpful and comprehensive summary of the principles that are relevant to the proper exercise of the court's section 33 discretion.

Whilst each case will turn on its own facts, the following observations can be made from the decisions in *Wilkins* and

Aderounmu, where the court exercised its section 33 discretion in the Claimants' favour:

1. The delay since the expiry of the limitation period was not particularly long in either case.
2. There was no specific evidence of prejudice to the Defendants caused by the passage of time. In each case, the central issues of breach of duty and causation were to be determined by reference to contemporaneous medical records and expert evidence. The passage of time did not have a material impact on the quality of the Defendants' evidence or their ability to defend the claims. In *Aderounmu*, the Defendant had an independent recollection of the consultation and did not appear in any way handicapped by the passage of time from giving a full and accurate account of her actions.
3. In each case, the court identified reasons for the Claimants' delay in bringing their claims. In *Wilkins*, the court refused to criticise the Claimant for the first period of delay after receipt of negative advice from his previous solicitors; and found that the fault for the second period of delay (after instruction of Shoosmiths) rested with his solicitors. The decision of the Court of Appeal in *Corbin v Penfold Metallising Co* [2000] Lloyd's Rep Med 247 was that the sins of the solicitor need not necessarily be visited upon their client in the exercise of discretion under section 33. In *Aderounmu*, there were a number of factors which caused or contributed to the delay in bringing the claim, including the fact that the Claimant was primarily preoccupied with conducting his immigration litigation until October 2017.
4. In *Wilkins*, the court rejected the Defendant's argument that the Claimant's claim was without merit and held that *"save in the very clearest of cases, a Court should exercise real caution before conducting a merits assessment as part of the s.33 balancing exercise ... The question is therefore whether this claim can be properly classified as so weak that the Court can properly take the merits into account in the exercise of its discretion under s.33, I do not consider that it can."*

The exercise of the court's section 33 discretion is essentially a balancing exercise. In the context of clinical negligence claims, where determination of the central issues of breach of duty and causation is primarily dependent upon the interpretation of contemporaneous medical records and assessment of expert evidence, defendants will often struggle to demonstrate evidential prejudice occasioned by the delay in bringing the claim, especially where the delay since the expiry of the limitation period is relatively short. Courts are likely to be sympathetic towards claimants, especially those who can point to specific/understandable reasons for their failure to act promptly. Parties to litigation are advised to adopt a pragmatic approach when dealing with claims that have (potentially) been brought out of time.

Applying the relevant test to the facts of each case, the court in *Wilkins* and *Aderounmu* decided that the balance of prejudice weighed in favour of allowing the claims to proceed and exercised the section 33 discretion in the Claimants' favour.

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