



Personal Injury and Medical Law Teams Case Note

A v Hoare (and other appeals) [2008] UKHL 6; [2008] All ER (D) 251 (Jan)

- **limitation in 'trespass against the person' claims'**
- **clarification of the test for 'date of knowledge ' under s.14 Limitation Act**
- **re-affirmation of the unfettered discretion under section 33**
- **guidance as to how that discretion should be exercised**

Summary

- 1) The decision in Stubblings was overruled. This category of case comes section 11 Limitation Act 1980 thereby permits a request for the court to exercise its discretion under section 33 to disapply the limitation period altogether
- 2) The test under section 14 is three-fold:
 - a. Section 14(1) is subjective in that it refers to knowledge actually possessed by the claimant
 - b. The test under section 14(2) is purely objective with the standard being "entirely impersonal". It is therefore incorrect to import the circumstances, character or intelligence of the claimant into the reasonableness under section 14(2). Horton v Sadler [2007] 1 AC 307, HL reaffirmed
 - c. Section 14(3) is a determination of when having reasonably acquired knowledge the claimant should have acted upon this knowledge is also substantially objective (Adams v Bracknell Forest Borough Council [2004] 3 All ER 897)
- 3) It is in the exercise of exercising 'unfettered' discretion (Horton v Sadler affirmed) under section 33 that the court should taken into account those subjective elements that the Court of Appeal in A v Hoare and Young v Catholic Care(Diocese of Leeds) had believed fell within section 14(2) and section 14(3). These circumstances arise from the injury itself and section 33 allows judges to look at the matter broadly and not to have to ask the artificial question of whether knowledge which the claimant has suppressed in some way amounts to knowledge for the purpose of the Limitation Act 1980.

Facts

A series of claims were brought by claimants who had been the victims of sexual or physical abuse as children. Their claims had previously been barred by reason of the unanimous decision of the House of Lords in Stubbings v Webb (1993) AC 498 that section 11 does not apply to a case of deliberate assault, including acts of indecent assault. The House held that an action for an intentional trespass to the person is not an action for "negligence, nuisance or breach of duty" within the meaning of section 11(1). Accordingly, the HL held that the victim of an intentional assault (sexual or otherwise) was bound by the non-extendable six-year limitation period laid down for torts in general by section 2 of the Limitation Act 1980. The lower courts having been bound by this decision have therefore held that the claimants are statute-barred.

The issues for determination by the House were:

- i) whether Stubbings was wrongly decided and whether the court should depart from it in accordance with the Practice Statement (HL: Judicial Precedent) (1966) 1 WLR 1234 HL;
- ii) whether the definition of "significant" injury in the Limitation Act 1980 s.14(2) allowed account to be taken of a claimant's personal characteristics, either pre-existing or consequent upon the injury suffered.

The House of Lords took the opportunity to clarify on how courts should approach the issue of when a claimant has knowledge of their injury under section 14 and to offer guidance as to how the court might exercise discretion under section 33.

Held: Appeal allowed.

- 1) The decision in Stubbings has led to uncertainty and had given rise to obvious anomalies [Lord Brown, paragraph 81] because lower courts in an endeavour to allow redress had tended to distinguish cases on inadequate grounds. In cases of sexual abuse where the discretion of the court had been sought under section 33, parties, with an increasing degree of artificiality, had been driven to alleging that the abuse was the result of, or accompanied by, some other breach of duty which can be brought within the language of section 11.

"Thus, in addition to having to decide whether the claimant was sexually abused, the courts must decide whether this was the result of "systemic negligence" on the part of the abuser's employer or the negligence of some other person for whom the employer is responsible" [paragraph 25]

- 2) The right thing was to depart from Stubbings and reaffirm the law laid down in Letang v Cooper (1965) 1 QB 232 CA, (Stingel v Clark (2006) 80 ALJR 1339 0 considered). This category of case came within section 11 Limitation Act 1980 thereby allowing a request for the court to exercise its discretion under section 33 to disapply the limitation period altogether
- 3) The appeal in Young v Catholic Care (Diocese of Leeds) [2007] 1 All ER 895, Court of Appeal, Dyson LJ raised the issue of the meaning of "significant" injury in section 14(2) in the context of 14(1) which provides that the "date of knowledge" is the date upon which the claimant first had knowledge of various facts, including "that the injury was significant". In that case Dyson LJ had summarised the effects of the House of Lords

decision in Adams v Bracknell Forest Borough Council [2004] 3 All ER 897 whereby a claimant is to be assumed simply to be a reasonable person and whose knowledge included that which he actually possessed and that which he might reasonably be expected to have. The Court of Appeal in Young however had retained an element of subjectivity within the test by holding that whether a claimant who has suffered a particular type of injury would reasonably be inhibited by the injury from instituting proceedings is a factor to be taken into account in deciding whether the claimant would have considered the injury sufficiently serious to justify proceedings. The Court of Appeal held that s.14(2) should be constructed in the same way as constructive knowledge under s.14(3)

- 4) The question therefore is whether the definition of significance in section 14(2) allows any and if so how much account to be taken of the personal characteristics of the claimant either pre-existing or consequent upon the injury which he has suffered. Lord Hoffman reviewed the case law including McCafferty v Metropolitan Police District Receiver [1977] 1 WLR 1073 where Lane LJ stated that test was partly subjective and partly objective. Similarly, in KR v Bryn Alyn Community (Holdings) Ltd [[2003] EWCA Civ 85, [2004] 2 All ER 716, the Court of Appeal held that the test if "significant injury" in the context of abuse claims was partly objective and partly subjective. This test was "somewhat confusing"

"The notion of the test being partly objective and partly subjective is somewhat confusing. Section 14(2) is a test for what counts as a significant injury. The material to which that test applies is generally "subjective" in the sense that it is applied to what the claimant knows of his injury rather than the injury as it actually was. Even then, his knowledge may have to be supplemented with imputed "objective" knowledge under section 14(3). But the test itself is an entirely impersonal standard: not whether the claimant himself would have considered the injury sufficiently serious to justify proceedings but whether he would "reasonably" have done so. 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" [paragraph 34]

- 5) The correct test therefore to determine a claimant's date of knowledge under sections 14(2) and 14(3) is purely objective – factors peculiar to the individual claimant ought not to be taken into consideration:

"Judges should not have to grapple with the notion of the reasonable unintelligent person. Once you have ascertained what the claimant knew and what he should be treated as having known, the actual claimant drops out of the picture. Section 14(2) is, after all, simply a standard of the seriousness of the injury and nothing more. Standards are in their nature impersonal and do not vary with the person to whom they are applied." [paragraph 35]

- 6) A distinction must be drawn between section 14(2) and section 14(3). Section 14(2) makes time run from when the claimant had knowledge of certain facts by reference to a standard of seriousness but section 14(3) defines knowledge by reference to what a claimant armed with such knowledge should have done: This question was posed by the Court of Appeal in Bryn Alyn where the court considered that section 14 "requires the courts on a case by case basis, to ask whether such an already damaged child would reasonably turn his mind to litigation as a solution to his problems." The Court of Appeal in Young considered there was some tension

between the test in Bryn Alyn and the House of Lords decision in Adams thought the House of Lords in that case having departed from the partly objective, partly subjective test in favour of a substantially objective test. Lord Hoffman considered that the tension in fact arose because Adams was concerned with the test under section 14(3) which is different in purpose from section 14(2). Section 14(2) simply lays down a standard of "reasonable" and "reasonableness" for knowledge whereas the test of knowledge under section 14(3) is by reference to what a claimant ought reasonably to have done. In determining this, account has to be taken of the nature of the claimant's injury.

"It asks whether he ought reasonably to have acquired certain knowledge from observable or ascertainable facts or to have obtained expert advice. But section 14(2) is simply a standard of seriousness applied to what the claimant knew or must be treated as having known. It involves no inquiry into what the claimant ought to have done. A conclusion that the injury would reasonably have been considered sufficiently serious to justify the issue of proceedings implies no finding that the claimant ought reasonably to have issued proceedings. He may have had perfectly good reasons for not doing so. It is a standard to determine one thing and one thing only, namely whether the injury was sufficiently serious to count as significant." [paragraph 38]

The test under 14(2) therefore is external to the claimant and impersonal. "The effect of the claimant's injuries upon what he could reasonably have been expected to do is therefore irrelevant". [paragraph 39]

" ... this subject has been unnecessarily confused by importing the notion that the test of whether the claimant had the requisite knowledge for the purposes of section 14 is partly objective and partly subjective. In my opinion it should be clearly understood that section 14(1) is subjective, in that it refers to the knowledge actually possessed by the claimant, whereas section 14(2) is objective, the relevant test being, as Lord Hoffmann describes it at paragraphs 39 and 42, an "entirely impersonal" standard. Section 14(3) then relates solely to constructive or imputed knowledge. It may fix the claimant with knowledge of facts which he might reasonably have been expected to acquire in the manner specified by the subsection. Once that knowledge is imputed to him, it becomes part of the corpus of his personal knowledge, the extent of which has to be assessed under subsection (1)" [per Lord Carswell, paragraph 66]

- 7) In Bryn Alyn the Court of Appeal held that the reasons for delay in bringing proceedings were more appropriately considered under section 14 as it would be unjust to deprive a claimant of his remedy. Lord Hoffman disagreed and considered that the approach to discretion would have to change. He referred to Horton v Sadler [2007] 1 AC 307, HL in which the House had rejected a submission that section 33 should apply to a 'residual class of case' as anticipated by the 20th report of the Law Reform Committee (Cmnd 5630) 1974 and reaffirmed the Court of Appeal decision in Firman v Ellis [1978] QB 886, holding that the discretion is unfettered. This led to the decision in Young (following Alyn) that the test of knowledge under section 14 being partly objective, partly subjective, had the claimant not succeeded on the date of knowledge under that section, he would not have had discretion exercised in his favour. Lord Hoffman considered this to be a wrong exercise of discretion and interpretation of Horton[paragraph 52]
- 8) Subjective elements which might affect a claimant's knowledge and which arise from the injury complained of (such as intelligence or personal characteristics or circumstances that may affect a claimant's decision) are irrelevant [paragraph 68, Lord Carswell]. These are matters that should be considered under section 33 and in the context of Young, S.14(2) of Limitation Act 1980 should be construed as

transferring from that provision to s.33 of the Act consideration of the inhibiting effect of sexual abuse upon a victim's preparedness to bring proceedings. Lady Hall supported "the more generous approach adopted towards discretion particularly by Lord Hoffman" [paragraph 60] although she had some 'niggling' reservations about the approach of the majority of the house to the interpretation of section 14(2) preferring to retain a subjective element [paragraph 61]

- 9) Lord Brown gave guidance [paragraph 84] to how that discretion should be exercised:
- a. Length of and reason for the delay by the claimant
 - b. Extent to which the delay had reduced the cogency of the evidence
 - c. Conduct of the defendant after the cause of action arose
 - d. Duration of any disability of the claimant arising after the date of the accrual of the cause of action
 - e. Extent to which the claimant acted promptly and reasonably once he knew whether or not the act or omission of the defendant gave rise to an action for damages
 - f. Steps taken by the claimant, if any, to obtain medical, legal or other expert advice

Comment:

In terms of sexual abuse claims, this case law repeal – arguably long overdue – will make the law fairer and more flexible and thus make it easier for survivors of such assaults to bring civil claims for compensation against their abuser several years after the event. Cases will now be able to proceed based on the facts of the case, the justice of that case and the balance of prejudice provided that the claimant can demonstrate that a fair trial can be held.

The catalyst for the most high profile case – that of a woman who raped in 1988 – was when her convicted attacker won the lottery; she had not sued him previously as he had no assets.

Aside from the specific cases considered in the ruling, the Law Commission in 2001, when revising the law of limitations of action, had described the decision in Stubbings as 'anomalous' and recommended a uniform regime of for personal injuries in respect of limitation irrespective of whether the claim was made in negligence or trespass to the person.

Lord Hoffman observed in the course of his judgment that this specific recommendation had probably not been adopted because the Law Commission did not confine itself to the Stubbings anomaly but proposed a completely new law of limitation. Lord Hoffman's speech repays reading in full.

The case however has wider implications in respect of the law of limitation as a and has provided much needed clarification of whether the test of "knowledge" under section 14(2) and (14(3) is essentially objective and if so, how the 'reasonableness' of such objective analysis should be determined. Lord Hoffman makes an elegant and necessary distinction between the purpose of section 14(2) to provide a defining

standard of 'reasonableness' 'reasonable' for knowledge and section 14(3) which is concerned with defining knowledge by reference to what a claimant armed with such knowledge should have done. Consideration of the 'subjective' element and reasons that may thereafter justify delay in bringing proceedings is separate off from section 14 and moved into the exercise of equitable discretion under section 33. This allows judges to look at the matter broadly including such factors as the nature of the injury, the intelligence or character of the claimant including his stoicism in the face of adversity (as in Mackie v Secretary of State for Trade and Industry [2007] all ER (D) 353 where the claimant only commenced proceedings when his deafness - which he objectively had been aware was 'significant' some years previously - became troublesome!) [DG]

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Please note that this Case Note is intended to provide a summary and comment of the subject matter covered. It is not intended to be comprehensive or to provide legal or other professional advice.

¹ See digest and comment on that case in the the 13 KBW PIMLU, June 2007, pages 3 to 5