Introduction

1. Any lawyer acting for a Claimant with a potential claim has a keen and cautious eye on the limitation period: when does our time for issuing expire? Or more worryingly: has the limitation period already expired? Similarly, anyone acting for a Defendant when faced with an issued claim will ask, as a matter of reflex: has the claim been brought in time? This consciousness is drummed into us from our legal infancy. So the central provisions are too familiar to any practitioner to be worth dwelling on even in a talk in a ‘Back to Basics’ series.

2. Conversely, we do not have enough time to cover all the points of difficulty and interest in the law of limitation, even restricting ourselves to its application to clinical negligence. Necessarily, therefore, I have had to restrict myself to a more modest task. What I have set out to do is:

   (1) To identify some general points worth bearing in mind in relation to any consideration of limitation.
   (2) To conduct a whistle-stop review of the principal statutory provisions, reminding ourselves on the way of some aspects that may be overlooked or forgotten.
   (3) In the main body of the discussion, to focus on a selection, perhaps a capricious selection, of recent developments and potential pitfalls for the unwary, at least to highlight them if not to analyse them fully.

3. There are many areas of limitation relevant to the clinical negligence practitioner, including some with their fair share of complications and pitfalls, that time prevents me from touching upon. I am also conscious that some of those issues that I have sought to flag up have been

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1 This lecture is provided for training purposes only. It is not legal advice and any liability is disclaimed. Reliance is at the listener’s or reader’s own risk!
treated very superficially. For more thorough comprehensive treatments that are reasonably up to date the following are recommended\(^2\):

- PIBA Personal Injury Handbook, 3rd edition (2006), Chapter 24 - *although there is very little on the issues arising from s.35*

- Nelson-Jones & Burton, 2007, Personal Injury Limitation Law – *this is probably the most up to date text specifically addressing limitation in the context of clinical negligence (and other personal injury) claims*

- Jackson & Powell, 6th ed (2007) - *not particularly focussed on limitation in clinical negligence, but useful for setting it in the broader perspective*

- Clerk & Lindsell, 19th ed, 2006 - *a good broad treatment, also setting clinical negligence/ personal injury limitation in the wider context; more detailed on special limitation periods from other statutes and s.35 than most other texts.*

- McGee, 5th ed. 2006, Limitation Periods

However, all of these sources are, to some extent already out of date (with the possible exception of Nelson-Jones & Burton), and are shortly to become more so when the HL gives its pending judgment in the conjoined cases on which it has just heard argument, the expected impact of which is considered further below.

\section{I. Preliminary observations}

4. The following general points are worth bearing in mind before embarking upon any consideration of limitation:

\hspace{1cm}(i) \hspace{1cm} The Limitation Act 1980 is a *consolidating Act*. The statutory history of limitation is long, and not always distinguished. It dates back to the Limitation Act 1623. Any arguments in appellate courts about construction of the 1980 Act are likely to benefit from careful research of (a) the legislative history of the section; and (b) the parliamentary and other materials.\(^3\)

\(^2\) The main texts of Grubb, 2\textsuperscript{nd} ed. 2004, *Principles of Medical Law*, and Jones, 3\textsuperscript{rd} ed. 2003, *Medical Negligence* are both somewhat out of date, although there are updating supplements.

\(^3\) See e.g. *Stubbings v. Webb* [1993] AC 498 and the imminent HL decision in *X and Y v. L.B. Wandsworth* (there were consolidated appeals and it is currently unclear under what name it will be reported – in this talk the case will
(ii) The Limitation Act 1980 came into force on 1 May 1981. Very old cases need to be considered carefully as to whether there are accrued defences under previous Limitation Acts.

(iii) Limitation in clinical negligence and other personal injury cases is not a self-contained topic within the law of limitation. The provisions relating to non-personal injury cases mirror, in many respects, those which apply to personal injury cases, so authority on these is likely to be illuminating – in particular in relation to the provisions relating to date of knowledge under section 14A.

(iv) Efforts to use the ECHR and Human Rights Act 1998 to challenge aspects of limitation law have not met with any noticeable success either at home or in Strasbourg. It does not seem likely that there will be a major role for ECHR / HRA in moulding the law of limitation.

II. The principal statutory provisions

5. The principal relevant provisions of the Limitation Act 1980 are identified below:

(i) A six year time limit is provided for actions founded on tort (section 2) and contract (section 5).

(ii) Section 11 is the central provision for our purposes. It provides a special time limit for actions in respect of personal injuries. By section 11(2) the general time limits for actions founded on tort (s.2) or breach of contract (s.3) – or indeed any other cause of action identified in sections 2 to 10 - are inapplicable where section 11 applies.

(iii) Section 11(1) provides:

(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.

be referred to as X v. Y). The deployment of such material is, of course, subject to constraints: Pepper v. Hart [1993] AC 593 and cases since, in particular ex p Spath Holme Ltd [2001] 2 AC 349.

The scope of the highlighted words ‘or breach of duty’ are considered further below.

(iv) In Section 38 ‘personal injuries’ in the Act are defined to include “any disease and any impairment of a person’s physical or mental condition ...”. This does not purport to be an exhaustive definition, which has the potential for uncertainty – also touched upon below.

(v) Section 11(4) provides for a three year time limit from the later of (a) the date on which the cause of action accrued; or (b) the date of knowledge under provided by section 14.

(vi) Where the prospective claimant has died before the expiry of the period under s.11(4), the clock is re-set for any claim brought for the benefit of the deceased’s estate: section 11(5) gives a further 3 years from the later of (a) the date of death or (b) the personal representative’s date of knowledge.

(vii) In respect of claims brought under the Fatal Accidents Act 1976, section 12 provides an parallel regime, providing for 3 years from (a) the date of death or (b) the date of knowledge of the person for whose benefit the action is brought. That time limit is subject to extension under s.33. The prohibitory terms of section 12(1) are highlighted below. Section 13 makes clear that different limitation periods may apply to different dependants.

(viii) Section 33 gives the Court a discretion to disapply the time limits provided by section 11 and 12 (as well as s.11A, subject to the long-stop in that case – see below).

(ix) There is no ‘long-stop’ provision in relation to personal injury claims, except those brought under the statutory cause of action under the Consumer Protection Act 1987: see section 11A of the Limitation Act 1980 (although see also (xi) below).

(x) Section 28 provides a general extension of limitation periods for those ‘under a disability’ at the date of the accrual of the cause of action. The clock under s.11 or s.12 does not start running until the person ceased to be under a disability, as considered further below. The interpretation section (section 38) specifies those who are to be treated as under a disability and this has been amended with very recent effect – as considered further below. Unaffected by this amendment is the provision that a person is treated as being under a disability while an infant, so until his or her 18th birthday.

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5 By virtue of the Law Reform (Miscellaneous Provisions) Act 1934.

6 The 10 year long-stop in s.11A is notably rigid, and time may start running (and even expire) before a cause of action has accrued, and so before the primary limitation period has started. Essentially, the time for calculating the long stop runs from the date of supply under s.4 of the 1987 Act, and is unaffected by disability, infancy, or knowledge.
(xi) Although unlikely to arise often in clinical negligence cases, practitioners should be aware of the significance of section 39, which disapplies the provisions of the 1980 Act where a limitation period is prescribed under any other enactment (whether passed before or after the 1980 Act). Section 7(5) of the Human Rights Act 1988 imposes a one year time limit in respect of claims brought under it, with a discretion to extend\(^7\). In respect of foreign limitation periods where the tort was committed abroad, but proceedings brought in England, a foreign limitation period may be imposed under the Foreign Limitation Periods Act 1984.

### III. Some new developments and potential pitfalls

**Intentional torts: the imminent demise of *Stubbings v. Webb***

6. In *Stubbings v. Webb* [1993] AC 498 the HL held that the 3 year limitation period under s.11 did not apply where the cause of action for the personal injury was trespass to the person. This was on the basis that trespass to the person did not constitute “breach of duty” within the scope of s.11(1). Thus the power to disapply under s.33 did not arise and there was a non-extendable time limit of 6 years in such cases.

7. This gave rise to the much criticised anomaly that the victim of an intentional tort (such as a physical attack, or sexual abuse) could be in a worse position than the victim of a negligently inflicted injury. In a medical case, where a claim was brought alleging both (i) trespass based upon lack of consent; and (ii) that negligent treatment was given, different limitation periods could apply\(^8\).

8. The HL have just heard a case\(^9\) this month (November 2007) in which they have been invited to revisit their decision in *Stubbings v. Webb*. Although the outcome is awaited, it is clear from what transpired in argument that *Stubbings* is to be departed from, so as to remove the anomaly that exists in relation to intentional torts: section 11 will apply across the general board of personal injury actions. The incoherent reasoning in the CA’s decision in *KR v. Bryn Alyn Community (Holdings) Ltd* (and cases following it) which may be seen to have arisen from an

\(^{7}\) The principal statutes relate to transport: Merchant Shipping Act 1995 (2 year time limit), Carriage by Air Act 1961 (2 year time limit), International Transport Convention Act 1983 (3 year time limit with a 5 year long-stop), the Carriage of Passengers by Road Act 1974 (3 years, with long-stop of 5 years). See also the Nuclear Installations Act 1965 (20 and 30 year long-stops).

\(^{8}\) See *Dobbie v. Medway H.A.* [1994] 4 All ER 450.

\(^{9}\) *X v. Y* – pending decision by the HL
attempt to avoid or limit the effect of Stubbings is also expected to be reviewed and put right. Thus, previous authorities in this area will require to be considered with caution after the HL have delivered their speeches in X v. Y, in the light of that judgment.

Fatal Accident Act claims

9. Section 12(1) provides an absolute prohibition upon the bringing of a claim under the FAA “if the death occurred when the person injured could no longer maintain an action and recover injuries in respect of the injury”. If the Deceased’s claim would have been out of time as at the date of his death, there is no possible claim by dependants. In determining whether the Deceased’s claim would have been in time, s.12(1) expressly makes clear that no recourse may be had to s.33 to extend the period provided by s.11 and s.14.

10. The recent case of Thompson v. Arnold\(^ {10} \) provides a salutary reminder of the impact of s.12(1). Mrs Thompson had a lump in her breast wrongly diagnosed as benign. By the time she discovered this mistake she did not have long to live. Proceedings were issued on her behalf, and she was advised by both solicitors and counsel in relation to the quantification of the claim and in negotiations. However, nothing was claimed for the ‘lost years’. This obvious error was compounded by the subsequent settlement of her claim for £120,000. Following Mrs Thompson’s death her husband and children sought to bring a claim under the Fatal Accidents Act. That was a hopeless venture, given both Read v Great Eastern Railway (1868) LR 3 QB 555 and – relevantly for our purposes – section 12(1) of the Limitation Act 1980.\(^ {11} \)

11. The case is also valuable for the observations of Langstaff J as to a possible approach to be adopted in advising in relation to the claim of a dying claimant who has dependants. Paragraph 28 of his judgment is worth setting out:

   In the (usual) case in which a claimant viewing her imminent death wishes her dependants to have the advantage of the more extensive sums that can be recovered under the Fatal Accidents Act, compared to a lost years’ claim, she can achieve this within existing rules. One well recognised route is to seek an interim payment which, in a case in which liability has been admitted, may be equal or nearly equal to the amount of a lifetime award. The fact that it may be, or nearly be, the full amount of such an award does not prevent it being a reasonable proportion of the damages to be expected in the eventual claim (which will by amendment add a claim under the 1976 Act), since in the usual

\(^{10} \) [2007] EWHC 1875 (QB), Langstaff J

\(^{11} \) By contrast, in Reader v. Molesworths [2007] 1 WLR 1082 the injured person brought a personal injury claim during his life time, then died while the claim was still extant. After his death his solicitors unwisely discontinued the deceased claimant’s claim. Nevertheless, as held by the CA, the dependants were not precluded from bringing a claim under the FAA, because the Deceased could bring (and was in fact bringing) a claim as at the date of his death.
case it follows from what I have set out above that a dependency claim will usually be larger. Authority supports such an approach: Stephenson LJ recognised in Murray v Shuter [1972] 1 LJ Rep 6, CA that: “delay usually defeats justice; but there are cases, of which claims for head injuries are notoriously an instance, where expedition may work injustice...” when ordering an adjournment of trial, which was otherwise ready and due to be heard, so that the dependants of an injured plaintiff whose death was imminent could benefit from the more generous financial compensation likely to be awarded under the Fatal Accidents Act. This principle of adjournment in appropriate cases, in order to secure the benefits of this Act, may be combined with an interim payment.

Persons under a disability

12. The general extension of the limitation period where a person was under a disability at the time the right of action accrued is given by section 28. As noted above, the definition of those under a disability is provided by section 38. Until 1 October 2007, a person was under a disability “while he is an infant, or of unsound mind”. However, the words “of unsound mind” have been replaced by 12:

“lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct legal proceedings”.

13. Subsections (3) and (4) of section 38, which set out the previous definition of “unsound mind” were repealed at the same time as the definition by reference to the Mental Capacity Act was substituted. Thus, it is now important to analyse the Mental Capacity Act 2005 in order to determine whether an individual the general extension provided by s.28 is applicable.

14. Unaffected by this amendment, it remains the case that the extension only applies if the person was under a disability on the date when the right of action accrued. This is surprisingly often not appreciated by practitioners. The clock does not stop running if an individual subsequently becomes loses capacity. Likewise, a person was lacking capacity at the date on which the right of action accrued, and then subsequently regains it, the clock does not stop running (or get reset) with any later loss or losses of capacity. Any such periods of subsequent loss of capacity are, however, relevant to the exercise of the court’s discretion under section 33: s.33(3)(d) requires regard to be had to “the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action”.

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12 Mental Capacity Act 2005, s.67, Sch 6, para 25
‘Consists of or includes damages in respect of personal injuries’

(a) Subsequent claims against legal professionals
15. The definition of ‘personal injuries’ in section 38 makes it clear that a claim for damages against professional representatives arising out of the negligent mis-handling of a claim for personal injury (for example in permitting such a claim to be struck out for want of prosecution) is not itself a claim for damages in respect of personal injury, and so s.11 does not apply. *Hopkins v MacKenzie* [1995] 6 Med.L.R. 26, CA [unless that negligence itself causes clinical depression, *Bennett v Greenland Houchen & Co* [1998] P.N.L.R. 458, CA].

16. However, if damages for psychiatric injury depression are claimed as part of the losses flowing from the failure to handle a claim properly, section 11 will be applicable. It is unclear how tolerant the court will be of an attempt to manipulate the applicable personal injury claim by abandoning the personal injury aspect of a claim. Such attempts were unsuccessful in *Bennett v. Greenland Houchen & Co.* [cited above] and *Oates v. Hart Reade* [1998] PNLR 458, although a more liberal approach may more recently be indicated by the CA in *Shade v. Compton Partnership* [2000] Lloyds Rep PN 81.

(b) Wrongful birth claims
17. In the light of recent authorities of the House of Lords (McFarlane and Rees) wrongful birth claims now appear to be understood as claims for economic loss; namely the additional cost of bringing up a disabled child which, but for the defendant’s negligence, would not have been born. Nevertheless, they still appear to be treated as claims for personal injuries for the purposes of the Limitation Act, at least at first instance, following the pre-McFarlane authority of *Walkin v South Manchester Health Authority* [1995] 4 All ER 132. In *Farraj v Kings* [2006] EWHC 1228 (QB) this was not contested by the parties. *Walkin* was also applied, subject to a ruling under s.33, in *Godfrey v Gloucestershire Royal Infirmary NHS Trust* [2003] Lloyd’s Rep. Med. 398 (a case of alleged negligent advice leading to failure to terminate a pregnancy in the case of an injured child).

(c) Claims for anxiety and upset falling short of ‘psychiatric injury’
18. Emotional and psychological upset resulting from a failure to deal with dyslexia was a personal injury even though it fell short of psychiatric injury, *Adams v Bracknell Forest BC* [2004] UKHL 29; [2004] 3 W.L.R. 89, HL. Such claims, however, may be subject to a less sympathetic consideration under section 33: “The question of proportionality is now important in the exercise of discretion, none more so than under section 33.”

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13 They are not treated as personal injury claims for the purposes of the CRU regime.
14 *Robinson v. St Helens MBC* [2002] EWCA Civ 1099
remains unsatisfactorily imprecise, particularly in the light of the recent HL decision that pleural plaques, and consequential anxiety as to the risks of future disease caused by them, do not amount to actionable personal injury\textsuperscript{15}.

**Date of knowledge**

19. I am shamelessly going largely to bypass section 14. This is for two reasons. First, it appears to me that not much of significance has happened very recently. For about a decade between 1993 and 2003 there was an unremitting flow of cases on s.14 in the Court of Appeal. As early as 1997, Brooke LJ bemoaned that section 14 was a provision whose construction was “grossly over-loaded with reported cases” \textsuperscript{16} – and that overload continued in the following years. However, since the HL decision in 2004 in *Adams v. Bracknell Forest Borough Council* [2005] 1 AC 76 the volume of authority spawned by section 14 has noticeably died down.

20. *Adams* indicates that the test for constructive knowledge under s.14(3) is an objective one, but the correct approach requires the court to consider the reality of the situation in which the claimant finds himself in, including the effects of the injury itself. (Lady Hale appears to have been prepared to go further than the other members of the HL, in being prepared to include pre-accident characteristics which affect a person’s ability to discover and comprehend facts as being potentially relevant.)

21. My second reason for avoiding any detailed consideration of this crucial area of limitation law is that section 14 is in the process of being revisited by the HL in the conjoined appeals referred to above. Anything that I ventured to say beyond, ‘watch this space’ is liable to be rendered obsolete by the HL even more quickly than the rest of this talk will otherwise be.

22. In relation to date of knowledge I will therefore restrict myself to flagging up one recent case, unlikely to be affected by the HL in its pending decision. It concerns the relatively unproblematic provisions of 14(1)(c) and (d), which relate to knowledge of the identity of the defendant. They were designed primarily to deal with cases where a claimant cannot ascertain immediately who was responsible for the injury, such as in a road traffic accident where a driver failed to stop, and is only later found. But they also have application where, for example, the precise legal identity of a defendant is difficult to ascertain. In *Cressey v E Timm & Son Limited and E Timm & Son Holding Limited* [2006] PIQR P9, the claimant brought a claim against his employers for injury suffered at work. He believed he was employed by the first defendants, as his pay slips were in their name. In fact, he was employed by the second defendants, and it was held that his date of knowledge was postponed, in particular because his employers had

\textsuperscript{15} Johnston v. NEI International Combustion Ltd [2007] UKHL 39.

misinformed him. Generally, as Rix LJ noted in that case, where the identity of the employer is uncertain (one could restate this as the identity of the relevant health authority in most clinical negligence cases), any postponement will be brief, only being ‘as long as it reasonably takes to make and complete the appropriate enquiries’. That may not be very long.

**Section 33 Discretion: the impact of Horton v. Sadler**

23. As will be known to all of you, the most significant recent development in the case law on the s.33 discretion is that *Horton v Sadler* [2006] UKHL 27, [2007] 1 AC 307 departed *Walkey v Precision Forgings* [1979] 2 All ER 548. For 27 years *Walkley* established that where a second writ had been issued because the first writ was never served, struck out for want of prosecution or otherwise discontinued, the section 33 discretion could not be exercised, because the prejudice to the C was caused not by the provisions of the Limitation Act, but by the failure to prosecute the first action. In *Horton*, the House of Lords found that *Walkley* was wrong as a matter of statutory construction, because the claimant was prejudiced by the Limitation Act in the second action, and this had also led to unprincipled distinctions. Given that it now appears that the HL is again about to depart from one of its own decisions on the Limitation Act for the second time in a year, I cannot resist quoting Lord Hoffmann’s incredulity at what he found himself doing in *Horton*:

“My Lords, it is with a reluctance verging on disbelief that one is driven to conclude that the deliberate opinions of Lord Wilberforce and Lord Diplock were quite wrong. Of each of them it may be said, as Viscount Simonds said of Lord Macnaghten when faced with a rather similar situation in *Public Trustee v Inland Revenue Comrs* [1960] AC 398, 409, that "to generations who have passed their lives in the law his is truly clarum et venerabile nomen". But, for the reasons given by my noble and learned friend, Lord Bingham of Cornhill, I think that they misconstrued what is now section 33 of the Limitation Act 1980.”

24. Some other points may be worth noting in the light of *Horton v Sadler*:

(i) The HL approved the observations of Parker LJ in *Hartley v Birmingham DC* [1992] 2 All ER 213 that, in nearly all cases, the prejudice to C of refusing an action to proceed was equal and opposite to that to D if it was allowed. The stronger C’s case, the greater the prejudice to C if case was barred, and greater prejudice to D if limitation period disapplied; conversely, the weaker the case, the less prejudice to C if the case was barred, and the less prejudice to the Defendant, as he would be more likely to win on the merits anyway.
(ii) Hence, per Parker LJ, the most important question concerning prejudice is evidential prejudice as specified in s33(3)(b), namely the effect of the delay on D’s ability to defend the case on its merits. On the one hand, where cases turn on oral recollection (such as in cases involving consent and warnings as to risk), they are less likely to be allowed to proceed if time barred. In *Baig v City and Hackney Health Authority* [1994] 5 Med LR 221, discretion was refused on basis that it would not have been possible to have valuable recollections of the warnings given with respect to an operation performed 17 years earlier. Conversely, where written medical and nursing notes have been preserved and clinical judgment is in issue, there is less evidential prejudice in allowing an otherwise out of time claim.  

(iii) With regards to the reasons for delay, in *Horton v Sadler* Lord Carswell noted (at para 53) that a claimant must bear responsibility for delays caused by his solicitors. He doubted two previous authorities, including *Das v Ganju* [1999] Lloys Med 198, where inaccurate and misleading advice given by lawyers was held not to be a fault attributable to C and in the absence of substantial prejudice to D a claim allowed to proceed (similarly Corbin v Penfold Metalising [2000] Lloyd’s Rep 247). The harshness of this approach may be offset by the fact that the claimant has a cause of action in negligence against the solicitors.

25. Appealing a first instance judge’s decision on section 33 is generally difficult. In *Bryn Alyn*, the Court of Appeal noted that an appellate court should not intervene save where the judge was so plainly wrong that his decision exceeded the ambit within which reasonable disagreement is possible. However much the ratio in *Bryn Alyn* is mauled by the HL in its pending decision, my guess is that this is likely to remain a leading authority on section 33 for some time yet.

**Section 35: New claims in existing proceedings**

26. Section 35 is perhaps the most frequently overlooked provision of potential relevance to the clinical negligence (or indeed any) practitioner. Anyone acting for a party whom it is proposed should be added as a defendant to an existing action where there is a potential limitation defence needs to beware; likewise if you are acting for a defendant in existing proceedings and a new cause of action is proposed to be added by amendment. The structure of the section is not straightforward, but the principal point to be aware of is that, aside from third party proceedings, a new claim in an existing action is deemed to have been commenced ‘on the same

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17 Also, of regular significance is the situation wher the Defendant has had detailed notice of the claim (e.g. from a pre-action protocol letter) and so could or should have investigated earlier, thereby fixing clinicians’ knowledge and recollections at an earlier time that may be within the primary limitation period.
date as the original action”\(^{18}\). Thus, if a defendant consents to an amendment by which he is joined to existing proceedings, any limitation point is lost (except to the extent that it can be run by reference to the date of issue of the original proceedings).

27. The circumstances in which a claimant can amend to raise a ‘new claim’ (which is defined by s.35(2)) are circumscribed by s.35(3); essentially as provided by section 33 or by rules of court. Each may be considered briefly\(^{19}\):

(a) Section 33: In practice, if a defendant or prospective defendant can show a reasonably arguable limitation defence, the proper course is for the claimant to issue fresh proceedings in which the limitation argument, including any section 33 discretion, may be resolved\(^{20}\).

(b) The relevant rules of court are now CPR r.17.4 (new cause of action) and r.19.5 (new party).

(c) In relation to CPR r.17.4(2)\(^{21}\), this must now be given an expanded reading. In Goode v Martin [2001] EWCA Civ 1899; [2002] 1 W.L.R. 1828, CA, r.17.4 and s.35(5) of the 1980 Act were construed in the light of the HRA 1998 and it was held that para (2) of r.17.4(2) should be read as providing that the same or substantially similar facts upon which a new claim may be based should be facts "as are already in issue" on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings. If the rule is expanded in this way, a claimant may be permitted to amend his statement of case to add a new claim arising, not out of facts that he had pleaded, but out of facts put in issue by the defence.\(^{22}\)

(d) CPR rule 19.5 has been held to comply with Article 6: Kesslar v. Moore and Tibbits [2004] EWCA Civ 1551.

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\(^{19}\) The extensive notes to CPR rules 17.4 and 19.5 provide a thorough treatment.


\(^{21}\) Rule 17.4(2) provides: “The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.”

\(^{22}\) A further layer of complication may arise where there are two defendants (D1 and D2) to the claimant’s (C) action. If D2 pleads facts by way of defence to C’s claim, it has been held that C may adopt those facts as the basis of a new claim against D1 within the scope of CPR r.17.4: Charles Church Developments Limited v Stent Foundations Limited [2006] EWHC 3158, Jackson J.
IV. The future

28. The effect of recent case law on limitation in personal injury cases seems to have been towards a stricter, more ‘objective’ approach to the reasonableness tests under s14(2) and s14(3), as exemplified by Adams v Bracknell Forest BC [2005] 1 AC 76 and Catholic Care (Diocese of Leeds) v Young [2006] EWCA Civ 1534. Indeed, in Adams, Lord Hoffmann explicitly argued that the availability of the s33 discretion enabled a stricter line to be taken to extending the time since the date of knowledge.

“Since the 1975 Act, the postponement of the commencement of the limitation period by reference to the date of knowledge is no longer the sole mechanism for avoiding injustice to a Plaintiff who could not reasonably be expected to have known that he had a cause of action. It is, therefore, possible to interpret section 14(3) with a greater regard to the potential injustice for the defendant if the limitation period should be indefinitely extended.” (para 45)

29. Extraordinarily, within a year, two long-standing, but unloved limitation decisions of the House of Lords have been (in the case of Walkley) or are about to be (Stubbings) departed from. This latter, currently awaited, decision may also be expected to refresh the law on section 14, but in any event will require careful scrutiny.

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14 November 2007