



Neutral Citation Number: [2018] EWHC 3505 (Ch)

Case No: D90MA014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Royal Courts of Justice
7 Rolls Building
Fetter Lane, London. EC4A 1NL

Date: 20th December 2018

Before:

HIS HONOUR JUDGE MCKENNA
(sitting as a Deputy High Court Judge)

Between:

DAVID ELLIS

Claimant

- and -

**HEART OF ENGLAND NHS FOUNDATION
TRUST**

**First
Defendant**

-and -

**UNIVERSITY HOSPITALS BIRMINGHAM NHS
FOUNDATION TRUST**

**Second
Defendant**

-and-

DR SWAYAM IYER

**Third
Defendant**

Darryl Allen QC Counsel (instructed by Jefferies Solicitors Ltd) for the Claimant
Bella Webb Counsel (instructed by The Medical Protection Society) for the 3rd Defendant

Hearing date: 27th November 2018

JUDGMENT

HHJ McKenna:

Introduction

1. In this action David Philip Ellis, the Claimant, sues three Defendants, The Heart of England NHS Foundation Trust, University Hospitals Birmingham NHS Foundation Trust and Dr Swayam Iyer, for damages as a consequence of the Defendants' alleged negligent medical treatment of the Claimant following his presentation at the 3rd Defendant's surgery on the evening of the 25th February 2013.
2. The 3rd Defendant, but not the 1st or 2nd Defendants where appropriate extensions of time were negotiated between them and the Claimant, raises a defence in respect of limitation and this is the hearing of a preliminary issue to determine whether the Claimant's claim against the 3rd Defendant is statute barred having regard to Sections 11 and 14 of the Limitation Act 1980 ("the Act") pursuant to the order of District Judge Lumb dated 10th May 2018.
3. Not surprisingly neither the 1st nor 2nd Defendant were present or represented at the hearing.

Background

4. The Claimant, whose date of birth is the 13th November 1981, developed a cerebral abscess and was seen by the 3rd Defendant on the evening of the 25th February 2013, who recorded a history of acute numbness and weakness of the left leg. On examination there was impaired sensation below the knee and the Claimant was unsteady on both feet.

Approved Judgment

5. On the 27th February 2013, the Claimant re-attended the 3rd Defendant's surgery to have bloods taken. The results were abnormal and were reported within minutes but the Claimant was sent home. Later the same day, the Claimant suffered a witnessed seizure. He attended Solihull Hospital, for which the 1st Defendant was responsible for its management and control, where a CT scan was taken which showed a lesion compatible with an abscess or a tumour.
6. On presentation at Solihull Hospital, the Claimant complained of a 2-day history of left sided weakness associated with a headache.
7. The Claimant was discussed with the neurological team at the Queen Elizabeth Hospital Birmingham, for whom the 2nd Defendant had management and control, who requested further imaging and blood tests.
8. The Claimant was eventually transferred to the Queen Elizabeth Hospital on the 1st March 2013 where he underwent drainage of an intracranial abscess via a right frontal-parietal craniotomy later the same day. Post operatively the Claimant suffered further seizures. He made a slow recovery and was discharged in May 2013.
9. The Claimant has been left with relative weakness on the left side, with a severe weakness of the left foot and a left foot drop. The left side of his face droops and feels numb. He suffers with frequent falls and in addition has suffered disruption of his cognitive and behavioural functioning. He has epilepsy and continues to have fits. These problems are now permanent and given the severity and impact of the injuries, the claim has a substantial financial value.

Approved Judgment

10. It is the Claimant's case against the 1st Defendant that it negligently failed to take blood cultures, withheld antibiotic therapy and steroid therapy, and failed to ensure a prompt transfer to the Queen Elizabeth Hospital for a definitive treatment.
11. It is the Claimant's case against the 2nd Defendant that it failed to arrange an urgent transfer to the Queen Elizabeth Hospital following referral on 27th February, with prompt investigation and surgery thereafter, and negligently advised the clinicians at Solihull Hospital to hold off on prescribing antibiotics until a biopsy had been performed.
12. Partial admissions as to breach of duty have been made by the 1st and 2nd Defendants and what is said on behalf of the Claimant is that the negligent delays caused an increased period of acute pain and suffering, and exacerbated the residual problems which could have been avoided with timely referral by the 3rd Defendant.
13. Specifically, so far as the 3rd Defendant is concerned, it is the Claimant's case that the examination was inadequate, the symptoms and signs recorded were incompatible with peripheral neuropathy related to alcohol and should have led to admission to hospital for urgent assessment and treatment and that had that admission taken place, the Claimant's brain abscess would have been promptly diagnosed and treated and he would have made a full recovery, albeit with an unchanged risk of epilepsy.

Procedural Background

14. The Claimant instructed his Solicitors on the 1st October 2013. Records were obtained and a consultant neurosurgeon reported on liability. Letters of claim were sent based on that report to all three Defendants on the 6th May 2015.
15. The Letter of claim addressed to the 3rd Defendant alleged a negligent failure to consider and take heed of the acute mono paresis affecting the Claimant's left leg and arrange urgent investigations or urgently refer the Claimant for the same. But for the avoidable 48-hour delay in hospital treatment it is said that the Claimant would have made a complete or near complete recovery.
16. A number of extensions of time were agreed between the parties:
 1. An extension for the 3rd Defendant's Letter of Response was agreed until 7th December 2015;
 2. A further extension was agreed with the 3rd Defendant for the Letter of Response to be served by the 15th January 2016 with limitation being extended to 29th April 2016.
 3. A further extension was agreed with the Letter of Response to be served by the 12th February 2016 and limitation was to be extended until 29th May 2016.
 4. A further extension was agreed with the Letter of Response to be served by 14th March 2016 and limitation being extended to the 27th June 2016.
 5. On the 15th March 2016 the 3rd Defendant served a Letter of Response denying breach of duty and causation.

Approved Judgment

17. On 15th March 2016 the Claimant's Solicitors received a GP expert's report based on the Claimant's medical records. It was not supportive of the claim against the 3rd Defendant. A decision was taken not to pursue the claim against the 3rd Defendant though there was a delay in communicating that decision to the 3rd Defendant's advisers. Ultimately, on 21st September 2016 the Claimant's Solicitor advised the 3rd Defendant's Solicitor that the 3rd Defendant was "*released from this matter and we are satisfied for you to close your file*".
18. Further extensions of time so far as limitation was concerned were agreed between the Claimant and the 1st and 2nd Defendants until 27th January 2017 to enable the Claimant to obtain evidence from experts in the fields of microbiology, neurology and neuropsychology.
19. In August 2016 the Claimant's solicitors instructed alternative Counsel to settle Particulars of Claim. That Counsel also had a medical qualification. He was not satisfied with the conclusions reached by the Claimant's instructed GP expert, Dr Kearsley. A conference was held and a supplementary report produced dated the 10th December 2016. The Claimant's other expert witnesses were consulted and a decision taken to obtain a second opinion from another GP expert.
20. On the 20th January 2017 the Claimant's Solicitors contacted the 3rd Defendant's Solicitors to alert them to the fact that the 3rd Defendant would after all be made a party to the proceedings and to invite the 3rd Defendant not to take any limitation point.
21. On the 25th January 2017 a claim form was issued against all three Defendants.

Approved Judgment

22. On 10th February 2017 the Claimant's Solicitors received a report from a second GP expert, Dr Colin Tidy. That report is supportive of a claim against the 3rd Defendant.
23. Extensions of time for service of defences were agreed and on 5th October 2017 the 3rd Defendant served a defence denying breach of duty and causation and raising limitation as a defence.

Applicable Law

24. Section 11 of the Act provides that the primary limitation period in personal injury cases is 3 years from the date of negligence. There is no issue in this case of there being a later date of knowledge.
25. Section 33 provides as follows:

(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 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—

Approved Judgment

- (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 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.*

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26. The provisions of Section 33 of the Act and the correct approach to the exercise of the discretion which it provides to the Court has been recently and comprehensively reviewed by the Court of Appeal in the case of *The Chief Constable of Greater Manchester Police – v – Carroll* [2017] EWCA Civ 1992. The judgment of the Court was delivered by The Master of the Rolls and at paragraph 42 of his judgment he summarised the general principles to be derived from the case law as follows:

“Section 33(3) of LA 1980 requires the court, when exercising its discretion under section 33(1), to have regard to all the circumstances of the case but also directs the court to have regard to the five matters specified in subsections 33(3)(a)-(f). There are numerous reported cases in which the court has elaborated on the application of that statutory direction in the context of the particular facts of the case. In many of the cases the court has stated various principles of general application. The general principles may be summarised as follows.

1) Section 33 is not confined to a "residual class of cases". It is unfettered and requires the judge to look at the matter broadly: Donovan v Gwentoy's Ltd [1990] 1 WLR 472 at 477E; Horton v Sadler [2006] UKHL 27, [2007] 1 AC 307, at [9] (approving the Court of Appeal judgments in Finch v Francis unreported 21.7.1977); A v Hoare [2008] UKHL 6, [2008] 1 AC 844, at [45], [49], [68] and [84]; Sayers v Lord Chelwood [2012] EWCA Civ 1715 [2013] 1 WLR 1695, at [55].

2) The matters specified in section 33(3) are not intended to place a fetter on the discretion given by section 33(1), as is made plain by the opening words "the court shall have regard to all the circumstances of the case", but to focus the attention of the court on matters which past experience has shown are likely to call for evaluation in the exercise of the discretion and must be taken into a consideration by the judge: Donovan at 477H-478A.

3) The essence of the proper exercise of the judicial discretion under section 33 is that the test is a balance of prejudice and the burden is on the claimant to show that his or her prejudice would outweigh that to the defendant:

Donovan at 477E; Adams v Bracknell Forest Borough Council [\[2004\] UKHL 29](#), [\[2005\] 1 AC 76](#), at [55], approving observations in *Robinson v St. Helens Metropolitan Borough Council* [2003] PIQR P9 at [32] and [33]; *McGhie v British Telecommunications plc* [\[2005\] EWCA Civ 48](#), (2005) 149 SJLB 114, at [45]. Refusing to exercise the discretion in favour of a claimant who brings the claim outside the primary limitation period will necessarily prejudice the claimant, who thereby loses the chance of establishing the claim.

4) *The burden on the claimant under section 33 is not necessarily a heavy one. How heavy or easy it is for the claimant to discharge the burden will depend on the facts of the particular case: Sayers at [55].*

5) *Furthermore, while the ultimate burden is on a claimant to show that it would be inequitable to disapply the statute, the evidential burden of showing that the evidence adduced, or likely to be adduced, by the defendant is, or is likely to be, less cogent because of the delay is on the defendant: Burgin v Sheffield City Council* [\[2015\] EWCA Civ 482](#) at [23]. *If relevant or potentially relevant documentation has been destroyed or lost by the defendant irresponsibly, that is a factor which may weigh against the defendant: Hammond v West Lancashire Health Authority* [1998] Lloyd's Rep Med 146.

6) *The prospects of a fair trial are important: Hoare at [60]. The Limitation Acts are designed to protect defendants from the injustice of having to fight stale claims, especially when any witnesses the defendant might have been able to rely on are not available or have no recollection and there are no documents to assist the court in deciding what was done or not done and why: Donovan at 479A; Robinson at [32]; Adams at [55]. It is, therefore, particularly relevant whether, and to what extent, the defendant's ability to defend the claim has been prejudiced by the lapse of time because of the absence of relevant witnesses and documents: Robinson at [33]; Adams at [55]; Hoare at [50].*

7) *Subject to considerations of proportionality (as outlined in (11) below), the defendant only deserves to have the obligation to pay due damages removed if the passage of time has significantly diminished the opportunity to defend the claim on liability or amount: Cain v Francis* [\[2008\] EWCA Civ 1451](#), [\[2009\] QB 754](#), at [69].

8) *It is the period after the expiry of the limitation period which is referred to in sub-subsections 33(3)(a) and (b) and carries particular weight: Donovan at 478G. The court may also, however, have regard to the period of delay from the time at which section 14(2) was satisfied until the claim was first notified: Donovan at 478H and 479H-480C; Cain at [74]. The disappearance of evidence and the loss of cogency of evidence even before the limitation clock starts to tick is also relevant, although to a lesser degree: Collins v Secretary of State for Business Innovation and Skills* [\[2014\] EWCA Civ 717](#), [2014] PIQR P19, at [65].

9) *The reason for delay is relevant and may affect the balancing exercise. If it has arisen for an excusable reason, it may be fair and just that the action*

Approved Judgment

should proceed despite some unfairness to the defendant due to the delay. If, on the other hand, the reasons for the delay or its length are not good ones, that may tip the balance in the other direction: Cain at [73]. I consider that the latter may be better expressed by saying that, if there are no good reasons for the delay or its length, there is nothing to qualify or temper the prejudice which has been caused to the defendant by the effect of the delay on the defendant's ability to defend the claim.

10) Delay caused by the conduct of the claimant's advisers rather than by the claimant may be excusable in this context: Corbin v Penfold Company Limited [2000] Lloyd's Rep Med 247.

11) In the context of reasons for delay, it is relevant to consider under subsection 33(3)(a) whether knowledge or information was reasonably suppressed by the claimant which, if not suppressed, would have led to the proceedings being issued earlier, even though the explanation is irrelevant for meeting the objective standard or test in section 14(2) and (3) and so insufficient to prevent the commencement of the limitation period: Hoare at [44]-[45] and [70].

12) Proportionality is material to the exercise of the discretion: Robinson at [32] and [33]; Adams at [54] and [55]. In that context, it may be relevant that the claim has only a thin prospect of success (McGhie at [48]), that the claim is modest in financial terms so as to give rise to disproportionate legal costs (Robinson at [33]; Adams at [55]); McGhie at [48]), that the claimant would have a clear case against his or her solicitors (Donovan at 479F), and, in a personal injury case, the extent and degree of damage to the claimant's health, enjoyment of life and employability (Robinson at [33]; Adams at [55]).

13) An appeal court will only interfere with the exercise of the judge's discretion under section 33, as in other cases of judicial discretion, where the judge has made an error of principle, such as taking into account irrelevant matters or failing to take into account relevant matters, or has made a decision which is wrong, that is to say the judge has exceeded the generous ambit within which a reasonable disagreement is possible: KR v Bryn Alyn Community (Holdings) Ltd [2003] EWCA Civ 783, [2003] 3 WLR 107, at [69]; Burgin at [16].”

Discussion and Conclusion

27. It was urged upon me by Counsel for the 3rd Defendant that when approaching the question of the interpretation of Section 33 of the Act the Court should take a robust approach in line with that taken to relief from sanction

Approved Judgment

applications that post date the decisions in *Mitchell – v - News Group Newspapers [2014] IWLR 795* and *Denton – v – TH White Ltd [2014] EWCA Civ 906* ; that the Court should look at the entirety of the period of delay and not simply the seven months of delay between the expiry of the agreed extension of time for issue of proceedings and the actual date of issue. Reliance was placed on the *Catholic Child Welfare Society case [2018] EWCA Civ 2342*. It was also submitted that the reason for the delay was poor given that the Claimant had instructed experienced clinical negligence Solicitors whose conduct was criticized as being dilatory with their repeatedly failing to respond to requests and failing adequately to plead the Claimant’s case on causation and failing to instruct relevant experts timeously.

28. Criticism was also made of the Claimant and/or his Solicitors in not setting out his position at the earliest opportunity and in particular that it was not until service of his Particulars of Claim that any mention was made of the Claimant complaining of suffering from a headache on presentation at the 3rd Defendant’s surgery which the Counsel for the 3rd Defendant categorised as amounting to a change in the entire nature of the claim.
29. It was also said that there was obvious prejudice to the 3rd Defendant as a result of the totality of the delay which led to a dimming of memories from the passage of time and which would inevitably affect the cogency of the evidence both of the 3rd Defendant and indeed of the Claimant.
30. Reliance was also placed on the emotional prejudice caused to the 3rd Defendant as a result of his unequivocal release from the action followed by its resurrection some months later.

Approved Judgment

31. By contrast, it was submitted that any prejudice to the Claimant would be limited by virtue of the fact that he could continue to pursue his claims against the 1st and 2nd Defendants where admissions of breach of duty have been made and where it was said the arguments as to causations were very similar.
32. For my part, I am not persuaded by these arguments and I have no hesitation in concluding that having regard to all the circumstances of the case and the principles enunciated in *Carroll*, it is equitable to allow the claim against the 3rd Defendant to proceed. I do so for a number of reasons.
33. I can see no justification for importing into the interpretation of Section 33 of the Act the case law relating to relief from sanctions. The Court's discretion under Section 33 is unfettered and requires the Court to look at the matter broadly so what is required is a balance of prejudice, all be it that the burden is on the Claimant to show that his prejudice would outweigh that of the 3rd Defendant.
34. It is plain that as early as the 4th March 2013 when the Claimant's sister and mother attended on the 3rd Defendant to discuss with him the delay in the referral and diagnosis of the Claimant, the 3rd Defendant knew or ought to have known that the chain of events were likely to be the subject of further enquiry and/or a possible claim for damages.
35. A formal claim was notified in May 2015 and hence the 3rd Defendant had a relatively early formal notification of the claim which he immediately notified to the Medical Protection Society.

Approved Judgment

36. The 3rd Defendant was able to formulate and despatch a Letter of Response (following an extension of time granted at his own request in March 2016.) It follows that the 3rd Defendant had a full opportunity to consider, investigate and respond to the allegations made against him well within the primary limitation period.
37. It is also not without significance that limitation was extended by agreement with the 3rd Defendant at least until June 2016 and it was submitted on the Claimant's behalf that in those circumstances it is difficult to conclude otherwise than that, at that stage at least, the 3rd Defendant and his advisers were content that the extension in the period of limitation did not prejudice the 3rd Defendant's ability to defend the claim being brought against him.
38. The delay in issuing proceedings beyond the extended limitation period is as it seems to me understandable given that GP expert instructed on the Claimant's behalf had produced a report which was not supportive of the claim against the 3rd Defendant and, it seems to me no criticism can be directed towards the Claimant in that regard.
39. Very significantly, the 3rd Defendant has not been able to identify any prejudice that he has suffered or will suffer in the investigation, preparation or presentation of his defence. No documentation has been lost nor has contact with any potential witness been lost. The 3rd Defendant has the benefit of his contemporaneous record of his consultation and his own recollection of the consultation given the contents of his defence. Moreover the 3rd Defendant was notified about the family's concern within a very short period after the consultation and had the opportunity to discuss the issues with his advisers and

Approved Judgment

to record his recollections well within the primary limitation period. His position is not in any way adversely affected as a result of the delay.

40. By contrast, the prejudice to the Claimant, should he not be able to pursue his claim against the 3rd Defendant would be profound. He would lose the opportunity to pursue a potentially significant claim against the 3rd Defendant and be left with a possible, but by no means, certain claim for the loss of a chance against his Solicitors and/or Counsel. On any view, the successful pursuit of a negligence claim against Solicitors and/or Counsel in the face of an unsupportive expert report from a reputable expert would be fraught with difficulty.
41. Nor am I persuaded that the arguments as between the 1st and 2nd Defendants and 3rd Defendant on causation are similar. On the contrary, in my judgment, there is plainly the potential for a different outcome.

Disposal

42. For all these reasons it is just and equitable to allow the claim against the 3rd Defendant to proceed.
43. I trust the parties will be able to agree the form of an order in which reflects the substance of this judgment including costs.
44. I would like to take the opportunity to thank both Counsel for all their assistance with this claim.

Approved Judgment