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## **Windfalls and corrective justice - Discretion to extend the limitation period in personal injury cases**

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There is a contradiction at the heart of the law of limitation periods. This lies in the conflict between the need to promote certainty (traditionally one of the key aims of having limitation periods in the first place<sup>1</sup>) and the need to avoid barring a claim at a time earlier than the prospective claimant had any reasonable opportunity to prosecute his case<sup>2</sup>. This is a contradiction which has great significance for practitioners as well as litigants. Failing to issue proceedings within a limitation period is one of the surest ways to a claim for professional negligence<sup>3</sup>, but the greater the levels of uncertainty as to when a claim is out of time the greater the difficulties in advising with confidence. This contradiction exists in most areas of modern limitation law but is somewhat compounded in the case of personal injury claims by the extra layer of uncertainty built into the system. This additional feature is the discretion granted to courts by section 33 Limitation Act 1980 to allow a claim to proceed even though it is out of time in relation to what might be called the primary limitation period<sup>4</sup>. The aim of this article is to consider the manner in which courts approach the exercise of that discretion in order to ascertain whether this important jurisdictional area of procedural law is operating in a way which best achieves the varied and contradictory aims it seeks to address.

### Limitation Act 1980

It will, first, be necessary to set out the relevant provisions of the Limitation Act, albeit reasonably briefly. Although the focus of this article is on the discretionary power contained in section 33, it is important to understand how the Act sets the primary limitation period in order to appreciate how section 33 operates. In relation to personal injury claims, with which this article is concerned, the starting point is section 11. This provides that for any action which includes a claim for damages for personal injuries the

limitation period is 3 years from the date on which the cause of action accrued, or, if later, 3 years from the claimant's 'date of knowledge'.

Date of knowledge is, in turn, defined in section 14 as the date on which the claimant had knowledge of certain relevant facts. These are, principally, the identity of the defendant, the fact that the 'injury in question was significant' and the fact that 'the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence...'

Knowledge of law (as opposed to fact) is not required but, by section 14(3), the claimant's knowledge includes constructive as well as actual knowledge, that is to say that knowledge which 'he might reasonably have been expected to acquire...'

In determining the primary limitation period, therefore, the law operates what is generally known as a 'discoverability' approach, that is to say that no limitation period begins to run unless and until the claimant discovers (or is deemed to have discovered, constructively) the facts that give rise to a cause of action<sup>5</sup>. Discoverability has formed part of the limitation period in personal injury cases since the Limitation Act 1963 and arose out of the controversial House of Lords decision in *Cartledge v E. Jopling & Sons Ltd*<sup>6</sup>. In that case a group of steel workers were found to be out of time in relation to a claim for silicosis, an insidious and slowly developing chest condition caused by industrial dust exposure, at a time when their symptoms remained at a sufficiently low level that no reasonable claimant was likely to have embarked on litigation at that stage. The existence of discoverability provisions within the law means that prospective claimants have some measure of protection. A claimant may not satisfy the requirements of discoverability until many years after the cause of action has accrued, especially in relation to insidious industrial disease claims, but also in relation to claims of clinical negligence whereby a claimant may legitimately assume that his adverse outcome is merely one of those things until he acquires sufficient knowledge to put him on the trail of possible negligence<sup>7</sup>.

Section 33 discretion, therefore, provides an additional level of protection for personal injury claimants over and above that offered by discoverability. Section 33(1) permits a court to allow an action to proceed notwithstanding that it is brought outside the time limit prescribed by sections 11 and 14 if the court considers it would be 'equitable' to do so. In determining this the court is directed to have regard to the degree to which the claimant would be prejudiced by the operation of the primary limitation period, and the degree to

which the defendant would be prejudiced by allowing the claim to proceed. The section does not use the word 'balance' but this is, clearly, an exercise in the court balancing the competing interests of claimant and defendant<sup>8</sup>. In carrying out this balance (and exercising the discretion thereby conferred) the court is required to have regard to all the circumstances of the case and, in particular, the 6 specific factors listed in section 33(3). I will return to the section 33(3) factors but they include, most importantly, the length of and reasons for the delay on the part of the claimant, and the extent to which that delay has effected the cogency of the evidence.

### What might section 33 be seeking to achieve?

It is submitted that section 33 needs to be judged against four measures of its effectiveness. Two of these have already been mentioned but need to be expanded on a little.

The first of these is the need to provide a fair and just outcome for claimants<sup>9</sup>. Despite the protections offered to claimants by the discoverability approach there may still be many reasons why seemingly deserving claimants find themselves outside the primary limitation period. The most obvious example may be those claimants who are in possession of all the facts necessary to establish discoverability but who do not pursue a claim because they do not know those facts give rise to a cause of action. It will be recalled that section 14 makes clear that knowledge of fact only is required to begin the running of the limitation period. There is no requirement of knowing that those facts give rise to a claim in law. So, a claimant may be aware that he is injured by virtue of something the defendant has done, but may have no idea that this permits him to launch a claim<sup>10</sup>. A further example (not totally unrelated) may be a claimant who has no *actual* knowledge of the relevant facts but is found to have constructive knowledge based upon what he should reasonably have known<sup>11</sup>. In such circumstances time will run against a claimant who, as a matter of reality, has no ability to pursue a claim. These are, for present purposes, no more than illustrations of situations in which a claimant may feel that he has a legitimate reason for not commencing proceedings within his primary limitation period.

The second measure against which section 33 must be judged is the degree to which it provides (or fails to provide) some certainty for defendants in the sense of repose<sup>12</sup>. Repose is the idea that a party can move on from a certain act (or omission) safe in the knowledge

that the party is no longer susceptible to legal action in relation to that act<sup>13</sup>. Repose may have commercial aspects (the party may wish to change their position in a way in which they cannot easily or safely do if the possibility of a future action remains<sup>14</sup>) or it may have psychological factors, at least in so far as the party is a human actor (the party may wish to be free of the worry or anxiety of possible future claims). It is not difficult to see that the existence of section 33 discretion has the potential to be almost wholly antipathetic to repose in that sense. Section 33 is open ended. There is (theoretically, at least) no point in time when the defendant can be certain that he has repose in respect of any specific act.

The third measure against which section 33 must be judged is closely related to the inter-relationship between the first two. This is the degree to which section 33 helps foster or hinder the underlying substantive law operating in this area. As we are dealing here with personal injury claims that is, overwhelmingly, the law of negligence. This requires some degree of consideration of the purpose (or purposes) being served by the law of negligence. The problem here is that the degree of academic effort that has gone into seeking to determine what is the underlying purpose of negligence law is enormous, and despite those efforts this remains contested terrain<sup>15</sup>. This is not the place to rehearse, let alone join, that debate. But for my purposes here there is probably enough common ground. That common ground would seem to revolve around the notion of corrective justice which, for the present, I will take to mean that wrongdoers should be required to make good their victims (in so far as money compensation can achieve this), in the absence of a sufficiently powerful countervailing interest. As Lord Steyn has put it ‘...the public policy which has first claim on the loyalty of the law is that wrongs should be remedied...<sup>16</sup>’. But even most of those who accept that negligence law is fundamentally about corrective justice equally accept that there may be good reasons to depart from corrective justice in some situations. When a sufficient reason exists to depart from corrective justice in a particular instance is equally a cause of much controversy but that negligence involves a balancing between corrective justice and other interests (often titled distributive justice, although this is something of a catch-all) is probably more capable of a level of agreement<sup>17</sup>. Limitation law may be jurisdictional rather than substantive but the degree to which section 33 provides a defensible balance between corrective and distributive justice is a relevant consideration.

The fourth measure is certainty. It may be objected that certainty has already been dealt with – is repose not about certainty? Repose may be an aspect of certainty but there is a more general sense (perhaps, even, a more prosaic sense) in which certainty is in issue. This is certainty of outcome. Litigation is an expensive (and sometimes traumatic) business. Users of the law are likely to require a sufficient degree of certainty of outcome before they invest their money or themselves in the bringing or defending of an action. In the law, of course, certainty is rarely absolute. But the fear that may often be induced by the use of the word ‘discretion’ is that the law may become no more than a series of separate instances, unconnected by any over-arching unity. The law, as has been recognised by Smith LJ, risks becoming ‘a lottery for litigants’<sup>18</sup> The certainty issue, therefore, is not about removing all unpredictability, but rather of keeping the predictability deficit within reasonable bounds so that users of the law can make informed choices. The nature of the uncertainty issue was illustrated in *Cain v Francis*<sup>19</sup>. This involved two conjoined appeals. Both concerned road traffic accidents where claims were made early and liability was admitted by insurers. In both cases, however, proceedings were not issued within the primary limitation period. In one the delay in issuing proceedings amounted to one day, in the other to one year. Two separate trial judges hearing applications under section 33 allowed the claim to proceed in the case of the longer delay but declined to do so in the case of the shorter. In the Court of Appeal Smith LJ accepted that these outcomes were, on the face of it, somewhat incongruous. Notwithstanding the relative unwillingness of an appeal court to interfere in the exercise of discretion by a trial judge some level of guidance was clearly required<sup>20</sup>.

#### What do we mean by discretion?

The nature of judicial discretion is something else which has occupied much academic writing. It is a word used very frequently when debating the actions of judges and is, in many senses, ubiquitous in the operation of the legal system. The problem (perhaps) with the word, however, is that it spans a number of various meanings which describe very different activities. As a consequence the use of the word discretion without further explanation has the potential to obscure rather than elucidate what is actually going on. What does it mean to say that judges are making a discretionary decision under section 33? For Dworkin there were three different types of discretion. ‘First, we say that a man has discretion if his duty is defined by standards that reasonable men can interpret in different

ways...Second, we say that a man has discretion if his decision is final, in the sense that no higher authority may review and set aside that decision...Third, we say a man has discretion when some set of standards which impose duties upon him do not in fact purport to impose any duty as to a particular decision...<sup>21</sup>. The first two of these Dworkin considered to be 'weak' discretion, the third he described as 'strong' discretion<sup>22</sup>. Dworkin was relatively uninterested in the two forms of weak discretion. Rather his concern lay in what we might call the developmental strong discretion, whereby judges are determining whether to develop the law in one direction or another. So, for example, when faced with the decision whether or not to develop the equitable notion of breach of confidence into a tort of misuse of private information the House of Lords in *Campbell* was, presumably, exercising the kind of strong discretion which interested (and concerned) Dworkin<sup>23</sup>. We probably do not need to explore further Dworkin's views on this type of discretion because that does not seem to be what is going on in the section 33 cases. Rather, judges deciding section 33 disputes seem to be exercising weak discretion in the first sense of Dworkin's taxonomy. That is to say, they are applying standards which can be interpreted in different ways by reasonable people. This 'discretion by judgment' might be styled as a 'someone has to decide' discretion. This is the most commonly exercised discretion in the legal system. This is the kind of discretion that judges exercise when operating as fact finders. If the claimant says that what happened was X, while the defendant says that what happened was Y, then someone has to decide which of those two is correct. Judges are granted that role. Provided that both accounts have some element of plausibility a judge is making a discretionary choice to accept one version over another, based on a myriad of factors, including consistency (both internal and also in relation to other available evidence) but also including such highly subjective elements as the demeanour of witnesses. There is no directed outcome. If we were to put the same evidence in front of several different judges it is likely that there would be different outcomes. This type of discretion is not developmental in that it does not change the law, it merely determines the result. As a consequence it has had more limited academic attention. It is, however, not merely frequent, but also, often, determinative, because there are many cases where the dispute of fact is the only issue, and the findings of fact by the trial judge determine the outcome.

This kind of weak ‘someone has to decide’ discretion is, therefore, problematic in terms of users of the legal system because it can give rise to high levels of unpredictability of outcome. This is, however, inherent in the nature of an adjudicative system. Whenever a dispute exists on matters of fact it will always be true that someone has to decide. While section 33 disputes are not disputes of fact, they fall into a similar ‘someone has to decide’ scenario. The fact that such discretion exists in, and is integral to, the operation of the system may have relevance for the fourth measure against which we may need to judge section 33 discretion – that is certainty of outcome. While we may be concerned about the predictability deficit of section 33, we do need to bear in mind that section 33 is not turning a highly predictable system into a highly unpredictable one – it is merely adding a layer of unpredictability to a system for which some levels of unpredictability are already inherent.

This is not to say that the reduction of the predictability deficit to the lowest level achievable consistently with seeking to achieve other aims is not desirable. Satisfying this requirement while continuing to allow discretionary decisions requires a consideration of the principles and policies within which the judge is exercising this discretion. If we want to ensure that we have a system which reduces the predictability deficit as far as possible then we must consider what constraints exist on the way judges carry out this task. If there are no such constraints, or they are insufficiently directive, then section 33 decisions do risk becoming a series of separate and isolated outcomes. For the most part, the more varied and complex these constraints are, the greater the likely predictability deficit.

In relation to section 33 there are two possible sources of such restricting principles and policies. There is the statute itself and there is the interpretation of the statute imposed by the higher courts.

#### Guidance from the statute

Those looking for much constraining guidance in the wording of section 33(1) itself may find limited assistance. Courts are directed to consider which outcome is ‘equitable’ having regard to the balance of prejudice between claimant and defendant, and, in doing so, to consider all the circumstances of the case. It can readily be seen that this is likely to produce little constraining guidance to judges and, by itself, does not help greatly to reduce the predictability deficit. Indeed, courts have indicated that the discretion conferred by section

33 is wide and unfettered. This was made clear early by Lord Denning in *Firman v Ellis*<sup>24</sup>. Lord Denning was alive to the issues of predictability and offered the following comfort to users of the legal system – ‘...the judges in making their decisions set a pattern from which the profession can forecast the likely result in any given set of circumstances<sup>25</sup>’. This may have proved to be optimistic.

Although there may be little constraining guidance in section 33(1), it is legitimate to consider to what extent the factors listed in subsection 3 may help this cause. These are, it will be recalled, a list of specific factors set out in the statute which the court is directed to ‘have regard to’ in addition to also considering ‘all the circumstances of the case’. The status of these specific factors has been considered by the courts. The general conclusion is that these represent Parliament’s best estimate of the kind of factors most often likely to be relevant but that they are not exclusive or exhaustive<sup>26</sup>.

The 6 factors themselves represent something of an odd mix, being described by Lord Diplock as ‘a curious hotchpotch<sup>27</sup>’. One reason for this is that it is not altogether clear how some of them are meant to relate to the concept of prejudice. For example, while it is reasonably apparent why the length of the delay may map onto to issues of prejudice, it is less clear how the claimant’s reasons for the delay do so, unless prejudice is being determined in some pseudo-moralistic way of seeking to assess whether the claimant is somehow deserving. This may indicate a more general issue, which is that courts are being directed under section 33 to consider two concepts which do not, on the face of it, seem to be addressing the same thing. The primary direction is to consider what is equitable. This clearly has connotations of fairness and it is easy to see how the claimant’s reasons (or excuses) for the delay would fit into this. But they are being directed to consider what is equitable in the context of prejudice and it is much less easy to see why a defendant is prejudiced any more by a claimant with a poor excuse than by a claimant with a good one.

### Guidance from the courts

Perhaps it is no surprise that we might conclude that looking to the words of the statute alone will provide limited constraining guidance. Such a generally worded provision clearly will require judicial interpretation. But if we look to the courts for clear guidance we may conclude that we look in vain. This is not because of lack of opportunity. If we take as a

reference point the important Court of Appeal decision in *KR v Bryn Alyn Community (Holdings) Ltd (in liquidation) and others*<sup>28</sup> section 33 has found itself under consideration in the Court of Appeal on 23 occasions and in the House of Lords/Supreme Court on 3 in the 14 years since, an average of almost 2 cases in the higher courts per year. Those figures by themselves may give some cause for concern. The fact that so many litigants find it worthwhile to invest the time, energy and money in pursuing an appeal, and the fact that appeal courts grant leave for them to do so, would suggest a significant lack of confidence in the outcomes being returned by first instance judges.

With so many cases going to the appeal courts over that period of time, not to mention those heard earlier than that, there will be inevitable difficulties in imposing any sense of order on the sheer volume of material. Ploughing through the cases chronologically is unlikely to elucidate a great deal, rather it seems preferable to attempt to identify themes which might provide a source of some helpful informing guidance.

#### The nature of the claimant's task

While there is no dispute that it is the claimant who bears the burden of proof under section 33, the courts have not been entirely consistent as to the nature of the claimant's task in discharging that burden. This was an issue considered early on by the courts. Lord Denning in *Firman v Ellis* noted that the Law Reform Committee whose report led to the enactment of what is now section 33 discretion had recommended a limited discretion, expressed as being for a 'residual class of cases' but went on to note that the legislation imposed no such restrictions<sup>29</sup>. Accordingly, Lord Denning's position was that this was a wide, unfettered discretion. Despite what might have been regarded as Lord Denning's clear and definitive viewpoint, the Court of Appeal has subsequently flirted with what might be called the 'heavy burden' doctrine, that is to say that the claimant bears not merely a normal civil burden of proof but some form of heavier, if largely unquantified, burden. The heavy burden doctrine is not, necessarily, inconsistent with Lord Denning's view of the unfettered nature of the discretion. Arguably they are addressing different issues. Lord Denning is dealing with the question of whether the type of case to which section 33 applies is somehow limited; the heavy burden doctrine may start from the premise that the discretion is available in all cases but may expect the claimant to do something more onerous in order to convince a court to exercise that discretion in his favour.

The origins of the heavy burden doctrine can be traced to the decision of the Court of Appeal in *KR and others v Bryn Alyn Community (Holdings) Ltd (in liquidation) and another*<sup>30</sup>. This was a consolidated action involving a number of claimants who alleged physical and/or sexual abuse in the defendant's children's home many years earlier. The number of claimants involved and the complex facts led to the Court of Appeal dealing with a large number of different issues during the course of the appeal. Auld LJ, giving the judgment of the court, did, however, take the opportunity to review some general principles as he saw them. Thus, he said, '[T]he burden of showing that it would be equitable to disapply the limitation period lies on the claimant and it is a heavy burden. Another way of putting it is that it is an exceptional indulgence to a claimant, to be granted only where equity between the parties demands it...'<sup>31</sup> In support of his position Auld LJ prays in aid a statement of Lord Diplock in the House of Lords in *Thompson v Brown* where he said of the exercise of discretion that '[t]his is by way of exception, for unless the court does make a direction the primary limitation period will continue to apply'<sup>32</sup>. With respect to Auld LJ, his interpretation is open to two criticisms. In the first place it does not seem to map on to the statutory language, which gives no hint of the placing upon the claimant of any especially heavy burden. In the second place he would appear to make rather too much of the statement of Lord Diplock which he uses to shore up his position. To describe something as an 'exception', as Lord Diplock does, is rather different from describing it as an 'exceptional indulgence'. Lord Diplock makes it clear that when he is using the word 'exception' he is doing no more than describing the factual reality – the case is out of time except when the court decides to exercise its discretion in favour of the claimant. To elevate that, as Auld LJ does, into a proposition about the nature of the claimant's burden is unconvincing. Notwithstanding this, the heavy burden doctrine was taken up in subsequent cases in the Court of Appeal<sup>33</sup>.

However, the heavy burden doctrine has come in for criticism and, it is submitted, that the preponderance of authority is against it. In *Kew v Bettamix Ltd*<sup>34</sup> Leveson LJ reverts to the original meaning of Lord Diplock's statement (and, indeed, seeks to deny that Auld LJ was seeking to state anything different)<sup>35</sup>. The matter is put at its clearest by Smith LJ in *Ministry of Defence v AB and others* when she referred to Auld LJ's heavy burden doctrine as being 'no longer good law'<sup>36</sup>. As she noted, 'the court's duty is to do what is fair'<sup>37</sup>.

So, while on the face of it it can be said that there is conflicting Court of Appeal authority on the matter, the heavy burden doctrine can probably now be regarded as an historical blip<sup>38</sup>. Exercise of the discretion is exceptional only in the sense of being an exception and while the claimant bears the burden of proof that burden is not subject to some especially high threshold.

### The prejudice to the defendant

The balancing exercise inherent in section 33 requires a consideration of the relative prejudice suffered by the claimant and the defendant. Leaving aside the question of the impact the passage of time may have on the possibility of a fair trial (to which I will return) what is the nature of the prejudice suffered by the defendant? Put another way, what is it that the defendant has lost if the court allows the claimant's claim to proceed?

Most obviously, of course, the defendant has lost his limitation defence and has to face, on the merits, a claim he would otherwise have avoided. So, what is the significance of (and the weight to be assigned to) the loss of that defence?

The earlier cases were not unanimous on this point. In *Hartley v Birmingham City District Council*<sup>39</sup>, a case where proceedings were issued one day late, Parker LJ was doubtful as to whether or not loss of the limitation defence as such was ever likely to count for much in the process of balancing. His rationale for this was that that loss would almost always be equalled by the claimant's loss of the ability to pursue her claim if permission to proceed was refused<sup>40</sup>. Not long afterwards, however, in *Nash v Eli Lilly*<sup>41</sup>, also in the Court of Appeal, Purchas LJ cast doubt on the proposition of Parker LJ, at least as a proposition of general application<sup>42</sup>. For Purchas LJ, requiring a defendant to defend a case even if they may ultimately succeed on the merits, could not necessarily be dismissed so lightly. His concern seemed to relate particularly to circumstances in which the claimant's case was poor and even if it was lost after an adjudication on the merits, putting the defendant to the effort of defending such a case might, he felt, outweigh the claimant's prejudice in losing the ability to pursue a poor case<sup>43</sup>.

The issue these two cases raise might be referred to as the windfall doctrine – is the limitation defence a mere windfall for the defendant and, consequently, is the loss of that defence of limited concern in the section 33 balancing exercise? In asking this question it is important to distinguish two different situations: one in which the loss of the limitation defence causes some forensic prejudice to the defendant in defending the claim, a matter to which I will return, the other where what is being considered is the value of the loss of the limitation defence of itself. It is only the latter of these that can be termed a windfall. It is not difficult to see that a defendant who has suffered forensic prejudice in mounting a defence is in a different position from one who has not.

In many ways there may be a connection between the windfall doctrine and the heavy burden doctrine. The idea that the claimant comes to the task with a particularly heavy burden would map on well to the idea that the defendant has lost something of intrinsically high value by virtue of losing the limitation defence. Perhaps the consignment of the heavy burden doctrine to history can equally suggest that the courts will be more open to seeing the limitation defence as no more than a mere windfall to which little weight needs to be attached.

This was an issue addressed by Smith LJ in *Cain v Francis*<sup>44</sup>. This involved two claims in which there were no defences available to the defendants on the merits and, therefore, no issues of consequential forensic prejudice. The two trial judges had, however, adopted diametrically opposed approaches as to the significance of the loss of the limitation defences as such. As Smith LJ put it ‘there should be consistency of approach between judges on an issue as fundamental...’ as this<sup>45</sup>. After a lengthy review of the authorities Smith LJ concluded that ‘...in a case where the defendant has had early notice of the claim, the accrual of a limitation defence should be regarded as a windfall and the prospect of its loss, by the exercise of the section 33 discretion, should be regarded as either no prejudice at all...or only a slight degree of prejudice...It is whether the defendant has suffered any evidential or other forensic prejudice which should make the difference<sup>46</sup>’. This is a statement that requires some analysis.

It will be noted that Smith LJ’s proposition is founded on the notion that the defendant has had early notice of the claim. This was clearly relevant on the facts of the cases before the court but, it is submitted, should not, of itself, be assumed to be decisive. As she goes on to

make clear the real question is the degree of forensic prejudice. Lack of forensic prejudice may arise not only in circumstances where there was early notification. It is, for example, possible to imagine a scenario in which an accident was fully and extensively investigated shortly after it occurred<sup>47</sup>, but where, for whatever reason, the claim comes only sometime later. It is submitted that the logic of Smith LJ's position would be that that situation would not elevate in importance the loss of the limitation defence because the extent of the initial investigation would still mean that there is unlikely to be any significant forensic prejudice and all that is being lost is the limitation defence itself. Equally, there may be cases where no such initial investigations took place but where the evidence on liability is sufficiently overwhelming that it is clear the defendant has no real defence on the merits. Again, such a case would not produce any forensic prejudice.

The second point raised may be whether a defendant might have a legitimate ground of complaint in respect of the windfall doctrine. Might a defendant not say that we have been granted this defence by the will of Parliament and, effectively, to belittle the intrinsic value of that right is to undermine Parliament's clear intent? While this argument may seem superficially attractive it tends to regard the limitation regime as a series of separate rights rather than as a scheme. While it is true that the legislation grants a limitation defence, and that defence must be regarded as important, it is equally true that that defence should not be viewed in isolation from the discretionary powers contained in section 33 that permit claimants to be relieved from the limitation defence. Once both parts of the limitation regime are seen holistically the notion of the limitation defence as a windfall makes more sense.

#### The prejudice to the claimant

On the face of it, what the claimant loses if not allowed to proceed is obvious – she loses her claim, irrespective of its substantive merits. But there are some claimants for whom the loss of that claim is less punitive than it is for others. Section 33 cases arise in many circumstances, but one such circumstance is where solicitors have negligently failed to issue proceedings in time, thereby allowing the claim to become time-barred in breach of the duty they owe to the claimant. So far as prejudice is concerned, what is the significance of the fact that such claimants will have a claim over against their original solicitors?

This is one area where the cases have presented a relatively consistent approach, even if it is one which may not help greatly to minimise the predictability deficit. This is that such a claim over is, as Smith LJ puts it in *Cain v Francis* 'relevant but not determinative'<sup>48</sup>. What this seems to mean is that where the defendant has suffered some forensic prejudice then the fact that the claimant has another cause of action which he may pursue is a factor in the exercise of the discretion. But, at least in cases where there is no such forensic prejudice, the mere fact that the claimant may be able to look elsewhere for recompense is not, by itself, a reason to let the original defendant off the hook<sup>49</sup>. That this is a relatively consistent position of the courts is confirmed by comments in *Firman v Ellis*<sup>50</sup>, one of the earliest Court of Appeal decisions on the discretionary power now found in section 33. Lord Denning MR was critical of the defendants' submission that their liability (in the capacity of road traffic accident insurers) should be passed on to the insurers of the claimant's negligent solicitors. As he put it, '[a]s a matter of simple justice it is the defendants' insurers who should pay the plaintiff's claim. They have received the premium to cover the risk of these accidents<sup>51</sup>'. While it is submitted that Lord Denning reaches the correct conclusion, his reason for doing so is less convincing. There are, of course, two sets of insurers interested in this case, the road traffic insurers of the original defendants and the professional negligence insurers of the solicitors. Both will have received a premium for insuring against the very risk that has materialised. It is not entirely clear that absolving the professional negligence insurers from liability is the obviously just outcome. There may be better justifications than those offered by Lord Denning. These are threefold. Firstly, there is what might be termed the inconvenience factor. A claimant would need to commence fresh proceedings against another party (his negligent solicitor) and incur the time and trouble involved in locating and instructing new solicitors to do so. At the very least that is likely to keep the claimant out of the compensation to which he is entitled for a longer period<sup>52</sup>. Secondly, in suing his former solicitors the claimant is suing a party who will be aware of any weaknesses which may have existed in the claimant's case, whether as to liability or quantum. Thirdly, the nature of professional negligence claims is that they are claims for loss of a chance and, particularly if there are any issues on liability or causation, there is no guarantee that the claimant will receive against his former solicitors the full value of the original claim<sup>53</sup>.

A second theme in relation to the prejudice of the claimant is the presumptive value of what the claimant may be losing. This involves the court in making an assessment of the underlying claim to determine its 'worthwhileness'. Despite a warning by the Court of Appeal of the dangers of basing any decision on the ultimate prospects of success, bearing in mind the generally interlocutory nature of limitation hearings<sup>54</sup> the issue of proportionality seems to have become increasingly prominent.

In *McGhie v British Telecommunications Plc*<sup>55</sup> the claimant suffered a back injury at work in 1998 but did not commence proceedings until 2003. The claimant's medical evidence was to the effect that he had sustained an acceleration of a pre-existing back injury by a period of about 5 years. May LJ noted that 'the pleaded case on liability is thin'<sup>56</sup> and, further, that it appeared to have a value, if successful, of between £10,000 and £20,000<sup>57</sup>. These two factors, together with the length of the delay and the evidential prejudice that delay was considered to produce were mentioned specifically by May LJ as being the grounds on which the claimant's application was refused<sup>58</sup>.

The idea of proportionality is very much a 'zeitgeist concept' in litigation<sup>59</sup> but the rationale of *McGhie* may be open to some criticism. If a claim can be demonstrated to have 'no real prospect' of success then powers already exist to grant summary judgment to the defendant<sup>60</sup>. If a defendant is unable to surmount that hurdle the inevitable implication must be that there is a triable issue. It is not clear why a defendant should be given another route to what is, in effect, summary judgment with a lower threshold through the medium of section 33. The second criticism may be one of perspective. The underlying assumption of May LJ's comments is that a claim worth, potentially, in the region of £20,000 is a claim of relative insignificance. To the vast majority of people, of course, £20,000 is a very significant amount of money. The increasing tendency of the courts to tell ordinary people that their claims are not worth the costs of adjudication is a trend entirely antipathetic to all notions of access to justice.

#### Forensic prejudice and the capacity for a fair trial

It is not surprising that the ability to have a fair trial looms large in many of the section 33 decisions. The impact of the delay on the evidence is, after all, one of the specific factors listed in section 33(3)<sup>61</sup>. But the general conclusion of this article will be that this is a factor

to which too little weight is paid by the courts and that, in contrast, evidential cogency and the ability to have a fair trial should be the dominant factor in the exercise of section 33 discretion.

Evidence can come in a number of forms<sup>62</sup>. For present purposes it is possible to simplify this variety into 3 types – documentary, oral and expert. Expert evidence is secondary in nature – it does not purport to speak directly to what may have occurred, rather it is interpretive and is, therefore, dependent on the existing primary oral and documentary evidence. It is the cogency of this primary evidence that is in issue here, because expert evidence is likely to be only as cogent as the primary evidence upon which it is based. Documentary evidence can have an important function in some personal injury claims and can, sometimes, be the key and determinative evidence. For example, in a clinical negligence case the content of the medical records, and the expert interpretation of them, may often be the entirety of the liability evidence. But in most personal injury cases the key evidence, often the only evidence, is oral. It is people saying what happened. As such it is primarily recollective rather than interpretive and, as such, it is a product of human memory. This leads us to some of the key issues in section 33 cases – how does the passage of time impact upon the probative value of that recollected evidence, and how do the courts deal with any deficiencies in evidential cogency in making their section 33 assessments.

In saying, in *Adams v Ali*, ‘the cogency of the evidence will undoubtedly have been affected to some extent [by the delay] because memories fade’ Ward LJ was echoing an assumption that seems common among judges – that the passage of time will necessarily have an adverse impact on the cogency of recollective evidence<sup>63</sup>. In one sense this statement has a superficial attractiveness – it is a common experience that the passage of time has an impact on memory. But in the context of these kinds of decisions it might have been hoped that judges could adopt a more subtle and nuanced approach to what they are actually saying about the relationship between time and memory.

What judges appear to be saying when they use phrases like ‘memories fade’ is that the passage of time makes the evidence they are hearing from a witness inherently less reliable. Psychological research would suggest that the position is, at the very least, less simplistic than that statement might suggest. As Davies puts it ‘It is a truism that memory

deteriorates over time'. But he goes on to say that 'the rate of loss and whether all experiences are lost at the same rate are matters of continuing controversy<sup>64</sup>'. In fact, research into memory accuracy over time is of relatively recent vintage<sup>65</sup>. The reasons for this research deficit are largely methodological and can be readily appreciated<sup>66</sup>. Testing memory accuracy over time requires 2 things which might be difficult to achieve experimentally. The most obvious of these is, of course, time. The second is a means of assessing the factual accuracy of the base events which are being recalled. Indeed, much memory research has focused on memory quantity, rather than memory quality, for example testing recall of a list of random words or syllables<sup>67</sup>. This may not provide an accurate reflection of how real life memory operates. Rather, it seems that such research as exists would suggest that memory reliability is governed by a complex matrix of factors, of which time is merely one<sup>68</sup>. Most research in the area would also seem to agree that autobiographical memory has a higher level of resilience than other types of memory, particularly if it is autobiographical memory of vivid events, as might be expected in the case, for example, of a claimant injured in a sudden one-off accident. Baddeley et al offer 4 possible reasons for this, all of which would seem to make intuitive sense:-

1. 'such events are highly distinctive, with little danger of their being confused with other events;
2. We tend to talk about such events, rehearsing them
3. They tend to be important events that potentially change some aspects of our lives
4. They give rise to emotions<sup>69</sup>

As they also say, 'we can easily remember experiences for a long time if they are unique<sup>70</sup>'. Routine, it would seem, makes life less memorable.

Judges dealing with recollected evidence of witnesses and, even more so, claimants, in personal injury cases are dealing with autobiographical memory of vivid events. While this does not, of course, make such evidence immune from error, it might be thought appropriate that judges engage in a somewhat more sophisticated assessment than that of the 'memories fade' type.

But there is also another aspect of memory accuracy that is of importance in the context of these cases. This is the question of what is being compared with what. Section 33

(3)(b) requires the court to have regard to ‘the extent to which, *having regard to the delay*, the evidence adduced or likely to be adduced...is or is likely to be less cogent than if the action had been brought [in time]’ (emphasis added). This would clearly suggest that the relevant comparison is that between the cogency of the evidence now, as opposed to the cogency of the evidence had the trial taken place at the time it might have been expected to have taken place had the claimant issued within the limitation period. And bearing in mind that the claimant could legitimately have issued at any time up until the expiry of 3 years from his date of knowledge, could have served the proceedings up to 4 months after that<sup>71</sup> and could, even if progressing the case with reasonable dispatch, have taken 18 months to get to trial, the question a court should be asking is how much less cogent is the evidence now as opposed to how cogent it might have been had the trial taken place at any point up to some 5 years after the claimant’s date of knowledge. Put another way, the question is not about the cogency of the evidence now, but about how much *extra* damage has been done to that cogency by the passage of time beyond the date when the claimant ought to have been getting his case before a judge. This is an important distinction because psychological research seems largely agreed that forgetting tends to be at its peak early in the time-line from the event and thereafter to flatten out. As Baddely puts the point ‘...the rate of forgetting is nonlinear, with amount forgotten being initially rapid, then slowing down<sup>72</sup>’. Koriat et al noted that research on autobiographical memory using diary entries showed a deterioration in accuracy over time, but that a significant amount of that deterioration had occurred within the first 2 ½ years<sup>73</sup> and while Bahrick was testing something rather different (retention of High School Spanish) he also concluded that retention declined quickly in the early years but after that showed very little evidence of further decline over the long term<sup>74</sup>. If these researchers are correct, this might suggest that the degree to which there is further significant decline in memory accuracy beyond the earliest time when a trial might realistically have taken place is very limited indeed. Put another way, judges need not be especially more suspicious of witness evidence about, say, the events of an accident, if it is given 6 years after the event, as opposed to 3 years after the event, because most of the accuracy deficit would already have occurred within that initial 3 year period.

There is one caveat to all this which is also highlighted in the research. That is that it may not be sufficient to talk about memory accuracy for events as if all parts of any given event are remembered or forgotten in the same way. The conclusion of Gold et al was that while fine detail of memory decays over time, broad outline memory is much more robust<sup>75</sup>. Baddeley confirms the point when he says ‘...much of our autobiographical recollection of the past is reasonably free of error, provided we stick to remembering the broad outline of events. Errors begin to occur once we begin to try to force ourselves to come up with detailed information from an inadequate base<sup>76</sup>’.

Judges, of course, are not psychologists. Nor is there any need for them to be so. All that this research would suggest is that judges should take a more nuanced view of the decay of memory accuracy by the passage of time. Rather than making bland generalisations of the ‘memories fade’ type it might be more helpful if judges gave clearer analysis to the likely impact of memory decay on the particular piece of evidence in the case. This may include considerations of the importance of memory evidence to the issues, the degree of involvement of the particular witness in the events being remembered, and the extent to which any memory decay which may have occurred may already have occurred within the limitation period and is, therefore, unaffected by any subsequent delay. That judges may not do this consistently is illustrated by *McDonnell v Walker* where Waller LJ declined to permit the claim to proceed concluding that ‘clearly forensic prejudice had been suffered by the defendant or more accurately his insurers’<sup>77</sup>. Waller LJ located this prejudice in the realm of quantum rather than liability. This was a case where there was an early claim and early admission of liability but the size of the claim became greatly increased after proceedings were eventually commenced some seven years after the date of the relevant accident. While it is entirely proper to conclude that prejudice to a defendant can lie in quantum just as much as it can in liability, what Waller LJ failed to do was to identify any evidence that had been lost or made more difficult to access, or any way in which the defendant would have behaved differently had it been aware of the scale of the claim at an earlier stage. Indeed, even had proceedings been commenced in time it is perfectly possible that the defendants would have found themselves in exactly the same position as the claimant’s medical evidence developed. This feels very much like a case in which prejudice is

being assumed from the mere fact of delay rather than being identified on the basis of tangible evidential decay.

### Conclusions

It is now necessary to try to draw together some threads and, in particular, to consider how the section 33 regime as operated by the courts matches up to the four main aims highlighted earlier. It is clear that in applying section 33 courts adopt a multi-factorial approach. This is unsurprising in a regime where judges are directed to consider all the circumstances of the case. But it might be questioned as to whether that approach is helpful in advancing the aims of the law, in particular the reduction of the predictability deficit so far as is feasible, and the achievement of an adequate level of corrective justice.

As has been indicated earlier, section 33 fails entirely the aim of providing repose to defendants in relation to any individual acts. This is inherent in the nature of a discretionary regime which is not time-limited. This may, however, be of limited significance when looked at in terms of real-world personal injury cases. The idea behind repose is that individual defendants can move on from individual events free from the fear that they are still subject to a potential claim. But the vast majority of the real defendants in personal injury cases are not individuals in that sense at all. Rather they are insurance companies. It may remain important for insurance companies to be able to reach commercial conclusions about likely exposure, but so long as they can do so broadly, in a statistical sense, across their risk, they do not, for the most part, care too much about which individual claims may crawl out of the woodwork at a late stage. Claims experience will provide sufficient commercial repose for insurance company defendants.

Two of the remaining three aims are closely related. These are the degree to which there is a proper regard for corrective justice and the degree to which claimants are being treated fairly. As a broad proposition, if corrective justice is being properly served then claimants will be being treated fairly because wrongs, if proven to have taken place, will be being righted. In the absence of a powerful counter veiling imperative, a limitation system which obstructs the righting of wrongs would seem to be failing to satisfy an important purpose of the underlying law. One of the problems here, however, is that the entire concept of limitation periods runs the risk of failing to achieve corrective justice, not just

section 33<sup>78</sup>. Assuming a wrong can be proved, then preventing a claimant from succeeding in a claim seems to be an obstruction of corrective justice. This raises the question of whether the 'mere' passage of time represents a good counter veiling reason to justify a departure from corrective justice. By enacting section 33 the legislature would seem to suggest that it does not. The 'mere' passage of time is no longer a sufficiently good reason to bar a claim. Rather courts are directed to consider what is equitable in the context of the relative prejudice to claimant and defendant. Instead of putting into the balance a whole range of issues including what seems to be a moral consideration of the claimant's reasons for delay, courts may do better to focus on the issues of forensic prejudice in order to determine whether or not it is still possible to do corrective justice between the parties. Put another way, when is it equitable to exercise section 33 discretion in favour of a claimant? The answer would seem to be when that claimant can prove, by evidence of sufficient robustness and reliability, that he has been wronged by that defendant. Because if a claimant who can prove that is deprived of his opportunity to do so, that is presenting to the defendant an unjustified windfall which enables him to escape the consequences of (provably) wrongfully inflicted damage. And in making that assessment about forensic prejudice it would be useful for courts to bear in mind who bears the burden of proof. The likelihood is that any deterioration in evidence will impact at least as much on claimants as on defendants, if not more so.

A concentration by the courts on forensic prejudice would also assist with the remaining aim that the law should seek to achieve: that is to keep the predictability deficit at as low a level as is reasonably possible. While any discretionary regime will involve some degrees of uncertainty, one focused on the ability of a claimant to prove his case relegates in importance such highly impressionistic considerations as the worthiness of the claimant's justifications for the passage of time.

This does not involve any major change in approach. Rather it is a shift of emphasis. The issue of forensic prejudice is already one of the considerations which courts evaluate. To suggest that they should give greater priority to this, and that they should evaluate forensic prejudice in a more analytical way, is no more than a plea to courts to keep firmly in focus the aim of righting wrongs, which is central to the common law method.

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<sup>1</sup> Law Commission, *Limitation of Actions Consultation Paper* (Law Com CP151, 1998) paras 1.27 – 1.28

<sup>2</sup> *Ibid*, paras 1.35 – 1.38

<sup>3</sup> ‘...few practitioners can now be unaware that one of the surest routes to incontestable liability for professional negligence is to allow a valid claim to become time-barred’ – Brian Childs, ‘The importance of being punctual’ (1996) 47 NILQ 98

<sup>4</sup> Such a discretionary power to extend the primary limitation period is not a feature of limitation law more generally, although a broadly similar power does exist in relation to defamation cases, by virtue of section 32A Defamation Act 1980

<sup>5</sup> n1 – para 1.14

<sup>6</sup> [1963] AC 758

<sup>7</sup> *Forbes v Wandsworth Health Authority* [1997] QB 402, 424, Roch LJ (dissenting as to outcome on the facts of the case)

8. *McDonnell v Walker* [2009] EWCA Civ 1257; [2010] PIQR P5 [18] (Waller LJ)

<sup>9</sup> This was recognised in the Orr Report, which led to the first introduction of discretion into modern limitation law, enacted in section 2D Limitation Act 1975, in substantially the same terms as the provisions now found in section 33 – Interim Report of the Law Reform Committee on Limitation of Actions (Cmnd 6923, 1974) para 35

<sup>10</sup> *Dobbie v Medway Heath Authority* [1994] 1 WLR 1234; *Forbes v Wandsworth Health Authority* [1997] QB 402

<sup>11</sup> *Collins v Secretary of State for Business, Innovation and Skills* [2014] EWCA Civ 717; [2014] PIQR P19

<sup>12</sup> As an underlying justification for the existence of limitation periods this sense of repose is of significant vintage – *A’Court v Cross* (1825) 3 Bing 329, 332 (Best CJ)

<sup>13</sup> *Forbes v Wandsworth Health Authority*, n7, Stuart Smith LJ 412

<sup>14</sup> Michael Franks, *Limitation of Actions* (Sweet & Maxwell 1959) 4

<sup>15</sup> See, for example, Anthony Beever, ‘Corrective Justice and Personal Responsibility in Tort Law’ (2008) 28 OJLS 475, 475; Izhak Engalrd, *The Philosophy of Tort Law* (Dartmouth 1993) 11-20; Peter Cane *The Anatomy of Tort Law* (Hart Publishing 1997) 17-18; Richard Mullender, ‘Corrective justice, distributive justice and the law of negligence’ (2001) 17 PN 35, 35; Ernest Weinrib, ‘Corrective Justice in a Nutshell’ (2002) 52 U Toronto LJ 349

<sup>16</sup> *X v Bedfordshire County Council* [1995] 2 AC 633, 749

<sup>17</sup> Richard Mullender, ‘Negligence, breach of duty, and circumstantial pressure’ (2016) 32 PN 105, 109

<sup>18</sup> *Cain v Francis; McKay v Hamrani* [2008] EWCA Civ 1451; [2009] QB 754 (CA) [39] (Smith LJ)

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<sup>19</sup> Ibid

<sup>20</sup> Ibid [1] – [3]. A similar point on the need for guidance from the Court of Appeal had been made much earlier by Parker LJ in *Hartley v Birmingham City District Council* [1992] 1 WLR 968 (CA), 979

<sup>21</sup> Ronald Dworkin, *‘Taking Rights Seriously’* (1977 Harvard University Press) 69

<sup>22</sup> Ibid 31-32

<sup>23</sup> *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 AC 457

<sup>24</sup> [1978] QB 886, 905, considering identically worded provisions in the Limitation Act 1975

<sup>25</sup> Ibid 905

<sup>26</sup> *Donovan v Gwent Toys Ltd* [1990] 1 WLR 472, 477-478 (Lord Griffiths)

<sup>27</sup> *Thompson v Brown* [1981] 1 WLR 744, 751 (Lord Diplock)

<sup>28</sup> [2003] EWCA Civ 85; [2003] 3 WLR 107 (CA)

<sup>29</sup> n24 904-905

<sup>30</sup> n28

<sup>31</sup> Ibid [74]

<sup>32</sup> n27, 750

<sup>33</sup> Eg, *Burgin v The Sheffield City Council* [2005] EWCA Civ 482 (CA).

<sup>34</sup> [2006] EWCA Civ 1535; [2007] PIQR P16 (CA). See also *Adams v Ali* [2006] EWCA Civ 91; [2006] 1 WLR 1330 (CA) [30] (Ward LJ)

<sup>35</sup> Ibid, *Kew v Bettamix* [28].

<sup>36</sup> *Ministry of Defence v AB and others* [2010] EWCA Civ 1317 (CA), (2011) 117 BMLR 101 [96]. By putting it in this way, of course, Smith LJ leaves over the issue of whether the doctrine ever was good law. *AB* was appealed to the Supreme Court but largely on the issue of date of knowledge and this comment was not challenged: *AB and others v Ministry of Defence* [2013] UKSC 9; [2013] 1 AC 78 (SC)

<sup>37</sup> Ibid

<sup>38</sup> Although as recently as 2012 the Court of Appeal still found itself needing to disapprove of the approach of a circuit judge who had applied the heavy burden doctrine in finding against a claimant - *Sayers v Lord Chelwood (deceased) and Chelwood* [2012] EWCA Civ 1715; [2013] PIQR P8. The Court of Appeal did, in the end, conclude that the judge had reached the correct outcome in denying the claimant the opportunity to proceed, but criticised the method by which the judge had reached that conclusion, through the application of the heavy burden doctrine.

<sup>39</sup> [1992] 1 WLR 968 (CA)

<sup>40</sup> Ibid 972-979

<sup>41</sup> [1993] 1 WLR 782 (CA)

<sup>42</sup> Ibid 803-805

<sup>43</sup> Ibid 804

<sup>44</sup> *Cain*, n18 [38]

<sup>45</sup> Ibid [39]

<sup>46</sup> Ibid [57]

<sup>47</sup> For example by the police, the Health and Safety Executive or, indeed, by an employer for its own internal purposes

<sup>48</sup> *Cain* n18 [72]

<sup>49</sup> Ibid. For an earlier example of a similar outcome, see *Das v Ganju* [1999] PIQR P260

<sup>50</sup> n24

<sup>51</sup> Ibid, 906

<sup>52</sup> n27, 750 (Lord Diplock)

<sup>53</sup> Harvey McGregor, *‘McGregor on Damages’* 19<sup>th</sup> edn (Sweet & Maxwell 2014) 388-393

<sup>54</sup> *Davis v Jacobs* [1999] Lloyd’s Rep Med 72 (CA)

<sup>55</sup> [2005] EWCA Civ 48; (2005) 149 SJLB 114

<sup>56</sup> Ibid [42]

<sup>57</sup> Ibid [25]

<sup>58</sup> Ibid [48]

<sup>59</sup> See the overriding objective found in part 1.1 of the Civil Procedure Rules

<sup>60</sup> Part 24.2 of the Civil Procedure Rules

<sup>61</sup> Section 33(3)(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...’

<sup>62</sup> Steve Uglow, *Evidence – Text & Materials* (2<sup>nd</sup> edn, Sweet & Maxwell 2006) 22

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- <sup>63</sup> *Adams v Ali* [2006] EWCA Civ 91; [2006] 1 WLR 1330 [39]. See also Waller LJ in *McDonnell v Walker* [2009] EWCA Civ 1257; [2010] PIQR P5 [31]
- <sup>64</sup> Graham Davies, 'Witnessing Events' in G.M. Davies and R.H. Logie (eds), *Memory in Everyday Life* (Elsevier Science Publishers 1993) 367
- <sup>65</sup> Harry P Bahrick, 'Semantic memory content in permastore: fifty years of memory for Spanish learned in school' (1984) 113 *J of Experimental Psychology: General* 1, 1-2
- <sup>66</sup> *Ibid* 2
- <sup>67</sup> Alan Baddeley, Michael W Eysenck, Michael C Anderson, *Memory* (Psychology Press 2009) 193; Asher Koriat, Morris Goldsmith, Ainat Pansky 'Towards a Psychology Of Memory Accuracy' (2000) 51 *Annual Review of Psychology* 481, 482; Asher Koriat and Morris Goldsmith 'Memory in naturalistic and laboratory contexts: distinguishing the accuracy-oriented and quantity-oriented approaches to memory assessment' (1994) 123 *J of Experimental Psychology: General* 297
- <sup>68</sup> Robert L Greene, *Human Memory. Paradigms and Paradoxes* (Lawrence Erlbaum 1992) 153
- <sup>69</sup> Alan Baddeley et al, n67, 148
- <sup>70</sup> *Ibid* 200. The same point is made by Helen L Williams, Martin A Conway, Gillian Cohen, 'Autobiographical memory' in Gillian Cohen and Martin a Conway (eds), *Memory in the Real World* (Psychology Press 2008) - 'Some of the things that tend to make an event memorable are characteristics of the event itself, and operate at the time of encoding. Events that are personally important, consequential, unique, emotional, or surprising are liable to be better remembered' - 78
- <sup>71</sup> Civil Procedure Rules Part 7.5
- <sup>72</sup> Alan Baddely, *Human Memory – Theory and Practice* (Psychology Press 1997) 169
- <sup>73</sup> Asher Koriat, Morris Goldsmith, Ainat Pansky 'Towards a Psychology of Memory Accuracy' (2000) 51 *Annual Review of Psychology* 481, 510-511. See also Ebbe B Ebbesen and Cynthia B Rienick 'Retention Interval and Eyewitness Memory for Events and Personal Identifying Attributes' (1998) 83 *J of Applied Psychology* 745
- <sup>74</sup> n65, 20-21
- <sup>75</sup> Jason M Gold, Richard F Murray, Allison B Sekuler, Patrick J Bennett, Robert Sekuler 'Visual Memory Decay is Deterministic' (2005) 16 *Psychological Science* 769.
- <sup>76</sup> n72, 222
- <sup>77</sup> [2009] EWCA Civ 1257; [2010] PIQR P5 [31]
- <sup>78</sup> Keith Patten 'Limitation Periods in Personal Injury Claims. Justice Obstructed?' (2006) 25 *CJQ* 349