Introduction

Limitation case law

Determining whether limitation is an issue?

Running a limitation defence

Trying limitation as a preliminary

Appendices

Appendix A: Table of Cases
Appendix B: Questions to claimant
Appendix C: Questions to a claimant’s medical expert
Appendix D: Arguments in favour of preliminary trial
Under the Limitation Act 1980 a claim is time barred under sections 11 and 14 of the Act if it is brought more than 3 years after the cause of action accrued or after the claimant’s ‘date of knowledge’ (whichever is the later-s.11 (4) (a) (b)).

In essence, ‘knowledge’ is when a claimant first had knowledge that the injury was significant and attributable to the alleged wrongdoing (s.14(1)).

There are 2 types of knowledge- actual and / or constructive.

Actual knowledge is that knowledge which the claimant actually acquires.

Constructive knowledge is knowledge which a claimant might reasonably have acquired (even if they did not) from facts observable or ascertainable by him or with the aid of expert advice (section 14(3)).

If a claim is statute barred the Court has the discretion to extend the limitation period to allow the claim to proceed out of time under s.33 of the Act having regard to ‘all the circumstances of the case’ but in particular addressing 6 factors set out at s.33 (3)(a)-(f).

Limitation is often a live issue in disease claims—particularly in noise induced hearing loss (NIHL) claims—because of the latency between exposure and onset of perceived disability.

This short guide considers the key caselaw on limitation and provides practical guidance on how to identify those cases where limitation may be an issue and how best to defend.
1. **The Limitation Period**

1.1 The period is 3 years: section 11(1), (3), (4) of the Limitation Act 1980.

1.2 The three year period runs from the date on which the cause of action accrued, or, if it is later, the date of knowledge of the person injured: section 11(4).

2. **‘Date of Knowledge’- section 14**

2.1 Date of knowledge refers to the date on which the injured person first has knowledge:

(a) that the injury was significant; and
(b) that it was attributable in whole or part to the alleged breach of duty; and
(c) the identity of the defendant or any other person alleged to have been in breach of duty: section 14(1).

2.2 Knowledge that the alleged breach of duty did or did not, as a matter of law, involve a tort is irrelevant: section 14(1). A claimant’s knowledge (or ignorance) of his right to bring a legal claim forms no part of the statutory test under s.14.

2.3 Actual knowledge is acquired when a claimant has a belief (that is more than a mere suspicion) which is held with sufficient confidence such that he should reasonably begin investigation as to whether he has a claim: **Ministry of Defence v AB [2012] UKSC9**.

2.4 For the purposes of section 14, an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgement: section 14(2).

2.5 ‘Knowledge’ includes constructive knowledge, that is knowledge which the claimant might reasonably have been expected to acquire:

(a) from facts observable or ascertainable by him; or
(b) from facts ascertainable by him with the help of expert advice which it is reasonable for him to seek: section 14(3).

2.6 But a claimant will not be fixed with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain and act on that advice.

2.7 The test for constructive knowledge is an objective one: would a reasonable adult in the position of the claimant (with the same age and mental capacity) have sought expert advice about the cause of their condition? Particular characteristics or the intelligence of the claimant are irrelevant. An individual who has suffered a significant injury should be assumed to be sufficiently curious to seek expert advice unless there are reasons why a reasonable person in that position would not seek advice. For example, an individual may be used to a condition from birth and may not therefore be curious. On the other hand, the unexpected removal of a leg would excite a high degree of curiosity. The degree of curiosity depends upon the seriousness of the condition: **Adams v Bracknell Forest Borough Council [2004] UKHL 29; Johnson v Ministry of Defence [2012] EWCA Civ 1505**.
2.8 An injury is significant if the claimant would reasonably have considered it sufficiently serious to justify his instituting proceedings against a defendant who conceded liability and was able to satisfy a judgment for damages: section 14(2). The test of what is a significant injury is concerned with quantum only—issues of the cause are not relevant: Dobbie v Medway Health Authority [1994] 1 WLR 1234. It is not difficult to show that injury is significant—provided it is more than de minimis then it satisfies the test under s.14(2): Rothwell v Chemical and Insulating Company [2006] ICR 158. Further the question of whether the injury is significant is decided by the seriousness of the injury and not by reference to its effect on the claimant’s private life or career: McCoubrey v Ministry of Defence [2007] EWCA Civ 17 [para 39]. The test is an entirely impersonal standard—what did the claimant know or ought to have known about the injury, and would the reasonable person armed with such combined knowledge have considered the injury significant? A v Hoare [2008] 1 AC 844 [para 34].

2.9 In the context of NIHL (and a male aged 61) a year is allowed as ‘thinking time’ between the time of realising there is a significant condition and the date on which a person ought reasonably to have taken expert advice: Johnson. In the context of both NIHL and HAIS it is assumed that if a claimant specifically sought medical advice in respect of those symptoms then a correct diagnosis would have been made: Johnson [paras 13 and 29] and Norton v Corus [2006] EWCA Civ 1630 [paras 16 and 20].

2.10 Attributable for the purposes of s.14 (1) (b) means ‘capable of being attributed to’, in the sense of being a real possibility rather than knowledge that injury was in fact caused. It is knowledge of possibilities that matters—a claimant only need enough knowledge for it to be reasonable for him to set about an investigation: Spargo v N Essex District Health Authority [1997] PIQR P235 and AB v Ministry of Defence [2012] UKSC 9.

2.11 Once there is knowledge the limitation period begins to run, even if harm of the kind already inflicted (such as further noise-induced hearing loss) continues to be inflicted during a later period. The continuation of harm does not postpone the limitation period. Rather, two limitation periods should be identified: one for the initial harm which begins to run once there is knowledge, constructive or otherwise, and one for the later continuing harm once there is knowledge of that harm: Malone v Reydon Heating Engineering Ltd [2014] EWCA Civ 904.
3. Dis-applying the limitation period—section 33

3.1 Where the limitation period has expired the court may dis-apply the limitation period and allow an action to proceed if it is equitable to do so having regard to the degree to which the limitation period prejudices the claimant and the degree to which dis-applying the period would prejudice the defendant: section 33(1).

3.2 The court must have regard to all the circumstances in deciding whether to exercise its discretion and in particular to:

(a) the length of, and reasons for, the claimant’s delay;
(b) the extent to which the cogency of the evidence has been affected by the delay;
(c) the conduct of the defendant after the cause of action arose;
(d) the duration of any disability of the claimant arising after the date of the accrual of the cause of action;
(e) the extent to which the claimant acted promptly and reasonably once he knew whether an alleged breach of duty might be capable of giving rise to a claim; and
(f) the steps taken by the claimant to obtain expert advice and the nature of any advice received.

3.3 Delay before the commencement of the primary limitation period can be considered as part of all of the circumstances of the case: Collins v Secretary of State for Business, Innovation and Skills [2014] EWCA 717. Particular consideration may be given to the period between the claimant’s date of knowledge and expiry of the limitation period: Beattie v British Steel; Monk v British Steel (unreported 6.3.1997).

3.4 The broad merits of the claim can also be considered. If a claim is weak, it militates against the exercise of the discretion: Collins v Secretary of State for Business, Innovation and Skills [2013] EWHC 1117 (QB) and Ministry of Defence.

3.5 Proportionality and the value of the claim are also important considerations. The Court should consider proportionality between the value of the claim and the costs of running it. Further if the claim is limited in value there is less prejudice to the claimant in the Court not exercising its discretion than if the claim has significant value: McGhie v British Telecommunications PLC [2005] EWCA Civ 48 [paras 31-38] and Robinson v St Helens Metropolitan Borough Council [2002] EWCA Civ 1099. [NB: Consider whether the disease is divisible and issues of apportionment and gaps in EL insurance cover. This may well reduce the true value of the claim and so strengthen the limitation defence—see Johnson at para 67].

3.6 Ultimately, section 33 asks if it is fair and just to allow the claim to proceed out of time. The burden is on the claimant to show it would be fair and just to allow the claim to proceed, but the defendant does have to show what efforts have been made to obtain evidence and that the evidence is less cogent due to the delay: Davies v Secretary of State for Energy and Climate Change [2012] EWCA Civ 1380. The issue of ‘paramount importance’ is the effect of the delay on the defendant’s ability to resist the claim. But a defendant should not be able to take advantage of its tortious acts when the decision to delay the issue of proceedings is the consequence of illness caused by the tort itself: Nicholas v Ministry of Defence [2013] EWHC 2351 (QB).

3.7 It should also be noted there is no longer a bar on the exercise of the section 33 discretion where a second action is brought out of time following a first action brought in time that is subsequently discontinued: Horton v Sadler [2007] 1 AC 307.

3.8 The key relevant case law is listed at appendix A with hyperlinks to the full judgements.
1. In many NIHL cases limitation may be an issue because of the latency between exposure and onset of perceived disability. Claimants invariably provide a history of recent onset of symptoms despite historic exposure to noise. It is important to check that such a history is compatible with the extent of overall hearing loss (age associated loss + NIHL).

3. There is a ‘reservoir’ of hearing which can be lost before there is any subjective disability. Subjective disability typically arises at around 20-25dB of loss (the ‘low fence threshold’). Often, the effects of NIHL are not perceptible until age associated loss begins to increase and/or hearing loss caused by other exposures exceeds this reservoir of hearing.

4. NIHL is a non-progressive condition. Once exposure to noise ceases so does any NIHL—there is no progressive deterioration other than arising as a result of natural ageing or some other pathology. The NIHL that exists today is the same as existed at the time exposure ceased.

5. If the claimant’s overall loss is significantly greater than the low fence threshold then it is likely there has been long standing disability or there is a third, recent cause of hearing loss which has caused disability to only recently onset. It is important to check that the degree of loss is ‘compatible’ with the history of onset of disability.
   - Estimate the claimant’s likely hearing loss at the time exposure ceased (AAHL+NIHL).
   - Would the overall binaural loss at this time exceed 20-25dB and so represent first disability?
   - If the overall loss at this time would not exceed the low fence threshold at what point would this happen?

6. Questions may need to be put to the claimant’s medical expert to establish the likely onset of disability. This exercise can also often assist on quantum as the medical expert may introduce a third, later cause of hearing loss to explain any incompatibility between the degree of loss and recent onset of symptoms. Even though this will not assist in any limitation defence, it will reduce the overall value of the claim.
Example:

C aged 70 when presents claim in 2012. He says symptoms only started in last few years;

Exposure to noise ceased in 1987 when C aged 45;

Overall loss in 2012 assessed by his medical expert at 60 dB loss-20 dB AAHL + 40 dB NIHL;

In 1987 C would have a NIHL of 40 dB-i.e. the same as exists today as non-progressive loss;

Predicted AAHL at age 45 (see appendix 2) would be 5 dB;

Overall loss in 1987 would be 45 dB (40 dB NIHL + 5 dB AAHL);

The overall loss in 1987 would exceed the low fence threshold-a history of recent onset is incompatible with the overall degree of hearing loss.
1. In any case where limitation may be in issue you will need to obtain full GP, hospital and occupational health records (if in existence). Occupational health records may also need to be obtained from other employers. The records may show / assist in determining the claimant’s actual date of knowledge.

2. Questions will need to be asked of the claimant in respect of limitation-a list of possible questions is set out at appendix B-sending template letters should be avoided and questions should always be relevant and tailored to each individual case.

3. Questions may need to be put to the claimant’s medical expert regarding the development of NIHL, the extent of overall hearing loss at the time exposure ceased, likely onset of symptoms / inconsistency between (typically recent) onset and degree of loss and apportionment (quantum). Typical questions are set out at appendix C. Again questions should always be relevant and tailored to each individual case.

4. Once you have determined likely onset of symptoms then it is reasonable to assume that primary limitation starts at least within a year. The Court will assume that the claimant would be sufficiently curious about the causes of loss to explore the reasons for the same and so acquire knowledge. The claimant effectively has a year of ‘thinking time’. Primary limitation starts at the end of this thinking time.

## LENGTH AND REASON FOR DELAY

5. Explore the length and reasons for any delay by the claimant (and solicitors) in proceeding with the claim by way of questions / part 18 requests.

6. Be pro-active in how you handle the claim. Do not add to any delay in the claim by not responding promptly to the claimant’s requests for information / documentation or investigating matters. Any such delay will adversely affect your limitation defence.
7. Examine the claimant’s evidence to identify and highlight all inconsistencies and ambiguity. This shows how delay has affected the cogency of the claimant’s evidence.

8. Examine the claimant’s disclosure. Are there relevant documents which can no longer be obtained? This may include occupational health screening / testing of hearing with other employers. This shows how delay has affected the cogency of the claimant’s evidence.

9. Examine and adduce evidence on how delay—not just since the expiration of limitation—but since employment ceased—has affected the cogency of the defendant’s evidence:
   - Does the defendant still exist?
   - If so have there been changes in corporate structure / ownership?
   - Do the premises / place of work still exist? If so has this changed and how?
   - Do the source(s) of noise still exist? Are the same plant / machinery available? Has the system of work materially changed?
   - Are witnesses still available? If so how has their recollection of events and evidence been affected? If there are no witnesses you should show reasonable attempts have been made to identify and locate them;
   - How has the defendant’s disclosure been adversely affected? You should show that documents existed but can no longer be located and why and what attempts have been made to locate the same – rather than simply saying no documentation exists;
   - Even if there are relevant noise surveys which show a noisy workplace do not concede any issues on breach. If you cannot say where, or how long the claimant may have been exposed to noise or what (if any) hearing conservation programme was in place, then breach remains a live issue. If necessary you can admit that if the claimant’s evidence on these issues is accepted by the court then breach would attach but you are simply unable to make any proper determination of these issues given the paucity of evidence;
   - Consider the strength of the claimant’s case on breach and diagnosis / causation. If there is a genuine argument on any of these issues then there is less prejudice to the claimant in the court refusing to allow a claim to proceed out of time. Questions may need to be put to the claimant’s medical expert to at least highlight genuine issues on diagnosis / causation—even if the medical expert is unlikely to change his / her position;
   - Consider the value of the claim. The lower the value the less the prejudice to the claimant if the court refuses to allow the claim to proceed out of time. Is there pre-negligent exposure or exposure with other employers who are not pursued? Introduce evidence on apportionment to reduce the value of the claim. Are there de minimis arguments?
   - Are there gaps in insurance cover which mean a defendant / their insurers have to pick up the shortfall on costs? This increases the prejudice to the defendant in allowing the claim to proceed out of time.

10. Whilst the onus rests on the claimant to persuade the court to disapply the limitation period, the defendant must provide evidence by way of a witness statement on the above issues and the prejudice to the defendant in allowing the claim to proceed out of time.

11. Be aware of misplaced arguments relying on Keefe v The Isle of Man Steam Packet Company Ltd [2010] EWCA Civ 683, to the effect that incomplete evidence resulting from delay does not cause prejudice to the defendant because the claimant’s evidence should be judged benevolently – and the defendant’s judged critically – in any event. This is incorrect: the Keefe principle only applies when the defendant’s breach of duty causes a gap in the evidence.
The court is empowered to direct that limitation is tried as a preliminary issue by CPR 3.1(2)(i) which provides:

‘...the court may direct a separate trial of any issue’.

Similarly, the court can rely on CPR 3.1(2)(m) to direct a preliminary trial. That rule provides:

‘...the court may take any other step or make any other order for the purpose of managing the case and furthering the overriding objective’.

Limitation is frequently tried as a preliminary issue in disease claims. Firstly, it allows consideration in isolation of complex matters concerning events that happened a considerable time in the past. Given that many diseases take significant time to manifest themselves, it is often the case that the primary limitation period has on the face of it expired. Claimants often argue that they were unaware their condition was referable to the alleged wrongdoing, so the time limit did not begin to run. Alternatively, if the time limit has expired and the claimant is applying for an extension of the time limit, this requires consideration of, amongst other things, the cogency of the surviving evidence (if any), the reasons for the delay and the respective prejudice to the parties. A preliminary trial allows consideration of these complex matters in isolation from issues of liability, causation and quantum, which themselves are often very complex and disputed in disease claims. It makes challenging issues more manageable.

Secondly, preliminary trials can significantly save costs and court time. If defendants can have claims struck out at a preliminary stage on the grounds of expiry of the limitation period, it prevents the need to incur the costs of preparing for a full trial. Moreover, it is beneficial to claimants in terms of costs. If their claims are struck out at an earlier stage when less costs have been incurred their costs liability is reduced. Furthermore, court time (and money) is saved if matters are dealt with conclusively at short preliminary hearings, rather than proceeding to full trials. Any process that saves costs (for both parties) and court time is wholly desirable as a matter of justice.

Thirdly, there are associated time savings. When defendants successfully defeat claims at an earlier stage on the ground of limitation it allows them to dedicate more time to other claims so that they can better serve the needs of their client. This time would be wasted were defendant practitioners required to prepare for full trials only for the claim to succeed on limitation in any event.

These advantages have to be balanced against one disadvantage: should limitation be tried as a preliminary matter but the claim still proceeds to trial, more costs will have been incurred. However, the additional costs are reasonably limited, accounting for the costs of the preliminary hearing itself. All other costs would be incurred in any event since arguments would still be made on limitation at trial and the trial would have to be prepared in the normal way. These limited additional costs do not, then, outweigh the benefits that a preliminary trial can result in.

Claimant representatives are increasingly relying on this disadvantage in an attempt to stave off preliminary trials.Arguments to convince a court to order a preliminary trial are set out at appendix D.
Appendix A – Table of Cases

- Links to the text of freely available and reported judgments are also provided - just click on the citation below the case names.

- A v Hoare
  [2008] UKHL 6

- Adams v Bracknell Forest Borough Council
  [2004] UKHL 29

- Beattie v British Steel; Monk v British Steel
  Court of Appeal, 6 March 1997

- Collins v Secretary of State for Business, Innovation and Skills
  [2013] EWHC 1117 (QB)
  [2014] EWCA Civ 717

- Davies v Secretary of State for Energy and Climate Change
  [2012] EWCA Civ 1380

- Dobbie v Medway Health Authority
  [1994] EWCA Civ 13

- Horton v Sadler
  [2007] 1 AC 307

- Johnson v Ministry of Defence
  [2012] EWCA Civ 1505

- Malone v Reyton Heating Engineering Ltd
  [2014] EWCA Civ 904

- McCoubrey v Ministry of Defence
  [2007] EWCA Civ 17
- McGhie v British Telecommunications PLC
  [2005] EWCA Civ 48

- Ministry of Defence v AB
  [2012] UKSC 9

- Nicholas v Ministry of Defence
  [2013] EWHC 2351 (QB)

- Norton v Corus
  [2006] EWCA Civ 1630

- Robinson v St Helens Metropolitan Borough Council
  [2002] EWCA Civ 1099

- Rothwell v Chemical and Insulating Company
  [2007] UKHL 39

- Sayers v Hunters
  [2012] EWCA Civ 1715

Spargo v North Essex District Health Authority
[1997] EWCA Civ 1232
Collins v Secretary of State for Business, Innovation and Skills

[2013] EWHC 1117 (QB)

The claimant had been a dockworker at Tilbury docks between 1947 and 1967. He was diagnosed with lung cancer. Proceedings were finally issued in May 2012, after he saw an advertisement from a firm of solicitors in 2009. The date of knowledge was held to be mid-2003 and therefore the limitation period had expired. The issue was whether the discretion in section 33 ought to be used to extend the time limit.

Nicol J held the prejudice caused to the defendants not only in the period after the limitation period had expired could be considered, but also the period between exposure and diagnosis of cancer, notwithstanding that a claim could have been brought as of right within the limitation period. He also held the merits of the claim could be a factor in determining whether to exercise the section 33 discretion. In the event it was held the merits were weak, there was disproportion between the recoverable loss and the litigation costs, and there was prejudice to the defendants. Extension of the limitation period was refused.

[2014] EWCA Civ 717

The Court of Appeal upheld the High Court’s decision. It was held, firstly, that applying the objective test on constructive knowledge, it was right a reasonable person in the claimant’s position would have asked about the possible causes of his lung cancer by mid-2003. It was therefore correct to hold there was constructive knowledge by mid-2003.

Secondly, as to the issue of extending the limitation period, particularly the extent to which the pre-limitation period time delay could be considered, the Court of Appeal held the time which elapsed between the breach of duty and the commencement of the limitation period could be considered as part of the ‘circumstances of the case’ within the meaning of section 33(3). The primary factors the court had to have regard to were those specifically mentioned in section 33(3) (a)-(f) since Parliament had singled those factors out for particular mention. Therefore, although the court would have regard to the time elapsed before a claimant’s date of knowledge, it would accord less weight to that factor; pre-limitation period effluxion of time would merely be a relevant fact to be considered. Both parties could rely upon it for different purposes. A claimant could use it to buttress arguments made about the cogency of the evidence, arguing that the recent delay had little or no impact on the cogency of the evidence as the damage was done before they were dilatory. The defendant could rely on the passage of time to show it already faced massive difficulties in defending the action, and that any additional problems caused by the claimant’s recent delay were therefore a serious matter. The court would assess the considerations.
Eight representative miners sought to claim that they had been negligently exposed to working conditions that resulted in the development of osteoarthritis of the knee. However, each of their claims was considerably out of time. The shortest period of delay between the expiration of the limitation period and the issue of proceeding was 10 years, and the longest was 21 years. The issue was therefore whether it was equitable to exercise the discretion in section 33 of the Limitation Act. At first instance the judge refused. On appeal it was contended that the broad merits test had been incorrectly applied, the assessment of the impact of the delay on the cogency of the evidence was wrong and that the analysis of the reasons for the delay was at fault.

The appeal was dismissed. As to consideration of the merits, the Court of Appeal held the judge identified the issues which were likely to arise at any substantive trial and the evidence which would be required to attempt to prove the case and to attempt to defend the claims. Both were equally important in assessing the broad view merits of the litigation. What the judge was rightly concerned to identify was the extent to which the enquiry would be hampered by the diminished cogency of the evidence available as a result of the long delay in bringing the claims. The judge’s approach to the assessment of the broad merits was careful, conscientious and impeccable.

As to delay, the judge was entitled to look at the totality of the delay and the impact of it. The judge recorded a positive conclusion that post-limitation period delay had caused additional substantial prejudice to the employers and had had a serious impact upon the cogency of the evidence. He gave careful and principled consideration to the impact of delay upon the cogency of evidence bearing upon the issues in the litigation and there was no error in his approach. His conclusion was well within the ambit of reasonable decision-making and clearly correct.

As to the reasons for the delay it was concluded that the judge was entitled to decide the claimants’ situation called for consideration and enquiry. He was correct to regard their failure to make enquiries as not telling in their favour when he came to exercise his section 33 discretion.
Johnson v Ministry of Defence

[2012] EWCA Civ 1505

Between 1965 and 1979 the claimant had been employed by the defendants where he was exposed to loud noise. He became aware of his hearing problem in 2001, but it did not occur to him that it might be linked to noise or that he might have a claim. He only consulted his doctor about his hearing in 2006, asking if there was wax in his ears during a consultation for another matter. He was told his ears were clear and any hearing difficulty was likely attributable to his age (then 66). The claimant maintained it was only in 2009, when he consulted an expert, that he knew he had a significant injury or that it was attributable to noise exposure. He issued proceedings in June 2010. At first instance the judge found he had failed to show his date of knowledge was after June 2007 because he had been aware that he had worked in noisy environments which could cause hearing difficulties and had actual knowledge of the onset and development of symptoms in 2001. The claimant contended that the judge had erred in moving straight from his findings of fact to the conclusion that by 2001, he had actual knowledge of his cause of action because he could not have known that his deafness might have been caused by noise without expert advice.

The Court of Appeal dismissed the appeal. Although the judge had erred in holding that the claimant had actual knowledge that his deafness might be attributable to noise exposure without the benefit of expert advice, it could be said that he had constructive knowledge. It was necessary to consider objectively whether he could have been expected to seek expert advice. There was an assumption that a person who had suffered a significant injury would be sufficiently curious to seek advice unless there were reasons why a reasonable person in his position would not have done.

Such a reason might be that the condition was something that the claimant had become so used to that a reasonable person would not be expected to be curious about its cause. Applied to the claimant, it was held a reasonable man in 21st century would be curious about the onset of deafness at the relatively early age of 61 and would wish to find out its cause. He would have asked his GP by the end of 2002. Thus limitation expired by the end of 2005 and the claim was statute barred.
Malone v Reylon Heating Engineering Ltd

[2014] EWCA Civ 904

The claimant had worked for the defendant between 1977 and 2004. His work involved the use of power tools. He claimed he was exposed to excessive noise and notified his claim for NIHL and moderate tinnitus in 2009, with proceedings issued in 2011. He accepted he had constructive knowledge. The issue was whether the limitation period should be extended. The judge found the cause of action regarding the entire period of employment had accrued when the injury was 'completed', namely when the claimant ceased working in 2004, with limitation expiring in 2007 (although there was constructive knowledge in 2001 it was contended the damage continued until the end of employment in 2004). The judge held that the determination of whether the limitation period expired in 2004 or 2007 was critical to the exercise of the section 33 discretion. She concluded the delay between 2007 and 2009 had not materially compromised the defendant’s ability to defend the claim and exercised her section 33 discretion.

The defendant appealed, contending the judge’s approach led to unsustainable result that the start of a limitation period was indefinitely postponed if harm of the kind already inflicted continued during a later period. The Court of Appeal agreed. It held the judge should have identified two periods of delay: 2004-2009 for pre-2001 damage, and 2007-2009 for post-2001 damage. There was no basis on which to suspend the limitation period for the earlier period, or to treat the injury for the entirety of the claimant’s employment as being indivisible, given that NIHL could be apportioned.

The judge should have considered whether to allow the case to proceed for pre-2001 loss, bearing in mind the prejudice caused by the delay since 2004, and whether to allow it to proceed for the post-2001 injury.

The decision on the first was potentially relevant to the second, since the court had to have regard to all the circumstances in the case, which inevitably included considering why it had become, overall, a distinctly stale claim for damages. It was also useful to stress that once limitation was running, it was appropriate to consider the delay since the claimant had knowledge, rather than focussing solely on the delay from the end of the limitation period.
Concerned a claim by the daughter (and executrix) of the estate of the deceased against the MOD. During the war the deceased was exposed to asbestos while assembling gas masks. She was advised in August 2004 that she could make an asbestosis claim. The deceased grew increasingly breathless and had limited mobility. Her daughter cooked and cleaned for her. Any claim was statute barred in August 2007. The deceased died in November 2008, aged 86, from unrelated cancer. The claimant took legal advice and a claim was notified to the MOD in June 2009. The claimant’s solicitors collected evidence and instructed an expert. Proceedings were issued in May 2012. Although the MOD conceded liability in principle and accepted it had not been prejudiced by the delay, it argued that it would be inequitable to override the limitation period as the claimant would benefit from a windfall given that the deceased had decided not to pursue a claim. The claimant argued a claim was not brought by the deceased since that would have been a heavy burden on the deceased in her state of health and the claimant was concerned with the deceased’s quality of life.

The section 33 discretion was exercised in favour of the claimant. There was no prejudice to the MOD as to the cogency of the evidence, and liability and causation were agreed subject to the limitation defence. The paramount issue was the effect of the delay on the MOD’s ability to resist the claim on the merits. The legislation obviously envisaged many situations where it could and would be equitable to allow proceedings outside the limitation period. It was fact-specific. As the law allowed the estate to benefit from damages awarded to a deceased person as a result of a defendant’s tort, the “windfall” argument had no merit. The deceased’s decision not to pursue a claim was directly related to the effects of the asbestos exposure, which was admitted to be the MOD’s fault. It would not be right to allow the MOD to take advantage of its tortious acts. Regarding the prejudice to the MOD in losing the limitation defence, that was balanced by the prejudice to the claimant were the discretion not exercised. For pain, suffering and loss of amenity the award was £40,000. For gratuitous care and assistance it was £7,657.
[2012] EWCA Civ 1715

From 1981, the claimant had worked for H and W as a gardener. H died in 1989 and S remained employed by W until May 2000, when he took up employment elsewhere. He was then suffering from hearing loss and tinnitus. In 2002, the claimant was told by a nurse during an occupational health check that he might be suffering from NIHL. In April 2005 he consulted his general practitioner, who referred him to a specialist. S was reviewed by the specialist in June 2006. A letter of claim was sent in July 2008 and proceedings were started in September 2009. The claim was initially found to be in time but on appeal a circuit judge concluded that the claim was out of time because the date of knowledge was 2002, when the claimant received advice from the nurse. He held that the burden on the claimant under s.33 of the Act was particularly heavy and that it would not be appropriate to exercise discretion to allow the claim to proceed because there had been unreasonable delay without explanation, the equipment used by the claimant at the relevant time was long gone, much of the complaint pre-dated H’s death at a time when W had been less closely involved, and W, at the age of 88, did not have a fair opportunity to defend the claim.

The claimant’s appeal was dismissed. It was said that it should not be necessary for judges in the county court to engage in textual analysis of a series of appellate decisions in order to discern whether a claimant relying on s.33 had a “burden” or a “heavy burden” to discharge. All that could properly be said about the general approach to the section was that the burden was on the claimant, because it was he who was seeking to be exempted from the normal consequences of failing to issue proceedings in time. It was not helpful to discuss in the abstract whether that burden was a heavy one. The court’s discretion under s.33 was broad and unfettered. Applied to the present case, a fresh consideration of the factors in s.33 supported a conclusion that it would not be appropriate to disapply s.11 of the Act. The action had been commenced four years after the expiry of the limitation period with no explanation for the delay. That delay made it substantially more difficult for the parties to adduce relevant evidence. Both the claimant and his legal advisers had progressed the claim in a leisurely manner. The prejudice to W far outweighed the prejudice to the claimant.
Appendix B – Questions to claimant

Complaints of noise

1. When did the claimant first consider that he was working in a noisy environment with the defendant? Did the claimant make any complaints about noise levels during employment with the defendant? If so:
   - when and where were they made?
   - to whom?
   - what was the nature / gist of the complaints, and;
   - what was the response by the defendant, if any?

Hearing protection and training / instruction

2. Was any hearing protection available to the claimant? If so:
   I. what type?
   II. from what approximate date was it available?
   III. what training or guidance was given in relation to the use of hearing protection / working in noisy conditions?
   IV. the approximate date when such training and guidance was given in relation to the use of hearing protection / working in noisy conditions?
   V. whether the claimant used the hearing protection provided. If not, why not?
   VI. what did the claimant believe the reason to be for the provision of hearing protection when it was introduced?
   VII. was the claimant aware of others wearing / being provided with hearing protection? If so what did they think it was for?

[Note: The above or similar type questions may need to be put in respect of other employments].

3. Did the claimant ever have any hearing tests whilst employed with the defendant? If so:
   I. when was each and every test performed?
   II. what did the claimant think the tests were carried out for?
   III. what was the claimant told about the purpose of the test?
   IV. was the claimant asked about his hearing at these tests? If so what did the claimant say about the same?
   V. what was the claimant told about his hearing at each and every test?
   VI. was the claimant told that he had any hearing loss and / or noise induced hearing loss?

4. When, if ever, did the claimant first become aware of workers or employees making claims for damages for noise induced hearing loss and what was the source of his information?
5. Whether the claimant was a member of a Trade Union and if so, the name of the Trade Union and the approximate dates of membership and whether the claimant was ever given any advice by the Trade Union regarding noise? If so:
   I. when was that advice given?
   II. what was the nature / gist of that advice?
   III. did the claimant seek advice from the Trade Union? If not, why not?

### Onset of symptoms

5. Please state the approximate date when the claimant first noticed symptoms related to his hearing loss and the nature, extent and severity of the same.

6. To what did the claimant attribute such symptoms to?

7. Did the claimant visit his GP / Hospital about any hearing loss? If so, when this was and what advice was he given? If not, why not?

8. Under the heading “History from the Claimant” on page x of Mr x’s medical report dated [ ] please state:
   
   i) As precise as possible, the date when the claimant first noticed that he was raising his voice when talking.
   
   ii) As precise as possible, the date when the claimant first noticed problems following conversational speech in the presence of a raised level of background noise.
   
   iii) As precise as possible, the date when the claimant first started having to turn up the television volume.

9. Whether the hearing loss / tinnitus has deteriorated since it was first noticed with a description of the deterioration and the approximate dates when each successive deterioration was noticed.

10. As precise as possible, the date when the claimant first thought that his hearing loss / tinnitus might be caused by working in noisy conditions.

11. As precise as possible, the date when and in what circumstances the claimant first learned that exposure to excessive noise could cause hearing loss.

12. As precise as possible, the date when and in what circumstances the claimant first learned that he might claim for compensation for noise induced hearing loss.

13. When did the claimant first legal advice in respect of this claim? What prompted the claimant to do so?

14. When was the claimant’s hearing first tested in relation to this claim?

14. Whether the claimant has made any other claims in respect of hearing loss, and if so, against whom, where, and with what result or whether such claims are contemplated.
Questions to a claimant’s medical expert

1. At the time of your examination of the claimant on [   ], please state the extent of:-
   • overall hearing loss;
   • noise induced hearing loss;
   • age associated hearing loss.

2. Please advise whether noise induced hearing loss is a progressive condition—in other words whether the condition worsens after exposure to causative noise ceases or whether the loss stops and then remains constant, as at the time of exposure to noise ceases.

3. The claimant states he was provided with hearing protection in 1990. Assuming the hearing protection provided was proper and adequate and worn so as to protect against any damaging effects of noise then are we right to further assume that the NIHL you assessed on [   ] would be the same as existed as at 1990 when hearing protection was provided and worn?

OR

4. The claimant’s occupational exposure to noise ceased in 1990. Would the NIHL we see today be the same as existed in 1990 as at the time that exposure ceased?

5. What would be the claimant’s predicted AAHL as of 1990 (with reference to ISO 7029 or other age related database and using either a median value or a range of appropriate percentiles)?

6. Following your opinion that the only causes of the claimant’s hearing loss are noise and ageing, then what would be the claimant’s overall hearing loss in 1990?

7. Would you expect the overall hearing loss in 1990 to have given rise to subjective hearing loss/disability? If not why not? Please can you give reasons for your opinions supported by any medical authorities where appropriate.

8. Is NIHL a divisible disease which can be apportioned between different causative exposures / noisy employments? If so then what contribution did exposure during the period [   ] / employer X have to overall NIHL? OR What NIHL can be attributed to employment / alleged exposure with the defendant?

Please provide your answers to the above questions by no later than [   ]
At the same time please also provide a copy to your instructing solicitors in this matter whose details are [   ].
Your [instructing solicitors] / The [defendant] will be responsible for your reasonable fees in providing these replies.
Appendix D

Arguments in favour of preliminary trial
Arguments in favour of a preliminary trial fall into two categories: those based on case law authorities and those based on the Civil Procedure Rules themselves.

The Authorities

The strongest support for ordering preliminary trials comes from the case law. In Bryn Alyn Community (Holdings) Ltd v Royal and Sun Alliance PLC Auld LJ held, at [74 (vi)], it is ‘a well-established and/or uncontroversial starting point’ (when deciding whether to exercise the section 33 discretion) that ‘[w]herever the judge considers it feasible to do so, he should decide the limitation point by a preliminary hearing by reference to the pleadings and written witness statements and, importantly, the extent and content of discovery’. He added: ‘It may not always be feasible or produce savings in time and cost for the parties to deal with the matter by way of preliminary hearing, but a judge should strain to do so wherever possible’ (emphasis added).

At [74 (vii)] Auld LJ noted the danger which arises when limitation is dealt with at the same time as the substantive issues and which justifies dealing with it as a preliminary issue. He said: ‘Where a judge determines the section 33 issue along with the substantive issues in the case, he should take care not to determine the substantive issues, including liability, causation and quantum, before determining the issue of limitation and, in particular, the effect of delay on the cogency of the evidence. Much of such evidence, by reason of the lapse of time, may have been incapable of being adequately tested or contradicted before him.

To rely on his findings on those issues to assess the cogency of the evidence for the purpose of the limitation exercise would put the cart before the horse. Put another way, it would effectively require a defendant to prove a negative, namely, that the judge could not have found against him on one or more of the substantive issues if he had tried the matter earlier and without the evidential disadvantages resulting from delay.

The point being made was that a judge trying limitation and substantive issues simultaneously could fall into the trap of deciding on the claim before deciding on limitation and then using those conclusions to drive the decision on limitation; if a claimant has a strong claim that should not be used to justify invariably extending the limitation period. For a judge to decide in this way would simply require the defendant to disprove the claim. That is not the purpose of the limitation exercise (moreover, it practically reverses the burden of proof). Instead, it is to weigh the respective prejudice to the parties in permitting a stale claim to proceed or not. A part of this, but by no means a decisive part, is the merits of the claim: Collins v Secretary of State for Business Innovation and Skills. The overriding consideration is the respective prejudice. To avoid this danger then, limitation can be decided as a preliminary matter.
In J, K and P v The Archbishop of Birmingham it was accepted at [18], that the comments in Bryn had not been overruled by A v Hoare [2008] UKHL 6. However, it suggested that in light of the Hoare decision the comments on limitation as a preliminary issue ‘should perhaps now [be treated] with a degree of caution. J concluded, at [21] that different decisions can be reached on whether it is appropriate for limitation to be dealt with as a preliminary issue. It was held at [22] that the following factors are relevant in deciding on whether limitation should be tried as a preliminary issue:

1. The potential saving in cost if a preliminary hearing was ordered.
2. The potential increase in costs if limitation is determined against the defendant.
3. The extent of the overlap between trial of limitation and liability and quantum.
4. The risk that the claimants would have to give evidence in court twice.
5. The fact that if the preliminary matter was determined in favour of the defendants then the claimants would not have to give evidence at all about the abuse.
6. The extent to which assumptions of fact can be made.
7. Considering the matter overall, whether it would be just to order the trial of limitation as a preliminary issue.

The decision in J needs to be treated with some caution. That case concerned child abuse. The judge was particularly concerned that the claimants should not have to recollect traumatic events more than necessary. This explains points 4 and 5 above and the reluctance to order a preliminary trial. Moreover, Bryn Alyn was not disapproved of in Hoare and is a clear authority of the Court of Appeal. Meanwhile, J is a High Court authority dealing with specific facts and concerns which do not usually trouble the civil courts. It is suggested that the decision in J should be confined to its facts and Bryn Alyn is the authority to be followed.

Claimants are increasingly relying on the decision of the Court of Appeal in Bond v Dunster Properties when arguing that preliminary trials of limitation are inappropriate. In that case the Master of the Rolls Lord Neuberger said, at [107]: ‘While they have their value, it is notorious that preliminary issues often turn out to be misconceived, in that, while they are intended to short-circuit the proceedings, they actually increase the time and cost of resolving the underlying dispute. It would, in my judgment, require a very exceptional case, almost inevitably one where a subsequent multi-week trial was anticipated, before a preliminary issue hearing, involving witnesses and expected to last[a number of days], could be justified.’

(QBD, 25 July 2008)
www.lawtel.com

[2011] EWCA Civ 455
www.bailii.org
accessed 15 November 2013. See in particular [105]-[108].
While seemingly a strong authority, we respectfully suggest that the Master of the Rolls’ comments also need to be treated with some caution in this context. In Bond the preliminary trial was ordered to determine a number of factual issues pertinent to the claim, not the issue of limitation which determines a quite different issue: namely the cogency of any remaining evidence and the respective prejudice to the parties in allowing a stale claim to proceed or not. Determining factual issues at a final trial does not involve the same identifiable danger as determining limitation at a final trial. Moreover, the comments in Bond were made against a background of titanic delay in that case where ordering a preliminary trial increased what turned out to be overall very lengthy delay. On that basis it is suggested that the comments have little persuasive authority in the context of preliminary determinations of limitation: the comments were not made about preliminary determinations of limitation and they were made once it became clear that the preliminary determination increased the delay in a case that was hugely delayed in the event. While the comments might well apply in similar factual scenarios they reach no further. Accordingly the authority to follow is Bryn Alyn and that patently requires preliminary limitation trials as a matter of course.

The Civil Procedure Rules

In addition to the authorities, the Civil Procedure Rules also support dealing with limitation as a preliminary matter. The overriding objective was amended as part of the Jackson reforms and now provides the rules are designed to enable the courts to deal with cases justly and ‘at proportionate cost’: CPR 1.1(1). This includes, so far as practicable, saving expense: CPR 1.1(2)(b); it also includes ensuring that cases are dealt with expeditiously: CPR 1.1(2)(d).

Dealing with limitation as a preliminary issue can save expense and expedite the progress of a case. Consequently, it pursues the overriding objective. The contrary argument is of course that if a preliminary trial of limitation is determined in favour of the claimant then time and expense is increased. This argument cannot be said to be a trump card. If that argument was determinative in every case then limitation would never be determined as a preliminary matter. Rather, it is suggested that to displace the presumption of a preliminary trial there must be good reason to suppose that costs will be wasted or significantly higher by ordering a preliminary trial so as to outweigh the benefits of a limitation trial (which also avoid recognised dangers). Such cases might, for example, include those where there is a considerable overlap between issues of limitation and liability which cannot readily be untwined so that a limitation trial would wholly waste costs. Ordinarily however, so long as it is plain that a limitation trial would not effectively have to determine liability a preliminary trial saves expense and time. Since saving time and expense are demanded by the CPR (subject to dealing with the case justly), preliminary trials are similarly demanded.

Conclusion

Preliminary determinations of issues of limitation are required by the authorities and the Civil Procedure Rules. Moreover, preliminary determinations are customarily advantageous and avoid recognised dangers. In those cases where claimants are resisting preliminary trials the court should be directed to the authorities and the advantages of preliminary trials to persuade it otherwise.
Disclaimer

This guide does not present a complete or comprehensive statement of the law, nor does it constitute legal advice. It is intended only to provide an update on issues that may be of interest to those handling occupational disease claims. Specialist legal advice should always be sought in any particular case.

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