

Limitations, limitations

Robert Jago, Deputy Head of School, Royal Holloway, University of London

The law of limitation in civil procedure is there to *'protect defendants from having to defend stale claims, claims which may be difficult to defend because of the inevitable loss of evidence during the passage of time. Statutes of limitation also aim to stimulate an early commencement of litigation as it is in the interests of litigants and their country that civil disputes are settled as soon as possible.'*¹ Although it could be argued that any hurdle which limits access to justice is contrary to the aims of the civil justice system it is the case that the law of limitation attempts to be both a principled and pragmatic hurdle to ensure the system operates fairly for both claimant and respondent. The Limitation Act 1980 largely governs limitation in civil claims in England and Wales. On reviewing the area in 2001 the Law Commission concluded that the law was 'unfair, complex, uncertain and outdated.'² The primary concern of the Law Commission was that the law did not give sufficient recognition to the interests of the claimant. This suggesting that the balance between the competing interests outlined above are currently tipped in favour of the respondent. Recent cases on limitation would appear to support this view with a particular focus on the discretion available to a trial judge under section 33 Limitation Act 1980 which allows for the exclusion of time limit for actions in respect of personal injury or death.

In recent years a wide range of allegations of historic physical and sexual abuse have come to light and claimants have sought redress through the civil courts as a way of being compensated for the abuse suffered. In *Kimathi & Ors v Foreign & Commonwealth Office* [2018] EWCA Civ 2213 (09 October 2018) a group of Kenyan nationals were in the process of bringing a claim for trespass to the person. The group alleged that they were tortured and raped by British soldiers and members of the Colonial Administration in Kenya during the State Emergency of 1952-1960. Some of the claimants were Test Claimants and in this case Test Claimant 34 alleged they were assaulted between 1955-1963 and the limitation period therefore came to an end in 1966 at the latest (being three years from 1963 under section 11 of the Limitation Act 1980). Test Claimant 34 joined the litigation in 2014. In order to pursue the claim, he had to persuade the judge to disapply the Limitation Act 1980 under section 33 on the basis it would be equitable to allow the case to proceed considering the prejudice for both claimant and defendant. In the High Court the judge declined to disapply the Act stating that the prejudice to the defendant is such that there cannot be a fair trial and that prejudice outweighs the prejudice to the claimant. At the Court of Appeal, the decision at first instance was upheld and the application dismissed. The appeal focussed on the judge at first instance who allegedly disregarded the reasons for delay, failed to determine the date when the action could have been commenced, the judge's lack of cogency in approach given the focus on corroboration and the lack of focus on the defendant's attempts to evade scrutiny and the overall un-even approach of the judge in reaching their decision not to permit the application to proceed. The Court of Appeal explored each of these grounds but were clear that given the judge was furnished with all the facts at the hearing and had a discretion to either disapply the Limitation Act 1980 or not the court would not interfere with the exercise of that discretion unless there was overwhelming evidence to do so. As the court concluded:

¹ Balan, S. 'Limitation periods affecting persons under disability in Malaysia: a critical overview.' *Civil Justice Quarterly*, 31(2), 2012, 239.

² Law Commission, *Limitation of Actions*, Law Com No 270 (2001), page 5

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'The applicant cannot get away from the fact that the judge had a discretion to exercise and that this court will not interfere with that exercise of discretion unless the judge has misdirected himself in law, taken into account irrelevant matters, failed to take account of relevant matters or has made a decision which has exceeded the generous ambit within which reasonable disagreement is possible...His judgment is a masterly synthesis of the complex web of facts, and absence of fact, and is a judgment with which this court would not interfere.' (at para 19).

In historic sexual abuse cases the courts have been no less reluctant to disapply the limitation period. In *Murray v Devenish (Provincial Superior of the London Province of the Sons of the Sacred Heart of Jesus sued on his own behalf and as a representative of all other members of the unincorporated association known as the Sons of the Sacred Heart of Jesus)* [2018] All ER (D) 30 (Aug) Murray alleged that he had been sexually abused by a staff member when he was 15 years old. Murray commenced his action for vicarious liability for personal injury in 2013. The judge was again asked under section 33 Limitation Act 1980 to disapply the limitation period and taking into account a range of factors including the fact that the alleged perpetrator was now dead, the reliability of the claimant's evidence to date, the absence of personnel records, the reasons for delay, the claimant's destruction of documents, the defendant's conduct after the claimant first raised the complaint, the claimant's conduct since commencement of proceedings and the absence of insurance all led the judge to decide not to disapply the limitation period in this case.

Similarly, in *Catholic Child Welfare Society (Diocese of Middlesbrough) and others v CD* [2018] EWCA Civ 23 42 (23 October 2018) CD alleged that he had been anally raped by a staff member of the Diocese in 1990 when he was 12 years old. CD commenced his action in 2006 but did not disclose the allegation of rape until 2014 which was 24 years after the alleged incident took place. Under section 11 Limitation Act 1980 the action for personal injury should have been brought by 1993. Taking into account CD was a minor at the time, the cause of action under ss28(1) and 38(2) of the Limitation Act 1980 expired in 1999. The claimant applied for the judge to disapply the limitation period and the judge decided to disapply on the basis he found the claimant's evidence to be cogent and details of the allegation credible. The judge also noted that the alleged perpetrator was still alive and able to give evidence. On appeal the court noted that the judge at first instance had underestimated the inconsistencies in the claimant's evidence and the inability of the defendants to call relevant witnesses. Consequently, the court reversed the decision believing the defendants were exposed to a real possibility of significant prejudice in their ability to defend the claim so long after the event, and without the ability to call relevant witnesses. The Court of Appeal proved they were willing to interfere with the exercise of the discretion in this case demonstrating that even if a judge at first instance is persuaded to disapply the limitation period there is no guarantee that the appellate courts will not be persuaded otherwise.

These alleged historic abuse cases do highlight the central problem faced by claimants. In criminal cases no such limitation exists³ but it must be remembered that the consequences of a criminal case are different to that of a civil case. There will always need to be a balancing of interests and the Law Commission are correct to confirm that, *'it will never be possible to achieve complete fairness between the parties (indeed the imposition of any limitation period could be regarded as doing 'rough justice' to the claimant).'*⁴ The cases discussed here may be seen as examples of 'rough justice' to the claimant as they proceed to fall at this first hurdle of judicial discretion under section 33 Limitation Act 1980. It should then be asked whether the hurdle is currently too high for claimants which thus impedes their access to justice? Or is the discretion exercised firmly early in proceedings saving the court and

³ Although s127 Magistrates Court Act 1980 and s1 Road Traffic Offenders Act 1988 have limitations in summary matters.

⁴ Law Commission, *Limitation of Actions*, Law Com No 270 (2001), page 6

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the parties' significant time and costs later on? In any balancing exercise there will always be a disappointed party. On current form though, that party does often appear to be the claimant.