

IN THE COUNTY COURT AT BIRMINGHAM

Civil Justice Centre,
The Priory Courts,
33 Bull Street,
Birmingham B4 6DS

Monday, 2 September 2019

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Before:

HIS HONOUR JUDGE RAWLINGS

SAKANDAR AZAM

Claimant

- and -

**UNIVERSITY HOSPITAL
BIRMINGHAM NHS FOUNDATION
TRUST**

Defendant

MR UDDIN (Direct Access counsel) for the **Claimant**
MR COUGHLAN (instructed by Bevan Brittan) for the **Defendant**

Approved Judgment
(Transcript prepared from poor quality audio)

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JUDGE RAWLINGS:

1. In respect of this matter I am dealing only with a preliminary issue, and that is whether or not the claims of the claimant Mr Azam should be treated as statute barred in accordance with the Limitation Act 1980. There are three matters that I need to consider in that respect: (a) sections 11 and 14 of the Limitation Act 1980, section 11 setting out the primary limitation period and section 14 setting out how the terms used in section 11 are to be defined; (b) section 32 which is raised by the claimant on the basis that he asserts there has been concealment of matters by the defendant which should lead to the suspension of the limitation period; and (c) section 33 in respect of which, if I find that the primary limitation period has expired, I have a discretion to nevertheless allow the claimant to pursue his claims.
2. The claim concerns surgery which took place on 9 March 1996, which was performed on the claimant Mr Azam by a Mr Campbell, the surgery is called a gynecomastia. It was carried out to his chest, and the claimant says that he was initially told that his scars from the operation had healed well and he was discharged under the care of his GP. He says however that in 2014 after his son had seen the scars on his chest for the first time, he requested a second opinion on that scar and was seen by a Mr Carner on 12 August 2014. The claimant says that Mr Carner deliberately expressing no view as to whether the original operation was carried out correctly, but nonetheless discussed the possibility of revision surgery with Mr Azam, which caused him thereafter to pursue the matter by instructing solicitors.
3. Mr Goodacre, a Consultant in Plastic Reconstruction Surgery, was instructed and prepared a report on 23 May 2016, suggesting that the form of the operation (a T-incision) was the inappropriate operation to carry out, and that even allowing for that the operation had been carried out very badly. Mr Azam pursues his case on the basis of the use of the wrong technique, and negligent carrying out of that technique. Mr Azam also raises the point that the appropriate informed consent was not obtained for the operation, in particular he was not informed of possible adverse outcomes, including scarring. He pleads that the date of his knowledge that there was a significant injury attributable to the negligence of Mr Campbell should be 12 August 2014 when Mr Carner examined him, or later when he received Mr Goodacre's report.
4. In contrast, the defendant, the relevant NHS Foundation Trust, points out that the claim was issued on 20 July 2017 in respect of an operation performed in 1996, 21 years before the claim form was issued. Its defence raises the issue of the primary limitation period having passed under sections 11 and 14. Permission was given by District Judge Shorthouse on 27 July 2018 for Mr Azam to amend his particulars of claim, which he did in order to rely on sections 32 and 33 of the Limitation Act 1980. By its amended defence the defendant denied that Mr Azam did not know that he had suffered from significant injuries prior to 12 August 2014 and says that relevant knowledge was acquired by him many years prior to that, in fact dating back to the aftermath of the surgery itself. The defendant refers to a Dr Beattie having written a letter as early as 6 February 1998, about the possibility of re-doing the operation.
5. The defendant says that the primary limitation period expired on 9 March 1999, or 2001 at the latest, and that the defendant should not be given permission to pursue his claim under section 33 of the Limitation Act 1980. So far as section 32 is concerned,

it is denied that the claimant was in any way misled or that any information was concealed from him that would enable him to rely upon section 32.

6. As to witnesses, Mr Azam made a witness statement and appeared today and was cross-examined on behalf of the defendant by Mr Coughlan. There is a witness statement by Mrs Justin Morris-Thomas on behalf of the defendant. She simply confirms information in relation to receipt of the claim by the defendant and that Mr Campbell, the surgeon concerned with the operation in March 1996 has unfortunately died. She was not called for cross-examination. The content of her witness statement is very short and was accepted by the claimant.

Section 11

7. Section 11 (1) of the Limitation Act 1980 provides:

“This section applies to any action for damages for negligence, nuisance or breach of duty...where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.”

Subsection (4) reads:

“Except where subsection (5) below applies” [which is not relevant here]

“the period applicable is three years from—

(a) the date on which the cause of action accrued; or

(b) the date of knowledge (if later) of the person injured.”

8. In this case it is the “date of knowledge” on which the claimant relies in order to push the limitation period beyond 3 years from 9 March 1996. As to what “date of knowledge” means, that is set out in section 14 of the Limitation Act 1980. Section 14(1) provides:

“...references to a person’s date of knowledge are references to the date on which he first had knowledge of the following facts—

(a) that the injury in question was significant; and

(b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and

(c) the identity of the defendant...”

It goes on to say:

“and knowledge that any acts did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.”

Subsection (2) says:

“For the purposes of this section 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 judgment.”

Subsection (3) says:

“For the purposes of this section a person’s knowledge includes knowledge which he 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 medical or other appropriate expert advice which it is reasonable for him to seek;

but a person shall not be fixed under this subsection 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, where appropriate, to act on) that advice.”

It is subsections (1) and (2) of section 14 that are relevant to the present case.

9. The claimant says that his date of knowledge was 12 August 2014 when Mr Carner advised him that he could go through an operation to improve the appearance of his chest, or alternatively the date on which Mr Goodacre advised that the operation had originally been carried out negligently. The defendant says that the claimant knew immediately after the operation had been performed that he had suffered a significant injury as a result of the operation when he raised concerns with Dr Beattie on 6 February 1998 and asked about the possibility of having the operation re-done. I accept the submission of Mr Coughlan for the defendant that knowledge that the injury in question was significant does not also require there to be knowledge that the injury was caused by a negligent act. That is what section 14 says.
10. Mr Uddin says, however, that I should not regard the claimant as having suffered an injury for the purposes of section 14(1) until Mr Azam became aware that the result of his operation in March 1996 was worse than he could reasonably have expected it to be. Mr Uddin’s point is superficially attractive. Why should time run against the claimant who has no reason to believe the disfigurement he suffered as a result of the operation was any different than he could reasonably expect as a result of that operation. However, if section 14(1) does not operate until Mr Azam knew that the outcome of the operation was worse than he could reasonably have expected it to be, that necessarily requires that he have knowledge that the operation was carried out negligently and section 14(1) does not require that he has that knowledge.

11. As for knowledge of the identity of the defendant. It is clear that the claimant Mr Azam knew that Mr Campbell had carried out the operation, and that it was the defendant who was responsible for Mr Campbell's actions, and indeed he wrote to them as an initial step towards pursuing his claim.
12. For those reasons, I have come to the conclusion that the primary limitation period expired in March 1999, three years after the operation was carried out, because Mr Azam had the necessary knowledge as defined by section 14 of the Limitation Act 1980 almost immediately after the operation had been carried out that he had suffered a significant injury, albeit I accept he did not necessarily know at that stage that the result of the operation was anything other than he might expect it to be (ie he did not know that he had suffered the injury because Mr Campbell had (on his case) carried out the operation negligently).

Section 32

13. As for the claim under section 32 of the Limitation Act 1980, section 32(1) provides:

“...where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.”

14. Mr Azam's case as pleaded is that Mr Campbell told him that the result of the operation was at least successful or perhaps acceptable. At trial the focus shifted to what a Dr Wong may have told Mr Azam about the result of the operation, shortly after it took place, either that it had been successful, or alternatively acceptable. I do not consider that that amounts to concealment for the purposes of section 32. Section 32(1)(b) refers to “any fact relevant to the plaintiff's right of action” being deliberately concealed by the defendant. I do not consider that any view expressed by Dr Wong or by Mr Campbell as to the relative success of the operation amounts to concealment of a fact for the purposes of section 32.

Section 33

15. I turn then to section 33 of the Limitation Act 1980. That section provides as follows:

“(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—

(a) the provisions of section 11 of this Act prejudice the plaintiff or any person whom he represents; and

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.”

Subsection (3) provides that the court shall have regard to all the circumstances of the case in deciding whether or not to exercise that power, and in particular to:

“(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11...;

(c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff’s cause of action against the defendant;

(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.”

16. The burden is on the claimant to persuade me that I should exercise my discretion in his favour. There is an evidential burden on the defendant in relation to the prejudice caused to it by the claimant’s delay, in the sense that it is the defendant who is likely to have evidence as to the extent of the prejudice caused to it by that delay.
17. As to the first of those items, the length of delay and the reason for it, the delay here appears to be 18½ years beyond the period when I have found that the primary limitation period expired. The claimant says that Mr Campbell or Mr Wong told him that the surgery had been successfully carried out and he proceeded on that false premise right up until he was eventually able to discover that the surgery was not carried out correctly.

18. The defendant says in its amended defence that the claimant Mr Azam was seen by Dr Beattie, a consultant cardiologist, who recorded in his clinic letter that the claimant had brought up concerns about possibly re-doing surgery, that on 14 April 1998 the claimant's GP, Dr Rajput recorded that Mr Azam's cardiogram was stable and he was to have a remedial mastectomy, and on 16 April 1998 Dr Rajput recorded that he had telephoned Mr Campbell's secretary at the hospital and that he was told that if it needed to be redone that Mr Azam would need to be re-referred to Mr Campbell. Mr Azam says that he did not ask Dr Beattie about re-doing his surgery, and the correspondence that I have referred to was not sent to him but was exchanged between medical practitioners. I find, however, that there was some discussion between Dr Beattie and Mr Azam on 6 February 1998, as set out in Dr Beattie's letter, and that there was some discussion about re-doing the surgery, which was initiated by Mr Azam. The reason I come to that conclusion is that the letter is relatively clear in its terms that the issue of having the surgery re-done was raised by Mr Azam with Dr Beattie.
19. As far as the cogency of the evidence is concerned, Mr Campbell, as I have indicated, unfortunately died on 12 April 2014. I accept also not only that his evidence is no longer available to the defendant, but that there may be difficulty in tracing witnesses, and insofar as they are successfully traced that there is likely to be much greater difficulty with the witnesses (including the claimant) recalling events going back to 1996 or thereafter, that they could otherwise have recalled more easily had this action been brought within the limitation period.
20. Next, the conduct of the defendant after the cause of action arose. It is said by Mr Uddin on behalf of Mr Azam that the conduct of the defendant in not informing the claimant that the surgery had been less than successful is of itself conduct that should be taken into account. However, I am satisfied that the relevant factor which section 33 is referring to is the conduct of the defendant after Mr Azam started to assert his claim, and there is nothing in that conduct which should count against the defendant. However, I will take into consideration the point made on behalf of Mr Azam that he was led to believe initially that the surgery may have been carried out to an acceptable standard as part of the circumstances of the case.
21. There is then an issue as to any disability that Mr Azam was under. Mr Azam refers to depression that he was suffering from as a result of the unfortunate death by suicide of his daughter in 1997. A report from a psychologist has been produced, which refers to what Mr Azam told the psychologist principally about the effect of the death of his daughter on him. That is not a diagnosis of a particular psychological condition, and there is no suggestion that Mr Azam was in any way suffering from a disability that would have prevented him from initiating proceedings such as a lack of capacity. I am not satisfied that Mr Azam was suffering from a disability that represents an excuse or a reason why he was unable to bring proceedings, but I am prepared to take it into account as part of the overall circumstances of the case that Mr Azam suffered an unfortunate tragedy that had an effect on his psychological condition that may have had some effect on his ability to function and bring his claim.
22. There is then the issue of acting promptly in obtaining medical and legal advice. The claimant consulted solicitors in April 2015 after meeting with Mr Carner and obtaining his opinion, on 18 August 2014, and then a report was prepared by Mr Goodacre on 23 May 2016, with a claim form being issued on 30 June 2017. The

claimant could have acted more promptly than that in terms of bringing his claim once, based on his case, he became aware from the opinion of Mr Carner about the possibility at least that his operation had been carried out negligently. However, I do not hold that against him. But he did not act promptly after raising, on my findings with Dr Beattie on 6 February 1998 the possibility of having the surgery re-done. It seems to me that having raised the issue of having the surgery re-done it should at least have been in the mind of the claimant Mr Azam, that there was some question about whether the original operation had been carried out in a correct and professional manner.

23. Having referred to all of those matters, both counsel accepted that the key issue here is the question of prejudice as between the parties. On the part of the claimant the prejudice (if I do not exercise my discretion under section 33 in favour of the claimant) is being deprived of the opportunity to pursue what may turn out to be a genuine claim, and in respect of which he may be entitled to a material amount of damages. Against that, there is the prejudice to the defendant (if I do exercise my discretion in favour of the claimant under section 33) in terms of the effect that the delay has had on it and its ability to defend the claim.
24. As to the importance of those matters, I have been referred to the speech of Smith LJ in *Cain v Francis* [2008] EWCA (Civ) 1451. At paragraph 57 she makes the point that “with great respect it does not seem to me that the length of the delay can be, of itself, be a deciding factor. It is whether the defendant has suffered any evidential or other forensic prejudice which should make the difference”, (that is, the difference between giving permission for the claimant to proceed under section 33 or not). Later at paragraph 69 Smith LJ says:
- “In my view, the words of section 33 must be construed against that background. The context is that the claimant had the right to pursue his cause of action which he has lost by the operation of section 11. The defendant, on the other hand, had an obligation to pay any damages due; his right was the right to a fair opportunity to defend himself against the claim. The operation of section 11 has given him a complete procedural defence which removes his obligation to pay. In fairness and justice, he only deserves to have that obligation removed if the passage of time has significantly diminished his opportunity to defend himself (on liability and/or quantum). So the making of a direction, which would restore the defendant's obligation to pay damages, is only prejudicial to him if his right to a fair opportunity to defend himself has been compromised.”
25. There are essentially two elements to the claim. Firstly, the carrying out of the operation negligently; and, secondly, the failure to obtain informed consent from Mr Azam before the operation. As to the second of those, informed consent, there is a consent form which has been produced which appears to have been signed by Mr Campbell and the claimant Mr Azam. If the action had been brought in time whilst Mr Campbell was still alive he could have given evidence as to his usual practice in completing consent forms, it being the case of Mr Azam that he was not told of the other options or possible downsides of the operation, notwithstanding that the consent form contains a statement to the effect that he was. I accept that in relation to that

element of Mr Azam's claim there may well be significant prejudice to the defendant if I were to allow that claim to proceed against it, given that Mr Campbell can no longer be produced to give evidence that may assist the court in deciding whether or not the consent form is correct in indicating that Mr Campbell had discussed with Mr Azam the downsides to the operation and other options that were available. For that reason, balancing factors for and against but giving precedence to the prejudice to the defendant's ability to defend the claim caused by the delay, I will not give permission under section 33 of the Limitation Act 1980 for that element of the claim to proceed.

26. As to the performing of the operation negligently, Mr Campbell was very unlikely to recall the operation, even if the claim had been brought within the 3-year limitation period. Mr Azam's expert says that the wrong technique was used in the operation and that the operation was carried out very badly. The evidence as to what was done in the operation and how well it was done remains in effect in the appearance of Mr Azam's chest, according to his expert, which was examined by his expert and can be examined by the defendant's expert. The defendant's expert is able to give an opinion as to whether what happened in 1996 in terms of carrying out this operation both as to technique and as to how well the operation was carried out is compliant with the way in which a reasonable body of surgeons would have carried out that operation in 1996, both in terms of technique and the competence with which the operation was carried out. Mr Campbell's evidence as to his two standard practice at the time is unlikely to have been much assistance the court in my view beyond what the experts could say as to whether the operation was carried out negligently or not. The medical records of the defendant pre-operation and the operation itself and as to what happened thereafter appear on their face to be relatively comprehensive and have been kept and will be available to the court at the trial.
27. I am not satisfied that there is significant real prejudice to the defendant in terms of its ability to defend the claim, that the operation was carried out negligently, by virtue of the passage of time beyond the limitation period. The remaining considerations are of relatively minor importance compared to the question of prejudice to the defendant (the length of the delay for which I found that Mr Azam does not have an excuse after February to 1998; Mr Campbell/Mr Wong leading Mr Azam to believe that the operation had been successful; and the depression suffered by Mr Azam in 1997 as a result of the death of his daughter). I will therefore give permission under Section 33 to Mr Azam to pursue his claim against the defendant in relation to the operation on the basis that it was negligently carried out.

This Judgment has been approved by the Judge.