Ministry of Justice

Consultation on limitation periods and personal injury

A response by the Association of Personal Injury Lawyers
11 September 2009

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation whose members help injured people to gain the access to justice they need and deserve. Our members are mostly solicitors, who are all committed to serving the needs of people injured through the negligence of others. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues.

The aims of the Association of Personal Injury Lawyers are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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We welcome the opportunity to respond to this consultation on limitation periods relating to personal injury, after responding to the Law Commission's original consultation on this issue in 1999.

The main focus of this response is an answer to question one in the consultation paper. Implementing the reforms in the draft Bill proposed by the Law Commission in 2001 would not replicate the effect of the present law of limitation relating to personal injuries. The draft Bill reflects the law as it stood in 2001, but case law has developed since then, something not reflected in key areas in the draft Bill.

Clause 1

Clause one of the draft Bill creates 'a defence to a civil claim that the claim was not made before the end of the period of three years from the date of knowledge of the claimant'. There is no such defence in current common law. The only defence a defendant currently has to a claim is to prove that there has not been negligence, not that the claim is time barred. This point was made by Lady Justice Smith in the recent case of *Cain v Francis*[1], when she said 'The [Limitation] Act did not provide a defence on the merits' and that the effect of the provision 'was not to extinguish the claimant's right to action, only to bar his remedy'.

When a case is brought after the limitation period has expired, it is vital for the claimant that the court, when asked to exercise discretion to disapply a time bar, appreciates and shows awareness of the fact that the defendant is or may be a tortious wrongdoer. There are two problems with the Bill as currently drafted in this respect. The first problem is that there is no statutory recognition in the Bill that the defendant is or may be a tortious wrongdoer, and the Bill creates 'a defence' of limitation. This problem is mirrored in the wording of clause 10 of the draft Bill, which states 'it is a defence to the 1934 Act claim that the deceased died after the end of the limitation

[1] [2008] EWCA Civ 1451

period under section 1(1) which would have applied to a civil claim in respect of the cause of action made by him'. It is also repeated in clause 11 which creates the same defence in claims relating to the Fatal Accidents Act 1976.

APIL suggests that all the clauses providing 'a defence' should be replaced by clauses worded similarly to the present Limitation Act 1980 providing instead a time limit for the bringing of a claim rather than the creation of a new tortious defence.

Clause 12

The discretionary powers that the courts would be able to exercise according to clause 12 of the draft Bill are defined differently from clause 33 of the current Limitation Act. The discretionary provisions under the current Act have been most recently considered by the House of Lords in the cases of *Horton v Sadler*[2] and *A v Hoare*[3]. These cases have resulted in significant clarity regarding the application of discretion, and it is no longer an 'exceptional indulgence' for discretion to be exercised in favour of the claimant. Any change to the application of discretion could restrict the powers of the courts to exercise discretion in the claimants' favour, which is not in the interests of fairness or access to justice. The current scope for discretion also appears to operate fairly for both claimants and defendants. In the case of *Khairule v North West Strategic Health Authority*[4] the claimant succeeded in the application for discretion, but in the case of *Whitson v London Strategic Health Authority*[5], the claimant failed, despite broadly similar facts involved in both cases.

[2] [2007] 1 AC 307
[3] [2008] UKHL 6
[4] [2008] EWHC 1537 QB
[5] [2009] EWHC 956

APIL submits that subsection (3) (i) of clause 12 should be removed and the wording of (3) amended to read:

(3) In acting under this section the court must take into account all of the circumstances, including but not limited to –

This amendment would ensure that the courts consider all circumstances before considering specific factors identified and listed in the Bill. This would properly reflect the current common law which specifically directs the court to have regard to *all* the circumstances, and not simply those listed to which the court's specific attention is drawn, including that the defendant is or may be a tortious wrongdoer, a factor not presently included in the list in the draft Bill. Moreover, whereas the common law now requires the court to take into account the subjective attributes of the claimant (age, education, intelligence etc.) when considering the exercise of this discretion, the Bill does not include such matters in the list.

Clause 3

The concept of a 'starting date', is introduced in clause 3 of the draft Bill, and subsection (1) applies the 'starting date' definition to cases involving a claim for personal injury. There is, however, no practical application of a 'starting date' in relation to cases involving personal injury anywhere else in the Bill. If the definition of 'starting date' is applied to the entire Bill then the date on which the limitation period starts will be, for example, when a person is exposed to asbestos, rather than when the exposure developed into an illness. Under the current Limitation Act the limitation period is three years after either 'the date on which the cause of action accrued; or the date of knowledge (if later) of the person injured'[6]. Any application of a 'starting date' as defined in clause three should, therefore, be limited to cases that do not include a

[6] Limitation Act 1980 (c.58) clause 11 (4) (a) and (b)

claim for personal injury, or a claim under the Fatal Accidents Act 1976. The new wording proposed in clause 3 of the draft Bill could, for obvious reasons, be a potential loophole for defendants and could be disastrous for injured people, due to the long latency periods associated with most asbestos-related conditions. Personal injury and fatal accident claims should not simply be exempted from the 'long stop' provisions but also the 'starting date' provisions.

Clause 4

We welcome the wording of subsection (2) (b) of section 4 of the draft Bill. It will reinstate into the test for constructive knowledge the subjective circumstances of claimants which might affect their ability to acquire knowledge. In *Hoare* the House of Lords decided that the test for constructive knowledge under section 14 of the Limitation Act 1980 was an entirely objective one. Clause 4 (2) (b) of the draft bill would restore the position prior to *Hoare* that was followed in cases such as *KR v Bryn Alyn Community (Holdings) Ltd*[7]. The test would be partly objective and partly subjective, and would require a court to consider whether the subjective characteristics of a particular claimant prevented them from acquiring knowledge that their injury or disability was the fault of another, against whom an action could lie at an earlier date than the one contended for by the claimant. This contrasts with the current law where the claimant's subjective position is merely one of a number of factors that a judge must take into account when deciding whether to exercise discretion to disapply the time bar.

[7] [2003] QB 1441