IN THE HIGH COURT OF JUSTICE CASE NO: 1994-O NO

2057
QUEEN'S BENCH DIVISON
DUDLEY DISTRICT REGISTRY
(Sitting at Birmingham Crown Court)
(Judgment delivered at the
Royal Courts of Justice, London)

Royal Courts of Justice
Strand
London WC2

Thursday 12th December 1996

B E F O R E :

MR JUSTICE POOLE

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ROSANNA MARY O'DRISCOLL
(Plaintiff)

- v -

DUDLEY HEALTH AUTHORITY
(Defendants)

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MR C LEWIS (instructed by Messrs Higgs & Sons and Harward Evers Solicitors, Stourbridge, West Midlands) appeared on behalf of the Plaintiff
MR M G SPENCER QC (instructed by Lewington Partnership, Dudley, West Midlands) appeared on behalf of the Defendants

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J U D G M E N T
(As approved by the Judge)

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Thursday 12th December 1996

MR JUSTICE POOLE: The plaintiff, who is now aged 26, brings this action against the defendants. It is in respect of injuries that she claims to have suffered at birth, arising from the negligence of the defendants and in particular their negligence in failing to deliver her by caesarian section as soon as a diagnosis of cord prolapse was made. This failure, she claims, led to hypoxia and consequent brain damage which has gravely affected her motor functions. The present hearing has concerned a limitation argument only. Very briefly the sequence of events was this.

The plaintiff was born on 8th October 1970. It was a breech delivery and the plaintiff's parents were told that there had been complications.

Thereafter there were many contacts between the plaintiff, her parents and doctors, by reason of the plaintiff's ongoing condition, which I need not here describe in detail. It is not in dispute that while that condition has not, happily, affected her intellectually, it is and continues to be one that leaves her severely physically disabled, unable or barely able to walk and unable normally or easily to communicate. For all practical purposes she is entirely reliant on her parents. In none of the contacts with doctors were the plaintiff or her parents given reason to believe that her condition was a result of any fault or failure in the management of her birth.

Her father has given evidence before me and told me that he and her mother simply accepted her condition as "just one of those things". I accept that evidence as true. My recollection is that the father had been employed for a number of years as a butcher with the local Cooperative Society until he was forced to give up work by reason of a disability some years ago.

In or about 1985, when the plaintiff was 15, the family saw a television programme on the subject of cerebral palsy. This programme led them to believe that the reason for the plaintiff's condition might be some fault or failure in management at birth.

They discussed the matter together with relatives. The plaintiff, aged 15, was involved in the discussions; and the decision was taken that when the plaintiff had reached the age of 21 a claim would be made, so that the child, having become an adult, could bring the claim in her own right. Until then they would do nothing. They advised the child accordingly and she followed that advice to the letter.

Her father told me that this decision was taken, because they believed that she would become an adult on her 21st birthday. I accept his evidence that that was the reason for the decision. No advice therefore was sought, either medical or legal, during the six or so years that then passed before the plaintiff's 21st birthday.

During this period her father continued to read or view with considerable interest any items in the media relating to cerebral palsy, and his belief continued that his daughter had a potential claim for what had happened at her birth.

On the plaintiff's 21st birthday, 8th October 1991 precisely, her father wrote, as agreed some six years earlier, to the Dudley FHSA.

As it happens that was the wrong body. But the correspondence soon rectified that and by the end of October his letter had been redirected to the defendants, they had acknowledged it, and he had sent a further letter to them, alleging negligence and fault, and failure to carry out a section as the cause of his daughter's condition, as indeed the earlier letter had done. What Mr O'Driscoll, what the entire family had overlooked was the fact that the plaintiff had reached her majority on her 18th and not her 21st birthday, and it was from that 18th birthday, say the defendants, that the clock had started to tick for the purposes of the Limitation Act.

A word about the family's decision to do nothing until the plaintiff's 21st birthday. At first and perhaps at second sight it was a remarkable and unusual decision. On any view the right course, the better course by far would have been to

seek immediate legal advice, with the medical advice that would almost certainly follow. But it was perhaps a decision by no means wholly beyond comprehension. First, the father and mother had little or no experience of legal involvement, and felt it would be better if the claim for compensation proceeded from the plaintiff as an adult. Secondly, they believed that for this purpose the plaintiff's majority began at 21. They were aware, I find, that for some purposes, eg voting, the age of 18 was the determining milestone, but did not extend this to litigation. I note in passing that for some significant legal purposes, eg that of sentencing in the criminal law, the age of 21 and not 18 remains to this day a critical milestone, and it is certainly the case, whatever the legislation may have decreed, that the age of 21 lives on in many minds as the one of the coming of age, of receiving the key of the door. So the decision, while wholly mistaken and misconceived, was not perhaps one that was entirely baffling and absurd. But whether it was or was not, it was a decision that was acquiesced in with absolute trust by the plaintiff.

Any child, dependent in the ordinary way on her parents, might have so acquiesced, and without any realisation of error dawning upon her on or after her 18th birthday when she became an adult.

This child, as I find, much more so, in that while unaffected by her condition in the strictly intellectual sense, she is nonetheless physically and no doubt emotionally dependent and reliant on her parents to a wholly exceptional degree, and could hardly communicate effectively for any purpose, including the purpose of a claim, without their active assistance and intervention. For all practical purposes, the management of her affairs was, and continues to be, in their hands.

That is the background.

The matter comes before me because, the defendants say, the plaintiff having had actual knowledge well before her 18th birthday, time started to run for the purposes of limitation on 8th October 1988; or, failing that, that she had constructive knowledge by about the end of 1990, one year after the breech delivery of her sister Melissa, so that, either

way, by the time the writ was issued on 11th May 1994 it was already statute barred.

The legislation deals with these questions at section 11 and section 14 of the Limitation Act 1980.

I am not concerned with any exercise of discretion under section 33, it being conceded by plaintiff's counsel that if the court were against him on either actual or constructive knowledge this would not be a proper case for the exercise of any discretion.

Section 11(4) of the Act provides (for actions in respect of personal injuries) that the limitation 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.

Section 14 of the Act provides:

"(1) In sections 11 and 12 of this Act 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...

(2) 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 judgment.

(3) 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."

The following propositions may be noted:

(a) "Attributable" means capable of being attributed to rather than caused by: Dobbie v Medway HA [1994] 1 WLR 1234.

(b) Ignorance of the law is irrelevant for the purpose of determining whether a person has knowledge.

The questions which the court may have to decide in any case involving the plaintiff's knowledge under section 14(1), (2) and (3) were fully considered by the Court of Appeal in Nash v Eli Lilly & Co [1993] 1 WLR 782. At 796 it was held that:

(a) "Knowledge" in the meaning of section 14 is a state of mind experienced by the plaintiff actually existing or which might have existed had the plaintiff, acting reasonably, acquired knowledge from the facts observable or ascertainable by him or which he could have acquired with the help of medical or other appropriate expert advice which it was reasonable for him to obtain.

(b) The period of limitation begins to run when the plaintiff can first be said to have knowledge of the nature of his injury to justify the particular plaintiff taking the preliminary steps for the institution of proceedings against the person or persons whose act or omission has caused the significant injury concerned.

(c) By section 14(3) "knowledge" for the purposes of section 14(1) includes knowledge reasonably expected to be acquired. There will be cases in which a firmly held belief actually held by the plaintiff precluded consideration of any further steps which he might reasonably have taken to acquire from knowledge of further facts before initiating proceedings. In other cases the state of the plaintiff's belief would make it reasonable for him to make the further inquiries envisaged in section 14(3). The temporal and circumstantial span of reasonable inquiry will depend on the factual context of the case and the subjective characteristics of the individual plaintiff involved.

(d) It is to be noted that a firm belief held by the plaintiff that his injury was attributable to the act or omission of the defendant, but in respect of which he thought it necessary to obtain reassurance or confirmation from experts, medical or legal, or others would not be regarded as knowledge until the result of his inquires was known to him or, if he delayed in obtaining that confirmation, until the time at which it was reasonable for him to have got it. If negative expert advice is obtained, that fact must be considered in combination with all other relevant facts in deciding when, if ever, the plaintiff had knowledge. If no inquiries were made, then, if it were reasonable for such inquires to have been made, and if the failure to make them is not explained, constructive knowledge
within the terms of section 14(3) must be considered. If the plaintiff held a firm belief which was of sufficient certainty to justify the taking of the preliminary steps for proceedings by obtaining advice about making a claim for compensation, then such a belief is knowledge and the limitation period would begin to run.

(c) Finally it is important to remember where the onus of proof lies. If the writ is not issued within three years of the date when the cause of action arose (section 11(4)(a)), the onus is on the plaintiff to plead and prove a date within the three years preceding the date of the issue of the writ (section 11(4)(b)). If the defendant wishes to rely on a date prior to the three-year period immediately preceding the issue of the writ, the onus is on the defendant to prove that the plaintiff had or ought to have had knowledge by that date.

In Forbes v Wandsworth HA (The Times, March 21, 1996) a majority in the Court of Appeal appeared to dissent, at least to a significant degree, from the proposition in Nash that the standard of reasonableness must be qualified by the position, circumstances and character of a particular plaintiff. Furthermore, as regards to the question of knowledge which may be imputed to the plaintiff with the help of medical or other expert advice, knowledge of facts capable of giving rise to a claim is not knowledge of facts ascertainable only with the help of expert advice: Halford v Brookes [1991] 1 WLR 428, where a plaintiff who realised that her daughter's death was capable of being attributed to the defendants, was held to have the necessary knowledge without recourse to legal advice.

Against the background of this confessedly economical outline of some of the recent developments in this area of the law the defendants have argued before me as follows:

1. The primary limitation period expired on 8th October 1991 and the plaintiff's claim is barred unless she first had actual or constructive knowledge of the relevant matters set out in section 14 within three years of the issue of the writ on 11th May 1994, that is at some time after 11th May 1991. The plaintiff, they say, had knowledge, either actual or constructive, before 11th May 1991 and therefore the claim is barred, subject to the exercise of the court's discretion under section 33. As to that, the plaintiff has conceded that this is not a case in which the court's discretion could properly be exercised. It being common ground that the primary limitation period expired on 8th October 1991, the argument before me has therefore proceeded entirely on the question of actual and constructive knowledge. Here the defendants have pointed me to page 79 of the bundle, a letter from an unidentified subordinate of the solicitor acting for the plaintiff, dated 24th January 1992, in which appears the bald statement that the limitation period has expired, and that it was not until Mr and Mrs O'Driscoll's last child was born in 1989 that they discussed the matter and came to the conclusion that the plaintiff's condition was possibly caused by the treatment received during her birth. The defendants place reliance on this. In my judgment, seen in the context of the conduct of the case as a whole, this is no more than an avowal of the expiry of the primary limitation period on the plaintiff's 21st birthday, and does little or nothing to assist us on the question of knowledge, though it does point to a belief about possible cause.

2. The acts or omissions said to constitute negligence are set out in the Statement of Claim where, fundamentally, the allegation is that the defendants omitted to carry out a caesarian section when the cord prolapse was diagnosed at admission, or at the latest when foetal distress occurred.

3. The defendants accept that the relevant matter of which the plaintiff must have had actual or constructive knowledge is that her injury, that is her cerebral palsy, was capable of being attributed to an omission to carry out a caesarian section.

4. This plaintiff is not a patient, but appears for understandable reasons to have left the management of her affairs to her parents. The court must have regard therefore not simply to what the plaintiff knew herself but to what her parents knew. In this context I was referred to the concession made by both sides in Atkinson v Oxfordshire HA [1993] 4 Med LR 18, namely that the plaintiff's mother was an agent to know and that her knowledge could be imputed to the plaintiff. That concession has not been made by plaintiff's counsel here, but from the evidence I have heard and read I am satisfied that Mr and Mrs O'Driscoll were agents to know and that their knowledge can be imputed to the plaintiff.

5. The plaintiff must have known from an early age that she was injured and that her injuries were significant.

6. The plaintiff claims that she first had actual knowledge that her cerebral palsy was capable of being attributed to an omission to carry out a caesarian section when she saw Mr House's report in June 1993. That claim, they say, should not be accepted.

7. If the plaintiff did not have actual knowledge, they say, she had constructive knowledge, within the meaning of section 14(3) of the Act, and in considering that issue, they say, the court should apply an objective test, namely what a reasonable person in the condition and circumstances of the plaintiff would or should reasonably have done.

8. It was wholly unreasonable, they say, for the plaintiff and her parents to decide in or about 1985 that the claim should be left to her 21st birthday. A reasonable person in her position would have written to the health authority indicating that the plaintiff had a claim to bring, and had they done so, six or more years would have been saved. In this context they argue, as I understand it, that the court should take into account, as against the plaintiff on the question of reasonableness, the fact (as they put it) that she had actual knowledge before her 18th birthday. In the absence of any authority in support of this argument, I am not persuaded by it.

9. At its most favourable to the plaintiff the latest date for constructive knowledge is by the end of 1990. This date is based on the date of sister Melissa's birth by breech delivery on 17th December 1989, followed by a year for seeking and obtaining expert advice.

10. Accordingly the claim, they say, was barred by the end of 1993 at the latest, some five or six months before the issue of the writ.

11. The primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim per Lord Griffiths in Donovan v Gwentoys Ltd [1990] 1 All ER 1018. The first indication the defendant had of a claim was over 21 years after the event, with all that that entails.

12. The doctors, they say, cannot now be traced, a third is not well enough to give evidence. Of the midwifery staff some cannot now be identified and one cannot be traced. Others have lost all recollection of the event. The records may be incomplete, and this possibility could have significant repercussions for the report of Mr House, who assumes that there was a failure to monitor, when the true explanation may be that records are missing.

13. The court will be required to consider the case on the basis of obstetric practice in 1970. Furthermore, by reason of relatively recent changes, a substantial portion of any damages payable will have to be paid by the defendant health authority rather than from other funds.

Paragraphs 11, 12 and 13 above would have been particularly relevant to an argument on a question of discretion, but it is not inappropriate that they be set out here as a reminder, were one needed, of the difficulties defendants can face in this class of action.

On the question of actual knowledge, the defendants argue that the plaintiff's claim that she first had it, after seeing Mr

House's report in June 1993, is in conflict, they say, with the terms of the letters written by her father on her behalf in October 1991. The first of these, headed claim for compensation due to negligence, sets out to describe the events of 8th October 1970. There is a reference to the non-performance of a "section", which led to lack of oxygen, which is "why she is like she is". "In our opinion", Mr O'Driscoll continues, "and that of others her condition was caused through incompetence". The second letter is in similar vein.

I have considered the terms of these letters, and the plaintiff's arguments thereon, together with the defendants' argument that there was a development of actual knowledge in the plaintiff and her parents from about 1985 when they saw the television programme, but I am not persuaded by any of them that they afford grounds for supposing that the plaintiff had actual knowledge at any time before seeing Mr House's report. Mr O'Driscoll's letters may be "bullish" in tone. They put the best foot forward for the impending claim. One would expect them to. But they fall short, far short in my judgment, of being evidence of required actual knowledge, either in Mr O'Driscoll or the plaintiff. As counsel for the plaintiff has argued, this is, or may well be, in medical terms a case of some complexity, and the act or omission constituting negligence has to be known with some degree of specificity: Hallam-Eames v Merrett Syndicates [1996] 7 Med LR 122, explaining the earlier decisions in Broadley v Guy Clapham [1994] 4 All ER 439 and Dobbie v Medway HA (supra). For the plaintiff to have had actual knowledge, she would have needed to know what the failure of care had consisted in, as pleaded in the Statement of Claim. This plaintiff may have suspected that her injury was due to birth hypoxia, but in a case as potentially complex on its facts as this one, there can be little doubt, in my judgment, that expert confirmation would be needed before that suspicion, or even belief, could attain the degree of firmness needed to amount to knowledge. Furthermore, as the plaintiff has reasonably argued, even knowledge, if knowledge there were, that injury could be attributed to hypoxia, is not knowledge that the injury was attributable to the act or omission alleged to constitute negligence, as hypoxia is not itself that act or omission. The act or omission alleged to constitute negligence is as pleaded in the Statement of Claim and no ordinary plaintiff could be expected to know that a birth injury was attributable to acts or omissions of that sort until advised by an expert: cf dicta Collins J in Spargo v North Essex District HA [1996] 7 Med LR 219.

The question of constructive knowledge remains. Ought the plaintiff to have gone for an expert report earlier? In answering this question, the defendants argue, the court has to apply the test of what a reasonable person in the condition (generally) and circumstances of the plaintiff would and should reasonably have done. Applying this test, they say, the very latest date for constructive knowledge is by the end of 1990. The defendants rely on this date because this was one year after the date of the birth of the plaintiff's sister Melissa, who was born by breech delivery on 17th December 1989. As to this, the evidence of Mr O'Driscoll, from whom I heard -- he was the only live evidence from whom I did hear -- was that one of the doctors looking after Mrs O'Driscoll before the delivery of Melissa may have said that a section would be necessary, and there may have been further discussion between Mr and Mrs O'Driscoll and the doctors about that time as to whether it had been necessary for the plaintiff to have had a section. He strongly denied, when pressed on the matter, that any of these conversations gave him knowledge of fault. The defendants further argue that had the plaintiff taken advice immediately after Melissa's birth in December 1989, she would by the end of 1990 have had actual knowledge. Here they rely on Forbes v Wandsworth HA where the court considered that a period of twelve to eighteen months was reasonable to allow a person time to take stock and seek (and presumably obtain) advice. I note in passing that the latter bracket would bring the commencement of constructive knowledge to 16th June 1991, which is, as it happens, less than three years before the issue of the writ. As I understand the defendants' argument, I am invited to prefer the former bracket on the facts of the present case. The plaintiff's solicitors did not press on, it is said, and/or they should have obtained the assistance of an expert who would have reported earlier than Mr House did, so that I should not be guided by the time it actually took them to obtain a report when they did. If it is necessary for me to make a finding as to this, it is that the plaintiff's solicitors acted with due and reasonable diligence, and that the time taken to obtain a report was not excessive for this class of case, where, as is well known, and as happened here, there can be considerable passages of time before notes are traced and suitably qualified experts instructed and a further passage of time before they report.

On constructive knowledge, therefore, my conclusions are these:

1. As to Mr and Mrs O'Driscoll's state of knowledge at the time of Melissa's birth, I am not persuaded on the evidence that anything said to them by doctors at that time either endowed them with knowledge for the purposes of section 14(3) or created a new situation which demanded the seeking of expert advice.

2. Accepting that there were was a free flow of information between Mr and Mrs O'Driscoll and the plaintiff at all material times, and that they were effectively her agents to know, I do not find that anything said to Mr and Mrs O'Driscoll at or about the time of Melissa's birth either imbued the plaintiff with knowledge for the purpose of the section, or imposed on her a duty to seek expert advice, or made it unreasonable of her at that stage not to do so.

3. Following Nash v Eli Lilly the temporal and circumstantial span of reasonable inquiry for the purpose of acquiring constructive knowledge is to be judged on the factual context of the case and the subjective characteristics of the individual plaintiff (see dicta of Purchas LJ at page 796).

What is the factual context and what are the subjective characteristics here? There is no dispute about them. They are that the plaintiff has been profoundly physically handicapped from birth. She has very serious difficulties with speech and communication. She is entirely dependent on the assistance and advice of her parents for all or most of the functions of living. It is assistance and advice that she has every reason to believe is reliable. When they gave her at about the age of 15 the well-meaning but wholly misconceived advice that she should wait until her 21st birthday before doing anything at all about the claim, she followed it like a child. That is scarcely surprising, for she was a child. But she continued to follow it until her 21st birthday, because it had been given to her as a child, and she remained, even after achieving her majority at 18, entirely within the reliable cocoon of her parents' care.

In my judgment, on these facts and in that situation (and it is more a matter of situation than of subjective characteristics) constructive knowledge in the plaintiff cannot, I believe, in the highly unusual circumstances of the

present case, properly be made out.

4. I am fortified in my reliance upon the test in Nash by Nourse's LJ adoption of it in his judgment in Coban v Allen and Another (The Times, October 14, 1996).

5. I am referred by the defendants to the decision of the Court of Appeal in Forbes v Wandsworth HA [1996] 7 Med LR 175 which Mr Spencer argues is now to be preferred to Nash on the question of the test to be applied in determining whether a plaintiff had constructive knowledge.

First of all, it is far from clear to me that Stuart-Smith's LJ judgment in Forbes does constitute an unqualified abandonment of the Nash test. Certainly it reaffirms the importance of a test of reasonableness, whilst pointing out that two alternative courses of action may both of them be perfectly reasonable. It also draws a telling analogy with the criminal law where in cases of provocation and duress there is a dual test, subjective and objective, and where the mere (my emphasis) fact that an accused is more suggestible, vulnerable or timid than a normal person of his age and sex is not relevant, because it undermines the objective test which requires him to be of reasonable firmness of mind. Proceeding from that analogy Stuart-Smith LJ continues:

"It does not seem to me that the fact that a plaintiff is more trusting, incurious, indolent, resigned or uncomplaining by nature can be a relevant characteristic, since this too undermines any objective approach.

I have come to the conclusion therefore that in the circumstances of this [my emphasis] case the deceased did have constructive knowledge."

The circumstances of the present case however are quite different from those in Forbes. It is not contended that a different standard should be applied to the plaintiff because she is more trusting, incurious, indolent, resigned or uncomplaining by nature than the ordinary man or woman, whereby the test of reasonableness should be undermined, but that she was, by reason of the long history of close and reliable parental care, to a wholly unusual degree insulated from the climate in which the ordinary reasonable man would be exercising his freedom of choice.

I do not read Stuart-Smith's LJ judgment therefore as an unqualified abandonment of all subjective considerations, but as a sharp reminder that an objective test should not be undermined. Of course no plaintiff, whatever the history, could be permitted to delay indefinitely. But this plaintiff did not do so. Within the limits imposed by the wholly misconceived advice she received from her parents at 15 (namely to wait until she was 21), she could hardly have acted more promptly. The first letter was sent on the very day of her 21st birthday, and thereafter, as I find, she did all she reasonably could to get on with the claim.

If I am wrong in my understanding of Stuart-Smith's LJ judgment, there is support, I believe, for the conclusion I have reached in that of Evans LJ. Understandably, Mr Spencer has stressed those parts of it that appear to promote a purely objective approach, for example:

"I therefore consider (the knowledge provisions of section 14) that they should be interpreted neutrally so that in respect of constructive knowledge under section 14(3) an objective standard applies." (per Evans LJ, p 191)

And again:

"I would hold that the objective test above must be applied and that it is necessary for this court to reassess this issue."

(p 191)

But he was also at pains to stress that "each case must depend on its own facts", and, above all perhaps, for the purposes of the present case, to distinguish between the relevance of "situation" on the one hand and "character and intelligence" on the other (p 191). In the present case it is precisely the situation in which the plaintiff was placed by her history and interaction with her parents that I have tried to consider. Nothing, I believe, in any of the judgments in Forbes precludes consideration of that situation. If I do not go to the judgment of Roch LJ it is only because it is one that I respectfully endorse and adopt. If I am wrong to do so, I respectfully adopt Evans' LJ distinction as to "situation", and I adopt it in his terms:

"The reasonable man must be placed in the situation that the plaintiff was." (p 191)

From all of the above it follows that in my judgment this plaintiff first had knowledge for the purposes of section 14 when she became aware of the contents of Mr House's report in June 1993. That was well within the three year period before the issue of the writ. My conclusion is that this claim is not statute barred.

MR SPENCER: My Lord, can I renew my application then, first, for a stay, and secondly, for leave to appeal? There are plainly issues of law which arise in this case. I appreciate that your Lordship has made findings of fact, but those findings of fact merely provide the matrix upon which the edifice of the law has to rest and the law stills needs to be looked at, most particularly Forbes, and its effect on the question of whether it is an objective or subjective test or partly one and partly the other.

MR JUSTICE POOLE: What is the future history of Forbes at the moment?

MR SPENCER: It has gone to the House of Lords.

MR JUSTICE POOLE: Have we any idea when speeches will be made in that case?

MR SPENCER: No. All I know is the case has recently been settled.

MR JUSTICE POOLE: The case itself?

MR SPENCER: The case has been settled and provided to their Lordships, but when it is likely to be heard, I cannot help you about that.

My Lord, quite plainly if this action were to proceed, there would be involved considerable expense. That being the case, in my submission it would be wrong that considerable expenditure should be incurred in circumstances when there may be an appeal at the end of the day which may be decisive of the litigation. If the matter is tried and judgment is given in the plaintiff's favour, it would still be open to the defendants to appeal the limitation point to the Court of Appeal. If in those circumstances the limitation point were decided in the defendants' favour, then all the costs and expenditure of the trial would prove to have been wasted. My submission is, therefore, in those sort of circumstances, if a defendant wishes to appeal, it is right and proper to grant a stay and to grant leave so that the matter can be tested in the Court of Appeal. If the defendants are successful, then it is the end of the matter, and, subject to any other appeal of course, all that cost expenditure is avoided. But it would be disastrous, in my submission, to incur the expense of a trial if, at the end of the day, this point is going to be decided against the plaintiff.

MR JUSTICE POOLE: What do you about this, Mr Lewis?

MR LEWIS: My Lord, if a stay is imposed at this stage then one is probably waiting another year before one takes any further step, which is hardly consonant with the current practice of trying to get on with cases as quickly as possible.

I would respectfully suggest perhaps two things. First, that your Lordship should not take the view that this is a proper matter for appeal; that your Lordship has come to clear conclusions in what, perhaps, is a fairly clear case. Secondly, that in any event because of a likely stay that your Lordship might impose if you did give leave to appeal -- because I can understand my friend's point, that we do not want to get to a trial of the substantive issue, having spent a further £10,000 each side, only to find that one week before the Court of Appeal rules against us. I would respectfully suggest for that reason also, as well as my reason number one, that your Lordship should take the view that you will leave it up to the Court of Appeal, I think first by a paper application for leave to appeal, and, if my friend gets through that, then

by a hearing in front of the Court of Appeal.

MR JUSTICE POOLE: What, before any substantive action that might take place, depending on the outcome of the appeal?

MR LEWIS: Yes. I do not know if I am thinking about this the right way. I know I had occasion to look at the provisions for interlocutory appeals to the Court of Appeal, which, I think, have been changed recently. But if your Lordship left it to the Court of Appeal to decide whether they wanted to hear the case, then one could know fairly soon whether the matter was going to the Court of Appeal. If your Lordship gave leave now -- I think I have this right -- one would simply be faced with the position that the matter would go to the Court of Appeal and therefore we can do nothing for a year or so, because, as I say, one would not want to waste anybody's money. But if you said no, this matter can get in front of the Court of Appeal by way of an application for leave to appeal pretty soon, that is a better way of doing it. Because if that matter comes up within two or three months and the Court of Appeal are not interested to hear an appeal, then we can get on with the substantive case. If they are interested to hear it, then we will not have lost anything because -- how can I put it? -- I will accept a stay up until the point at which my friend's application to the Court of Appeal was heard.

MR JUSTICE POOLE: What do you say about that?

MR SPENCER: My Lord, I do not, with great respect to my friend, suggest that that is a sensible course to take. Given the facts of the judgment and the decision that your Lordship has made about the law, in particular Nash and Forbes, and matters of that sort, this is plainly a case that requires leave to go to the Court of Appeal. It may well be that the decision in Forbes could substantially affect the judgment that your Lordship has given in this case, or impact upon it. That being the case, in my submission it is right that the defendants should have their rights preserved pending the decision of the House of Lords in that case. The only sensible way in which that can be done, in my submission, is to grant the defendants leave to appeal and stay the proceedings.

My learned friend talks about needing to get on with the action, one has to remember that, through no fault of the defendants, nothing was done for 21 years after the plaintiff was born and it is hard to see how now much prejudice in respect of the facts could arise by any further delay; it has all been incurred already.

That being the case, in my submission it is only right that the defendants should be allowed leave to appeal and, if they pursue the appeal and are successful, then that is the end of it. If they are not successful, then all we have lost is the period of time between now and the hearing. In my submission that is really the only sensible way to proceed.

MR JUSTICE POOLE: Is there anything further from either of you?

MR LEWIS: My Lord, no.

(Pause.)

MR JUSTICE POOLE: I am not going to grant leave, but I am going to grant a stay until this matter can be placed before the Court of Appeal.

MR SPENCER: On an application?

MR JUSTICE POOLE: On an application, as proposed by Mr Lewis.

Is there any other application?

MR LEWIS: On your Lordship's judgment, I am not quite sure what form the order takes, but if you would declare the action is not statute barred and say that the defendants should pay the plaintiff's cost, to be taxed if not agreed, of and associated with the limitation trial, I think that would cover us.

MR SPENCER: My Lord, that seems to be the appropriate way of so ordering and I cannot resist the application for costs.

MR JUSTICE POOLE: I so order.

Is there anything further?

MR LEWIS: No.