



## FOIL UPDATE

September 2009

### Proposed Changes to Limitation

In 2001 the Law Commission published its report on the law of limitation. It raised some general concerns:

- The Limitation Act 1980 makes different provision for different causes of action and it is not always clear in which category a case falls
- The start date of limitation does not always take account of the claimant's knowledge of facts, which can lead to unfairness
- In some cases those under a disability are given inadequate protection, in other cases they receive too much protection, causing unfairness to defendants.

The Law Commission solution to the problems was the introduction of a single, core limitation regime, to include a primary limitation period of three years from date of knowledge of (a) the facts, (b) the identify of the defendant, and (c) that the injury was significant; and a long stop limitation period of ten years from the date of accrual of the cause of action. The proposal was that the core regime should apply to the majority of tort claims, contract claims, and restitutionary actions, with a modified regime for personal injury actions.

In its original consultation paper the Law Commission included two provisional recommendations for personal injury claims: a long stop limitation period of thirty years and the removal of the courts' discretion to extend the limitation period. Having received responses to the

consultation the Law Commission reconsidered and in its final report recommended that the core limitation regime should apply to personal injury cases with two amendments:

- No long stop limitation; and
- Courts to retain a discretion to extend limitation (as now under Sec 33 Limitation Act 1980).

In December 2008 the Government announced, as part of the Queen's Speech, that a Civil Law Reform Bill would address the issue of limitation. An informal consultation paper published by the MOJ this summer indicates that the Government intends to include the Law Commission's recommendations on personal injury limitation in that Bill. It is not clear at this stage whether the Law Commission's proposals for other types of actions will be included in full, which would obviously entail major changes for claims in tort and contract currently subject to limitation periods of 6-12 years.

#### **Personal injury – the detail**

Before the Draft Bill is published it is impossible to know for certain what will be included. The following detail comes from a consideration of the Law Commission's recommendations and the Government's current consultation. It should be considered as a current 'best guess'.

#### *The personal injury proposals in brief\* :*

*Limitation period to be defined as three years from date of knowledge*

*Slight change to the definition of 'knowledge' of the claimant to start the limitation period running*

*Rules on constructive knowledge will bring together objective and subjective elements.*

*Lack of knowledge of the individual defendant in a claim of vicarious liability will no longer delay the running of time*

*Supervening disability will in future suspend the limitation period.*

*Rules may change definition of adult disability and introduce a long stop limitation for adult claimants under disability but with a Representative Adult, but position not yet clear – see below*

*Courts' discretion to extend the limitation period will continue largely as under Sec 33 with minor changes. \*current 'best guess'*

### Limitation period

The limitation period will, in effect, remain the same as at present although the definition will be changed slightly as the start of the limitation period will depend only upon knowledge, with no reference to the accrual of the cause of action (a change to the current Sec 11 Limitation Act 1980). There will be no long stop limitation period.

### Date of knowledge

Under the Law Commission's proposals, Sec 14(1) Limitation Act 1980 will be amended slightly:

#### *Sec 14(1):*

Date of knowledge is defined as the date on which a person had knowledge of the following facts:

- (a) that the injury was significant
- (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
- (c) the identity of the defendant

#### *New proposal:*

Date of knowledge will be defined as the date on which a claimant knows:

- (a) that the injury was significant
- (b) the facts which gave rise to the cause of action
  
- (c) the identity of the defendant

It does not appear that the new definition will significantly change the current position in most cases. The Law Commission's intention is to widen (b) slightly and allow the courts more flexibility by declining to define in detail the facts a claimant must know to have 'knowledge'.

### Constructive knowledge

The definition of constructive knowledge in the new provisions will bring together objective and subjective elements. The Law Commission felt that the current distinction which permits the court to take account of the claimant's situation, but does not allow the claimant's characteristics to be factored in, was artificial. It proposed that a claimant should be considered to have constructive knowledge when "a claimant in his or her circumstances and with his or her abilities ought reasonably to have known of the relevant facts". The introduction of this test will allow the claimant's intellectual abilities to be taken into account.

### Identity of the defendant

This test will operate largely as at present although the Law Commission recommended that where there is an action being taken against an employer for vicarious liability, the running of time should not be delayed where the particular individual's identity is unknown. This will mean that the requirements of Sec 14(1)(d) and Sec 14A(8)(c) of the Limitation Act 1980 are not repeated in the new Bill.

### Disability

It is unclear at present to what extent the rules on date of knowledge will be affected by 'adult disability'. In its report the Law Commission proposed that there be a shift from the concept of 'mental disability' to the concept of 'lack of capacity'. This would bring within the definition of disability, for example, claimants who are unconscious and unable to make decisions. This issue is not included in the Government's consultation paper and its plans on the definition are unclear.

The Law Commission also recommended that a long stop limitation period should apply to adult claimants under a disability and under the care of a responsible adult. Under this provision after a period of ten years from the accrual of the cause of action or, if later, from the onset of the disability, the primary limitation period would run, with the knowledge of the claimant's Representative Adult regarded as the knowledge of the claimant (except where the representative is the defendant). The Representative Adult for these purposes would be the member of the claimant's family who is responsible for the day to day care of the claimant, or a person who is authorised under Part VII of the Mental Health Act 1983 to conduct proceedings in the name of the claimant. If there is no-one who falls into either of these categories at the end of the ten year period, no long stop will apply. Again, this issue is not included in the current consultation and the Government's plans are unclear.

One change which it appears will be included will allow a supervening disability to suspend the limitation period (unlike at present where for a disability to affect the limitation period, it must exist at the accrual of the cause of action). The Government believes that this change will reduce the number of occasions where the courts' discretion is sought under Sec 33 to extend the limitation period on behalf of a claimant with a mental disability.

#### The courts' discretion

The courts' discretion to extend the limitation period will continue to operate largely as it does now under Section 33 Limitation Act 1980, with some minor changes:

- The distinction between a claimant who has not issued and a claimant who has issued within the limitation period but not served will be removed allowing the court to use its discretion in both situations;
- Courts will be entitled to look at the total time which has passed since the events giving rise to the claim, not just the delay after the end of the limitation period, when considering the defendant's ability to defend the claim;
- The inclusion of provisions to make clear that the question of whether the claimant has an alternative remedy and the strength of the claimant's case are relevant to the exercise of the discretion.

#### Conclusion

In its informal consultation paper the Government states that in its view the new proposals for personal injury limitation seem to be "broadly similar to the present law". Although at present it is hard to be certain what the exact proposals will be, that does appear to be the position – that but for a few minor changes the position will continue largely as before.

The Government in its consultation is seeking, in particular, comments on the impact of the proposed reforms, including significant costs or benefits. An impact assessment will be published with the Draft Bill.

As with all proposed legislation at present, the prospect of an early General Election must be factored in. As the Bill will only be undergoing pre-legislative stages at the end of this year it seems unlikely that it will become law before the end of the current Parliament.

If you have any views or comments on the issues please contact Shirley Denyer at [shirley.denyer@foil.org.uk](mailto:shirley.denyer@foil.org.uk). The informal consultation will close on 11 September 2009.

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