



## JUDICIAL APPLICATION OF THE LIMITATION ACT 1980 IN CLAIMS FOR PERSONAL INJURY: HAS TIME RUN OUT ON THE PROSPECT OF CERTAINTY IN THE LAW?

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### **Abstract**

In 2008 the landmark decision in *A v Hoare*<sup>1</sup> was received from the House of Lords. The decision will have a wide impact on the law on limitation periods in claims for personal injury. Victims of intentional trespass to the person can now apply to the court to either extend or disapply the primary limitation period. This article will consider the wider implications of the decision on issues of limitation. It aims to examine what the initial rationale of limitation legislation is. With this in consideration the article then analyses judicial application of the Limitation Act 1980 prior to, and post *A v Hoare*. This enables the article to conclude on whether the initial purpose of having limitation periods in personal injury claims is currently being met.

**Keywords:** limitation periods, personal injury claim, Limitation Act 1980

### **Introduction**

Placing limits on the amount of time in which a claimant has to institute proceedings against his tortfeasor is a concept widely accepted and firmly recognised by law. The consequence of failing to make a claim within the limitation period is procedural only. It bars the claimant's ability to take an action to receive a remedy for his injury. Under the current law a claimant has three years from the date of accrual, or the date of knowledge, to bring a claim for personal injury. However, in practice defining when the limitation period should start to run under section 14 Limitation Act 1980 (LA 1980), and in what circumstances the discretion should be exercised under section 33, has proved a difficult task to achieve.

In 2001 the Law Commission (LC) published a *Report on Limitation of Actions*,<sup>2</sup> which reviewed the entire topic of limitation law and provided strong recommendations for reform. The view of the LC in this report is that the law on limitation of actions in personal injury is 'unfair, complex, uncertain and outdated.'<sup>3</sup>

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<sup>1</sup> [2008] UKHL 6.

<sup>2</sup> Law Commission, *Report on Limitation of Actions*, (2001, LC No 270).

<sup>3</sup> *Ibid* para.1.4.

The LC recommended that a new 'core regime' should be applied to limitation periods in order to overcome these problems and that 'a simpler and more uniform scheme'<sup>4</sup> needed to be established in relation to the application of the LA 1980. Most notably the LC put forward their recommendations in relation to claims for injuries arising as a result of intentional trespass to the person. The LC argued that these claims, which fall under s.2 of the 1980 Act and are subject to a limitation period of six years, should fall within the same provisions as the three-year period relating to all other types of personal injury<sup>5</sup> under s.11 of the Act.

This article discusses the history of limitation law to establish the initial purpose of limitation periods in personal injury claims. It then examines judicial application of sections 14 and 33 of the LA 1980, both of which threaten the initial purpose of the legislation. The article finally examines the decision in *A v Hoare*, which brings the law in line with the recommendations made by the LC in relation to victims of intentional trespass to the person. This enables a conclusion to be reached on the effectiveness of limitation law in relation to its initial purpose.

## **1 The Initial Purpose of Limitation Laws in Claims for Personal Injury**

The law in relation to limitation periods in personal injury claims has seen significant development over the centuries culminating in the LA 1980. Over time, important new provisions have been introduced which have meant that it is possible to divert from the primary limitation period. The legislation dates back to the Limitation Act 1623 when a simple and fixed limitation of six years applied mainly to various land transactions. Following a Law Committee report in 1936,<sup>6</sup> the 1623 Act was reformed. This led to the Limitation Act 1939 enacting the recommendation that 'a single limitation period should apply to actions in simple contract, and actions in tort.'<sup>7</sup> No special provisions existed in favour of claims for personal injury under the statute. However, the policy behind enacting the initial legislation was clear: "to create certainty and finality."<sup>8</sup> Generally this is in favour of a defendant, who 'should not

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<sup>4</sup> Ibid para.1.4.

<sup>5</sup> Injuries arising as a result of negligence, nuisance or breach of duty.

<sup>6</sup> Law Revision Committee, *Fifth Interim Report (Statutes of Limitation)* (1936) Cmnd 5334.

<sup>7</sup> Law Commission, *Consultation Paper on Limitation of Actions*, (1998, Law Commission No LCCP151), para.1.6.

<sup>8</sup> Jones, R.N., Burton, F., and Roy, A., *Personal Injury Limitation Law*, (2007, 2<sup>nd</sup> edn., Tottel Publishing) p.1.

have to live with the risk of legal action indefinitely.<sup>9</sup> In 1954 Parliament passed the Limitation Act 1954 which introduced a lesser-fixed period of three years for cases specifically involving personal injuries. The law was therefore still supporting the initial policy of certainty, by prescribing the period as both short and fixed.

### ***The Introduction of Discoverability and Discretion***

Having a fixed limitation period began to emerge as a severe injustice to personal injury claimants as highlighted in *Cartledge v E Joplin & Sons Ltd*,<sup>10</sup> which paved the way for 'the impetus for reform of the limitation rules concerning personal injury.'<sup>11</sup> In *Cartledge*, the claimants had been negligently exposed to hazardous material when working for the defendant between the years of 1939-1950. They subsequently fell ill with a severe lung disease before 1950 but did not become aware of their diseases until a later date issuing their claim for damages in 1956. The House of Lords (HL) held the case to be statute barred as it fell outside the limitation period of six years under the 1954 Act.<sup>12</sup> The limitation period was to run from the date of the accrual of the injury 'irrespective of his (a claimant's) knowledge of such loss or damage.'<sup>13</sup> Lord Reid expressed his concern towards the harshness of the decision:

It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and, therefore, before it is possible to raise any action.<sup>14</sup>

As a result, Parliament enacted the Limitation Act 1963 which introduced what has become known as the concept of 'discoverability.' Claimants had one year from their 'date of knowledge,' to bring a claim. It is this date of knowledge concept that is now contained within section 14 of the LA 1980.

In 1975, Parliament passed the Limitation Act 1975 and further reformed limitation law. Potentially disregarding the need for certainty, Parliament pursued 'the most radical recommendation from the Law Reform Committee.'<sup>15</sup> The 1975 Act introduced a discretion that the court would be able to use in favour of claimants, to completely

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<sup>9</sup> McGee, A., and Scanlan, G., 'Judicial Attitudes to Limitation,' (2005) *Civil Justice Quarterly* p.460.

<sup>10</sup> [1963] AC 758.

<sup>11</sup> Murphy, J., *Street of Torts*, (2007, 12<sup>th</sup> edn., Oxford University Press), p.650

<sup>12</sup> In *Cartledge v E Joplin & Sons* the Limitation Act 1939 applied, as the injury occurred before the 1954 Act came into force, which meant the relevant period was six years.

<sup>13</sup> [1963] AC 758 at 759.

<sup>14</sup> *Ibid* per Lord Reid at 772.

<sup>15</sup> Jones et.al., *Personal Injury Limitation Law*, p.10.

disapply the three-year limitation period. It is this discretion, which is now contained within s.33 of the LA 1980.

This article adopts the view that the introduction of sections 14 and 33 threaten the level of certainty available in the law and argues that the extension and discretionary tools that have been given to the judiciary must inevitably result in a 'lack of consistency'<sup>16</sup> that 'subverts the very purpose of limitation laws.'<sup>17</sup> It also suggests that the provisions neglect the certainty required by the law in order to provide justice for defendants. Analysis of relevant case law and judicial application of both sections support these arguments. Throughout this article, the 'purpose' of limitation law will be taken to be 'certainty.'

## **2 Judicial Application of Section 14 of the Limitation Act 1980**

The provision of section 14, *prima facie* mitigates the discussed purpose of limitation law. It threatens to undermine the creation of certain and final periods in which a defendant should expect to be subject to a claim for personal injury. The overall purpose of section 14 is to further define the reference to 'the date of knowledge' under section 11 of the Act, which will determine the date on which the limitation period will begin to run against a claimant. Under section 11(4) the primary limitation period in claims for personal injury is three years from the date on which the injury was accrued, or the date of knowledge, if later.

### ***The Provisions of Section 14***

Section 14(1) defines a claimant's date of knowledge as the date on which the claimant first knew; that their injury was significant, that the injury was attributable to the alleged act or omission, and the identity of the defendant or the person that created the cause of action. The meaning of 'significant' appears to be the most important of these provisions as it is further defined in section 14(2); an injury is 'significant' when the claimant would have reasonably considered his injury serious enough to justify the institution of proceedings against the defendant for damages. Section 14(3) additionally provides a test to determine whether a claimant has 'constructive knowledge' of his case. Under this section it is possible for a claimant to be deemed to have constructive knowledge of his action if he can reasonably be held to have done so from the facts observable and ascertainable to him, or by seeking

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<sup>16</sup> Pattern, K., 'Judicial Discretion to extend the limitation period – policy, principle and application,' (2004) *Journal of Personal Injury Law* pp.306

<sup>17</sup> *Ibid.*

medical or other appropriate advice. A defendant may argue that a claimant has an earlier date of constructive knowledge on the grounds that it would be reasonable to expect a claimant to issue proceedings from what facts *were available* to him, or that the claimant should have taken advice from what he *knew* of his injury.

***Determining the 'date of knowledge'- a subjective or an objective test?***

Judicial application of both these provisions has been criticised in that 'the courts have shown little consistency of approach or coherence in propounding principle, in determining the attribution of knowledge.'<sup>18</sup> It has proven difficult to gain clarity on whether 'the law lays down an objective test... or whether there is an element of subjectivity in attributing knowledge.'<sup>19</sup> This is in relation to both section 14(2) and the test for 'significant injury', and section 14(3) and the test for 'constructive knowledge.' Between 1969 and 1996 the judiciary undoubtedly favoured that the subjective elements of each particular claimant should be taken into account in relation to both the test for 'significant injury' and 'constructive knowledge.'

It was the nature of the test for when a claimant would be fixed by constructive knowledge that first came under scrutiny by the judiciary. In *Newton v Camel Laird & Co*<sup>20</sup> the CA held that when the Court were to consider whether a claimant should be fixed by an earlier date of constructive knowledge, over his actual knowledge, they must take into account the subjective characteristics of the particular claimant.

In *Newton* the claimant's wife brought an action against her deceased husband's employers for the asbestosis he contracted during his time working for them, which led to his death in August 1965. It was held that the test for constructive knowledge depended on the reasonable man, in the particular claimant's position. Widgery LJ in particular held that 'it is necessary to look at all the circumstances of the particular individual concerned.'<sup>21</sup>

The CA in *McCafferty v Metropolitan Police District Receiver*<sup>22</sup> followed their earlier decisions in relation to constructive knowledge and held that the test for when a claimant knew his injury to be 'significant' was also partly subjective and partly objective. The claimant in *McCafferty* brought an action for damages for the tinnitus

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<sup>18</sup> McGee and Scanlan, 'Judicial attitudes to Limitation,' p.461.

<sup>19</sup> *Ibid.*

<sup>20</sup> [1969] 1 WLR.

<sup>21</sup> *Ibid* per Widgery LJ at p.421.

<sup>22</sup> [1977] 1 WLR 1073.

he acquired as a result of his negligent employee failing to provide him with adequate protection for his ears, which led to the early termination of his employment.

Lane LJ emphasised the subjective elements, which must be considered in deciding whether a claimant knew his injury to be significant.

it is clear that the test is partly a subjective test, namely: 'would this plaintiff have considered the injury sufficiently serious?' and partly an objective test, namely: 'would he have been reasonable if he did not regard it as sufficiently serious?'<sup>23</sup>

This partly subjective and partly objective test remained good law and was first confirmed in relation to the provisions of the LA 1980 by the CA in *Nash v Eli Lilly & Co.*<sup>24</sup> Subjective characteristics were to be taken into account under both section 14(2) and section 14(3). The claimants had taken prescription drugs supplied by the defendant and began to suffer various side effects. It was held that determining whether each claimant had knowledge of their case 'was a matter which had to be considered with reference to the individual facts of each plaintiff's case.'<sup>25</sup>

At this point, the judiciary seemed to be sacrificing the certainty of limitation law to ensure justice for claimants. The partly subjective nature of the section 14 tests would mean that the law was difficult to predict. The nature of the test meant that the purpose of limitation law was certainly not being met. However, the judiciary did appear to apply a consistent test but this changed significantly from 1996 onwards.

In *Forbes v Wandsworth Health Authority*<sup>26</sup> the CA took a drastic diversion from its own decision in *Nash v Eli Lilly*, in relation to the nature of the test for constructive knowledge under section 14(3). The Court held that the test 'should be construed as applying a strictly objective approach in attributing constructive knowledge to a claimant.'<sup>27</sup> The importation of an objective test was welcomed, in the sense that it would create hopes for a more predictable test for the date of knowledge. However, the fact that at this point in time, limitation law was faced with the difficulty of having the same court, the CA, decide differently on the same issue would appear as evidence of the inconsistency of approach towards. It was clear that '*Nash* and

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<sup>23</sup> *Ibid* per Lane LJ at 1081.

<sup>24</sup> [1993] 1 WLR 782.

<sup>25</sup> *Ibid* per Purchas LJ at 791.

<sup>26</sup> [1996] 3 WLR.

<sup>27</sup> McGee, A. and Scanlan, G., 'Constructive knowledge within the Limitation Act,' (2003) *Civil Justice Quarterly* p.255.

*Forbes* could not be reconciled, and that the law would have to choose between the two authorities.<sup>28</sup> While the CA began to favour an objective test under section 14(3) in relation to constructive knowledge, they still appeared to favour a subjective approach to the test for 'significant' injury under section 14(2). In *KR v Bryn Alyn Community (Holdings) Ltd*<sup>29</sup> the Court held that the nature of the 'significant' test had 'to have a degree of subjectivity within it.'<sup>30</sup>

The conflict between *Forbes* and *Nash* lasted for an unacceptable period of eight years. The CA had created two completely different principles in relation to the test under section 14(3). This inconsistency would undoubtedly have made the task for the lower courts to implement reasoned decisions a difficult one during this period. Finally in 2004 the HL settled the dispute. In *Adams v Bracknell Forest*,<sup>31</sup> the HL provided a 'welcome re-affirmation'<sup>32</sup> of the law relating to knowledge and the test relating to constructive knowledge. In *Adams* the claimant had made a claim against the defendant local council for negligently failing to diagnose him with dyslexia as a child. He 'alleged that this failure had caused him to suffer disabling psychological syndromes such as depression, panic and lack of self-esteem,'<sup>33</sup> and submitted his claim for damages 14 years after he left school, in 2002. The key issue was to decide whether the personal characteristics of the claimant, such as the particular claimant's reticence,<sup>34</sup> should be taken into account. The judge at first instance held that his claim was not statute barred and the defendants appealed that decision. The case subsequently reached the HL where it was held that the claimant's case was statute barred due to the *objective* standards of the constructive knowledge test. Therefore, the more recent approach of the CA in *Forbes* was confirmed that personal characteristics were not to be taken into account.

This increase in certainty from *Adams*, due to the objective nature of the test, appears to have since expanded to also cover section 14(2) and the test for significant injury. In *Catholic Care (Diocese of Leeds) and Another v Young*<sup>35</sup> the CA moved away from the existing application of a subjective element within an objective

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<sup>28</sup> *Ibid.*

<sup>29</sup> [2003] EWCA Civ 783.

<sup>30</sup> Jones et.al., *Personal Injury Limitation Law*, p.45.

<sup>31</sup> [2004] UKHL 29.

<sup>32</sup> Moules, R., 'Out of the shadows and into the spotlight: the importance of civil procedure'. (2005) *Civil Justice Quarterly* p.37.

<sup>33</sup> *Ibid.*

<sup>34</sup> [2004] UKHL 29 per Lord Hoffmann at [49].

<sup>35</sup> [2007] QB 932.

test, and held the test to determine when an injury became significant as purely objective. This was held to be largely due to the HL's decision in *Adams*.

In *Catholic Care* the defendant nursing home appealed against a decision that the claimant's action in negligence was not statute barred. The claimant had been sexually abused by employees of the defendant in the 1970s, and claimed that he did not realise that his post-traumatic stress disorder, which he acquired later in life, was a significant injury caused by the abuse until 2000 when the case was brought to the attention of the police and he met with a psychologist. When deciding on the preliminary issue of *when* the claimant knew his injury to be significant enough to enable him to have knowledge of his claim against the defendant, the CA referred to the recent *Adams*' decision. Dyson LJ decided that 'the presence of the word 'reasonably' in both sections required similar construction,'<sup>36</sup> and therefore the test was objective as 'Parliament cannot have intended that a substantially objective test be applied in section 14(3), but a substantially subjective test in section 14(2).'<sup>37</sup>

Dyson drastically altered the application of the test for significance by stating that 'intelligence, personal history and all the personal characteristics of the claimant...are to be disregarded'<sup>38</sup> favouring a purely objective approach. The CA therefore held the claimant's case to be statute barred by his date of knowledge and the three-year limitation period was up. In so deciding so, the CA directly contradicted its own decision in *KR v Bryn Alyn*, creating further uncertainty as to what the nature of the test stood to be generating more difficulty for the lower courts.

### ***The effect of A v Hoare [2008]***

The recent case of *A v Hoare [2008]*<sup>39</sup> has provided HL authority on the CA's decision to depart from the subjective nature of the test for 'significant' injury under section 14(2). The conflict between *KR v Bryn Alyn* and *Catholic Care* have now been reconciled. The decisions in *Catholic Care* and subsequently *McCoubrey v MOD* have now been confirmed and the HL found in 'favour of a simple objective test.'<sup>40</sup>

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<sup>36</sup> Jones et.al., *Personal Injury Limitation Law*, p.45.

<sup>37</sup> [2007] QB 932 per Dyson LJ at [95].

<sup>38</sup> [2005] 1 AC 76 per Dyson LJ at [45].

<sup>39</sup> [2008] UKHL 6.

<sup>40</sup> Prime, T. and Scanlan, G., 'Limitation and personal injury in the HL – problem solved?' (2008) *Statute Law Review* p.123.



Therefore a claimant's subjective characteristics will not be regarded when deciding whether they knew that their injury was significant enough to justify proceedings. The dictum of Lord Hoffmann summarises the HL's decision that section 33 of the LA 1980 'is the place to in which to consider it (the subjective elements of a claimant).' The discussion on judicial application of section 14 has proven extremely beneficial to determining the degree of certainty and predictability in this element of limitation law. Most importantly, the tests under section 14(2) for significant injury and section 14(3) for constructive knowledge, are both objective and a high degree of certainty has been re-established.

### ***Judicial Inconsistency***

Discussion on case law relating to section 14 demonstrates that the most significant criticism, which negates the certainty and the purpose of limitation law, appears to be the inconsistency arising from judicial decision making. This is evident in the varying decisions of the courts in applying both the test for significant injury and constructive knowledge. Nevertheless, it would seem that by creating more certainty and predictability by adopting an objective test the judiciary have restored the fair balance of interests between claimants and defendants. The tests are objective and therefore do not favour claimants. In fact, it would appear that because the test for the date of knowledge is now objective, it is now weighed in the favour of defendants. The LC's view that the law does not recognise the justice that should be afforded to claimants sufficiently could in fact be justified. However, as recognised by the HL in both *Adams* and *Hoare*, the claimant will always have the discretion of the Court to fall back on if their claim is statute barred by section 14. This then leads onto an examination of section 33.

### **3 Judicial Application of Section 33 of the Limitation Act 1980**

If a claimant fails to argue that the three-year limitation period should be extended under section 14, then he will most likely look to the discretion under section 33 where the court may allow an action that is time barred to proceed if it appears equitable to do so. The courts' exercise of this discretion is important to establishing whether the purpose of limitation law can be met. Section 33(1)a) states that the court must have regard to any prejudice, which may result towards the *claimant* if section 11 is applied. Section 33(1)b) states that the court must have regard to any prejudice that may result towards the *defendant* if the discretion is exercised.

When determining the prejudice which may result against either the claimant or the defendant under section 33(3) the court must pay regard to 'all the circumstances of the case.' In particular this includes; the length of and reasons for the delay in proceedings, the cogency of available evidence, the conduct of the defendant after the cause of action arose, any disability of the claimant after the date of accrual, the conduct of the defendant once he knew he had a claim and the steps taken by the claimant to obtain legal, medical or any other advice.<sup>41</sup>

***Can any certainty be achieved whilst discretion exists?***

This article suggests that the very fact that the section 33 discretion exists means that all possibility for certainty in the law is removed. While the application of section 14 goes far in achieving a more certain system for limitation periods, because of the objective nature of the tests, section 33 then makes these long awaited attempts at clarity seem somewhat futile. Both academics and professionals have recognised how considerably 'discretion removes that comfort of certainty.'<sup>42</sup> This appears to be an accurate evaluation.

Firstly, the terminology used in the statute lacks clarity and appears extremely broad. When exactly it is 'equitable' to exercise the discretion has been noted to cause problems. In *Firman v Ellis*<sup>43</sup> Lord Denning defined the term 'equitable', in relation to the discretion, to mean 'fair and just.'<sup>44</sup> This failure to provide any precise definition of the term simply increases the uncertainty of the provision, Patten states it 'merely replaces one inexact concept with another.'<sup>45</sup> Further, under section 33(3) the court must pay regard to 'all the circumstances of the case'. It would seem that in being able to consider all the circumstances in each individual case, the law might not be very predictable. It is a broad reference, and even though the provision goes on to define issues such as delay, conduct and disability, the section implies that there is no limit as to what circumstances may be taken into account.

The courts themselves would appear to be a significant reason why the discretion may result in such unpredictability. Despite the recommendations of the LC in 2001

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<sup>41</sup> See ss.33(3)(a) to 33(3)(f) respectively.

<sup>42</sup> Patten, 'Judicial discretion to extend the limitation period,' p.306.

<sup>43</sup> [1978] 3 WLR 1.

<sup>44</sup> Ibid per Lord Denning at [3.168].

<sup>45</sup> Patten, 'Judicial discretion to extend the limitation period,' p.312.

to only apply the discretion in what have become known as 'hard cases,'<sup>46</sup> the HL have upheld that the discretion under section 33 is unfettered. In *Horton v Sadler*, the HL agreed that they 'had a wide general discretion that was not limited to occasional difficult cases.'<sup>47</sup> Furthermore, the courts have repeatedly shown 'a reluctance to offer guidelines'<sup>48</sup> for the exercise of their discretion.

Each provision of the statutory checklist will now be examined to demonstrate whether there is any degree of predictability that can be extracted from judicial application of section 33.

### ***Section 33(3)a) length of and reasons for delay***

The court must first consider the length of and the reason as to why there was a delay on the part of the claimant in bringing the action. It appears somewhat difficult to establish any specific length of delay where the courts will refuse to exercise the discretion. In *Buck v English Electric Co Ltd* the claimant had contracted a disease as a result of exposure to hazardous dust in his working conditions. The High Court held that with regards to the length of the delay 'there was a rebuttable presumption that a delay of five to six years would prejudice the defendants.'<sup>49</sup> However, in 2003 in *KR v Bryn Alyn* the CA expressly doubted the proposition of a rebuttable presumption. Auld LJ considered that 'some form of tariff for cases such as these' would not conform to the broad nature of the discretion, but did say that, as a general rule, 'the longer the delay...the more likely it is that the balance of prejudice will swing against disapplication.'<sup>50</sup>

Thus it appears almost impossible to establish any degree of predictability due to the courts' approach to what will suffice as an acceptable reason for the delay; 'the question is not whether the reasons are reasonable but whether they are genuine.'<sup>51</sup> The word 'genuine' implies that the test would include little in the way of objectivity. In deciding whether the reasons for the delay are genuine, the courts have inserted more unpredictability into an already uncertain discretion. In *Coad v Cornwall and Isles of Scilly Health Authority*, the test for what is a 'genuine' reason for the delay

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<sup>46</sup> Law Commission, *Report on Limitation of Actions*, (2001, LC No 270): 'it should only be the most exceptional cases that the Court will be justified in allowing a claimant a more generous time period within which to bring a claim.'

<sup>47</sup> [2007] 1 AC 307 per Lord Bingham at [9].

<sup>48</sup> Patten, 'Judicial discretion to extend the limitation period,' p.312.

<sup>49</sup> [1977] 1 WLR 806.

<sup>50</sup> *Ibid* per Auld LJ at [79] and [80].

<sup>51</sup> Patten, 'Judicial discretion to extend the limitation period,' p.319

was held by the CA to be subjective. Ward LJ drew attention to the specific wording of the section that 'on the part of the plaintiff' in section 33(3)(a) 'indicates that it is a subjective inquiry.'<sup>52</sup> The potential effect of the subjective nature of the test for what is an acceptable reason for delay is that the discretion may be extremely unpredictable. It means that no matter how unreasonable a claimant's reason is for delaying his proceedings, it will not act to prevent the exercise of the discretion.

**Section 33(3)b) The effect of the delay on the cogency of evidence**

Section 33(3)b) links directly to section 33(3)(a) as 'the longer the delay, the greater the likely effect on the cogency of evidence.'<sup>53</sup> Case law appears to demonstrate that the circumstances where evidence will become less cogent, and therefore mean that the court is less likely to exercise its discretion, are quite predictable. In *Forbes v Wandsworth*, the High Court refused to exercise the discretion based on the difficulties in obtaining the relevant medical notes and locating witnesses.<sup>54</sup> What may amount to 'evidential prejudice' is an element of the discretion which is fairly certain and predictable, achieving some clarity for parties and the lower courts to be able to ascertain when evidence should affect the exercise of the discretion. The CA in *Hartley v Birmingham City Council* held that 'what is of paramount importance is the defendant's ability to defend.'<sup>55</sup> In this case, where the action was delayed by only one day, the Court denied that the length of the delay was significant enough to hinder the defendants' ability to defend. From case law it seems that where the delay is longer, the more likely it is that a defendant may be subject to evidential prejudice. Consequently, judicial application of section 33(3)b) appears to achieve a satisfactory degree of certainty.

**Section 33(3)c) Conduct of the defendant after the cause of action arose**

What type of conduct by the defendant will be regarded as prejudicial towards the claimant is broad, and would appear to make the discretion in relation to this section difficult to predict. In *Marston v British Railways Board* the defence the defendants had provided against the claim was mistakenly wrong and this was found to be a significant factor in exercising the discretion<sup>56</sup>. A defendant's conduct may be held to be prejudicial towards a claimant, even when he honestly believed what he was

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<sup>52</sup> [1997] 1 WLR 189 per Ward LJ at 195.

<sup>53</sup> Jones, M.A., *Limitation Periods in Personal Injury Actions*, (1995, Blackstone Press Limited), p.134.

<sup>54</sup> [1997] QB 402 per Stuart Smith LJ at pp.416-417.

<sup>55</sup> [1992] 1 WLR 968 per Parker LJ at 979.

<sup>56</sup> [1976] ICR 124 per Croome-Johnson J at 137: Even though this case came before the LA 1980, it is still relevant in relation to how the discretion is exercised today.

doing was proper and correct. In addition, in *Thompson v Brown*, Lord Diplock saw conduct under this section 'as including the conduct of his solicitors and his insurers.'<sup>57</sup> This in itself makes the potential prejudice against a defendant under this section wide. It may result in the discretion being exercised in favour of the claimant due to the conduct of the defendant solicitors or insurers, which the defendant himself may not even be aware

**Sections 33(3)e) and 33(3)f) Conduct of the claimant since they became aware of the cause of action**

Both sections concern the conduct of the claimant since the cause of action arose. The first concerns to what extent the claimant acted promptly and reasonably once he knew he had a claim. The second concerns whether the claimant took any steps to obtain medical or legal advice, and if he did, then the nature of that advice. Unlike when the courts must consider the conduct of the defendant under section 33(3)c), sections 33(3)e) and 33(3)f) only include the conduct of the claimant himself who 'is not necessarily to be associated with the conduct of his advisors.'<sup>58</sup> In *Das v Ganju* the court held that 'the failings of a plaintiff's lawyers must [not] be visited on her, and there was no other way in which her conduct could be properly criticised'<sup>59</sup> and subsequently exercised the discretion in her favour. This in itself would seem to make the balancing of potential prejudice between claimants and defendants unfair. A defendant may be held blameworthy for the actions of his advisors, where a claimant will not.

In relation to the extent to which the claimant acted promptly and reasonably once he knew he had a claim, under section 33(3)e), the courts have consistently held that 'the test to be applied is an objective one',<sup>60</sup> as established in *Rule v Atlas Stone Co Ltd*.<sup>61</sup> In *Dale v British Coal Corp* the CA held that the test for whether a claimant's conduct was to be regarded as prompt and reasonable 'is an objective one, namely, what would a reasonable workman in the position of the plaintiff do?'<sup>62</sup> This element of objectivity would seem to take one step in making the discretion clearer and simpler to predict.

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<sup>57</sup> [1981] 1 WLR 744 per Lord Diplock at 751.

<sup>58</sup> Murphy, *Street on Torts*, p.654.

<sup>59</sup> [1999] PIQR P 260.

<sup>60</sup> Bijlani, J., 'Limitation in medical negligence cases: Part 2: How the court's discretion is exercised under section 33 of the Limitation Act 1980', (1997) *Journal of Personal Injury Litigation* p.164.

<sup>61</sup> [1987] CLY 2335.

<sup>62</sup> Unreported: (1992) WL 893894 Lord Justice Dillon.

In relation to section 33(3)f), the court must then consider if the claimant sought medical advice. In *Jones v G.D Searle and Co Ltd* it was held that when a claimant has sought advice, legal or medical, what the court will be concerned with is whether the advice in general was 'favourable or unfavourable' to his case.<sup>63</sup> This appears to remain the case under the current law in relation to the section 33 discretion and does not seem to raise any issues in relation to certainty.

***Section 33(3f) The duration of any disability of the claimant after the accrual of the injury***

This final element of the 'statutory checklist' is quite straightforward and does not appear to pose threats to any issues of certainty. Disability under this section 'has been defined as infants or as persons suffering from mental disorder.'<sup>64</sup> A person who is a minor<sup>65</sup> or who is mentally disabled<sup>66</sup> for some or all of the period between the date of accrual and the date proceedings were issued should have this taken into account and if it is proven to have hindered the claimants ability to claim it 'is likely to receive a sympathetic hearing.'<sup>67</sup>

This discussion has shown that it is possible, in some instances, to show some attempt to apply a consistent discretion. Most notably it seems that the longer the delay, the more likely it is that the court will not exercise the discretion. However, this certainty is then almost completely lost by the subjective nature of the test for which reasons for delay will suffice. The Court will consider the reason the particular claimant has for their delay in instituting proceedings, no matter how unreasonable. This means that the discretion, which is already in itself ambiguous, is made even more uncertain against potential defendants.

***A more generous approach to discretion since A v Hoare***

As discussed, the case of *A v Hoare* and primarily the judgment of Lord Hoffmann, has made the test for section 14(2) inherently objective. His reasons for disregarding subjective characteristics and circumstances were that it is a question dealt with

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<sup>63</sup> [1979] 1 WLR 101 per Roskill LJ at 106.

<sup>64</sup> Bijlani, 'Limitation in medical negligence cases,' p.165.

<sup>65</sup> In limitation law a person is regarded as a minor until they reach their eighteenth birthday.

<sup>66</sup> Under the Mental Health Act 1983.

<sup>67</sup> Carey, D., *Practice Guide: Medical Negligence Litigation*, (1998, CLT Professional Publishing) p.139.

under section 33(3)a) and the reasons for the delay on the part of the plaintiff.<sup>68</sup> Subsequently it seems 'more weight'<sup>69</sup> will now be given to section 33 as opposed to section 14, which clearly 'is not a recipe for consistency'.<sup>70</sup> This, combined with the fact that both Lord Hoffmann and Baroness Hale were 'fully in support of the more generous approach to the exercise of the discretion'<sup>71</sup> means that section 33 is now more likely to be the main contributing factor to uncertainty as 'section 33 will now be more easily applied to a claim.'<sup>72</sup> The potential effect that this will have on certainty is far from positive.

#### 4 The Effect of the House of Lords decision in *A v Hoare*

Claims for intentional trespass to the person now fall under the same provisions as section 11 of the LA 1980, as opposed to section 2 that provided a fixed limitation period of six years for tort actions. In order to fully understand the problems that this historical legal development has potentially overcome, it is beneficial to consider the HL case of *Stubbings v Webb*.<sup>73</sup> The facts of *Stubbings* were as follows. The claimant brought an action for damages against her stepfather and stepbrother for the sexual abuse she had suffered as a child. By the time the claimant issued proceedings against the defendants, the six-year limitation period under section 2 of the LA 1980 had expired. The claimant argued, referring to *Letang v Cooper*,<sup>74</sup> that her claim should be subject to the three-year limitation period that applied to personal injuries and was capable of extension under the LA 1980. The CA in *Letang v Cooper* held that the term 'breach of duty' referred to in section 11 meant that the section applied to all torts resulting in personal injury. This fell to be a preliminary issue to be decided in *Stubbings*.

The HL found in favour of the defendants and held that 'complaints of deliberate assault, including acts of indecent assault, were subject to a six-year limitation period.'<sup>75</sup> The decision in *Letang v Cooper* was overruled and the claimant's case against the defendants, who had subjected her to abuse as a child, was statute barred.

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<sup>68</sup> [2008] UKHL 6 at [44].

<sup>69</sup> Prime and Scanlan, 'Limitation and personal injury in the HL,' p.129.

<sup>70</sup> Brown, S.C, 'Limitation – Still something of a lottery?' (2008) *Journal of Personal Injury Law*, p.184.

<sup>71</sup> [2008] UKHL [60].

<sup>72</sup> Prime and Scanlan, 'Limitation and personal injury in the HL,' p.129.

<sup>73</sup> [1993] AC 498

<sup>74</sup> [1965] 1 QB 232 CA

<sup>75</sup> [1993] AC 498 at 499

The absurdity of the *Stubbings* decision is clearly demonstrated in *S v W*<sup>76</sup> in which, as a result of the inflexibility of *Stubbings* ‘a late claim in negligence was allowed against a mother for failing to prevent the claimant’s abuse by the father, but not a claim in trespass for battery against the father himself.’<sup>77</sup> Evidently the limitation laws that applied to cases of intentional trespass were ‘capable of causing considerable injustice.’<sup>78</sup>

### ***The decision in A v Hoare***

The HL ruling in *Hoare* followed considerable recommendations that the decision in *Stubbings* should be overruled, as it was ‘illogical and unjust.’<sup>79</sup> *Hoare* concerned five joined appeals from victims of intentional abuse or assault, the most significant of these concerned the widely publicised ‘lottery rapist,’ Iorworth Hoare, the facts of which are unusual. The claimant had been the victim of an attempted rape by the defendant in 1988. Following criminal proceedings the defendant was convicted of attempted rape and received a sentence of life imprisonment. On the day of his release from prison, he won several million pounds on the National Lottery. The claimant, on discovering this brought a civil action for damages against the defendant for the psychological injuries she had suffered as a result of his earlier crimes. Her claim was statute barred as the provision that applied to her injury was section 2 of the LA 1980, and thus the fixed six-year time period was up. The issue reached the HL on whether claims for intentional trespass to the person could fall within section 11.

It fell to be decided ‘which of the two regimes of limitation governed the actions.’<sup>80</sup> The HL drew attention to the history of the LA 1980, which implied that “breach of duty’ in section 2(1) of the 1954 Act included trespass to the person.’<sup>81</sup> In particular Lord Hoffman took note of the LA 1975, which introduced the discretion in the first place, which indicated that there was ‘no good reason to exclude such victims (of intentional trespass to the person) from it.’<sup>82</sup> The HL decided, with all five judges in agreement, that because of this, what was held in *Letang v Cooper* was in fact the

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<sup>76</sup> [1995] 1 FLR 862

<sup>77</sup> Tofaris, S., ‘Ironing out the law of limitation for tort actions,’ (2008) *Cambridge Law Journal* p.465.

<sup>78</sup> Deakin, S., Johnson, A. and Markesinis, B., *Tort Law*, (2008, 6<sup>th</sup> edn. OUP) p.929.

<sup>79</sup> Prime and Scanlan, ‘Limitation and personal injury in the HL,’ p.11.

<sup>80</sup> Tofaris, ‘Ironing out the law of limitation for tort actions,’ p.464.

<sup>81</sup> *Ibid* p.465.

<sup>82</sup> Brown, ‘Limitation – Still something of a lottery?’ p.177.



correct approach to the section. Their Lordships reasoning to depart from *Stubbings* and apply the Practice Statement varied but to keep the decision in *Stubbings* would 'impede the coherent development of the law.'<sup>83</sup> From this, and from accepting modern developments to demonstrate how 'victims may be too traumatised to bring (a claim) within the limitation period,'<sup>84</sup> the HL departed from *Stubbings*. The decision has therefore now been overruled and section 11 now includes claims for intentional trespass to the person resulting in personal injury.

### ***The effect of the decision on certainty***

Discussion suggests that, since the decision in *Hoare*, section 14 will now be more certain. The fact that intentional trespass is now governed by the same limitation regime as all personal injury 'is to be welcomed'<sup>85</sup> in the sense that it creates 'rationality and uniformity'<sup>86</sup> in limitation. It has also brought the law in line with the recommendations of the LC,<sup>87</sup> and in this respect would appear to be a positive step forward. However, the effect of this decision is that the uncertainty in application is potentially going to increase. Both sections 14 and 33 now apply to claims of intentional trespass to the person. Therefore, the instances where the proposed uncertainty of discretion applies, now applies to even more types of injury.

It has been said that the decision 'could pave the way for thousands of actions by victims of sex abuse to make claims against their attackers many years after they were attacked'<sup>88</sup> extending the scope of potential uncertainty, but *Hoare* is based on 'exceptional circumstances'<sup>89</sup> and the 'fears of floodgates opening are misconceived.'<sup>90</sup> A brief analysis of post-*Hoare* will now be conducted to help clarify how the new *Hoare* principles appear to be affecting limitation law.

## **5 Post *A v Hoare***

It has been just over one year since the HL delivered its judgment in *Hoare*. The most recent case to follow the decision comes from the High Court in *Raggett v Society of Jesus Trust*.<sup>91</sup> The claimant alleged that his now deceased male teacher,

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<sup>83</sup> Capper, D.J, 'Stubbings v Webb 'stubbed-out,' (2008) *Civil Justice Quarterly* p.175.

<sup>84</sup> *Ibid.*

<sup>85</sup> Prime and Scanlan, 'Limitation and personal injury in the HL,' p.129

<sup>86</sup> *Ibid* p.111.

<sup>87</sup> Law Commission, *Report on Limitation of Actions*, (2001, LC No 270) para.1.4

<sup>88</sup> [http://news.bbc.co.uk/1/hi/england/west\\_yorkshire/7975538.stm](http://news.bbc.co.uk/1/hi/england/west_yorkshire/7975538.stm)

<sup>89</sup> Case Comment, 'Further out of time claims unlikely,' (2008) 158 *New Law Journal* p.1016.

<sup>90</sup> Burns, S., 'Justice – Not a Lottery?' (2008) 158 *New Law Journal*, p.1085.

<sup>91</sup> [2009] EWHC 909 (QB).

Father Spencer, sexually abused him during his years as a pupil at a Catholic school between 1969 and 1976. Following initial disputes over who the correct defendant was, a claim was issued against the Board of Governors (the defendant) on 14 March 2008, over 30 years from the time that the alleged abuse took place. The claimant took an action based on vicarious liability against the defendant school and sought to recover damages for personal injury, claiming that his failed career, alcoholism and psychological distress were a result of physical and psychological abuse by Father Spencer. The evidence provided in favour of the claimant's allegations was strong. It included correspondence from Father Spencer years after the abuse, making reference to specific instances during the period of abuse. There were also numerous witness accounts from the claimant's school acquaintances that had come forward voluntarily. In response, the defendant's raised the limitation defence. It therefore fell to be determined as a preliminary issue, whether the claimant's case was out of time under section 11 of the LA 1980. The judgment given by the Honourable Mrs Justice Swift provides some excellent reflection on the application of the decision in *A v Hoare*.

#### ***Application of Section 14***

Although mentally aware that the activities were taking place at the time, the claimant alleged that he did not 'know' for the purpose of limitation that he had actually been subjected to unlawful acts until a conversation with a friend in 2005. Upholding the rules established in *Hoare*, Justice Swift reiterated the objective nature of the tests for knowledge under section 14.<sup>92</sup> She referred to the 'practical and relatively unsophisticated approach to the question of knowledge' devised by Lord Hoffman in *Hoare*. It was confirmed that the claimant must have been taken to have objectively 'known' that he had suffered a significant injury at the time the abuse occurred. Justice Swift held that the three-year limitation period began to run from the date of the claimant's majority, being his eighteenth birthday, and that his claim was statute barred since June 1979.

This strict approach to section 14 confirms the increased certainty available in the application of the LA 1980. The instances where claimants will be taken to bring their claim within the three-year limitation period because of delayed knowledge appears to be limited by the continued application of an objective test increasing the level of certainty in the law.

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<sup>92</sup> [2009] EWHC 909 (QB) paras.108-109

### **Application of Section 33**

After ruling out the possibility that the claimant had brought his claim within three years from his date of knowledge, the Court considered whether or not to exercise the discretion to allow the claim to proceed under section 33. Justice Swift considered the usual statutory checklist and exercised a balancing of prejudice test towards both the claimant and the defendant. The most significant sections posed for consideration were sections 33(3)a) and 33(3)b), the length of and reason for the delay, and the effect of the delay on the cogency of evidence. While accepting that the length of the delay was overly long, Justice Swift acknowledged that the reasons given for the delay were acceptable in relation to this particular claimant.<sup>93</sup> She continued to consider the effect of such a delay on the cogency of evidence and whether the defendants would have been in a significantly better position to disprove the allegations if they were brought within a reasonable period of time.<sup>94</sup> Justice Swift concluded that based on the evidence available, such as the witnesses who had come forward voluntarily, the defendants were always going to have a difficult task in disproving the allegations<sup>95</sup> Furthermore, she found it difficult to believe that even if Father Spencer were alive and denied the allegations, it would have been possible for such a plea to override the existing evidence.<sup>96</sup>

### **Vicarious Liability**

As the employer of Father Spencer, the school was vicariously liable for any tortious acts that he committed. It was held in *Lister v Helsey Hall* that for vicarious liability to arise there must be a 'sufficiently close connection' between the course of the employment of the tortfeasor and the torts committed,<sup>97</sup> and that torts of sexual abuse are capable of falling within the course of employment. In considering whether or not to exercise the discretion under section 33, Justice Swift highlighted how the existence of a vicarious relationship between the defendant and Father Spencer had a simplistic effect on deciding the case. As vicarious liability is strict, if it could be shown that the acts had taken place, then the school would be liable. Justice Swift compared this to cases based on negligence that would be less straightforward,<sup>98</sup> as evidence would need to be strong enough to prove the requisite duty, standard and

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<sup>93</sup> [2009] EWHC 909 (QB) at [119-120].

<sup>94</sup> *ibid* [122]

<sup>95</sup> [123]

<sup>96</sup> [124]

<sup>97</sup> [2001] UKHL 22

<sup>98</sup> [2009] EWHC 909 (QB) [121]

breach on the part of the school in failing to prevent the abuse. Justice Swift accepted that in these cases, the required evidence would be difficult to prove 30 years on.

For example, in *Albonetti v Wirral Metropolitan Borough Council*,<sup>99</sup> the difficulty in proving negligence 40 years later was the reason that the section 33 discretion could not be exercised. The claimant took an action against a children's home for negligently failing to prevent abuse by a friend of the home. In the absence of a vicarious relationship the court regarded it as impossible for a fair trial to be achieved after such a long delay and refused to exercise the section 33 discretion.<sup>100</sup> But Justice Swift asserted that the ability of the defendants to defend the issue of liability had not materially been affected and a fair trial on the issue of causation was still possible. The Court exercised the discretion, the three-year limitation period did not apply and the claimant was not barred from pursuing his claim for damages against the school.

### ***The effect of the decision in Raggett on certainty***

That the High Court exercised the discretion in *Raggett*, where there was a delay of over 30 years, suggests that the more 'generous approach' established in *Hoare*, is being applied by the judiciary. It is under section 33 that the judiciary will consider the subjective characteristics of a defendant. This poses a threat to the certainty of the law but it can be argued that this may not be as great as initially thought. *Raggett* indicates that section 33 is only practically going to be available to a specific group of claimants, who have a claim in vicarious liability. It has been argued that it is vicarious liability that will prove to be the 'mechanism for resolving cases where compensation is sought for past abuse.'<sup>101</sup> The success of the claimant in *Raggett* was due to the combination of intentional trespass now considered under the same limitation provisions as personal injury, and the ability to then take an action for this tort on the basis of vicarious liability. It must be questioned whether or not he would have succeeded if there was no vicarious relationship in which case he would have had to take his claim in negligence, just as in *Albonetti*, where the judiciary did not exercise the discretion.

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<sup>99</sup> [2009] EWHC 832 (QB)

<sup>100</sup> Ibid Mr Justice Mckinnon [23]

<sup>101</sup> Case, P., 'Limitation Periods and Sexual Abuse,' (2009) *Professional Negligence*, p.5

It is not uncommon in abuse cases where there is often a long delay in bringing the action that the person who committed the tort is not capable of being sued. In *Raggett* this was because the tortfeasor was deceased. However, it can often be due to other reasons, such as the fact that the tortfeasor is impecunious. In such cases, if there is no vicarious relationship for the claimant to base his claim on, then a claim in negligence against a party for failing to prevent the abuse will be the claimant's only option. *Raggett* indicates that because of the evidential difficulties that will face historical abuse claims based on negligence, it is unlikely that the claimant will convince a court to disapply the limitation period, and it is argued that 'few cases (based on negligence) will convince a court that section 33 ought to be employed.'<sup>102</sup>

### **Conclusion and Recommendations**

The judiciary appear to have made some attempts over the years, to increase the level of certainty in the law relating to limitation periods. A strict objective test to determining the date of knowledge under section 14 of the LA 1980 is now consistently being applied. Here claimants will find it difficult to show that their claim has been made within the three-year period, due to delayed knowledge. This will make the application of section 14 more certain.

However, as the judiciary are adopting a more generous approach to the discretion under section 33, this will mean that uncertainty in the law is potentially going to increase as the subjective elements of a claimant can be considered. It now seems that 'more weight' will be placed on section 33 and that the discretion will be exercised in a greater number of cases, including claims for intentional trespass to the person since the decision in *A v Hoare*. These developments have led to fear of the floodgates opening, and that there will be greater uncertainty in limitation law. In reality it seems that fears of *Hoare* opening the floodgates should not be so extreme. *Raggett* has provided some current guidance on where the decision in *Hoare* may take us. It seems that vicarious liability will play an important role on the availability of the section 33 discretion and that the future for certainty in limitation law following *Hoare*, may not be as hopeless as initially suggested. This is not to say that there will be a high level of certainty, it simply means that certainty may not be as threatened as it could have been.

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<sup>102</sup> Ibid

This article has established that the current purpose of certainty in limitation law does not seem to be being met and several recommendations could be considered in an attempt to overcome this problem. First of all, it has been suggested that 'limitation periods in claims for personal injury should be abolished.'<sup>103</sup> This suggestion, although extreme, should not be disregarded as an alternative. In light of the comment 'that certainty will gain no merit if all it results in is injustice,'<sup>104</sup> the suggestion to make all claims depend on the equitable discretion would seem understandable. Alternatively, it has also been suggested that 'the reporting of such cases merely causes confusion and difficulty in reconciliation'<sup>105</sup> and that therefore, an alternative would be to simply not publish decisions in relation to section 33. This recommendation would at least avoid the difficulty that judicial confusion and inconsistency causes the lower courts.

The responsibility of clarifying the law of limitation periods would, for the time being however, appear to rest with Parliament. A fresh look at 'making the law simpler and more consistent'<sup>106</sup> will take place some time later this year in the Civil Law Reform Bill 2009. It would therefore be beneficial to reflect on this discussion once this long awaited response from Parliament is finally received, alongside additional case law following the decisions in *Hoare* and *Raggett*.

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<sup>103</sup> Patten, K., 'Limitation Periods in Personal Injury Claims – Justice Obstructed?', (2006) *Civil Justice Quarterly* p. 49

<sup>104</sup> Report of the Committee on the Limitation of Actions in Personal Injury 1962 (Cmnd 1829)

<sup>105</sup> Prime and Scanlan., 'Limitation and personal injury in the HL,' p.128

<sup>106</sup> <http://www.commonleader.gov.uk/output/Page2672.asp>