
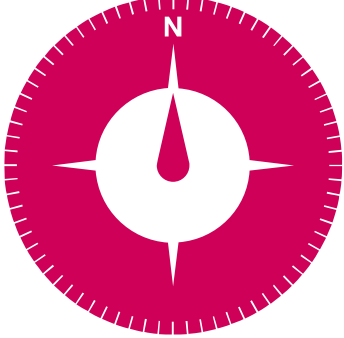


Raising the Dead: Limitation and Loss of a Chance

Professional Indemnity Forum 2016



Go further




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Outline



- Limitation Basics
- s14A (Ben Nevis)
- S32 (Scarfell Pike)
- The real zombies (Snowdon)




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Limitation Basics

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Limitation basics (easy stuff before we go uphill)

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Limitation Basics



Limitation Act 1980

- s2 tort - 6 years from the accrual of the cause of action
- s5 contract - 6 years from the accrual of the cause of action
- s4A defamation – one year
- s8 specialties – 12 years
- s10 contributions – 2 years
- s11 personal injury – 3 years



Latent Damage



Latent damage (the big one)



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Latent Damage



s14A Limitation Act

- Inserted by the Latent Damage Act 1986
- Applies to negligence but not personal injury
- 6 years from accrual of cause of action
- 3 years from the “starting date” if longer
 - earliest date claimant had knowledge required to bring an action
 - the right to bring the action

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Latent Damage



- Knowledge
 - the material facts about the damage
 - such facts as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment
 - the other facts
 - damage attributable in whole or in part to the act or omission which is alleged to constitute negligence
 - the identity of the defendant
 - or if the act was of a person other than the defendant, the identity of that person and the additional fact supporting the bringing of an action against the defendant



Latent Damage



- Knowledge
 - which a person might reasonably have been expected to acquire
 - from observable or ascertainable facts; or
 - from facts ascertainable with the help of appropriate expert advice which it is reasonable to seek
 - a person shall not be taken to have knowledge of a fact ascertainable only with the help of expert advice so long as s/he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice



Latent Damage



- s14B Any action for damages for negligence ...shall not be brought after the expiration of 15 years from the date (or if more than one from the last of the dates) on which any act or omission:
 - which is alleged to constitute negligence; and
 - to which damage in respect of which damages are claimed is alleged to be attributable (in whole or in part)
- This is not the same date as the accrual of the cause of action



Fraud, Concealment or Mistake



Fraud, concealment or mistake (tricky in the dark)



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Fraud, concealment or mistake



s32 Limitation Act

- If the action
 - is based upon the defendant's fraud or
 - any fact relevant to the claimant's right of action has been concealed by the defendant or
 - is for relief from the consequences of a mistake
- Limitation does not run until the claimant has discovered the fraud, concealment or mistake or with reasonable diligence **could** have discovered it

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Fraud, concealment or mistake



s32 Limitation Act

- deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty
- facts essential to cause of action must be concealed not evidence
- no long stop



Will the real zombies please stand up



The Real Zombies



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The Real Zombies



- Ombudsman
- The Civil Liability (Contribution) Act
- Failure to report your own negligence



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The Real Zombies



- The Financial Ombudsman Service
 - six months after the final response; or
 - more than six years after the event complained of; or (if later)
 - three years post awareness
 - no 15 year long stop
- Pensions Ombudsman
 - 6 years/3 years post awareness/13th April 1996
- Legal Ombudsman
 - 5 October 2010
- Parliamentary & Health Service Ombudsman
 - one year post awareness



The Real Zombies



- Civil Liability (Contribution) Act 1978
 - 2 years from the date on which the right accrued
 - date of judgment or award
 - settlement
 - the earliest date on which the amount to be paid is agreed between the parties
 - How does this apply in the context of a complex settlement?



The Real Zombies



- Failure to report your own negligence
- Claim “*you failed to tell me you were negligent and let the limitation period expire*”



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The Real Zombies



The Problem of Barber

- Barber v GRE 17 May 1990 [role of European law post Brexit?]
- Pensions are pay for the purposes of the equal pay directive
- Disadvantaged “equalised up” to the position of the advantaged
- Men could retire at 60 without reduction for early retirement
- Most schemes sought to equalise up to 65
- Many schemes failed to implement the changes correctly
- Changes failed but no one realised
- Ongoing role of benefit consultants and/or scheme advisers



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The Real Zombies



- Real case
 - errors in 1992
 - limitation period expired 2007
 - proceedings issued in 2014
- Loss of a chance
 - value at date proceedings would have been brought if negligence had been discovered
 - Be mindful of the 2008 stock market crash
 - Brexit crash
 - interest from notional trial date
 - claim limited to value of PI in place at trial date



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The Real Zombies



- Many things can extend the life of a negligent act
- An issue in the claims made/losses occurring debate
 - Original action
 - Losses occurring 1992 response
 - Claims made 2004 response
 - Parasitic/secondary action:
 - Error might have been 2004
 - Error might have been on expiry of limitation period in 2007
 - Block notification in 2009
 - Aware of this claim from 2012
 - Claim actually made 2014



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