IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MR JUSTICE POOLE

FC3 98/5393/1

Royal Courts of Justice
Strand, London, WC2A 2LL
Thursday 30 April 1998

B e f o r e :

LORD JUSTICE SIMON BROWN
LORD JUSTICE OTTON
SIR CHRISTOPHER SLADE

- -

O'DRISCOLL — Appellant
- and -
DUDLEY HEALTH AUTHORITY — Respondent

- -

(Transcript of the handed down judgment of
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Official Shorthand Writers to the Court)

- -

Mr Michael Spencer QC (instructed by The Lewington Partnership) appeared on behalf of the Appellant)
Mr Charles Lewis (instructed by Messrs Higgs & Sons) appeared on behalf of the Respondent)

- -

JUDGMENT
(As approved by the Court)

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Lord Justice Otton:

By a writ and statement of claim dated 11 May 1994 the plaintiff, who was born on 8 October 1970, claimed damages for personal injury, loss and damage resulting from the negligence of the defendant, Dudley Health Authority in the medical treatment she received at her birth in Wordsley Hospital, West Midlands. She suffered hypoxia and consequent brain damage resulting in cerebral palsy. By its defence dated 26 March 1995, the defendant asserted, inter alia, that the action was not brought before the expiration of three years from the date when she ceased to be under a disability (which was her 18th birthday on 8 October 1988); consequently the plaintiff's claim is statute-barred by virtue of sections 11 and 28 Limitation Act 1980.

By her reply, dated 5 July 1995, she averred that she did not have the relevant knowledge within the meaning of sections 11 and 14 Limitation Act, nor could she reasonably have been expected to acquire it, until she received an expert medical report from Mr Michael House, Consultant Gynaecologist & Obstetrician, dated 16 June 1993, and accordingly the action was not statute barred. In the alternative she sought the exercise of the Court's discretion under section 33 of the Act to allow the action to proceed.

By this Order on a preliminary issue dated 12 December 1996, Poole J determined that the plaintiff did not have actual knowledge before her 18th birthday, it was not established that the plaintiff had actual knowledge at any time before seeing her expert's report. The Learned Judge also held that where the plaintiff had been profoundly physically handicapped from birth and was entirely dependent on assistance and advice from her parents, it was not unreasonable for the plaintiff and her parents to delay taking proceedings for alleged negligent mismanagement of the plaintiff's birth until her 21st birthday and that constructive knowledge on the plaintiff's part had not been established. In the course of the hearing before Poole J the plaintiff, through her Counsel, abandoned the application for the exercise of discretion under section 33 and no ruling was given on this issue.

The Facts:

The facts are not essentially in dispute. The plaintiff's mother underwent a breech delivery and was told that there had been complications. The baby did not progress normally. After about a year she was referred to a Consultant Paediatrician at the Children's Hospital in Birmingham. Dr M I Griffiths assessed Rosanna and informed her mother that she was mentally and physically impaired although she later advised that she was only physically handicapped and that she was suffering from cerebral palsy due to lack of oxygen at birth. In none of the subsequent contacts

with doctors were the plaintiff or her parents informed that her condition was a result of any fault or failure in the management of her birth.

In about 1985 when the plaintiff was 15 years old, the family read a newspaper article and saw a television programme concerning the case of a brain damaged child whose family were claiming compensation from the Health Authority. The judge accepted that this programme led them to believe that the reason for Rosanna's condition might be some fault or failure in management at birth. There was a family discussion about a possible claim between the father, mother, Mrs O'Driscoll's mother and sister-in-law in which the plaintiff was also involved. The decision was taken which (it was to transpire) determined the fate of the subsequent litigation. It was decided that when the plaintiff became an adult at the age of 21 years they would write to the Health Authority making a claim. Thus the child, having become an adult, could bring this claim in her own right. Until then they would do nothing. The child was so informed and agreed. The father said in evidence (and the judge accepted) that this decision was taken because they believed that she would become an adult on her 21st birthday, and accordingly no advice, either medical or legal during the six years that passed before Rosanna's 21st birthday, was sought.

On that day, 8 October 1991 precisely, her father wrote to the Dudley Family Health Services Authority (FHSA). The relevant passage read:

> "Claim for Compensation Due to Negligence
>
> Dear Sir
> Our daughter Rosanna, who has just reached the age of 21, suffers from cerebral palsy. It is our intention to claim compensation from the Dudley Area Health Authority on the grounds of negligence on the part of their doctors at that time when Rosanna was born. ....."

He described how his wife went to the G.P.'s surgery and that during an examination her waters broke and she was admitted to hospital. He continued:

> ".... although the doctor said there were complications it was never suggested at any time that they would perform an operation 'Section'. Because of this my daughter suffered from lack of oxygen. That is why she is like she is.
>
> In our opinion and that of others her condition was caused though incompetence. ...."

And later:

> "We will await your reply as to whether or not we will be offered any compensation for Rosanna before taking any further action".

The FHSA immediately passed the letter to the appropriate body and on the 29 October 1991 the

Administrator of Wordsley Hospital acknowledged the letter and added:

> "Claims relating to allegations of negligence are in fact a matter for legal process, which generally speaking, leads either to settlement out of court or a hearing in court leading to an award in cases where the Plaintiff's case is upheld. At the present time in this country there is no other mechanism for considering a claim for compensation due to an alleged negligence. You are, I think, best advised to seek legal advice in regard to this matter and of course your solicitor will be able to advise you in regard to legal aid. If, however, you would wish to discuss this matter further, I would of course be glad to meet with you in order to perhaps advise and help in more detail".

Two days later Mr O'Driscoll wrote to solicitors:

> "In my opinion the G.P. should not have given my wife an internal and broke the water and if the doctors knew that there were complications why then did they not perform a Section. Instead she was left in labour for hours and when Rosanna was born she suffered lack of oxygen. This to me says my daughter's condition was caused by negligence..."

The solicitors, doubtless aware of potential limitation problems on the 24th January 1992 wrote a letter to the Defendant's solicitors which included:

> "We would also advise you that the limitation period in this matter has now expired. However, 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 our client's condition was possibly caused by the treatment received during her birth. ....."

This was a reference to Mrs O'Driscoll's eighth child, Melissa (born 17 December 1989) who was also a breech presentation. A caesarean section was discussed but not carried out. The solicitors applied for Legal Aid but it was not until July 1993 that they obtained Mr House's Report in which he gave his opinion:

> "I feel that Mrs O'Driscoll's care in labour fell below a satisfactory level on two counts. Firstly, and most importantly, when the cord prolapse was diagnosed caesarean section should have taken place. Even in 1970 I can think of no indication for conservative management of this condition. Although it does not appear that acute fetal distress followed this diagnosis immediately, there can be no doubt that the stage was then set for fetal distress to develop at a later stage of the labour. There can be no doubt that if Rosanna had been delivered at this point she would not have suffered hypoxic brain damage.
>
> Secondly, there was inadequate fetal heart monitoring later in the labour leading to the failure to diagnose fetal distress. Even if there had been some reason for not performing a caesarean section earlier (and I can think of none), then with adequate monitoring the fetal distress could have been diagnosed and Rosanna still delivered unharmed by timely caesarean section".

There was a further delay over Legal Aid and the writ was served on 11 May 1994.

The Law

Sections 11 and 14 Limitation Act 1980, so far as relevant to this appeal, provide:

> "Special time limits for actions in respect of personal injuries:

11. (1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the Plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the Plaintiff or any other person.

(2) None of the time limits given in the preceding provisions of this Act shall apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below.

(4) Except where subsection (5) below applies, the 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."

"Definition of date of knowledge for purposes of sections 11 and 12

14. (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; and

(c) the identity of the defendant; and

(d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

(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 a 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 effect of sections 11(4)(b) and 14(1)(a) is to postpone the running of time until the claimant has knowledge of the personal injury on which he seeks to found his claim. The word 'knowledge' must be given its natural meaning. As May L.J. said in Davis v Ministry of Defence (unreported) 26 July 1985 C.A. No. 413, Lexis transcript p.4:

> "'Knowledge' is an ordinary English word with a clear meaning to which one must give full effect; 'reasonable belief' or 'suspicion' is not enough. The relevant question merits repetition - "when did the appellant first know that his dermatitis was capable of being attributed to his conditions at work?"

In Halford v Brookes [1991] 1WLR 428, 443 Lord Donaldson of Lymington M.R. said:

> "In this context 'knowledge' clearly does not mean 'know for certain and beyond possibility of

> contradiction.' It does, however, mean 'know with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence.'"

The effect of sections 11(4)(b) and 14 (1)(b) is to postpone the running time until the claimant has knowledge that the personal injury on which he founds his claim was wholly or partly attributable to the act or omission of the defendant on which his claim for damages is founded. 'Attributable to' means 'capable of being attributed to' and not 'caused by'. 'Act or omission' does not equate with 'negligence', 'actionable' or 'tortious' (see Broadley and Guy v Clapham & Co [1993] 4 Med L.R. 328). It is not disputed that the personal injury was significant for the purpose of S.14(2).

In Dobbie v Medway Health Authority [1994] 1WLR 1240 Sir Thomas Bingham M.R. when considering knowledge said:

> "This test is not in my judgment hard to apply. It involves ascertaining the personal injury on which the claim is founded and asking when the claimant knew of it. In the case of an insidious disease or a delayed result of a surgical mishap, this knowledge may come well after the suffering of the disease or the performance of the surgery. But more usually the claimant knows that he has suffered personal injury as soon or almost as soon as he does so".

Actual Knowledge

Mr Michael Spencer QC in his first ground of appeal submits that the Learned Judge was wrong in law and in principle in finding that the plaintiff's actual date of knowledge was when the plaintiff received the report from Mr House dated 16 June 1993. The Learned Judge should have found that the plaintiff had actual knowledge before or at the time she was 18 years old, in the alternative, at the latest, in December 1989 when Melissa was born.

Mr Charles Lewis for the respondent submits that the plaintiff did not have actual knowledge until she received and read her expert's report. Short of being told so by the treating hospital, doctor or midwife, a plaintiff (or, when injury is suffered at birth, the parents) cannot know that this sort of injury can reasonably be attributed to reasonably specific acts or omissions (as opposed to fault) until an expert says so. Until then she can, at most, only suspect that it was due to something which her medical attendants did or did not do. Until the age of 18 she only had vague general knowledge that her injury, albeit significant, occurred in the birth process, and the act or omission constituting negligence had to be known with some degree of specificity which she did not acquire until 1993.

The Judge found that:

> "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 is attributable to the act or omission alleged to constitute negligence 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 of Collins J in *Spargo v N Essex District Health Authority* [1996] 7 Med LR 219."

It is understandable why Poole J expressed himself in this manner. Collins J had proceeded in a similar fashion. However after the decision in this case was handed down Spargo was reviewed on appeal [1997] 8 Med LR 125. Brooke L J observed (correctly, in my view,) that this branch of the law is grossly overloaded with reported cases. Having considered several previous decisions of the Court of Appeal he drew the following principles (at pages 129-130):

1. The knowledge required to satisfy sect 14(1)(b) is a broad knowledge of the essence of the causally relevant act or omission to which the injury is attributable;
2. "Attributable" in this context means "capable of being attributed to", in the sense of being a real possibility;
3. A plaintiff has the requisite knowledge when she knows enough to make it reasonable for her to begin to investigate whether or not she has a case against the defendant. Another way of putting this is to say that she will have such knowledge if she so firmly believes that her condition is capable of being attributed to an act or omission which she can identify (in broad terms) that she goes to a solicitor to seek advice about making a claim for compensation;
4. On the other hand she will not have the requisite knowledge if she thinks she knows the acts or omissions she should investigate but in fact is barking up the wrong tree: or if her knowledge of what the defendant did or did not do is so vague or general that she cannot fairly be expected to know what she should investigate: or if her state of mind is such that she thinks her condition is capable of being attributed to the act or omission alleged to constitute negligence, but she is not sure about this, and would need to check with an expert before she could be properly said to know that it was."

He went on to distinguish the more stringent test of proof of causation from the much less rigorous statutory test of attributability. He emphasised that the test is subjective: What did the plaintiff herself know? He continued:

> "After all, the policy of Parliament, in these cases which would otherwise be statute-barred, is to give a plaintiff who has the requisite low level of knowledge three years in which to establish by inquiry whether the identified injury was indeed probably caused by the identified omission and whether the omission (identified initially in broad terms) amounted to actionable negligence. The judge's approach would be to stop the three years from even starting to run until a much more advanced stage of the investigation had been completed."

In the light of this analysis and statement of principle I turn to evaluate the decision in the present case and the manner in which it was reached. In my judgment the approach of the learned judge cannot stand. Like Collins J, Poole J applied the more stringent test of proof of causation and fault for the less rigorous test of attributability. In stating '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', he followed and applied the approach of Collins J which the Court was subsequently to decide was incorrect.

Consequently it is necessary to address afresh the two issues: (1) Did the plaintiff acquire the requisite knowledge before she read Mr House's report? (2) If so, when did she acquire it?

The letter of the 8 October 1991 contained everything that was required to initiate a claim. In layman's language it identified hypoxia at birth due to a failure to perform a timeous caesarean section. The father merely recorded in writing what his daughter already knew. She had sufficient information to justify embarking with confidence on the preliminaries to the issue of the writ by intimating a claim to the proposed defendant before taking legal or other advice. When the claim was

rejected the matter was immediately put into the hands of solicitors.

In my judgment, her state of knowledge was not materially different from what was later contained in Mr House's report and subsequently pleaded in the Statement of Claim. Consequently I cannot accept the judge's finding that the letters to the Health Authority and to the solicitors fell far short "of being evidence of required actual knowledge, either in Mr O'Driscoll or the plaintiff". I agree with Mr Spencer's formulation that if the judge had directed himself that all that was required was 'a broad knowledge of the essence of the causally relevant act or omission to which the injury is attributable' rather than 'no ordinary plaintiff could be expected to know that a birth injury was attributable to acts or omissions of the sort (pleaded) until advised by an expert', then he would have found the plaintiff had the requisite knowledge. In my judgment the defendants (upon whom the burden rested) have discharged the burden and proved that she did have the requisite actual knowledge.

The second question is when she had that knowledge so as to trigger the limitation period. It is not necessary to determine whether she had the requisite knowledge when she saw the television programme in 1985 when she was 15. She still had until she was 18 years before any limitation considerations could arise. In the absence of any evidence to suggest a material change in her knowledge between the age of 18 and 21 years it is safe to infer that there was not. Mr Lewis frankly and realistically conceded that if the family had realised that the correct age for majority was 18 years, a letter would have been written on 8 October 1988 in essentially the same terms as that of 8 October 1991. In my view the experience at Melissa's birth did little more than to confirm the family's state of knowledge which had already crystallised by Rosanna's 18th birthday and which by agreement was not to be acted upon until she was 21.

Accordingly, time began to run from 8 October 1988 and the action had to be commenced before 8 October 1991. She had the requisite knowledge more than three years prior to the issue of the writ and her claim is statute barred.

CONSTRUCTIVE KNOWLEDGE:

In the circumstances it is not essential to determine the issue of constructive knowledge. However, out of respect for the arguments presented on both sides I venture to express a view (and because of the particular circumstances of the case).

Mr Lewis contended in argument that there is a division of opinion or inconsistency in the Court of Appeal in their approach to this issue as revealed in the judgments of some individual members of the

Court. In Nash v Eli Lilly [1993] 4AER 383 Purchas L.J. said at 399c:

> "The standard of reasonableness in connection with the observations and/or the effort to ascertain are therefore finally objective but must be qualified to take into consideration the position, and circumstances and character of the plaintiff .... In considering whether or not the inquiry is, or is not reasonable, the situation, character and intelligence of the plaintiff must be relevant".

Counsel contrasted this with the approach of the constituent members of the Court in Forbes v Wandsworth Health Authority [1996/7] MLR 175 who (he suggested) applied a wholly objective test in the sense that they held that the average patient would have investigated the matter earlier. Stuart-Smith L.J. doubted that the individual character and intelligence of the plaintiff was relevant to the inquiry: (p186 col.2).

Evans L.J. had reservations about Nash:

"I would hold that the objective test must be applied" (p.191), whilst stressing that "each case must depend on its own facts".

Stuart-Smith L.J. said:

> "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 accept that there is substance in Mr Lewis's argument. It is not easy to reconcile these two approaches but in my view it is not necessary to do so for the purpose of deciding this case.

The Judge (following Nash) concluded:

> "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 dependant 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".

Turning to Forbes he said:

> "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 prefer to take as my starting point the precise language of S.14(3):

- previous knowledge which he might reasonably have been expected to acquire.
- expert advice which it is reasonable for him to seek ...
- taken all reasonable steps to obtain (and, where appropriate, to act on) that advice

The emphasis is on what is reasonable. These concepts are not difficult to apply to the facts of individual cases.

Applying the Forbes test a person who is too incurious, indolent, resigned or uncomplaining to do anything about it would be unreasonable if he allowed a potential claim to lapse through effluxion of time. I would see no reason to exclude a person who is too trusting. It would not be unreasonable to expect him to take reasonable steps to obtain advice, if only to verify whether his trust was not misplaced.

On the other hand, applying the more generous or liberal Nash approach and viewing this plaintiff's situation in the round I have grave doubts that the plaintiff would succeed in this issue. Dr David Jefferson, a Consultant Neurologist, in a report dated March 1974, confirms the presence of generalised dystonic cerebral palsy causing severe physical handicap. Rosanna has poor motor control. Her speech is barely intelligible because of a spastic explosive quality. However, he also records that she has average intellectual ability, her comprehension is normal, she has visual acuity of 6/12 unaided in each eye and normal visual fields and optic fundi. Eye movements are normal and hearing and smell are unaffected. Although her handwriting is illegible she uses a keyboard for writing notes and letters. She has passed two RSA examinations in basic keyboard skills. He notes that although totally dependent on her family and friends for mobility she has an enjoyable social life and has a circle of friends with whom she goes out. In 1988 (the critical year) she was attending Dudley College two days a week. In her affidavit Rosanna reveals that over the years she has had numerous friends who have suffered from cerebral palsy. Jane suffered as a result of measles, another girl from a stroke. They often discussed their disabilities. Moreover, since the age of 18 she has voted in elections and it is not suggested that she is unable to make a rational choice between parties or candidates.

If this outcome of this Appeal were to turn on the issue of constructive knowledge alone I would have grave difficulty in agreeing with the Learned Judge's conclusion.

I accept without reservation that she is totally dependent on her family and friends for mobility. In my judgment the evidence as a whole does not support the Judge's conclusion that she was, by reason of the close and reliable parental care, to a wholly unusual degree, isolated from the climate in which the ordinary reasonable man would be exercising his freedom of choice. Similarly, I am unable to share his view that she continued to follow the "advice of her parents" 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".

First, the evidence does not show that the parents so advised her, but that the matter had been discussed with Rosanna and a joint decision was made to delay the claim until she became 21. Consequently, in my view, the Learned Judge misdirected himself that "within the limits imposed by the wholly misconceived advice she received at 15 (namely to wait until she was 21) she could not have acted more promptly".

Second, the evidence indicates clearly that she was not as dependent upon her parents mentally as she was physically. She had a degree of intellectual independence which was not constrained to the same degree. The concept of a cocoon was apt to describe the physical dependency, but was inappropriate to describe the mental state. In my judgment she was not so isolated from the outside world, or so dependent on her parents, or so trusting that she was wholly deprived of independent thought or action concerning her condition and possible compensation. Given the seriousness and extent of her condition it would have been reasonable for her to seek advice at the age of 18. The decision to postpone pursuing the claim until 21 cannot justify or render reasonable a decision to do nothing about seeking advice until 21.

The overwhelming probability is that if she had sought advice she would have been told by any responsible person (eg. lawyer, case worker) that she had reached her majority in law and that she should pursue her claim without delay. This would have inevitably led her to seek the further expert advice it was reasonable for her to obtain.

Accordingly I have come to the conclusion that the Learned Judge erred in concluding that the plaintiff did not have constructive knowledge outside the three year period prior to the issue of the writ. On the evidence he ought to have found that she had constructive knowledge of her possible course of action prior to 11 May 1991.

Discretion Under S. 33

At the outset in the Court below counsel for the plaintiff indicated that he would not in any event seek to argue that it was an appropriate case for the Court to exercise discretion in her favour.

The Judge recorded:

> "I am not concerned with any exercise of discretion at s.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".

Counsel sought, in the event that this court reversed Poole J, to reinstate the argument. He informed us that he withdrew the argument below 'because in the light of the authorities then available to me I did not consider there was any chance at all of the court exercising discretion in favour of the plaintiff in view of the passage of time and the affidavit evidence filed on behalf of the defendants'. He sought leave to argue the point and to adduce fresh evidence.

There is some doubt whether this Court has jurisdiction to allow a case to be made which was not raised in the Court below. If there is, the point must be 'jealously scrutinised' (see 059/10/6). On the assumption that we have jurisdiction I regret that I am not persuaded that I should exercise my discretion in the plaintiff's favour. There have been no subsequent decisions which would justify a revision of Counsel's earlier assessment. It would be unfair to the appellants to open up the issue for the first time at this stage. For the plaintiff to succeed she would have to rely upon the fresh evidence which was served recently and to which the appellant's have had no opportunity to respond. There are no other exceptional circumstances which would justify any other course.

I have reached all of my conclusions with great reluctance. I am conscious that the outcome will be a profound disappointment to the plaintiff and her parents. Occasionally a judge is obliged to reach a decision which he would rather not reach. This is such an occasion but my deep sympathy cannot be allowed to overrule the position in law.

Accordingly I would allow the Appeal.

Sir Christopher Slade:

I have had the advantage of reading the judgments of Simon Brown LJ and Otton LJ in draft. I agree that the plaintiff's case on limitation fails on the issue of actual knowledge and, for the reasons given by them, that this Court cannot properly allow her counsel now to resurrect his previously abandoned

reliance on section 33 of the Limitation Act 1980. Like Simon Brown LJ, I think it unnecessary to consider the question of constructive knowledge and prefer not to do so. Since we are differing from Mr Justice Poole, I will attempt to state in my own words the reasons why I too have reached the conclusion that the plaintiff's claim is debarred at the first hurdle of actual knowledge.

Section 11 (4) of the Limitation Act 1980 provides that the limitation period applicable to actions in respect of personal injuries shall be 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".

The plaintiff's cause of action accrued on her birth. Section 28(1) and 28(6) of the 1980 Act had the effect of permitting her to bring her action at any time before the expiration of three years from her 18th birthday (8th October 1988). But by the time she issued proceedings this three year period had long since expired. On this appeal therefore much turns on her "date of knowledge" for the purpose of section 11 (4) (b).

By virtue of section 14(1), the reference in section 11(4) to the "date of knowledge" of the plaintiff falls to be treated as a reference to the date on which she 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 of omission which is alleged to constitute negligence... or breach of duty" ....

The "injury in question" in the present case is the plaintiff's hypoxia and consequent brain damage. At all material times she indisputably knew that the injury was "significant", in the sense given to that word by section 14(2). Attention therefore has to be focused primarily on section 14 (1) (b).

The "act or omission" which is alleged to constitute negligence in the present case is the defendant's failure to deliver the plaintiff by timeous Caesarean section as soon as a diagnosis of cord prolapse was made.

The word "attributable" in section 14(1) (b) does not mean "caused by". It merely means "capable of being attributed": (see Dobbie v Medway Health Authority [1994] 1 W L R 1234).

The issue relating to actual knowledge in the present case thus resolves itself to the question: When did the plaintiff first know that her brain damage was capable of being attributed to the defendant's failure to deliver her by timeous Caesarean section?

Knowledge can be an elusive concept. In many contexts philosophers and lawyers may debate at length nice distinctions between knowledge and belief; and we have heard some debate in this Court. In the context of the 1980 Act however, we have the benefit of authoritative guidance given by Lord Donaldson of Lymington M.R. in Halford v Brookes [1991] 1 W L R 428 at p443 in a passage cited with approval and adopted by Sir Thomas Bingham M.R. in Dobbie's case (supra) at p1240:

> "In this context 'knowledge' clearly does not mean 'know for certain and beyond possibility of contradiction'. It does, however, mean 'know with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence".

Furthermore the decision of this Court in North Essex District Health Authority v Spargo [1997] 8 Med L.R. 125 at p129 shows that the knowledge required to satisfy section 14 (1) (b) is no more than a broad knowledge of the essence of the causally relevant act or omission to which the injury is capable of being attributed "in the sense of being a real possibility".

Mr Justice Poole expressed himself as satisfied from the evidence he had heard and read that the knowledge of the plaintiff's parents could be imputed to the plaintiff. This important finding has not, I think, been challenged on her behalf. I therefore look in particular to the knowledge of Mr O'Driscoll.

Mr O'Driscoll's letter of 8th October 1991, from which Otton LJ has quoted the most relevant passages, makes it plain beyond doubt that at that date he had a broad knowledge of the essence of the causally relevant omission to which the plaintiff's injury was capable of being attributed (the defendant's failure to deliver her by timeous Caesarean section) and further that he possessed such knowledge with sufficient confidence to justify embarking on the preliminaries to the issue of a writ. The evidence and the Judge's findings of fact show with almost equal clarity that Mr O'Driscoll had possessed such knowledge ever since he saw the television programme, in or about 1985, on the subject of cerebral palsy, following which the family's decision was taken that a claim would be made in due course, but would be deferred until the plaintiff attained 21. There is no suggestion that Mr O'Driscoll's state of knowledge was increased in any material respect between the date of the television programme and the plaintiff's 21st birthday (8th October 1991).

In the circumstances, the inferences are in my judgment irresistible that:

> (a) by the date of her 18th birthday (8th October 1988) the plaintiff shared the knowledge of her father to which I have referred in the immediately preceding paragraph;
> (b) that knowledge was confirmed by the circumstances of her sister Melissa's birth in December 1989;
> (c) by virtue of section 11 (4) (b) of the 1980 Act the limitation period applicable to her claim was three years from 8th October 1988 or at latest December 1989;

(d) by the time that her writ was issued on 11th May 1994, that three year period had long since expired.

I share the regret and sympathy for the plaintiff expressed by my Lords. However, for the reasons set out above and for the further reasons given by them, I conclude that this appeal must inevitably be allowed.

Lord Justice Simon Brown:

I agree that this appeal must be allowed and add only a short judgment of my own, gratefully adopting Otton LJ's helpful exposition of the facts and statutory provisions.

The critical question arising here for decision under s.14(1)(b) of the Limitation Act 1980 is this: When did the plaintiff first have knowledge that her injury (hypoxic brain damage suffered at birth) was attributable to the "omission which is alleged to constitute negligence" (the doctor's failure to deliver her by timely caesarean section)?

Applying the second of the Spargo principles usefully drawn by Brooke LJ from earlier authorities - see North Essex District HA v Spargo [1997] 8 Med.LR - the question can be reformulated thus: When did the plaintiff first know that there was a real possibility that her injury was a result of a failure to deliver her by caesarean section?

To my mind there is only one possible answer to that question: it was on any view more than three years before this writ came to be issued on 11th May 1994. As is clear from the second limb of the third Spargo principle, a claimant will be found to have the requisite knowledge when "she so firmly believes that her condition is capable of being attributed to [a particular act or omission] that she goes to a solicitor to seek advice about making a claim for compensation." It seems to me plain from the undisputed facts of this case both that the plaintiff's knowledge was the same as that of her father and also that their knowledge was not materially greater or different on 8th October 1991 when she became twenty-one than it had been on 8th October 1988 when she became eighteen. That she had the requisite knowledge on 8th October 1991 is to my mind conclusively demonstrated by the terms of the letter which her father wrote that day to the Dudley FHSA. Just twenty-three days later, on 31st October 1991, Mr O'Driscoll manifested the same knowledge when he wrote "to a solicitor to seek advice about making a claim for compensation" (to use the words of the third Spargo principle).

True, that solicitor, when writing to the defendants on 24th January 1992, stated that "it was not until Mr and Mrs O'Driscoll's last child [Melissa] was born in 1989 [on 17th December] that they discussed the matter and came to the conclusion that our client's condition was possibly caused by the treatment received during her birth." But even had that been the true position (and the evidence ultimately given suggested that it was not), the writ would still have had to be issued, if not by 17th December 1992, at any rate well before 11th May 1994.

Mr Lewis's able argument by which he seeks to sustain the judgment below centres upon his contended-for distinction between knowledge and belief. Whilst acknowledging, as he must, that even before the plaintiff's eighteenth birthday she believed that her condition was capable of being attributed to the failure to deliver her by caesarean section, he asserts that this belief fell short of knowledge and, indeed, that this continued to be so until June 1993 when Mr House's expert report was obtained.

In my judgment, however, the argument is an impossible one. Not least, as stated, it demonstrably conflicts with the third Spargo principle: a firm belief in attributability which takes the plaintiff to a solicitor for advice is to be regarded as the requisite knowledge. The logic is plain: once one recognises, as Lord Donaldson pointed out in Halford v Brookes [1991] 1 WLR 428 (in the passage already cited by Otton LJ), that knowledge in this context does not mean knowing for certain, knowledge and belief inevitably shade into each other. Knowledge here is, after all, only of the real possibility of causation. I had thought at one stage of the argument that Mr Lewis's best hope lay in equating the plaintiff's state of mind with that identified in the fourth Spargo principle as one not involving the requisite knowledge, namely "if her state of mind is such that she thinks her condition is capable of being attributed to the act or omission alleged to constitute negligence but she is not sure about this, and would need to check with an expert before she could be properly said to know that it was."

The difficulty with this, however, is that it would put the fourth Spargo principle into conflict with the third. The fourth principle in my judgment must be read as postulating a situation antithetical to that covered by the third principle; i.e. the fourth principle postulates a state of mind short of a firm belief which takes a potential claimant to a solicitor.

So as to clarify further the contrast between principles three and four, I would just add that the reference in principle four to the "need to check with an expert" is a reference to the need for an expert's opinion before even the claimant can be said to know that the attributability of her condition to

a particular "act or omission" is a real possibility. (It is in that situation, of course, that the question of constructive knowledge arises.) That is not the same investigation as is referred to in the first limb of principle three; this latter is an investigation into whether the plaintiff "has a case against the defendant" - what Brooke LJ later in his judgment called "enquiry whether the identified injury was indeed probably caused by the identified omission and whether the omission (identified initially in broad terms) amounted to actionable negligence" - an investigation which must be carried out whilst the limitation clock is ticking.

I therefore conclude, in common with Otton LJ and with no less regret and sympathy than he has expressed, that the respondent's case on limitation fails on the issue of actual knowledge.

That being so, it is in my judgment not merely unnecessary but also somewhat unrealistic to consider the question of constructive knowledge and accordingly I prefer not to do so.

On this part of the case I add only that this whole disastrous situation arose only because of the fundamental mistake made by the entire family that the plaintiff was to attain her majority at the age of twenty-one rather than eighteen, a mistake which needlessly and in the event decisively allowed the three year limitation period to expire whilst nothing whatever was done to progress the envisaged claim.

As to Mr Lewis's argument that he should be allowed now to resurrect his pleaded but expressly abandoned reliance on s.33 of the 1980 Act, it would require a compelling case indeed before this court could properly allow such a course, even assuming that it had jurisdiction to do so. The arguments against such a course are legion and powerful. The exercise of the s.33 discretion is *par excellence* for the first instance judge and here he was expressly invited not to exercise it. The material is in any event not available to enable this Court to exercise its own discretion on the issue, so that at most we could remit the matter for a fresh hearing. If the defendants were then to succeed they would go uncompensated as to costs. In any event the interest of finality argues strongly against such a course, not least in the context of a preliminary hearing upon the issue of limitation. Only perhaps if the plaintiff could point to some development in the law casting blinding new light on her prospects of success on the s.33 issue would the Court contemplate acceding to this argument. Nothing approaching such a legal development has been demonstrated here.

For all these reasons, which really do no more than summarise those more fully developed by Otton LJ. I too would allow this appeal.

ORDER: Appeal allowed with costs; action dismissed; costs in court below not to be enforced without leave of the court; costs here to be payable under section 18 with a nil contribution; legal aid taxation for plaintiff.
(Order not part of approved judgment)