



Cayman Insurance Litigation Q2 2016 Review

Welcome to the Q2 2016 Stuarts Insurance Litigation review. In this edition, we review the Law on Limitation. Stuarts acts for a number of leading Cayman Islands Insurance Companies and specifically advises and acts for Insurers in defending large loss personal injury claims. We hope that you will find the review of interest.

Cayman Islands Law on Limitation

The ability to pursue a claim in the Cayman Islands is subject to the Law concerning Limitation. Subject to specific provisions within other enactments such as the Vehicle Insurance (Third Party Risks) Law (2012 Revision) ("TPRL"), the Limitation Law (2011 Revision) ("LL") governs all classes of actions and prescribes time limits for the commencement of proceedings.

Part II of the LL governs the "Ordinary" time limits for different classes of action. Section 3(2) states that the "The ordinary time limits given in this part are subject to extension or exclusion in accordance with Part III".

Classes of action

The most common classes of action are:

Section	Class of Action	Time Limit (No of years)	Exclusions/Variations
4(1)	Tort	6 from the date on which the cause of action accrued	Except Libel and Slander
7	Contract	6 from the date on which the cause of action accrued	With regard to certain loans that do not provide for repayment of the debt on or by a fixed date, the date on which the cause of action accrues is the date on which a written demand for repayment of the debt is made (section 8)
12	Claim for Contribution under section 6 of the Torts (Reform) Law (1996 Revision)	2 years from the date on which that right accrued. Section 12(3) states that date is to be the date the liability arises (date of a judgment or an arbitration award)	Section 12(4) provides that where a compromise is reached, the relevant date is the "earliest date on which the amount to be paid by him is agreed between him and the person (or persons) to whom the payment is to be made"
13	Personal Injury claim arising from negligence, nuisance or breach of duty	3 years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured, subject to s.13(5)	s13(5) provides that where a person dies before the expiry of the general time period, 3 years starts to run from the date of death or date of the PR's knowledge (whichever is later)
14	Certain negligence actions	6 years from the date on which the action accrued or 3 years from the starting date as defined by s14 (see below for date of knowledge test s.14(4))	
16	Fatal Accidents (Torts Reform Law) 1996 Revision	3 years from date of death or date of knowledge of person for whose benefit the action is brought (whichever is later)	Where there is more than 1 dependant, section 17 dictates that section 16 applies separately to each and so time runs against each dependant independently
30	Enforcement of Judgments	6 years from the date on which the judgment became enforceable	

It must be borne in mind that the time periods referred to above are not absolute. As will be discussed below, the Court has a wide discretionary power to dis-apply any limitation period.

Date of knowledge Test

s.18(1) *"In sections 13 and 16, a reference to a person's date of knowledge is a reference to the date on which he first had knowledge-*

- a. *that the injury in question was significant;*
- b. *that the injury was attributable in whole or in part to the act or omission which is alleged to constitute the negligence, nuisance or breach of duty;*
- c. *of 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, of the identity of that person and of the additional facts supporting the bringing of an action against the defendant, and knowledge that any act or omission did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant".*

Date of knowledge is often disputed in occupational disease cases where there is a latency period and or the disease is not manifest for some time. For example, in an industrial deafness claim, the plaintiff may claim to only have been aware of the deterioration to his hearing several years after his exposure ceased and could not attribute the deafness to the exposure until many years later after investigations had ensued and he became fixed with knowledge thereafter.

Part III Extension or Exclusion of Ordinary Time Limits

This Part applies to situations where the time limits contained within Part II can be extended in specific situations; such as where a person is under a disability; **section 32** serves to extend the time limit to 6 years from the date when they cease to have the disability or die. **Section 37** provides that the time limit to bring a claim founded upon a Defendant's fraud, concealment or mistake does not begin to run until the plaintiff has discovered or could with reasonable diligence, have made the discovery.

Section 39 Discretionary Exclusion

Most importantly, section 39 provides that ***"if it would be equitable to allow an action to proceed having regard to the degree to which- (a) section 13 or 16 prejudice the plaintiff or any person whom he represents; and (b) any decision of the court under this section would prejudice the defendant or any person whom he represents, the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates"***.

The lifting of the applicable limitation period is an exercise which requires the Court to balance the prejudice the parties will suffer if the limitation period is or is not applied. **Section 39(3)** proves that "In acting under this section the court shall have regard to all the circumstances of the case and, in particular, to:-

- a. the length of, and reasons for, the delay on the part of the plaintiff;
- b. the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be adduced by the plaintiff or the defendant which is likely to be less cogent than if the action had been brought within the time allowed by s.13 or 16 (as the case may be);
- c. the conduct of the defendant after the cause of action arose, including the extent, if any, to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the Plaintiff's cause of action;
- d. the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
- e. the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages; and
- f. the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received".

The most important factor for the Court to consider under this section is the extent to which the statute bar prejudices the plaintiff (or estate or dependants) and the extent to which the exercise of discretion in the plaintiff's favour prejudices the Defendant. There has been an abundance of guidance on this point in the English Courts, which would be of persuasive authority before the Cayman Islands Courts.



In the leading English case of *Horton v Sadler* [2007] 1 AC 307, the House of Lords held that the identical discretionary provision at section 33 of the Limitation Act 1980 “conferred a **wide and unfettered discretion** empowering the court to dis-apply the application of section 11 (identical to section 13) where it appeared equitable to allow an action to proceed, having regard to the degree to which the parties would be prejudiced and taking into account all the circumstances of the case and the matters listed in section 33(3)” (identical to section 39(3)).

In the English Court of Appeal case of *Cain v Francis* [2009] R.T.R. 18 Smith LJ held at paragraph 230 that “It appears to me that there is now a long line of authority to support the proposition that, in a case where the defendant has had early notice of the claim, the accrual of a limitation defence should be regarded as a windfall and the prospect of its loss, by the exercise of the s.33 discretion, should be regarded as either no prejudice at all (see *Firman v Ellis* [1978] Q.B. 886 which was considered in the Cayman case of *Fisher v Fireworks Limited*, discussed below) or only a slight degree of prejudice (see *Donovan v Gwentys Ltd* [1990] 1 W.L.R. 472 also considered in the *Fisher* case). It is true that, in *Thompson v Brown* [1981] 1 W.L.R. 744, Lord Diplock said that the accrual of the defence might be regarded as a windfall only where the delay in issuing proceedings was short. However, with great respect, it does not seem to me that the length of the delay can be, of itself, a deciding factor. It is whether the defendant has suffered any evidential or other forensic prejudice which should make the difference”.

It is clear from the English authorities that **the burden applies heavily in favour of dis-applying the limitation period** where the Defendant will suffer little if any prejudice. It is when the possibility of a fair trial is compromised by the availability and cogency of evidence, and there is significant delay for which there is no good reason, that the Courts will be less sympathetic. The reluctance to dis-apply a limitation period is most commonly seen where the Defendant may no longer be in business.

Where the plaintiff is found to have an earlier date of knowledge than pleaded and or there is no good reason for the delay, the Court, in considering the issue of prejudice in light of an application under section 39, will take into account the inability for the Defendant to investigate and deal with the claim which may be a reason for the Court to decide against the Plaintiff as to permit the claim to proceed would be akin to giving the plaintiff an ‘open goal’ in circumstances which would amount to an injustice.

The Cayman Islands

Whilst there is not the same volume of case law within this jurisdiction, assurance can be taken from the fact that the Cayman Islands Courts have, where the issue has arisen, adopted the same approach to the balancing exercise that the English Courts have, drawing upon English authorities for guidance as to the consideration of the factors listed identically in the two mirroring pieces of legislation, such as, length of delay, fact specific conduct of the parties, the merits of the parties cases, the availability and cogency of evidence available and whether a fair trial is possible.

In the case of *Fisher v Fireworks Limited* [2012] (1) CILR 190 Quin J held at paragraphs 61-62 that “should this court decline to exercise its discretion, the plaintiff would be deprived of the opportunity to pursue what appears to this court to be a genuine claim, with reasonable prospects of success, and significant value in circumstances where the impact of the injury has resulted in ramifications for the plaintiff in terms of pain, suffering and loss of amenity... In conducting the inevitable balancing exercise, I find that in all of the circumstances of this case there is considerable prejudice to the plaintiff by the operation of s.13 of the Limitation Law, and no significant prejudice to the defendant by exercising the discretion conferred upon me by s.39 of the Law. Accordingly, I accept the plaintiff’s submission that to exercise my discretion in this case would be equitable and in the interest of justice, having regard to all the facts and circumstances set out above”.

This case highlights how the Cayman Islands Judiciary has adopted and are prepared to utilise in the same way, the wide and unfettered discretion they have under section 39 of the LL. In cases such as this where the Defendant will suffer no additional evidential burden as a result of the delay and the only prejudice is the loss of a windfall, the plaintiff who has a meritorious claim can be expected to surmount the limitation hurdle.

Specific Legislation – Vehicle Insurance (Third Party Risks) Law (2012 Revision) (TPRL)

It is important to recognise that whilst the Limitation Law applies to different classes of action generally in so far as the time limits and the discretionary waiver will apply, the prevailing exception to this rule comes within the form of the TRPL which applies specifically to third party claims arising from road traffic accidents.



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Section 17 of the TPRL reflects the same three year limitation period to that provided for at section 13 for personal injuries generally. The wording is clear and states:-

“Notwithstanding anything contained within any other law or in any rule of law or equity, no action shall be brought in any court by or on behalf of any person after the end of the period of three years from the date on which a cause of action accrued for any injury or damage against or in respect of which a vehicle is insured under this Law”.

The three year time limit here is absolute and there is no secondary period to allow for either a date of knowledge argument or a general exercise of discretion. This is perhaps unsurprising, because injury from a road traffic accident within the significant majority of cases will be very much apparent and capable of being attributed to such an accident within a relatively short time frame. Injuries of this kind do not generally manifest at a much later date, particularly more than 3 years later.

The wording as to the limitation period in the TRPL is drafted much more narrowly to preclude actions being commenced after a three year period. Due to the wording “notwithstanding anything contained within any other law” this Law also precludes the Courts from exercising their discretion pursuant to section 39 of the LL in respect of third parties who sustain injuries arising from road traffic accidents.

This has the effect of limiting an Insurers’ statutory obligation to meet a judgment obtained by a third party against their insured pursuant to section 15(1) of the TPRL in proceedings which must be commenced no later than 3 years from the date on which the cause of action accrued (the road traffic accident) and at least gives the assurance of finality in these specific circumstances.

Conclusion

It can therefore be seen that the limitation periods that apply to personal injury actions and claims under the Fatal Accidents (Torts Reform Law) are subject to the Court having a very broad discretion to not apply those limits. The limitation period that is absolute, in the context of road accident claims, is the three year limitation period prescribed by the TPRL for claims by third parties.

This publication is for general guidance and is not intended to be a substitute for specific legal advice. Specialist advice should be sought about specific circumstances. If you would like further information please contact Richard Annette at Stuarts Humphries.

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