INTRODUCTION

This chapter deals with key issues relevant to the beginning and end of liability. There are three key questions which arise on this subject:

Nutshell analysis: Beginning and end of liability

1. When does a cause of action accrue for C?
2. What ‘variables’ govern the assessment of limitation periods in English law?
3. When does D’s liability for a tort suit end?

The beginning of liability, in tort, is defined by when the cause of action accrued – or is deemed to accrue at a later date by virtue of statute.

The duration of liability is defined by the operation of the Limitation Act 1980\(^1\) – which contains the various statutory rules which govern the periods during which litigants may commence tortious (and other civil) claims. The right to initiate civil litigation is not indefinite – achieving finality of the dispute is at the heart of all limitation statutes. Limitation periods essentially give rise to two important issues: (1) how long is the relevant limitation period?; and (2) on what basis (if any) can the relevant limitation period be extended?

Whenever C files suit, the relevant limitation period is tolled (or stops running). If C does not file suit within the limitation period, and is ‘out of time’ (even by a solitary day), then that operates as a complete defence for D. It is a procedural defence only – the expiry of a limitation period does not affect the substantive aspects of C’s claim. In spite of the statutory language used (specifically, s 2 of the Limitation Act 1980), the bringing of an action after the expiry of the limitation period is not prohibited; but D has a statutory defence of time-bar in such a case (per Horton v Sadler\(^2\)). In other words, ‘[t]he right asserted [by C] will remain intact; it is merely the method of enforcement of that right that is affected’.\(^3\) However, a ‘stale claim’ provides immunity for D, and is effective to prevent C’s claim from proceeding.

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\(^1\) c 58. It has been amended several times since coming into force on 1 May 1981.

\(^2\) [2006] UKHL 27, [2007] 1 AC 307, [7].

\(^3\) Irish LRC, Limitation of Actions (Rep 104, 2011) [1.137].
The end of liability is defined by either the expiry of the relevant limitation period, or alternatively, by a number of doctrines which preclude C from litigating, or from re-litigating, the issues in dispute.

This chapter deals with each of these three matters in turn.

**ACCRUAL OF THE CAUSE OF ACTION**

It has been oft-said that the whole question of accrual of a cause of action in tort can be difficult – the subject of ‘much litigation’ (per Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)\(^4\)), and ‘difficult to ascertain and understand, even for experienced practitioners’ (per the Irish Law Commission\(^5\)).

The point at which a cause of action accrues in tort is vitally important, for two reasons:

- it is the first point at which C can commence proceedings against D – the first point at which the cause of action is complete. Any claim commenced prior to that, purporting to sue D in tort, will be struck out as failing to disclose a cause of action.\(^6\) For example, if a negligent act or omission does not cause damage, then no cause of action, upon which C can validly sue, has accrued in negligence. The so-called Pleural Plaques litigation,\(^7\) considered in Chapter 8, is a timely reminder of that principle.

- generally, the point at which the cause of action accrues is when the relevant limitation period begins to run (subject to exceptions and qualifications, considered shortly). Hence, just when the cause of action accrued will be essential to determine, wherever D is complaining that C’s action is ‘time-barred’, or a ‘stale claim’.

It is impossible to do justice to all the vagaries of limitations jurisprudence in this chapter (readers are referred to elsewhere for more comprehensive treatments\(^8\)), but the following sections highlight some of the most important conundrums arising in Tort litigation.

**The general rule**

\(\text{§BE.1}\) As a general rule, a limitation period begins to run from the date on which the cause of action accrued. A cause of action accrues when C can establish the facts necessary to prove each element of the cause of action. Hence, a cause of action in negligence is only made out when C suffered damage (as that is usually the last element satisfied, after the breach by act or omission occurred).

The final-in-time element fixes the accrual of the cause of action. According to Lord Esher MR’s famous dictum in Read v Brown, the cause of action accrues when there exists:

> every fact which it would be necessary for [C] to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.\(^9\)


\(^5\)Irish LRC, Limitation of Actions (CP 54, 2009) [2.251].

\(^6\)Per CPR 3.4(2)(a).


\(^9\)(1889) 22 QBD 128 (CA) 131.
Wherever damage is a pre-requisite element of the tort, then the accrual of the cause of action will ordinarily be complete from the date when the damage occurred – given that the occurrence of damage may be well after the actual wrongdoing happened. On the other hand, for torts which are actionable without proof of actual damage, the cause of action accrues when the wrongful act is committed.

This is precisely why causes of action for breach of contract and in negligence may arise at different times. In the former, the cause of action arises at the date of the breach of contract (because proof of damage is not an element of proving the cause of action for breach of contract), whereas negligence is only actionable with proof of actual damage. Essentially, for negligence, the cause of action does not accrue until both the breach and the damage have occurred.

Of course, the debate in many of the problem cases in negligence concerns the question: when, precisely, did C suffer the requisite ‘damage’ necessary to make out the cause of action?

**A lack of actual knowledge, but reasonable discoverability**

**The problem**

C may suffer damage, either physically or economically, but be unaware (without any fault or neglect on his part) that he had suffered injury, until the limitation period had expired. According to the test of Lord Esher in *Read v Brown*, C will not be in a position to establish, by evidence, that he has suffered damage, before he knows about it. The limitation period may have expired, as soon as the damage actually occurred, but before C knew of it. That outcome has been rightly noted to be a ‘severe apparent injustice and [C] would be entitled reasonably to entertain a major sense of grievance’ (to quote Finlay CJ in *Tuohy v Courtney*).

In *Cartledge v EF Jopling & Sons*, various employees, C, claimed for breaches of duty against their employer, D, for pneumoconiosis. According to the evidence, the inhalation of noxious dust could cause substantial injury to lungs, before such injury could be discovered by any means known to science. Each C had, in fact, developed pneumoconiosis and consequent reduction in lung capacity, to an extent that would have been detectable by X-ray prior to when their limitation periods expired. **Held:** time began to run, for limitation purposes, when the damage was caused, not when it was discovered. Hence, the employees’ claims were statute-barred.

More recently, the House of Lords called this scenario ‘an obvious source of injustice’ (per *Horton v Sadler*).

However, such a harsh outcome has been ameliorated by statute, in that the limitation period can start from the later date of ‘reasonable discoverability’, in several instances – in personal injury actions arising from negligence, nuisance or breach of duty; in Fatal Accident Act cases; in defective product cases; and in negligence cases that result in damage other than personal injury.

There are, in fact, four relevant dates in such cases:

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[10] [1994] 3 IR 1 (SC) 47.  
[12] [2006] UKHL 27, [2007] AC 307, [7].
The potential triggering points for a limitation period to start running

<table>
<thead>
<tr>
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<th>Triggering Event</th>
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<tbody>
<tr>
<td>A</td>
<td>D commits an act or omission against C (i.e., the point of wrongdoing)</td>
</tr>
<tr>
<td>B</td>
<td>Injury or damage to C manifests (develops) for C (albeit that C may not be aware of the injury at the time, because it was latent) (i.e., the point of ‘manifestation’)</td>
</tr>
<tr>
<td>C</td>
<td>C could have discovered that the cause of action, and the relevant facts relating to the injury or damage, had occurred, by the exercise of reasonable diligence (i.e., the point of ‘reasonable discoverability’)</td>
</tr>
<tr>
<td>D</td>
<td>C, in fact, discovers the injury or damage which he suffered (the point of ‘actual discovery’)</td>
</tr>
<tr>
<td></td>
<td>C issues proceedings against D</td>
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§BE.2 For actions for negligence, nuisance, or breach of duty, which give rise to damages for personal injury, the limitation period runs from the later of either: the date on which the cause of action accrued (i.e., the point of manifestation of the injury); or at the date of reasonable discoverability (per s 11(4)(a) and (b) of the Limitation Act 1980).

Pursuant to s 11(4) and s 14 of the Limitation Act 1980, the primary limitation period for personal injury cases (i.e., three years) runs from the accrual of the cause of action, or the date of C’s knowledge of the relevant personal injury, if later.

Of course, in many cases of personal injuries, the wrongdoing (say, D’s negligent driving) and C’s injury (say, a broken arm suffered in the car accident) occur simultaneously – as pointed out several times (e.g., per Griffin J in Hegarty v O’Loughran[13]). In that event, Point B is the accrual date.

However, C may undergo a medical operation, after which all seems to be well, but things later take a turn for the worse for the patient, because the operation wasn’t competently done; or C may be involved in a serious accident, from which he seems to have escaped unharmed, but where C becomes seriously ill, several years later, from a condition which was attributable to the accident; or C may have been negligently exposed to a toxic substance during his employment with D, which substance entered his body and remained there, seemingly causing no apparent ill-effects (indeed, C was entirely oblivious to its presence), but years later, it caused serious illness. In that event, Point C is the accrual date where latent damage has arisen.

The ‘reasonable discoverability’ test

By permitting the cause of action to commence from the date of reasonable discoverability, the ‘clock starts ticking’ solely by reference to when C should reasonably have discovered it (Point C). Whenever D committed the conduct (Point A) or when the injury actually manifested (Point B), is not determinative.

There are two issues that arise with the reasonable discoverability test: what C needs to know; and what type of knowledge is sufficient.

§BE.3 For the purposes of the test of reasonable discoverability, knowledge means knowledge of the facts identified in s 14(1) of the Limitation Act 1980. C will have acquired knowledge of those...

facts when, reasonably, he first came to believe them, i.e., when C knows enough to make it reasonable for him to start investigating whether he has a ‘case’ against D.

Knowledge, for the purposes of the test of reasonable discoverability, means knowledge of all of the following:

s14(1) [what is relevant is when C] first had knowledge of the following facts:

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

s14(2) [For the purposes of s 14(1)(a)], an injury is significant if [C] would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against D who did not dispute liability and was able to satisfy a judgment.

In *Halford v Brookes*, Lord Donaldson described the trigger as when C had ‘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’. It was a view with which the majority of the Supreme Court expressly agreed in *AB v MOD*. A ‘reasonable belief’ means that the enquiry must focus, not on whether C’s belief ‘is evidence-based’, but ‘more on whether it is held with a sufficient degree of confidence to justify embarking on the preliminaries to making a claim including collecting evidence’ (per Lord Mance in *AB*). When that point occurs, the limitation clock starts ticking, under the reasonable discoverability test.

Usually, the question will turn on whether C had the requisite knowledge that his injury was ‘attributable’ to D’s act or omission (as, e.g., in *AB v MOD*). The reference in s 14(1)(b) to ‘attributable’ means ‘capable of being attributed’, a ‘possible cause of the damage, as opposed to a probable one’, and a ‘real possibility’ of making out a cause of action (per *Spargo v North Essex District HA*). Indeed, for each fact referenced in s 14(1), and for the purposes of assessing whether the limitation period started, all that is required is that C knows ‘the essence of the act or omission to which his damage is attributable, the substance of what ultimately comes to be pleaded as his case in negligence’ (per *Haward v Fawcett*). C does not need to be able to prove the fact, for time to start running against him (per Lord Mance in *AB v MOD*).

In *AB v MOD*, nine war veterans, part of a group action, were exposed to ionisation during atomic testing near Christmas Island during 1956–58, in a variety of occupations (e.g., aircraft fitter, navigator, sapper, engineer), and suffered a variety of conditions (e.g., cancer, lymphomas, acne,
lipomas). Most of them issued their proceedings on 23 Dec 2004. The question was whether they had acquired sufficient knowledge of the facts in s 14(1) prior to 23 Dec 2001. If so, then their claims were statute-barred. Held: all nine veterans were statute-barred. Prior to 2001, each C reasonably believed that the injury was able to be attributed to the nuclear tests conducted by D between 1956–58. The veterans gained sufficient knowledge of the s 14(1) facts for time to start running against them from that point. To choose a couple of lead claimants:

Mr Hart – his claim was issued in 2004. In 1998, he joined the British Nuclear Tests Veterans Association, an action group committed to securing compensation for veterans who suffered injuries, believed to have been caused by radiation. The group understood the link which it was asserting between radiation and the injuries of its members. Mr Hart had applied for a war pension in 1991, on the basis that his lipomas had been caused by exposure to radiation;

Mr Noone – his claim was issued in 2004. In 1983, he was reported in The Guardian newspaper as stating that the exposure had caused his medical condition. In 1983, he also joined the action group; and he also applied for a war pension, linking his condition to his exposure to radiation. In 1986 and 1989 he also suggested the link to different GPs whom he consulted.

In Mirza v Birmingham HA,\(^\text{20}\) Asad Mirza, C, sued thoracic surgeon D in 1998, for alleged negligence in D’s carrying out a heart operation in 1976, when C was 4 years old. C contended that paraplegia and other damage was avoidable and caused by D’s negligent omission. The primary limitation period expired on C’s 21st birthday, in 1995. Proceedings were not commenced until 1998. Held: C only acquired the relevant knowledge of the facts in s 14(1) in 1998, when C obtained the medical notes of the operation. These were requested in January 1995, and were supplied in dribs and drabs over the next two years. Until these were available, it was not reasonable to expect any expert to offer a meaningful opinion – that was done in 1998, and only then could the relevant knowledge be attributed to C. Hence, the proceedings issued in 1998 were not out of time.

In other rarer cases, C may be uncertain as to who to sue, i.e., the identity of the correct D to sue.

In Nash v Eli Lilly & Co,\(^\text{21}\) a group action was brought against the various manufacturers of Opren, a pharmaceutical product for the relief of arthritic pain, which was withdrawn in 1982 because it was producing unacceptable side-effects including photosensitivity and onycholysis, and sometimes fatal liver and kidney failure. Held (2:1): two of the lead claimants were not statute-barred, because they did not have sufficient knowledge of the ‘significance’ of their injury; whether their injury was ‘attributable’ to Opren; or which manufacturer to sue, given the number which supplied Opren to the UK market.

Clearly, C’s actual knowledge of those matters is not necessary, for the limitation period to start ticking – some measure of constructive knowledge is also sufficient. This is why the limitation period does not start to tick only at Point D in the Diagram (i.e., the point of actual knowledge). The legislature clearly envisaged that the trigger for the start of the limitation period could occur earlier than that (i.e., at Point C), by virtue of s 14(3) of the Limitation Act 1980 (overpage).

\(\text{§BE.4}\) The type of constructive knowledge required by s 14(3), in order for the limitation period to commence, is predominantly an objective test. Merely because C consults an expert (medical,
legal, or otherwise) does not necessarily mean that C has acquired the requisite reasonable knowledge of his cause of action – although that may be the correct inference to draw in a given case.

The type of knowledge which C must have, to start the limitation clock ticking under s 14(3), is not founded on an entirely subjective test (as earlier English authorities had, at times, suggested\(22\) – e.g., in Nash v Eli Lilly & Co, the Court of Appeal said that ‘the span of reasonable inquiry [under s 14(3)] will depend on the factual context of the case, and the subjective characteristics of the individual plaintiff involved’\(23\)).

The test is now more objective – there has been a ‘decisive shift away from a subjective approach’, said Lord Walker in AB v MOD\(24\). Indeed, the earlier House of Lords’ decision in Adams v Bracknell Forest BC\(25\) had said much the same thing, that ‘it would be fairer to D that the test should be mainly objective.’ In fact, whilst the particular circumstances of C can be taken into account, the quid pro quo of C’s being able to take advantage of the extension provision in s 33 (considered shortly) is that a tougher (to C) objective knowledge test is appropriate for s 14(3). It is not now possible for C to state that he, personally and subjectively, did not know of the matters in s 14(1), and hence that D should be subjected to a postponed accrual date (and an associated lack of peace of mind, while the limitation period is yet to start running).

In KR v Bryn Alyn Community (Holdings) Ltd\(26\) 14 adults claimed that they had suffered serious sexual, physical and/or emotional abuse from 1973–91, while they were in the care of D’s children’s homes in North Wales. All the circumstances were somewhat different. CGE’s claim was for serious physical abuse, 1980–1983, when he was 13–17, at the Bryn Alyn Community care home. He did not issue proceedings until he was 32, and certainly not within three years of his majority, when the limitation period would otherwise expire. Held (trial judge): all claims were out of time, brought well after the primary limitation period, and were not saved by the postponement ‘date of knowledge’ provisions in ss 11 and 14 (but the judge exercised discretion under s 33 to disapply the

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\(22\) Newton v Cammell Laird & Co (Shipbuilders and Engineers) Ltd [1969] 1 WLR 415 (CA) 419 (‘You do not ask: At what date would a reasonable person have taken advice? You ask: At what date was it reasonable for this man to take it’: Lord Denning MR); Smith v Central Asbestos Co Ltd [1973] AC 518 (HL) 530 (‘this test is subjective’: Lord Reid).

\(23\) [1993] 1 WLR 782 (CA), ‘Conclusions’, [4].

\(24\) [2012] UKSC 9, [47].

\(25\) [2004] UKHL 29, [2005] 1 AC 76, [73].

\(26\) [2003] EWCA Civ 85, [2003] QB 1441, [166]–[171].
The beginning and end of liability

**Held (CA):** re CGE, he was entitled to postponement of the start of the limitation period. He did not have knowledge of significant injury under ss 14(1)(a) and 14(3) until 1998, when he was 31. He made a statement to the police in 1993, but at the time, he did not know of the development of his personality disorder. Also, the long-term disabling effect of the abuse on his personality involved an inability to face up to past events – which he didn’t start to do until 1998, when he saw both a solicitor and a doctor about his condition.

Constructive knowledge possessed by C, which is sufficient to start the clock ticking, includes C’s knowledge of ‘facts observable or ascertainable by him’, per s 14(3)(a). In *AB v MOD*, Lord Walker noted\(^\text{27}\) that, although there was ‘little authority as to these wide general words’, it included any relevant information that had been given wide publicity in the press or on television (e.g., in *Eli*, press coverage as to Opren’s side-effects). However, C may be taken to have had the requisite constructive knowledge, even before such publicity was given to the potential connection between D’s breach and C’s injury or illness.

In *White v Eon*,\(^\text{28}\) C, an employee, worked as a lightning conductor fitter. In 2006, he sued a number of employers for whom he had worked from 1962–96, seeking damages for vibration white finger and carpal tunnel syndrome caused by excessive levels of vibration from tools used in his work. He claimed that he appreciated the link between his injury and his employment in 2003, when he saw an advertisement for a claims company. His employers argued that his date of knowledge was much earlier, so that his claim was statute-barred. **Held:** C did not actually know that his condition was attributable to negligence, but he had constructive knowledge under s 14(3), by the time he left his employment in 1996. By then, it had been reasonable to expect C to have sought medical advice in respect of his combination of symptoms, which would have led to ‘the necessary link between his condition and the vibrating tools’. The limitation period started to run in 1996, and hence, his claim was ‘out of time’.

If C seeks legal advice by consulting a solicitor about his potential claim against D, that does not entitle the court to automatically assume that the limitation period must start ticking then, although that may be the justifiable inference to be drawn. Judges have not agreed on the point – as Lord Walker pointed out in *AB v MOD*,\(^\text{29}\) there was a decided difference of opinion in the Court of Appeal in *Sniezek v Bundy (Letchworth) Ltd*,\(^\text{30}\) where Judge LJ disagreed that time automatically starts to run against C who has taken legal advice, whereas Simon Brown LJ said that it was ‘difficult indeed to imagine a case where, having consulted a solicitor with a view to making a claim for compensation, a claimant could still then be held lacking in the requisite knowledge.’ In *AB* itself, Lord Walker ‘unhesitatingly’ supported the view of Judge LJ – because all the first visit to a solicitor may do is to initiate a lengthy fact-finding, investigative, process, such that ‘the date of C’s first visit to a solicitor is (without more) of very little significance in most cases’.\(^\text{31}\) The prospect of C’s knowledge being acquired at some point after first visiting his solicitor was also endorsed by Lord Wilson, but a bit less emphatically: ‘[t]he focus is upon the moment when it is *reasonable* for C to embark on such an investigation. It is possible that C will take legal advice before his belief is held with sufficient confidence and carries sufficient substance to make it reasonable for him to do so. Thus [per] Judge LJ [in] *Sniezek*, it does not automatically follow that, by the date when he first took legal advice, C will have acquired the

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\(^{27}\) [2012] UKSC 9, [49].  
\(^{29}\) [2012] UKSC 9, [51]–[58].  
\(^{30}\) [2000] PIQR P213 (CA), with views at, respectively, P229 and P234.  
\(^{31}\) [2012] UKSC 9, [68].
requisite knowledge; but such an inference may well be justified.\(^{32}\) Hence, consulting a solicitor will, in some cases, be perfectly sufficient for time to begin running.

In any event, as pointed out previously, a ‘tougher’ anti-C construction of the knowledge provisions under s 14(3) is appropriate, when C still has the remaining tactic of seeking an extension of the limitation period under s 33. There must be some appropriate balance between the interests of C and D, when construing the Limitation Act 1980.

§BE.5 For the purposes of proving constructive knowledge under the ‘reasonable discoverability’ test, what matters is whether C had sufficient knowledge to make it reasonable to begin investigating whether he had a valid claim against D. It is irrelevant, for the purpose of the limitation period starting to run, that C will ultimately be unable to prove his case successfully.

This was a key point of disagreement in the English Supreme Court, in the veterans’ case of \(\text{AB v MOD}\).

In \(\text{AB v MOD}\), facts previously, the various veterans, who issued their claim in 2004, argued that they had acquired the requisite knowledge of attributability under s 14(1), \(\text{viz}\), a causal link between the atomic testing at Christmas Island and their various medical conditions, in 2007, when an expert report (the Rowland Report), containing clear scientific evidence of that link, was privately presented to them. D argued that C had acquired their knowledge prior to 2001, more than 3 years before their claims were issued. **Held (4:3):** according to the majority, the claims were out of time. The dissenters considered that the limitation period began to run from the date that the veterans became aware of, or should have been aware of, the contents of the Rowland Report – but this was expressly disagreed with by the majority.

According to the majority, it does not matter that C will never be in a position to acquire enough evidence to prove the case against D, and that the claim is held to have no reasonable prospects of success. As soon as C had enough knowledge to begin investigating the claim, that will start the limitation time running.

The minority, however, was entirely in disagreement. Lord Phillips, for example, concluded that, as there were ‘no known facts capable of supporting a belief that the veterans’ injuries were attributable to exposure to ionising radiation’, and as even the expert Rowland report (produced in 2007, well after the commencement of proceedings) fell ‘well short of establishing causation according to established principles of English law’, then the limitation clock had not started ticking for the veterans. Of course, this is a far more pro-C outcome, in cases where C just cannot get the evidence together to support the case in negligence.

There were three key reasons supporting the majority’s more hard-line view:\(^{33}\)

1. were the minority’s approach to be adopted, it would be unworkable and unintended: ‘the more hopeless the claim, the likelier it is that C will be in a position to defeat the Limitation Act defence ... With the best will in the world, this simply cannot have been Parliament’s intention’ (Lord Brown); and it would mean that C’s claim could be ‘kept on ice ... until the right evidence turned up’ (Lord Walker);
2. in \(\text{AB v MOD}\), C lacked the evidence with which to establish a credible case that their injuries

\(^{32}\) ibid, [12].

\(^{33}\) [2012] UKSC 9, with quotes at, respectively: [72] (Lord Brown), [67] (Lord Walker), and [25] (Lord Wilson).
were caused by the atomic testing at Christmas Island. They conceded that it got ‘nowhere near the balance of probabilities’, and that some exceptional theorem of causation was probably necessary to establish. Nevertheless, the veterans held their belief (that there was a claim worth investigating) with sufficient confidence to have made it reasonable for them to consult solicitors and expert medical evidence. Hence, under the proper construction of s 14(3), the ‘reasonable discoverability’ test was met, and their claim started ticking from that time;

iii. the fact that C’s position in proving causation remained hopeless – and that their claims had no reasonable prospect of success – was ‘entirely irrelevant to an inquiry’ as to whether the limitation period had started running against them: ‘the difficulty of actually establishing the claim confers no right thereunder to a further, open-ended, extension of the time within which the action must be brought’ (per Lord Wilson). Otherwise, a preliminary issue on limitation period would become a full-blown enquiry into the relevant facts.

### Actions under the FAA

Where FAA actions are brought by dependants and relatives, C, in cases in which D has allegedly brought about the tortiously-caused death of the deceased, then pursuant to s 12(2) of the Limitation Act 1980, the relevant limitation period starts running from the later of either: the date of the deceased’s death; or the date of ‘reasonable discoverability’ by C.

The general principles governing the test of reasonable foreseeability, as outlined in respect of personal injury claims above, apply equally to FAA claims.

In *AB v MOD*, some of the relevant group claimants were bringing FAA actions, following the death of their husbands, who were servicemen exposed to atomic testing (see facts above). These claims were out of time too. For example: re Mrs Brothers – Mr Brothers was diagnosed with oesophagus cancer in 1997. At that time, Mrs Brothers knew that cancer was capable of being caused by radiation, and that Australian veterans had claimed damages for illnesses, including cancer, which they alleged to have been the result of exposure to radiation. She issued her FAA action in 2004. Re Mrs Clark – she was aware that her husband signed a home-made statement in 1991, for possible reference in future court proceedings, in which he described his exposure to atomic testing (he died in 1992). Shortly after his death, Mrs Clark made an unsuccessful application for a war pension on the basis that his cancer had been linked to his service on Christmas Island; and she consulted solicitors about a possible FAA action in 2002. She issued her FAA claim in 2008. Both were statute-barred.

The Supreme Court was not prepared to extend the limitation periods either (as discussed below), and hence, the action was barred from proceeding.

### Actions in negligence for property damage

For latent property damage, the cause of action can arise from the later of either: the date on which the cause of action accrued (i.e., when the damage manifested); or the date of reasonable discoverability (per s 14A(4)(a) and (b) of the Limitation Act 1980). Hence, just as with most personal injury actions, the limitation period can start later than when the damage actually manifested, i.e., at the point of ‘reasonable discoverability’, if C lacked knowledge of the cause of action because the damage was latent.

The same difficulty of latent damage – of which C has no knowledge – can arise with physical structures (such as buildings, or products), as with latent personal injury. The damage may not be visible and known to C (or to anyone else), until several years after the thing was built.
or manufactured. The added difficulty with this category is that a different owner (from the original) may own the building at the point at which the damage becomes visible, and at which point, the value of the building has dropped.

Section 14A of the Limitation Act 1980 was inserted by the Latent Damage Act 1986 – some three years after *Pirelli General Cable Works v Faber* was handed down by the House of Lords – precisely to mitigate the severity and injustice of that decision.

In *Pirelli v Faber*, a factory chimney had been designed defectively, because of the use by a firm of consulting engineers, D, of an unsuitable material. The chimney manufacture was completed in mid-1969. Cracks developed in the chimney around Apr 1970. However, because they were positioned at the top of the chimney, C, the factory owners, could not have discovered the cracks with reasonable diligence until Oct 1972. C discovered the chimney damage in Nov 1977, and sued in Oct 1978. **Held:** the cause of action accrued when the damage manifested (i.e., not later than Apr 1970) – whether it could be reasonably discovered, or not. The cause of action did not accrue at the later dates when the damage should have been discovered with reasonable diligence, or when it was actually discovered. Hence, the action was time-barred.

Now, under s 14A(4)(b), C’s cause of action can accrue at point C, at the stage at which a reasonable person could have discovered the defect. Just as with personal injury actions, the test of reasonable discoverability turns on both what C needs to know, and what type of knowledge C needs to have. The wording of the relevant knowledge provisions differs slightly, for actions of latent property damage. What C has to have knowledge of is described in s 14A(6) and (8) of the Limitation Act 1980:

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<tr>
<th><strong>s 14A(6)</strong></th>
<th>[the relevant knowledge necessary for the cause of action to accrue] means knowledge both</th>
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<tbody>
<tr>
<td></td>
<td><em>(a)</em> of the material facts about the damage in respect of which damages are claimed; and</td>
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<td></td>
<td><em>(b)</em> of the other facts relevant to the current action mentioned in subsection (8) below.</td>
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<tr>
<th><strong>s 14A(8)</strong></th>
<th>[Those other facts consist of]:</th>
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</thead>
<tbody>
<tr>
<td><em>(a)</em></td>
<td>the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence;</td>
</tr>
<tr>
<td><em>(b)</em></td>
<td>the identity of D;</td>
</tr>
<tr>
<td><em>(c)</em></td>
<td>if it is alleged that the act or omission was that of a person other than D, the identity of that person, and the additional facts supporting the bringing of an action against D.</td>
</tr>
</tbody>
</table>

Similarly with personal injury which is latent, constructive knowledge will do, according to s 14A(10):

<table>
<thead>
<tr>
<th><strong>[C’s knowledge]</strong></th>
<th>includes knowledge which he might reasonably have been expected to acquire:</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>(a)</em></td>
<td>from facts observable or ascertainable by him; or</td>
</tr>
<tr>
<td><em>(b)</em></td>
<td>from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek.</td>
</tr>
</tbody>
</table>

---

34 [1983] 2 AC 1 (HL) 19.
Continuing employment, where culpable conduct is ongoing

In cases of cumulatively-caused injury in the workplace, time will not begin to run until either C has ceased to be employed by D, or had ceased to undertake the work which exposed him to the disease or practice, whichever is the earlier.

It is not from the first exposure to unsafe workplace practices that C’s limitation period begins to run. Even so, the employee may not have commenced proceedings within the primary limitation period, in which case he will be out-of-time, unless he can convince the court that either the accrual of the cause of action should be postponed, or the court’s discretion to disapply the limitation period should be exercised.

In *Cairns-Jones v Tyler*, 25 several employees, C, were involved in upholstery work, which involved the use of staple guns. Six employees developed an upper limb disorder, known as Vibration Syndrome, allegedly as a result of their exposure to the repeated vibration resulting from the use of guns. This condition is caused by the cumulative effect of vibration. Some claims were not made within 3 years of C’s leaving the employment of D, e.g., Mr Cairns-Jones was employed with his employer, D, until Nov 2003; and issued his claim in Dec 2007. **Held:** time would not begin to run until either C had ceased to be employed or had ceased to work as an upholsterer, whichever was earlier. The claims had not been made within the primary limitation period, e.g., Mr Cairns-Jones’ claim was made 13 months after the primary limitation period ended. Attempts to disapply the limitation period, or to postpone the accrual date, were not successful either.

Matters which stop the limitation period from running

The Limitation Act 1980 provides that the limitation period does not run at all, when C is considered to be under a disability or disadvantage against which it is just that the Legislature should protect (i.e., defer) the accrual of their cause of action during that period of disability or disadvantage.

There are numerous instances which stop a limitation period running, as stipulated in Part II of the Limitation Act 1980. Those which are most relevant to tort causes of action are as follows:

**When C is a minor (under 18 years of age).** In spite of the fact that litigation on behalf of children is generally conducted, in their interests, by their parents or guardians, s 28 of the Limitation Act 1980 provides that the limitation period, relevant to the child’s cause of action, does not start running until he reaches the age of majority (or dies, in which case the estate may bring the action). Under s 38(2) of the Limitation Act 1980, C is treated as ‘under a disability while he is an infant’.

Whenever the disability ceases, the period in which C must commence proceedings varies, depending on the tort – for personal injuries, C has three years from the age of majority (i.e., until his 21st birthday occurs); 26 for defamation and malicious falsehood, C has one year; 27 and for property damage, C has six years. 28 These differing periods are discussed in the next section.

---

When C lacks capacity, under the Mental Capacity Act 2005, to conduct legal proceedings. This also constitutes a disability, under s 38(2), and the limitation period is suspended while that disability persists, and resumes running when it ceases.

When C was the victim of fraud, etc. A limitation period does not run, if the action is based on D’s fraud, or the right of action is deliberately concealed from C by D. In that event, the limitation period only begins to run when C discovered the fraud or concealment, or could with reasonable diligence have discovered it (per s 32(1)(a) and (b)).

Under s 32(1)(a), an action cannot be based on D’s fraud, if the claim against D is, in fact, either negligent misrepresentation or a claim under the Misrepresentation Act 1967. Hence, any attempt to postpone the limitation period by proving a ‘deliberate misrepresentation under the 1967 Act’ is doomed to fail, because that type of claim is a contradiction in terms (per Startwell Ltd v Energie Global Brand Management Ltd[39]). In order to postpone the limitation period under s 32(1)(b), C must prove the so-called ‘statement of claim test’, viz, the facts which have been concealed must be those which are essential for C to prove in order to establish a prima facie case – because the purpose of this section is to cover the case where, because of D’s deliberate concealment, C lacks sufficient information to plead a complete cause of action (per Arcadia Group Brands Ltd v Visa Inc[40]).

**LIMITATION PERIODS**

**General points**

The very first limitation statute in English history dates back to 1540.[41] The modern Limitation Act 1980 continues the legislative trail – but with several instances of unclear drafting. A few of these are described in this section.

Limitation periods have multifarious purposes. As the Irish Law Reform Commission described,[42] there are three parties for whom limitation periods exist: C, D, and the public. All have interests – sometimes conflicting – which a limitation statute seeks to balance: for C, ‘it is better for that person not to prolong the presence [of litigation] in their lives, personal or corporate’; for D, because ‘any person facing potential litigation should be able to know that certain claims must be brought within clearly defined time limits; and that they will not face unreasonably “stale” claims’; and for the public, because ‘it is important that the valuable and limited resources of the courts are not taken up with very old claims that it would be futile to litigate.’ The English Law Commission also noted that limitation periods serve both C and D: they give C time to consider their position, take legal advice, investigate the claim, and begin preparing their case, but cannot allow so much time that C can be in a position to delay unreasonably in issuing proceedings.[43]

In AB v MOD,[44] Lord Wilson noted that limitation statutes are ‘Acts of peace [citing the 1825 case of A’Court v Cross[45]]’ in order to protect D from stale claims; and also, they ‘require claims to be put before the court at a time when the evidence necessary for their fair adjudication is likely to remain available, or, in the words of the preamble to the 1540 Act, at a time before
it becomes “above the Remembrance of any living Man ... to ... know the perfect Certainty of such Things”.’ Or, as stated in Allen v Sir Alfred McAlpine & Sons, delays can mean denial of justice, and dimmed recollection of facts ‘puts justice to the hazard’.

Law reform consideration
Before turning attention to the actual law regarding limitation periods, it is worth noting that the English Law Commission recommended, in 2001, that it should be markedly simplified, because the Limitation Act 1980 was a hotchpotch of ad hoc statutory revisions, affected by numerous judicial developments, and with a marked lack of consistency among causes of action. The Commission called the statute, ‘uneven, uncertain and unnecessarily complex’. It was particularly concerned that uncertainty about the law was causing satellite litigation, and that a more ‘cost-effective’ reform was required.

The law reform corner: A nutshell of the English law reform proposals

- a primary limitation period of three years should apply;
- the cause of action should accrue from the date that C had knowledge, or ought reasonably to have had knowledge, of the facts necessary to substantiate the cause of action;
- a long-stop limitation period of 10 years should apply, starting from the accrual of the cause of action (but not to apply in the case of personal injuries);
- judicial discretion should apply to extend the primary limitation period in respect of personal injuries;
- the same primary limitation period and regime should apply, whether the claim concerned was framed as negligence or as trespass to the person.

In 2011, the Irish Law Reform Commission also advocated for the significant reform of the Irish law.

In any event, the prospects of the English law reform seeing the ‘light of day’ in statute in the near future appears most unlikely. In fact, the indications from Government are precisely to the contrary. In November 2009, the Government announced that the proposed draft Civil Law Reform Bill 2009 would not include provisions to reform the law of limitation of actions, because a consultation with key stakeholders did not support the large-scale costs associated with the reform, and because some of the most significant difficulties, e.g., in relation to the limitation periods in child abuse cases, were resolved by case law. When a different Government revisited the issue in 2011, it decided not to proceed with the remaining elements of the draft Civil Law Reform Bill. Hence, limitation periods reform seems unlikely in the short-term.

46 [1968] 2 QB 229, 245. 47 Limitation of Actions (CP 151, 1998) [1.1], [1.5].
46 Limitation of Actions (Rep 104, 2011).
50 HC Debates (19 Nov 2009), col 13 (Bridget Prentice MP).
D must plead the point
It is not for a court to point out to the parties, on its own motion, that a limitation period may have expired – the court has no ‘protective role’. Rather, D must expressly raise and plead the point. As the Irish Law Reform Commission stated, a limitation defence ‘is not self-executing upon the expiry of the limitation period’, and hence, if D chooses not to plead the defence but to argue the case on its merits; or omits to realise that there is a potential defence, then C ‘may still obtain his remedy, even though the limitation period has expired. In this way, the [defence] has no effect unless and until pleaded.’\(^{52}\)

In fact, C has four possible protections against any delay in bringing his claim:

(i) the primary limitation period itself (considered below);
(ii) suspension of the primary limitation period, for reasons of disability, etc (considered above);
(iii) postponement of the accrual of the action, due to lack of relevant knowledge (considered above); and
(iv) the limitation period is disapplied/extended (considered below).

All in all, the jurisprudence surrounding the application, and disapplication, of limitation periods has regularly been fraught – shown by the important appellate overrule in the abuse claims against care homes and orphanages,\(^{53}\) brought many years after the expiry of the limitation period.

Dealing with i and iv, in turn:

The applicable time limits
§BE.10 The general rule is that, per s 2 of the Limitation Act 1980, an action founded on a tort may not be brought after the expiration of six years from the date on which the cause of action accrued. However, that general rule is overridden by numerous other provisions, under which different limitation periods apply.

Primary limitation periods
The following primary limitation periods apply, in actions in tort, or which are tort-related:

<table>
<thead>
<tr>
<th>Cause of action</th>
<th>Time (in years)</th>
<th>Limitation Act 1980</th>
</tr>
</thead>
<tbody>
<tr>
<td>An action in tort, which is not subject to one of the other limitation periods elsewhere in this Table</td>
<td>6</td>
<td>s 2</td>
</tr>
<tr>
<td>An action for negligence, nuisance, or breach of duty, which consists of, or includes, damages for personal injuries to C or to any person</td>
<td>3</td>
<td>s 11(1)</td>
</tr>
<tr>
<td>Conversion of a chattel</td>
<td>6</td>
<td>s 3(1)</td>
</tr>
<tr>
<td>Libel or slander (defamation)</td>
<td>1</td>
<td>s 4A</td>
</tr>
<tr>
<td>Malicious falsehood</td>
<td>1</td>
<td>s 4A</td>
</tr>
</tbody>
</table>

\(^{52}\) Limitation of Actions (Rep 104, 2011) [1.134].

\(^{53}\) As in, e.g., KR v Bryn Alyn Community (Holdings) Ltd [2003] EWCA Civ 85, [2003] QB 1441.
Many law reform commissions have criticised the lack of uniformity of limitation periods. For example, the Alberta Law Reform Institute said, in its report, that ‘there is neither a sound theoretical nor practical foundation for the practice of assigning different fixed limitation periods to different categories of claim’. Nevertheless, differing limitation periods remain the reality for the English landscape.

**Long-stop periods**

Long-stop periods specified by the Limitation Act 1980 are intended for absolute finality – which is important to D, when the initiating point of the limitation period may be the point of ‘reasonable discoverability’ (i.e., which may be years after D’s breach, or the damage actually manifested).

If the limitation period does not start ticking until C becomes aware (or a reasonable person should have become aware) of the facts necessary to make out the cause of action (including the damage or injury suffered), then claims could be brought many years after the act or omission that allegedly caused the injury. In response to this concern, a long-stop period for latent damage and for defective product actions has been considered desirable by the

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54 Limitations (DP 4, 1986) [2.63], and cited in Irish LRC, Limitation of Actions (Rep 104, 2011) [2.02].
legislature of England and Wales, as noted in the Table above. However, and unlike in several other common law jurisdictions, there is no long-stop period for tort actions in general in English law.55

### The law reform corner: The virtues of a long-stop period

The numerous benefits of the implementation of a longstop period were extensively described by the Alberta Law Reform Institute56 (and endorsed by the Irish Commission57 too):

- from an evidentiary point of view, finality is important, because factual witnesses die or vanish, relevant paperwork is lost, expert witnesses are put in impossible positions of evaluating what was ‘reasonable’ years ago. In other words, all aspects of evidence ‘will deteriorate with the passage of time’, to the point of unreliability;
- any D should be entitled, at some defined point after the alleged wrongdoing was committed, to peace of mind, such that it ‘serves society as a whole to have the slate wiped clean periodically’;
- there is an associated cost of keeping records organised, and of keeping in touch with witnesses, years after the relevant event, which a long-stop period sets a finite limit to, and which avoids parties becoming subject to significant ‘document maintenance costs’;
- recalling the standards of a past era, which is often at the heart of negligence claims (i.e., whether D achieved a reasonable standard of care), can be very difficult to well-nigh impossible, years after the relevant event actually occurred – and courts must at all times guard against imposing the standards of the time of litigation to the conduct in question. In fact, ‘conduct which may have been acceptable in the past may no longer be acceptable today’ – but it is the standards of that past which matter.

### Extension of the limitation period for personal injury claims

§BE.12 Having started to run, the limitation periods for any action for damages for personal injury or death may be exceptionally extended (or disapplied), at the court’s discretion, if it would be ‘equitable’ to do so, per s 33(1) of the Limitation Act 1980.

The decision to disapply limitation periods is discretionary. It is to be applied, in C’s favour, ‘if it appears to the court that it would be equitable to allow an action to proceed’. Both s 33 (relevant to negligence) and s 32A (relevant to defamation) stipulate a list of factors that should be judicially taken into account, when an extension is being sought. The following concentrates upon the ‘negligence-related’ factors, under s 33(3):

s 33(3) ... the court shall have regard to all the circumstances of the case, and in particular to:

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

The English Law Commission\(^58\) would have liked to have seen two further factors added to the s 33(3) list (viz, any alternative remedy or compensation available to C, and the strength of C’s case), but these have not been statutorily implemented. In fact, that lack of legislative activity is no doubt attributable to the fact that the prospects of success are frequently judicially taken account of – and the list of factors in s 33(3) is not judicially regarded as being exhaustive in any event. That is plain from the opening words of s 33(3): the court must ‘have regard to all the circumstances’. The matters identified in s 33(3) are just indicators of what past experience has shown as likely to be relevant in the exercise of the discretion. For example, the likely costs to be incurred in pursuing the claim, when offset against the likely compensation awarded to C, may be taken into account. Also, as the Supreme Court stated in \textit{AB v MOD} (where it refused to disapply the limitation period), the difficulties which confronted the various veterans there were immense – especially in proving the causal link between their exposure to ionisation and their injuries. The majority variously called it ‘absurd’ if the limitation period had been disapplied under s 33 to allow the veterans to proceed – but then to have a further application brought by D for strike out\(^59\) or for summary judgment\(^60\) because the claim had no reasonable prospects of success. The strength of the claim clearly mattered.

The s 33(3) factors, and the discretionary exercise which must be exercised thereunder, have been ‘fleshed out’ by many judicially-created principles. To note some of them (drawn from the Court of Appeal’s summaries in \textit{Cairns-Jones v Tyler},\(^61\) \textit{KR v Bryn Alyn Community Ltd},\(^62\) and \textit{AB v Nugent Care Socy}:

- C bears the burden of proving that it would be equitable to disapply the limitation period. It is a heavy burden to discharge, as it is an ‘exceptional indulgence’ to C to have the discretion exercised for his benefit;

\(^{58}\) \textit{EWLC, Limitation of Actions} (Rep 270, 2001) [3.165].
\(^{59}\) CPR 3.4(2).
\(^{60}\) CPR 24.2(a)(i).
\(^{62}\) [2003] EWCA Civ 85, [74].
\(^{63}\) [2009] EWCA Civ 827, [32].
in exercising discretion under s 33(3), the court has to balance the prejudice to C if an extension were not granted, against the prejudice to D if it were. To disapply a limitation period would always prejudice D because he will lose his limitation defence, whereas rejecting an application to disapply the limitation period would always prejudice C, because ‘he would continue to be met with a complete statutory defence, regardless of the merits’ (per Zinda v Ark Academies (Schools)\(^{64}\)). How the court balances those two prejudices will vary, depending upon the facts. The ‘basic question’ is whether it is fair and just to expect D to meet C’s claim on the merits, notwithstanding the delay in commencement;

- in assessing the degree of prejudice to C, the court must properly take into account the likely prospect of success, and the potential value, of C’s claim. Proportionality greatly matters in the exercise of discretion under s 33(3). For example, without cogent medical evidence showing a serious effect on C’s health or enjoyment of life and employability, discretion to disapply should be slow to grant – and the weaker the claim and the smaller its value, the smaller the prejudice to C if he is barred from the action;

- the length of C’s delay in commencing proceedings will be both material and important (albeit that even a 2-day delay in filing proceedings will undoubtedly cause some detriment to D). However, so too will be the reasons for C’s delay, and whether that delay occurred for some ‘excusable reason’. The length of the delay, of itself, is not a deciding factor as to whether the discretion should be exercised;

- an appellate court should only intervene to overturn a trial judge’s exercise of discretion under s 33(3) if the trial judge was so plainly wrong, by misapplying relevant principles, or ‘by reaching a decision that is so clearly unsustainable that his decision has exceeded the generous ambit of discretion within which reasonable disagreement is possible’. (However, although the trial judge’s discretion is unfettered and should not ordinarily be the subject of an appeal, the volume of case law suggests that appeals are reasonably frequent);

- a trial judge should not reach a decision (in favour of or against discretion), effectively concluding his decision on the strength of any one of the s 33(3) factors, or without regard to all the issues in the case. He must conduct a balancing exercise of all the relevant circumstances, and with regard to all the issues.

Notably, s 33 takes account of the likely prejudice to C and D, but not to the insurers who often are standing behind each party (especially D). In Horton v Sadler,\(^{65}\) Lord Bingham stated that this was ‘a problem underlying the whole of s 33’, and that the provisions of s 33 are not capable of referring to insurers, since C and D ‘do not in any legal sense “represent” their insurers’, as the statutory wording requires – albeit that courts have ‘routinely and rightly taken account of the parties’ insurance rights’, in deciding whether or not to exercise their discretion to disapply the limitation period under s 33.

To provide some examples of where the discretion under s 33(3) was not extended:

In AB v MOD, facts previously, involving claims by numerous veterans, their claims were out of time between 3–18 years; plus their prospects of proving causation were hopeless, without a change or development of the law of causation, which was unlikely. In Cairns-Jones v Tyler,\(^{66}\) facts previously, involving Mr Cairns-Jones, C, an employee with the upper limb Vibration Syndrome disorder, the period between the date of constructive knowledge of the condition (1998) and filing his claim
(2007) was 9 years; C had low prospects of success; D would have difficulty in locating witnesses of fact, given the length of time that had elapsed; and there was likely to be a disproportion between costs and amount of likely recovery.

Contrast these examples of where the limitation period was extended under s 33(3):

In *Cain v Francis*, two claims for personal injuries arose from car accidents. The respective drivers, D, had accepted liability, but the claims had subsequently become statute-barred under s 11, because they were not issued within 3 years of the accidents. In each case, C intimated a claim to D’s insurers very promptly, the insurer accepted liability, recognised that early settlement would not be possible because of the uncertain medical prognosis, and made voluntary interim payments. When the claims became statute-barred, each C sought disapplication of the limitation period. For C#1 (McKay), the delay in commencement was just under a year. For C#2 (Cain), the delay was one day. In both cases, the discretion to disapply the limitation period was exercised. D had early notification of the claims, and every opportunity to investigate them. Even where the delay was a year, the discretion should still be exercised, because it had not significantly prejudiced D. In *Johnston v CC of Merseyside Police*, Mr Johnston, C, had a history of mental health problems, including schizophrenia. In 2006, he was arrested by police for creating a disturbance, and was sprayed with CS gas, resulting in severe skin blistering and damage to his face, neck and chest. C was handcuffed, detained, and taken to hospital, but was not subsequently charged with any criminal offence. C sued for both assault and false imprisonment, but his claim was 2.5 months out of time (post the 3-year limitation period for personal injury claims for assault). The delay was relatively short; no prejudice to D flowed from the delay, as it did not affect the cogency of the evidence on either side; if the limitation period was not extended, that might lead to a potential claim against C’s lawyers for adopting the wrong procedure (discussed shortly), and therefore create satellite litigation, which would be ‘unattractive’; and given that the false imprisonment claim, which turned on precisely the same facts as the assault claim, was not affected by any limitation difficulties, then it would be ‘woefully artificial’ to conclude that C could be barred from bringing the assault claim.

Cases of alleged sexual and/or physical abuse present particular difficulties. Stale claims are a particular feature of such litigation, given that the abuse frequently happened when C was a child, C may exist in a ‘twilight world’ of drugs and crime, and one of the manifestations of the psychiatric injury sustained by C may be an inability to confront what happened for a long time after the alleged wrong. Although such claims deserve great sympathy, the court will not necessarily exercise its discretion under s 33(3) in C’s favour. As Lord Brown said in *A v Hoare*:

By no means everyone who brings a late claim for damages for sexual abuse, however genuine his complaint may in fact be, can reasonably expect the court to exercise the s 33 discretion in his favour. On the contrary, a fair trial (which must include a fair opportunity for D to investigate the allegations) ... is in many cases likely to be found quite simply impossible after a long delay.

To give a couple of examples where the limitation period was not extended:

In *KR v Bryn Alyn Community (Holdings) Ltd*, facts previously, the discretion to extend the limitation period was not exercised under s 33(3) in CGE’s favour, as ‘it would have led to a plainly inequitable result’ – the period of delay was very long (16 years from the last of the abuse, and
12 years from the expiry of the primary limitation period); that delay was likely to have had a serious effect on the cogency of the evidence, particularly that of C himself, and for D to investigate the claim and defend it. (Even though the limitation period was not disapplied, the accrual of the cause of action needed postponement under s 14, because CGE acquired the relevant knowledge around 1999, so C was entitled to proceed with his stale claim.) In *EL v Children's Socy*, EL, C, was born in 1944. His parents could not afford to raise him or his two elder sisters. All three children were put into care. Whilst in the care of the Church of England Children's Socy, C was sexually abused by D, the son of the warden of the care home. D later became a vicar in the Church of England until his retirement. When D was confronted with the claims, and underwent police interviews in 2009, he admitted some acts of sexual abuse against C. D committed suicide in 2010. The primary limitation period in this case was C's 21st birthday, in 1965. He filed his claim in 2011 – 46 years out of time. However, with the passage of half a century, and in the absence of the accused himself, a fair trial of the abuse issue would not be possible.

**The problem of choosing the 'right' cause of action**

All claims for personal injuries, whether founded on negligence or on intentional assault (i.e., assault and battery), are subject to a limitation period of 3 years under s 11, which is extendable under s 33 of the Limitation Act 1980. Despite statutory language apparent to the contrary, judicial discretion to extend the limitation period can be invoked in respect of intentional assault and battery.

It will have been apparent from the foregoing discussion in this chapter that the various torts are not treated with parity under the Limitation Act 1980. That dissimilarity in treatment may have a very important effect upon the way in which the claim is couched. The most notable and important differences in limitations treatment occurs between trespass to the person (e.g., battery) and negligence, as the Table below summarises:

<table>
<thead>
<tr>
<th>Torts</th>
<th>Limitation Periods</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trespass to the person</td>
<td>The action must be brought within 6 years of the cause of action accruing, per s 2, but:</td>
</tr>
<tr>
<td></td>
<td>• The discoverability test does not apply to change the accrual date, so there is no possibility of the time limit starting to run later than the accrual date (i.e., the point when the injury manifested, Point B);</td>
</tr>
<tr>
<td></td>
<td>• The limitation period is (at first glance) non-extendable, with no discretion vested in the court to extend it under s 33, (but see below for reversal of both of these points)</td>
</tr>
<tr>
<td>Negligence</td>
<td>Any action for damages for 'negligence, nuisance, and breach of duty' must be commenced within 3 years of the cause of action accruing, per s 11, but:</td>
</tr>
<tr>
<td></td>
<td>• For the purposes of any s 11 claim (e.g., in negligence), the time can start running from the date of reasonable discoverability (Point C), if that is later than when the cause of action accrued;</td>
</tr>
<tr>
<td></td>
<td>• The limitation period is extendable, as the court has a discretion under s 33 to extend it.</td>
</tr>
</tbody>
</table>

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Why the difference matters

These differences between the torts can be extremely important in practice. To take two examples:

**Education abuse.** As discussed in Chapter 18, *Lister v Hesley Hall Ltd* 72 conclusively established that a school owner could be vicariously liable for the sexual abuse carried out by an employee upon pupils who attended that school. In *Lister*, and in other similarly-themed suits since, C, as the abused ex-pupil, is almost always an adult – and the suit against the abuser (for a direct tort) and against his employer (vicariously), are commenced many years after the employee actually committed the acts of abuse.

The problem is that an action in battery is the obvious tort for the ex-pupil to sue for – but it is subject to a 6-year, non-extendable, limitation period. More sympathetically, the more artificial cause of action in negligence is subject to a 3-year limitation period, but which can be judicially extended if it is equitable to do so, and which can run from the later date of reasonable discoverability and not accrual.

The *Lister* case was bedevilled with limitation period problems – even if one would be hard-pressed to realise it from the judgments themselves. The action was brought well beyond the 6-year limitation period in s 2, and no judicial discretion to extend the limitation period was applied for under s 33. Some of the judgments in *Lister* did not clearly state what tort of the warden’s gave rise to the finding of Hesley Hall’s vicarious liability – negligence or battery. Lord Millett’s judgment clearly stated, though, that Hesley Hall was liable for Mr Grain’s assault (‘I would hold the school vicariously liable for the warden’s intentional assaults, not … for his failure to perform his duty to take care of the boys’ 73). However, if that were indeed the case, the limitation period would have been the non-extendable 6-year period, and Mr Lister’s claim ought to have been time-barred.

Subsequent to *Lister*, courts were clearly troubled by the lack of clarity which *Lister* provided on the issue. For example, Holland J commented in *AB v Nugent Care Socy (formerly Catholic Social Services (Liverpool))* 74 that the claim for which Hesley Hall was vicariously liable was for the actions in trespass of the warden, but ‘[f]or some unknown reason, limitation was not in issue.’ In *KR v Royal & Sun Alliance plc*, 75 the Court of Appeal noted that the claims by abused victims against their abusers, and against the owners of the children’s care homes at which the abuse occurred, were ‘not advanced before Connell J on a *Lister* basis i.e., vicarious liability for the abusive acts of individual employees. One reason was, no doubt … the unextendable six year limitation period for trespass to the person.’

**Parental abuse.** An even odder situation can unfold, where an action against the actual perpetrator of child abuse is subject to the strict 6-year limitation period for battery, whereas any action for negligence against the observer and non-perpetrator of abuse involves a 3-year extendable limitation period.

In *S v W (Child Abuse: Damages)*, 76 S, C, was subjected to physical and sexual abuse by her father, between early childhood and her late teens. C’s mother knew of the abuse, but did not take steps to stop it. The father was imprisoned for incest, and C sued both her father and mother about 9 years after the last act of abuse. C sued her father for intentional battery, and sued her mother in negligence for failing to protect C against her father. **Held:** the claim against the father was struck

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out as being statute-barred under s 2. However, the claim against the mother survived under s 11, because the court granted an extension of the limitation period under s 33.

In S v W, Sir Ralph Gibson said that the result was ‘illogical and surprising’. In the same case, Millett LJ of the Court of Appeal referred to the different torts and different limitation periods in S v W as ‘a problem’, and one which ‘deserv[ed] the attention of the Law Commission’.\(^{77}\)

**The Hoare solution.** The real legal conundrum in these scenarios is that C, the adult who suffered abuse as a minor, does not wish to be ‘stuck’ with the non-extendable 6-year limitation period which is stipulated by s 2 – but in order to take advantage of the judicial discretion to extend the limitation period under s 33, intentional assaults would have to be encompassed within the s 11 phrase, ‘negligence, nuisance, and breach of duty’. Artificially as it may sound, that is exactly what has occurred.

According to the House of Lords in its groundbreaking 2008 decision in *A v Hoare*, trespasses to the person arise from a ‘breach of duty’, specifically, from a duty ‘not to inflict direct and immediate injury to the person of another, either intentionally or negligently in the absence of lawful excuse’.\(^{78}\) Hence, even though it may appear, on the face of the Limitation Act 1980, that a claim for assault would fall within s 2 (and thus be the subject of the non-extendable 6-year time limit), *Hoare* means that claims for assault are subject to s 11(4) of the Limitation Act 1980, which provides for a 3-year limitation period from the later of the date of accrual or the date of reasonable discoverability – and unlike the 6-year limitation period under s 2, this period is capable of being disapplied under s 33(1), if the court considers it equitable to do so. However, this principle does not extend to claims for false imprisonment, for which the 6-year non-extendable limitation period continues to apply (per *Johnston v CC of Merseyside Police*).\(^{79}\)

Hence, since *Hoare*, a vicariously-liable D has been lawfully able to face claims brought by C, more than three years after the last act of trespass/abuse (or more than three years after C’s age of majority, if C was a minor when the abuse occurred) – provided that the court is prepared to extend the 3-year limitation period.

**Overruling Stubbings.** In *Hoare*, the House of Lords overruled its 1993 decision in *Stubbings v Webb*,\(^{80}\) in which it had been held that an action for assault and battery was not an action for ‘negligence, nuisance or breach of duty’ within the meaning of s 11. Thus, according to *Stubbings*, an intentional act of sexual abuse was governed by the non-extendable 6-year limitation period prescribed by s 2. However, the House of Lords in *Hoare* held that *Stubbings* was wrongly decided and should be departed from, in accordance with the Practice Statement (Judicial Precedent).\(^{81}\)

Hence, legally speaking, abused claimants have received two advantageous decisions from the House of Lords in one decade: (1) heinous abusive conduct by an employee may be considered to be ‘in the course of employment’, rendering the employer vicariously-liable, per *Lister* (per Chapter 18) and (2) actions may be commenced by victims many years after the abuse ceased, per *Hoare* (and overruling *Stubbings*), provided that those victims can convince the court that a discretion to extend the limitation period ought to be exercised.

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77 Ibid. [21].


81 [1966] 1 WLR 1234.
In *C v Middlesbrough CC*,\(^{62}\) (one of the conjoint appeals heard with *A v Hoare*), C was subjected to frequent sexual abuse by a teacher at his school (the school was managed by the Council, D). The abuse ended in 1988, when C was 16. C commenced proceedings in 2002, years beyond the limitation period. **Held (trial):** D was vicariously liable for the assaults committed by the teacher; and if the action had come within s 11, the trial judge would have exercised his discretion to extend the limitation period so as to allow the action to proceed, and would have awarded £95,000 in damages. However, per *Stubbings*, C’s action was barred by s 2. An allegation of systemic negligence against the Council (which would have given rise to an extendable limitation period) failed. **Held (HL):** given that *Stubbings* should be departed from, and given that the action now came within s 11, the damages assessed by the trial judge should stand. In *A v Hoare*, A had been the victim of an attempted rape by Mr Hoare (H), a serial sexual offender, in 1988. H was sentenced to life imprisonment. In 2004, H won £7.2m on the National Lottery, on a single lottery ticket bought when he was on day release from prison. A had recovered £5,000 from the Criminal Injuries Compensation Fund. When A became aware of H’s windfall, she sued him for damages for the psychiatric harm she had sustained as a result of the rape. **Held (trial):** her claim was statute-barred, per *Stubbings*. **Held (HL):** A’s appeal was allowed, and her case was remitted back to trial to decide whether the discretion under s 33 should be exercised in her favour.

**Why the law changed.** The reasons given in *A v Hoare* for departing from the *Stubbings* rule were as follows:

i. earlier English authority (e.g., *Billings v Reed*)\(^{83}\) had held that s 11’s ‘breach of duty’ was ‘comprehensive enough to cover the case of trespass to the person which is certainly a breach of duty as used in a wide sense’;

ii. a phrase similar to s 11’s was enacted in Victoria, and both the Supreme Court of Victoria\(^{84}\) and the High Court of Australia\(^{85}\) had declined to follow the *Stubbings* interpretation (note, however, that the Irish Supreme Court held, in *Devlin v Roche*,\(^{86}\) that the phrase, ‘breach of duty’, in s 3(1) of the Irish limitation statute, did not include intentional trespass to C);

iii. there were no grounds for treating victims of injuries caused by negligence more favourably than the victims of intentional assault and battery, where extension of the limitation period was concerned;

iv. *Stubbings* was ‘impeding the proper development of the law’ and had ‘led to results which were unjust or contrary to public policy’,\(^{87}\) as manifested in *S v W (Child Abuse: Damages)*;

v. the *Stubbings* interpretation meant that victims alleging sexual abuse by employees in schools, nursing homes, etc, were required to frame their actions against the perpetrators in *negligence*, and could not frame their actions on the (more sensible and accurate) basis that the employer was vicariously liable for the *intentional* tort of its employees. For that reason, the claims in negligence, so as to circumvent the *Stubbings* problem, could be framed in rather fanciful ways – including a claim against the abuser’s co-employee for failing to supervise or to detect the abuse, and a claim that the abuser should have notified the employer of his own wrongful acts. Lord Hoffmann described these negligence claims as having ‘an increasing degree of artificiality’,\(^{88}\) whilst Auld LJ called the various strike-out applications which these claims inevitably

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\(^{83}\) [1945] KB 11 (CA) 19 (Lord Greene MR).

\(^{84}\) Kruber v Grzesiak [1963] VR 621.

\(^{85}\) Stingel v Clark [2006] HCA 37, (2006) 228 ALR 229, [8], [15].


\(^{87}\) [2008] UKHL 6, [20], citing Lord Reid’s remark in *R v National Ins Commrs, Ex p Hudson* [1972] AC 944 (HL) 966.

\(^{88}\) [2008] UKHL 6, [25].
generated as giving rise to ‘arid and highly wasteful litigation’. Hence, a continued adherence to the rule in Stubbings was perceived to be impeding the proper development of the law.

Thus, the unsatisfactory lack of clarity which was evident in Lister, and the peculiar inconsistency in S v W, have been overcome by the Hoare decision, which now permits out-of-time actions to be framed against the perpetrator for intentional assault, and against his employer for vicarious liability – the ‘obvious and direct ground’ for such claims – with the possibility of an extendable limitation period under s 33.

The interaction between the ECHR and limitation periods

The English law of limitation periods is compatible with the ECHR. The fact that C may be barred from bringing a ‘stale claim’ is not an infringement of the Art 6 right to ‘a fair and public hearing within a reasonable time’.

The most relevant article from the ECHR, for present purposes, is Art 6(1), stating that ‘everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’. The European Court of Human Rights has considered the subject of English limitation periods in several cases – and has laid down the following propositions:

- the right of access to the court, pursuant to Art 6(1), is not absolute, and it does not prohibit the imposition of limitation periods upon litigants (Golder v UK);
- the imposition of limitation periods by national legislatures has advantages, in that they ‘serve to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter, and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time’ (Stubbings v UK).

Under Art 6, ‘it is for the State to organise its legal system as to ensure the reasonably timely determination of legal proceedings’ (Price and Lowe v UK) – which necessarily involves that limitation periods are imposed, and enforced;

- Art 6 is not infringed by the facts that limitation periods may be final, and that there can be no possibility of instituting proceedings, even when new facts arise after the expiry of the limitation period (X v Sweden);
- Member States differ enormously, regarding length of limitation periods, whether time starts running at the date of accrual or later under a reasonable discoverability test – but there is a margin of appreciation as to how Member States may set their limitation periods (Stubbings);
- under the principle of proportionality, it is appropriate that some restrictions may be placed on the right of access to the courts by way of a limitation period, but such restrictions cannot be permitted to reduce the ‘essence’ of the litigant’s right to access the courts (Ashingdane v UK).

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[89] KR v Bryn Allyn Community (Holdings) Ltd [2003] EWCA Civ 85, [100].
[92] [1979] 1 EHRR 524, [38].
[93] [1997] 23 EHRR 213, [51].
[94] [2003] ECHR 409, [23].
[96] [1997] 23 EHRR 213, [54].
[97] [1985] 7 EHRR 528, [57].
WHEN LIABILITY CEASES DUE TO PRECLUSIVE EFFECTS

This section provides a brief overview\(^{98}\) of when C will be precluded (or estopped) from bringing a claim against D in tort. In some scenarios, C will not be able to sue D in action #2, because of the legal effects of action #1, whereas in other scenarios, action #1 itself is precluded.

Preclusive effects can arise in any of the following six scenarios:

(1) the traditional doctrine of res judicata (cause of action estoppel);
(2) issue estoppel;
(3) a merger of the cause of action by virtue of entry of judgment;
(4) the extended principle of res judicata;
(5) the doctrine of ‘accord and satisfaction’; and
(6) an equitable set-off.

Notably, C’s attempt to bring action #2, subsequent to action #1, may fall foul of more than one of these doctrines – they are not necessarily mutually exclusive (per Traffic Signs and Equipment Ltd\(^{99}\)).

At the root of each of them is that there must be a finality to litigation. As the Privy Council put it in Hoystead v Commr of Taxation, litigants ‘are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present ... If this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law ... namely, that of setting to rest rights of litigants’.\(^{100}\) In Johnson v Gore Wood & Co, the House of Lords also reiterated the public policy importance of finalising litigation, for both litigants and the wider public alike: ‘[t]he underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole’.\(^{101}\) On this point, English law shares a common bond with ‘many other legal systems, including Roman law, [in] recognis[ing] the importance of ensuring finality of litigation, of protecting parties from multiple claims in relation to the same dispute, and of avoiding conflicting decisions between courts’ (per Ulster Bank Ltd v Fisher & Fisher\(^{102}\)).

Dealing with each doctrine in turn (and illustrated by a tort case):

**Cause of action estoppel**

§BE.15 A ‘cause of action estoppel’ (‘estoppel per rem judicatam’) is a branch of estoppel which precludes C from re-litigating the same cause of action.

It is a legal doctrine which ‘prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between

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\(^{99}\) [2012] NICA 18, [26].

\(^{100}\) [1926] AC 155 (PC) 165–66 (Lord Shaw).

\(^{101}\) [2001] 2 WLR 72 (HL) 90 (Lord Bingham).

the same parties’ (per Diplock LJ in *Thoday v Thoday*[^103]). The only exception is where fraud or collusion justifies setting aside the judgment in action #1 (per *Naraji v Shelbourne MD*[^104]).

**Constituent elements of cause of action estoppel**

Source: *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*[^105] Coke-Wallis, R (on the application of) v *Institute of Chartered Accountants in England and Wales*[^106]

i. action #1 involved a decision pronounced by a judicial tribunal;

ii. the court in action #1 was a court of competent jurisdiction, i.e., having jurisdiction over (1) the parties and (2) the subject matter;

iii. the decision in action #1 was (1) final and conclusive; and (2) on the merits (and, on that score, a judgment disposing of a case by consent, and a default judgment, are just as capable of being final and conclusive on the merits as one given following the determination of disputed issues);

iv. action #1 determined a cause of action which is raised in a later action #2 (and, for the purposes of cause of action estoppel, ‘the ingredient of identity of causes of action means just that: identity, not substantial similarity’[^107]); and

v. the parties (or their privies) are the same in action #1 as they in action #2 – there can be no cause of action estoppel arising, if the parties in action #1 and action #2 are different.

Cause of action estoppel has a relatively narrow application. Even if the underlying facts necessary to establish the (different) causes of action in action #1 and action #2 overlap, and even if the remedies sought by C in action #1 and action #2 are the same, a cause of action estoppel is not established. It may be an abuse of the court’s process to put forward a new cause of action that is substantially similar to that which was put forward in action #1, but there can be no cause of action estoppel in relation to a cause of action which has not previously been the subject of litigation (per *Bank of Scotland v Hussain*[^108]).

In *Naraji v Shelbourne MD, Shahrooz Naraghi*,[^109] C, 22, was a professional footballer with Sheffield UFC. He alleged that his burgeoning career as a footballer at the highest level was destroyed by the negligent surgery to reconstruct the anterior cruciate ligament of his right knee, and by negligent medical aftercare, provided by an orthopaedic surgeon specialising in knee surgery and who ran the Shelbourne Clinic at the Methodist Hospital in Indianapolis. C never played professional football again. C instituted a claim against D and the Indiana Dept of Insurance for medical malpractice (action #1), which claim was dismissed with prejudice by the Marion Superior Court. C then sued D for both breach of contract, and for negligence, in an English action (action #2). **Held:** cause of action estoppel did not apply to the contract claim. Dismissal of a claim ‘with prejudice’ was a decision on the merits, for the purposes of the doctrine of *res judicata*. However, the Indiana claim was pursued only in tort, and therefore, the Indiana proceedings could have no *res judicata* effect on the claim in these proceedings in so far as it was brought in contract. Moreover, no contract claim could have been pursued in Indiana, and hence, the *Henderson* rule (the extended principle of *res judicata*, below) did not preclude action #2 either.

Issue estoppel
§BE.16 The doctrine of ‘issue estoppel’ precludes a party from denying, in action #2, any matter of fact or law necessarily decided by action #1.

An ‘issue estoppel’ arises, even where the causes of action are different in actions #1 and #2, but where ‘separate issues as to whether a particular condition has been fulfilled’ are decided, such that it would be an abuse of process to relitigate the same issue (per Diplock LJ in Thoday110).

Constituent elements of an issue estoppel
Sources: Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2);111 DSV Silo-und Verwaltungsgesellschaft mbH v Owners of The Sennar (The Sennar);112 Arnold v Natl Westminster Bank plc;113 Bank of Scotland v Hussain114

i., ii. and iii. – all as above, for a cause of action estoppel;
iv. the issue in action #2, which is said to create an estoppel, must be the same issue as that decided in action #1 (what is required is that a particular issue forming a necessary ingredient in a cause of action has been litigated and decided in action #1, and action #2 involves perhaps a different cause of action to which the same issue is relevant, and one of the parties seeks to re-open that issue – '[t]he starting point ... is to identify the issue in the present proceedings in relation to which there is said to be an estoppel', per Arnold);
v. only an issue, the determination of which was ‘necessary for a decision, and fundamental’ in action #1 will create an issue estoppel in action #2;
vi. as in v above, for cause of action estoppel.

The doctrine of issue estoppel has its definite limits. Element v is particularly important. It was established in R v Hartington, Middle Quarter Inhabitants,115 where Coleridge J noted that the doctrine applies to points which it was ‘necessary to decide, and which were actually decided, as the groundwork of the decision itself’. If the points from action #1 sought to be re-litigated were not ‘necessary steps in the decision ... so cardinal to it that, without them, it cannot stand’, then their re-litigation is proper, because they are only collateral issues (per Ulster Bank Ltd v Fisher116). Further, in Friend v Civil Aviation Authy, the Court of Appeal noted that issue estoppel should be ‘used with caution’, and that a court must be satisfied that the issue on which C has to succeed in action #2 is indeed the same issue as that which was considered and decided in action #1.117

In Friend v CAA, Captain Brian Friend, C, sued the CAA in tort (malicious falsehood, conspiracy, and inducing breach of contract) (action #2). Previously, he had sued for unfair dismissal, which had been heard by the Industrial Tribunal (action #1). Held (trial): action #2 was struck out on the

111 [1967] 1 AC 853 (HL) 935.
112 [1985] 1 WLR 490 (HL) 499.
113 [1991] 2 AC 93 (HL) 105.
114 [2010] EWHC 2812 (Ch) [63].

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ground that it was barred by issue estoppel following upon action #1. In action #1, C's dismissal was held to be entirely his own conduct (i.e., failing to participate in unsafe inspection procedures), and that no conduct on behalf of the CAA caused or contributed to that dismissal. Hence, all damages resulting from the dismissal resulted, not from anything done by the CAA, but from C's own behaviour. That meant that all the claims in action #2 were defeated, because damage was an essential element of all of them. Held (CA): in the unfair dismissal proceedings (action #1), it was unnecessary to decide whether the CAA were acting unlawfully in requiring C to participate in what he maintained were unsafe inspection procedures. The Industrial Tribunal was not concerned with CAA's conduct as employer, and whether C was required to act unlawfully, which led to the breakdown of their relationship and, ultimately, his dismissal, and whether the CAA caused C damage. The Tribunal said 'nothing as to where the blame for that lay', and hence, no issue estoppel arose here.

Merger in judgment

§BE.17 Where C sues in tort, and judgment is given in C’s favour, then the cause of action which is determined to exist is said to have ‘merged in the judgment’.

The principle of ‘merger in judgment’ is also called the doctrine of former recovery (or, in Latin, ‘transit in rem judicatam’). The essence of the doctrine is that ‘any cause of action which results in a judgment is merged in the judgment, and disappears as an independent entity, the judgment being of a higher nature than the cause of action’ (per Ulster Bank Ltd v Fisher).\(^\text{118}\)

Constituent elements of merger in judgment

Source: Republic of India v India Steamship Co Ltd\(^\text{119}\)

i., ii. and iii. – all as above, for a cause of action estoppel;
iv. the decision in action #1 granted recovery or relief upon a cause of action in favour of C;
v. as for v above, for cause of action estoppel.

As the court explained in Ulster Bank,\(^\text{120}\) merger in judgment differs from cause of action estoppel in two respects. For one thing, cause of action estoppel ‘prohibits contradiction’, whereas merger ‘prevents reassertion’ of the same claim. For another, in a cause of action (or, indeed, an issue) estoppel, the proposition of law or finding of fact declared in action #1 cannot be controverted, whereas, under merger in judgment, what is not allowed is action #2 for relief previously granted or refused. Further, in Republic of India,\(^\text{121}\) Lord Goff explained that the doctrine of merger in judgment could not be ‘described simply as a species of estoppel – rather, the cause of action, having become merged in the judgment, ceases to exist.’

In Ulster Bank v Fisher, the Bank, C, had a customer, V, who was substantially indebted to it. V owned a house and adjoining block of land. V's solicitors, D, gave to C an undertaking to hold the title documents, and if V sold the property, then D would lodge the net proceeds of sale with C. C allegedly loaned V more funds on the strength of those undertakings. However, as it turned out, D handed over the title documents to another firm of solicitors, and the property was sold to another party

without the sale proceeds being handed over to C. C sued D, for failing to fulfil their undertakings given to C (action #1). D was held *prima facie* liable for misconduct, but not for any dishonourable conduct, when there was room for misunderstanding on D’s part. The court declined to make any compensatory order, but to leave the matter to a disciplinary body. C then sued D in negligence, for handing over the title documents to another firm of solicitors (action #2). D argued that C was precluded from bringing the negligence action #2 due to merger in judgment. **Held:** D could not set up that plea. C could bring action #2, as it could not be said that C, in action #2, was seeking to recover a second or inconsistent judgment against D.

**Extended principle of res judicata**

Where D successfully alleges that action #2 being instituted by C was one which could, and should, have been raised in the earlier proceedings, then the extended principle of res judicata will apply. This is also known as ‘the Henderson rule’. However, just because C did not raise a matter (whether it be a cause of action, issue, or fact) in action #1, but seeks to do so in action #2, does not amount to an *automatic* abuse of process, in contravention of the extended principle of res judicata, given caveats to the Henderson rule.

The extended principle of res judicata was espoused by Wigram V-C in *Henderson v Henderson*:\(^{122}\)

where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

**Constituent elements of the Henderson rule**

Sources: *Yat Tung Investment Co Ltd v Dao Heng Bank*;\(^{123}\) *Barrow v Bankside Agency Ltd*\(^{124}\)

i., ii. and iii. – all as above, for a cause of action estoppel;
iv. the subject matter (cause of action or issue) in action #2 was not before the court in action #1, but – because of its relationship and relevance to the subject matter in action #1 – could, and should, have been decided in action #1 (although *Barrow* suggests that the *Henderson* rule does not apply, to prevent action #2, if the subject matter would *not have been decided* in action #1, even if it had been raised);
v. as for v above, for cause of action estoppel; and
vi. there are no special circumstances precluding the operation of the *Henderson* rule.

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\(^{122}\) (1843) 3 Hare 100 (Ch) 114–15, 67 ER 313. Of this passage, it was said in Ulster [1998] NI Ch 7, [19], that the ‘elegantly worded dictum calls to mind the comment of Benjamin Cardozo in ‘Law and Literature’ (1931): ‘For quotable good things, for pregnant aphorisms, for touchstones of ready application, the opinions of the English judges are a mine of instruction and a treasury of joy.’

\(^{123}\) [1975] AC 581 (PC).

\(^{124}\) [1996] 1 WLR 257 (CA).
The extended principle of *res judicata* has judicially been considered to be one facet of the court’s inherent jurisdiction to control its own proceedings, so as to strike out as an abuse of process proceedings which the court considers should not proceed\(^{125}\) – and in circumstances where the doctrines of former recovery, merger, cause of action estoppel, and issue estoppel, are not strictly available.\(^{126}\) Indeed, the *Henderson* principle is not a ‘true case of *res judicata*’ at all, because the issues being raised in action #2 are not the same as the issues which were decided in action #1. In *Brisbane CC v AG (Qld)*,\(^{127}\) Lord Wilberforce, citing: *Greenhalgh v Mallard* [1947] 2 All ER 255 (CA), stated that, ‘it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.’ A court’s jurisdiction to strike out an action as an abuse of the process is, according to Lord Diplock in *Hunter v CC West Midlands Police* derived from, ‘[a]n inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.’\(^{128}\)

In *Talbot v Berkshire CC*,\(^{129}\) Stuart-Smith LJ explained the three justifications for the extended principle of *res judicata*. First, it avoids unnecessary proceedings involving expense to the parties and waste of court time which could be available to other litigants. Secondly, it prevents stale claims being brought long after the event. Thirdly, the rule enables D to know the extent of his potential liability in respect of any one event, especially important for insurance companies who have to make provision for claims, who have to negotiate claims/defend claims, and consider any question of appeal. The *Henderson* rule applies, even where action #1 is settled, rather than adjudicated upon (per *Johnson v Gore Wood & Co*).\(^{130}\)

In *Talbot v Berkshire CC*, C was driving a car, and hit a tree. His passenger, B, and C himself, were seriously injured. B sued C, and C then joined the road authority, D, alleging negligence and nuisance (action #1). This first step was confined to a claim for contribution as between C and the road authority, and did not include any claim for damages for C’s own injuries. By the end of the limitation period, C had not issued a claim in respect of his damages for personal injuries. B succeeded in action #1; and responsibility for B’s injury was apportioned, two-thirds against C, and one-third against the road authority. Then, C, the driver, sued the highway authority, D, for his own injuries (action #2). D submitted that C was barred by the doctrine of *res judicata*. **Held:** C was barred from pursuing a claim which could have been litigated at the same time as proceedings brought by B, which involved the same cause of action against the same D. C’s personal injury claim could have been brought at the time of B’s action, and there were no special circumstances justifying the bringing of fresh proceedings by C. In *Naraji v Shelbourne MD*,\(^{131}\) a dicta example was given: suppose that patient C sued doctor D for negligence (action #1). A subsequent claim for breach of contract (action #2), arising out of the same facts, would be barred – not because of cause of action estoppel, because clearly that can’t apply, they are not the same causes of action. The contractual claim by the patient would require a contract, whereas the negligence claim only requires an assumption of responsibility. However, action #2 would normally be barred because the contractual action should have been brought in action #1 (‘it is the *Henderson v Henderson* extension of the doctrine at work’).

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\(^{125}\) *Brisbane CC v AG (Qld)* [1979] AC 411 (PC) 425 (Lord Wilberforce), citing: *Greenhalgh v Mallard* [1947] 2 All ER 255 (CA).

\(^{126}\) *Ulster* [1998] NI Ch 7, [18].

\(^{127}\) [1975] AC 581 (PC) 590.

\(^{128}\) [1982] AC 529 (HL) 536.

\(^{129}\) [1994] QB 290 (CA) 297.

\(^{130}\) [2002] 2 AC 1 (HL) 32–33.

\(^{131}\) [2011] EWHC 3298 (QB), with quote at [149].
The *Henderson* rule is not immutable, however. In *Johnson v Gore Wood & Co*, Lord Bingham noted that the question of an abuse of process must depend upon a ‘broad, merits-based judgment’, which requires an examination of all the circumstances – including giving due weight as to whether C had reasons, which he regarded as compelling, for not bringing up all of his claims in action #1. Just because a matter could have been raised in action #1 does not automatically mean that it should have been raised:

In *Johnson v Gore Wood & Co*, Mr Johnson, C, ran his business through a number of companies, including WWH Ltd. He instructed GW, a firm of solicitors, D, to act for WWH Ltd to exercise an option to purchase some land which his company planned to develop. The exercise of the option did not go smoothly. In Jan 1991, WWH Ltd sued D for professional negligence re the exercise of the option (action #1). Before that action came to trial, solicitors representing WWH notified D that C also had a ‘personal claim’ against D arising out of the option, which he would pursue in due course. Subsequently, during discussions aimed at settling the WWH claim, the respective solicitors discussed that it had been thought better to wait until WWH’s claim against D had been concluded before dealing with C’s personal claim. WWH’s claim against D settled during trial. In Apr 1993, C then brought his personal claim against D (action #2), which D applied to strike out as an abuse of process. **Held (HL):** action #2 was not an abuse of process of the court. When negotiating settlement of WWH’s action, both parties had proceeded on an underlying assumption that further proceedings by C would not be an abuse of process. Hence, it would be unfair and unjust to now permit D to go back on that assumption.

Further, in *Henderson*, Wigram V-C recognised that there were ‘special circumstances’ in which a party would be permitted to raise, in action #2, something which could have been raised in action #1, but was not. Such special circumstances, in which the *Henderson* rule does not apply, include (but are not limited to) where:

- there was some agreement between the parties that the claim brought in action #2 should be held in abeyance to await the outcome of action #1, so that C did not bring the action forward as part of action #1 (*Johnson*);
- D was guilty of unconscionable conduct (dicta in *Talbot v Berkshire CC*);
- C was ignorant of some facts, and did not appreciate that he had a claim when action #1 occurred (again, dicta in *Talbot*);
- action #1 concerned proceedings under the disciplinary inherent jurisdiction of the court, and action #2 was common law proceedings – these are separate and distinct types of proceedings, with the parties being left to their common law remedies if the court in the exercise of its supervisory discretion declined to make a compensation order (per *Ulster*).

However, Wigram V-C emphasised, in *Henderson*, that ‘negligence, inadvertence, or even accident’, would not comprise ‘special circumstances’ to excuse C from failing to raise the subject matter in action #1.

**Doctrine of accord and satisfaction**

§BE.19 *The doctrine of accord and satisfaction occurs where a contract or deed of compromise is entered into between C (the victim of the tort) and D (the wrongdoer) which, when performed*

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or executed, respectively, is a bar to all actions for the injury done to C. The injured party is contractually deemed to have received satisfaction for, and redress for, the injury done to him, and its effect is to release C’s cause of action.

An agreement of accord and satisfaction\(^\text{134}\) can be contained in either a contract in which consideration passes from D to C, or by deed. That agreement, termed a settlement or compromise, can be incorporated in a judgment by the court (a consent order), or merely constitute a contract between C and D. A typical clause reads as follows:

In consideration of the Defendant agreeing to pay to the Claimants the sum of £X ... each of the Parties hereto agrees and undertakes as follows: ... This agreement is in full and final settlement of all claims and potential claims of whatsoever nature and kind (including interest and costs) which the Parties have or may have against each other under or in respect of or arising out of or in connection with the matter, whether directly or indirectly.

Most disputed claims in tort are settled on the basis of a valid accord and satisfaction. However, it is a matter of scrutinising the facts.

In *Kaschke v Osler*,\(^\text{135}\) Johanna Kaschke, C, sued Mr Osler, D, in respect of an article on his blog, under the heading, ‘Respect member’s “Baader-Meinhof link”’, alongside a photograph of C. The blog referred to C in terms that linked her to terrorism (e.g., she ‘was in the 1970s held in custody in her native Germany, charged with support for the ultra-leftist Baader-Meinhof terrorist group’). Thereafter, D submitted that an agreement of accord and satisfaction was entered into between C and D, by way of an exchange of emails, whereby C was given a right of reply on her blog, which was published. D argued that there had been a concluded agreement that C would not pursue a defamation claim against D, by way of consideration for the right of reply. **Held:** there was no accord and satisfaction here. Although D’s offer to C of a right of reply was ‘commendable, so far as it went’, there was nothing in the email exchanges to support the proposition that a binding agreement had been entered into, that it was to be in full and final satisfaction of any claim C might have.

### Set-off

\(^\text{§BE.20}\) There are two types of ‘set-off’ in English law (apart from a contractual right of set-off, or a set-off which occurs when a company is wound up) – i.e., a legal set-off, and an equitable set-off.

A legal set-off\(^\text{136}\) enables D to require his counter-claim to be tried together with C’s claim, instead of having to be the subject of a separate action – even if the counter-claim is on a wholly different subject-matter from the claim. Lord Hoffmann stated, in *Stein v Blake*, that a legal set-off ‘ensures that judgment will be given simultaneously on claim and cross-claim, and thereby relieves [D] from having to find the cash to satisfy a judgment in favour of [C] (or, in the 18th century, go to a debtor’s prison) before his cross-claim has been determined’.\(^\text{137}\) However, for a legal set-off to apply, both the claim and cross-claim must be for sums which are due, and which are either liquidated, or capable of ascertaining without estimation when

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\(^{136}\) Per CPR 16.6, and s 49(2) of the Senior Courts Act 1981.

the pleadings are drafted – whereas in most tort litigation, that will be impossible, as damages will be unliquidated, and only to be estimated, at the time of the claim being instituted.

For this reason, and as noted in Fearns (t/as Autopaint Intl) v Anglo-Dutch Paint and Chemical Co Ltd, the restriction of legal set-off to circumstances where both claims are for ascertained or readily ascertainable amounts severely diminished its usefulness.\footnote{138}{[2010] EWHC 2366 (Ch), [2011] 1 WLR 366, [17].}

An equitable set-off, on the other hand, was an attempt by equity to restrain C from proceeding to trial or judgment, if D had a cross-claim which the court regarded as entitling D to be protected against C's claim, even though no legal set-off was available. In modern parlance, equitable set-off is available to D where his cross-claim is 'so closely connected with [C's claim] that it would be manifestly unjust to allow [C] to enforce payment without taking into account the cross-claim' (per Federal Commerce & Navigation Co Ltd v Molena Alpha Inc (The 'Nanfri')\footnote{139}{[1978] 2 QB 927 (HL) 975 (Lord Denning), and cited in: Geldof Metallconstructie NV v Simon Carves Ltd [2010] EWCA Civ 667, [43(vi)].}). To constitute an equitable set-off, D's counter-claim must flow out of, and be inseparably connected with, the dealings or transactions which give rise to the subject of C's claim, so that it would be absolutely unjust to allow one to be enforced without regard to the other (per S&I Property Investments Ltd v Nisbet\footnote{140}{[2009] EWHC 1726 (Ch) [123].}).

In S&I Property Investments Ltd v Nisbet, Mr French, C, co-director of S&I Property Investments Ltd, sued Mr Nisbet, D, for an action for a debt due and owing, for the amount of £111,500 (action #1). A few months earlier, D had sued C for harassment under the Protection from Harassment Act 1997, claiming that C had harassed him and caused him anxiety, in pressuring him to pay the debt (action #2). In action #1, D filed a counter-claim in which he admitted the debt, but sought to counter-claim damages for harassment from C, which he argued should constitute an equitable set-off, in extinction or diminution of C's claim for the debt. Held: an equitable set-off was appropriate. The harassment of D flowed out of C's attempts to recover the debt, which was the subject matter of the claim. There was 'an obvious and inseparable connection between the subject matters of the claim and counter-claim. ... it is also obvious that it would be manifestly unfair to allow S&I to enforce the full amount of its judgment debt without giving allowance for the damages (£7,000) that they must pay for Mr French's harassment'. That meant that the principal sum of the debt had to be reduced by £7,000.

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\footnote{138}{[2010] EWHC 2366 (Ch), [2011] 1 WLR 366, [17].}
\footnote{139}{[1978] 2 QB 927 (HL) 975 (Lord Denning), and cited in: Geldof Metallconstructie NV v Simon Carves Ltd [2010] EWCA Civ 667, [43(vi)].}
\footnote{140}{[2009] EWHC 1726 (Ch) [123].}