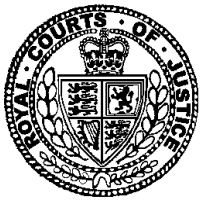

Neutral Citation Number: [2021] EWHC 2038 (QB)

Case No: QB-2019-004523

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/07/2021

**Before** :

**THE HON. Mr JUSTICE BOURNE**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **LEE WITCOMB** | **Claimant** |
| **- and -** | |
| **(1) J. KEITH PARK SOLICITORS (A FIRM)** | **Defendant** |
| **(2) HHJ PETER GREGORY** | |

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**Jeremy Hyam QC** (instructed by **Fieldfisher LLP**) for the **Claimant**
**Simon Wilton** (instructed by **BLM Solicitors**) for the **Defendant (1)**
**Carl Troman** (instructed by **Womble Bond Dickinson LLP**) for the **Defendant (2)**

Hearing dates: 28th – 29th June 2021

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**The Hon. Mr Justice Bourne:**

*Introduction*

1. This is the trial of a preliminary issue of whether the Claimant's claim against his former solicitors and counsel was brought outside the limitation period.

2. The Claimant's claim arises from his representation by the Defendants in an earlier personal injury claim. As I will explain in more detail, the Claimant suffered serious leg and foot injuries in a road traffic accident on 20 July 2002. He brought a claim against a third party who in due course admitted liability. At a meeting for the purpose of settlement on 16 December 2009, agreement was reached for the third party to pay £150,000 in full and final settlement. The Defendants were his solicitors and counsel who represented him, in particular, for the settlement meeting.

3. Unfortunately, the Claimant's symptoms worsened. On 19 January 2017 he was advised, for the first time, that the best treatment for him could be amputation of his right foot and leg below the knee. He underwent that operation on 24 July 2017.

4. In the present claim, the Claimant alleges that the Defendants negligently caused him to enter a settlement which did not make sufficient provision for the risk of future serious deterioration in his condition, including the possibility that he might have to undergo an amputation.

5. The alleged negligence had two components. First, it is said that the Defendants did not cause a medico-legal report to be obtained from a plastic surgeon despite earlier recognition that this was needed. If such a report had been obtained, it is said that it would have highlighted the risk of amputation in future, and the identification of that risk would have made this an appropriate case for an award of provisional damages. Second, and consequent on the first failure, it is said that the Defendants failed to advise the Claimant to seek provisional damages. Had they done so, the eventual settlement of the personal injury claim would have included such provision by agreement, or settlement would have been at a higher figure to take account of this risk, or if no such settlement had been forthcoming, the Claimant would have obtained provisional damages at trial.

6. It is common ground that the primary limitation period, whether in tort or contract, was a period of 6 years running from 16 December 2009, which expired long before the commencement of this claim on 17 December 2019.

7. The Claimant therefore relies on section 14A of the Limitation Act 1980. That section provides:

> (1) "This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.
>
> (2) Section 2 of this Act shall not apply to an action to which this section applies.

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

(4) That period is either –

(a) six years from the date on which the cause of action accrued; or

(b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.

(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

(6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both –

(a) of the material facts about the damage in respect of which damages are claimed; and

(b) of the other facts relevant to the current action mentioned in subsection (8) below.

(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in subsection (6)(b) above are –

(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and

(b) the identity of the defendant; and

(c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of

> that person and the additional facts supporting the bringing of an action against the defendant.
>
> (9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.
>
> (10) For the purposes of this section, a person's knowledge includes knowledge which he might reasonably have been expected to acquire –
>
> (a) from facts observable or ascertainable by him; or
>
> (b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;
>
> but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

8. It is the Claimant's case that he did not have all of the knowledge referred to until, at the earliest, 19 January 2017, when he first learned that he was facing a possible amputation. Only then did he know that he was likely to have suffered damage (the under-settlement of his personal injury claim) which was causally attributable to the Defendants' acts or omissions (the omission to obtain a plastic surgeon's report and to advise him to claim provisional damages).

9. The Claimant in fact contends for one or more possible later dates of knowledge, e.g. in February 2017 when he asked Mr Crook (the solicitor at the First Defendant who had dealt with his claim) whether his case could be reopened and Mr Crook replied that it could not, or later in 2017 when he took legal advice about a possible claim against the Defendants. However, these contentions do not really matter, because even if the correct date is as early as 19 January 2017, the claim is in time under section 14A.

10. In response, the Defendants contend that section 14A does not save this claim, because the Claimant in fact had the necessary knowledge either (1) at the time of the settlement meeting on 16 December 2009 so that section 14A does not extend the primary limitation period at all, or (2) by no later than mid-2016, by which time he had suffered a serious deterioration in his medical condition, so that the section 14A limitation period expired in mid-2019, well before the claim was issued.

11. By consent of the parties, on 13 November 2020 Master Cook ordered this limitation issue to be tried as a preliminary issue.

12. To decide this preliminary issue it is necessary to ascertain the legal meaning of section 14A of the 1980 Act and then to decide, as a question of fact, what relevant knowledge the Claimant had and when he had it.

*The facts in more detail*

13. The relevant documentary evidence consists of various medical reports and records, two witness statements by the Claimant and some correspondence. I also heard oral evidence from the Claimant. The parties have agreed, rightly, that the Claimant's evidence has been frank and truthful in all respects. It seems to me that there is no real dispute of fact concerning the preliminary issue, and the issue is one of law.

14. Save as regards the Claimant's relevant knowledge, the facts of the claim are not to be determined at this preliminary issue trial. If the claim proceeds to a final trial, the Claimant will have to prove his case on negligence, causation and quantum, all of which are in dispute. I make no comment on the merits of the claim, which are not relevant today.

15. The Claimant was born on 4 January 1985 and was aged 17 when the accident occurred on 20 July 2002. He is now 36. He sustained a fracture of his right femur, a soft tissue injury to the right knee and a compound fracture of his right ankle and foot. He was in hospital for over six weeks, undergoing various operations including skin grafting. He was weight bearing by January 2003. He also suffered from post-traumatic stress disorder for around 2 ½ years.

16. He was advised at various times by his treating orthopaedic surgeon, Mr Allardice. He also obtained medico-legal orthopaedic reports from Mr Ransford. The following are the essential facts about his symptoms and treatment before and after he settled the personal injury claim:

    i) He was advised by Mr Ransford on 23 October 2007 that he would need "further attention to his right ankle and right mid-tarsal area at some stage in the future", i.e. arthrodesis surgery necessitating about 6 months off work.

    ii) On the same date he was told that because of stiff right subtalar and mid tarsal joints, walking would always be a problem, and that his right big toe would require further surgery.

    iii) He was told by Mr Ransford on 10 February 2009 that he would probably have surgery at some point to remove metalwork from his right ankle in order to permit an MRI scan, and that this would not be straightforward because of skin grafts in that area, for which reason Mr Ransford did not recommend the procedure. The procedure would necessitate about 6 weeks off work.

    iv) Mr Ransford's answers to questions on 20 October 2009 stated that surgery to the extensor tendon of his right big toe could be carried out at the same time as removal of metalwork.

    v) Those answers further stated that the future ankle and mid tarsal surgery would probably be needed at age 40-50 and that the main risk in that surgery would be of infection.

    vi) In further answers dated 17 November 2009, Mr Ransford advised that the Claimant would be likely to develop osteoarthritis in his right ankle joint by

around 2013-18. On 14 December 2009 Mr Ransford added that once such osteoarthritis developed, he would probably be offered further surgery.

vii) Not long after the personal injury claim was settled in December 2009, the Claimant began suffering very bad pain in his right ankle. This was due to the onset of osteoarthritis – i.e. between four and nine years earlier than predicted by Mr Ransford.

viii) On 16 March 2011 he had surgery, as anticipated, to remove metalwork from his ankle and to lengthen his achilles tendon. Two screws were left in situ because it was difficult to remove them.

ix) In late 2015, x-rays revealed a hairline fracture to his fibula.

x) He had further surgery on 24 February 2016 to remove the two remaining screws in order to permit more scans. Early signs of arthritis in the ankle were observed.

xi) In April 2016 he was still experiencing foot and ankle pain which were limiting his ability to work.

xii) On 5 July 2016 he saw Mr Allardice because the pain in his foot and ankle had reached an unbearable level.

xiii) On 27 September 2016, after a CT scan, Mr Allardice suggested that he might undergo joint fusion. Mr Ransford had predicted that this procedure would be needed, but not until 10 or 20 years later. Mr Allardice advised that, because of potential issues involving skin grafts at the site of the proposed surgery, he should first see the plastic surgeon Mr Kang, and sent a letter of referral on 29 September 2016.

xiv) This led to the consultation with Mr Kang on 19 January 2017, when amputation was contemplated for the first time.

17. That summary is not intended to be comprehensive. It is sufficient to demonstrate (1) that in mid-2016 the Claimant was experiencing serious problems which were worse then, or were occurring earlier than, had been predicted, and (2) that the suggestion of amputation in January 2017, for the Claimant, came out of the blue.

18. It is also necessary to note the essential facts about the settlement of the personal injury claim.

19. By a letter dated 27 November 2008, Mr Crook of the First Defendant informed the Claimant that an offer of settlement in the sum of £130,000 had been received. The letter analysed the offer and stated, in particular:

> "You should appreciate that settlement of the claim is on a once and for all basis. That is to say, you will not be able to obtain further damages arising from the same accident following settlement of the claim.

> You have not made a full recovery from your injury, including that at least one further operation is required. It is not anticipated that the operation will take place prior to [the deadline for accepting the offer]. If you settle your claim prior to the operation and the operation is not a success then there is a risk that you will have settled your claim at an undervalue."

20. A telephone attendance note dated 28 November 2008 recorded the solicitor's view that the claim was not capable of quantification at that time and that "it is not safe to settle".

21. That advice was reiterated in a letter of 1 December 2008, which also said:

> "If you are not advised the very early part of January 2009 that you will definitely be offered permanent employment, you do not wish to take the risk of losing your employment by undertaking the operation. In these circumstances, the case expert will be asked to advise on your condition and prognosis without undergoing the operation to remove the metalwork. The consequence of not having the operation is that you would not be able to have an MRI. If you do not have an MRI the case expert will be restricted in their ability to identify the extent of the damage caused to your ankle, including arthritic change. Therefore, the case expert will be restricted in their ability to identify the prognosis for your future. Therefore, there is a risk that your claim will be settled at an undervalue.
>
> You appreciate why we have advised that it is not safe to quantify and settle the claim at the present time.
>
> You appreciate that settlement is on a once and for all basis and therefore, if for example, the operation does not proceed in a satisfactory manner, you will not be entitled to seek further compensation from the Defendants."

22. In a letter dated 9 November 2009, Mr Crook advised that it was unlikely that the Court would stay the claim pending the operation to remove the metalwork, and advised agreeing to a settlement meeting. On 12 November 2009 the Claimant confirmed that that he agreed to a meeting and Mr Crook confirmed that the Second Defendant would be instructed.

23. In a telephone conference on 16 November 2009, the Claimant confirmed that he understood that a settlement would be full and final, and he was warned not to feel pressurised to settle just to get the litigation over with.

24. The settlement meeting took place on 16 December 2009.

25. The following further facts are recorded in the First Defendant's file note of that date:

    i) The defendant opened with an offer of £130,000 plus costs. The Claimant made a counter-offer to settle for £180,000. The defendant made a final offer of £150,000, which was accepted.

ii) The Claimant was advised that if the defendant paid £150,000 into Court, there was a risk of not "beating" the offer and therefore of becoming liable for costs.

iii) The Claimant instructed that he was willing to give evidence at trial but was not keen to do so, and this was a major factor in his decision to settle the case.

iv) He was advised that although, in his claim and in the settlement negotiations, sums were attributed to the cost of future operations carried out privately, there would be no obligation to use settlement monies for this purpose and he could have NHS surgery.

v) He was advised that settlement was being offered on a "once and for all" basis and so if, after surgery to remove metalwork, it was discovered that he had a more serious injury than was previously appreciated, he "cannot recover further damages".

vi) He did not wish to delay settlement and to seek a stay pending further surgery, because he did not know when any such future picture could emerge and wanted to achieve certainty of settlement now.

*The application of section 14A*

26. The application and the interpretation of section 14A have given rise to some difficulty since its introduction.

27. The leading case is the House of Lords' decision in *Haward v Fawcetts* [2006] UKHL 9, [2006] 1 WLR 682. The claimants had acquired interests in a company, in reliance on advice from accountants as to the sum which would need to be invested to make the company profitable. Despite that investment, and much more, being made, the company failed. The claimants claimed that the advice had been negligent. The claim was brought more than 6 years after the acquisition, and more than 3 years after the company's losses had started to mount significantly. The House of Lords ruled that the burden of proof was on the claimants to show that the relevant date for section 14A purposes was less than 3 years before issue, and that they had failed to discharge this burden. The 5 opinions of their Lordships contain helpful guidance, in particular on the application of section 14A(8)(a), i.e. knowledge "that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence".

28. Lord Nicholls, it seems to me, put his finger on the difficult problem which I have to resolve when he said:

> "In many cases the distinction between facts (relevant) and the legal consequence of facts (irrelevant) can readily be drawn. In principle the two categories are conceptually different and distinct. But lurking here is a problem. There may be difficulties in cases where a claimant knows of an omission by say, a solicitor, but does not know the damage he has suffered can be attributed to that omission because he does not realise the solicitor owed him a duty. The claimant may know the solicitor did not advise him on a particular point, but he may be totally unaware this was a matter on which the solicitor should have

> advised him. This problem prompted Janet O'Sullivan, in her article 'Limitation, latent damage and solicitors' negligence', 20 Journal of Professional Negligence (2004) 218, 237, to ask the penetrating question: unless a claimant knows his solicitor owes him a duty to do a particular thing, how can he know his damage was attributable to an omission?"

29. Unfortunately for present purposes, Lord Nicholls' opinion continues at [16] by stating: "This particular difficulty does not arise in the present case."

30. Nevertheless, Lord Nicholls did go on to say at [18-20] that knowledge that the accountant's advice "might well be flawed" was relevant, that "the conduct alleged to constitute negligence … was not the mere giving of advice" but "was the giving of flawed advice", and:

> "There may be cases where the defective nature of the advice is transparent on its face. It is not suggested that was so here. So, for time to run, something more was needed to put Mr Haward on inquiry. For time to start running there needs to have been something which would reasonably cause Mr Haward to start asking questions about the advice he was given."

31. Thus at [23] Lord Nicholls said that the relevant date was "when Mr Haward first knew enough to justify setting about investigating the possibility that Mr Austreng's advice was defective", and that since the claimants' evidence had not been directed at this issue, they had not proved their case.

32. Lord Walker then pointed out at [58] that there are "tensions arising from the juxtaposition of subsection (8)(a) with subsection (9)", that the application of subsection (8)(a) requires "something of an exercise in hindsight, looking back from the pleaded particulars of negligence" and that subsection (9) does not "free the section entirely of any hint of legal technicality".

33. Lord Walker also referred at [66] to the need to identify the "essence" or "essential thrust" of the negligence case. He made a comparison with *Dobbie v Medway HA* [1994] 1 WLR 1234. There, the negligence was the removal by a surgeon of a patient's breast because of a lump, where the lump in due course turned out to be benign. Prior pathological examination of the lump would have shown the operation to be unnecessary. Under section 14A, time ran from when the patient later found out that the operation need not have been carried out without a prior pathological examination. In *Haward* at [62], Lord Walker described that fact as part of the essence of her complaint, because "the additional fact is necessary to make the act something of which she would prima facie seem entitled to complain". He distinguished this from knowledge that the defendant had been negligent, which is expressly made irrelevant by section 14A(9).

34. Lord Mance at [116] also referred to the situation discussed by the article referred to at paragraph 28 above, and said that it "is in any event not on all fours with a case where an adviser causes or allows a client to enter into a transaction but the client has no reason to attribute loss suffered in the transaction to his adviser until he discovers that the transaction was from the outset intrinsically unsound", there being a narrow but

important distinction between the knowledge referred to in the latter case (relevant), and knowledge that the adviser had been negligent (not relevant). Lord Mance concluded:

> " For present purposes what matters is that it is, in my opinion, wrong to suggest that all a claimant needs to know is that he has received professional advice but for which he would not have acted in a particular way which has given rise to loss, or that he has not received advice when, if he had received it, he would have acted in a way which would avoided such loss. The defendants' primary contention to that effect was, I think, accepted by the judge at first instance (cf paragraph 103 above), and was advanced again before the House by counsel for Fawcetts. But it is, in my view, untenable, and could lead to unjust results.
>
> A claimant who has received apparently sound and reliable advice may see no reason to challenge it unless and until he discovers that it has not been preceded by or based on the investigation which he instructed or expected. A claimant who has suffered financial loss in a transaction entered into in reliance on such advice may not attribute such loss to the advice unless and until he either makes the like discovery about the inadequacy of the work done, or at least discovers some respect in which the transaction was from the outset unsound giving him (as Hoffmann LJ said) *prima facie* cause to complain. Such a scenario may well occur where there are other causes of loss which appear to him capable of explaining the whole loss."

35. Lord Mance applied the test of when knowledge made it reasonable for the claimants to begin to investigate whether or not they had a claim against the accountants. In his opinion, this occurred when they realised that they "had prima facie cause to complain of unsoundness from the outset of the investments", which in turn would suggest "unsoundness in the advice given or not given". Lord Mance agreed that the claimants had failed to address this question and prove their case in evidence.

36. From all of this, I conclude that where the essence of the allegation of negligence is the giving of wrong advice, time will not start to run under section 14A until a claimant has some reason to consider that the advice may have been wrong.

37. Similarly, where the essence of the allegation is an omission to give necessary advice, time will not start to run under section 14A until the claimant has some reason to consider that the omitted advice should have been given.

38. The Claimant placed reliance on *Oakes v Hopcroft* [2000] Lloyds Rep Med 394 CA. In that case, like this one, the claimant alleged that she had settled a personal injury claim at too low a figure because of professional negligence (in that case, by a medical expert). Lord Walker in *Haward* made passing reference at [65] to *Oakes* as a "fact-sensitive" case "in which the claimant needed correct medical advice and legal advice

before she knew that she had settled her original personal injury claim at too low a figure".

39. The facts of *Oakes* were that the claimant settled her personal injury claim at too low a figure in 1983 because, in 1982, reports by the defendant, a medical expert, negligently did not reveal the full extent of her injuries. Those reports wrongly described her as effectively recovered and fit for work. The judge found that the claimant did not agree with the expert at the time, but that she "believed in him and assumed that she would get better soon". Nevertheless, "she knew her action was being settled on an essentially incorrect basis". Then in January and February 1988 she received medical advice showing that her condition was worse than previously advised, she knew that she was unable to work because of disability arising from the accident and she knew that her loss of earnings was exceeding the settlement amount. These findings might have been expected to undermine her section 14A case. However, as Lord Woolf said at [24], she finally "appreciated the true position" when she received a new expert's report in 1990. She sued on 8 March 1991.

40. The trial judge had found that she had all of the relevant knowledge well before March 1988 and therefore her claim was not saved by section 14A. Lord Woolf CJ, however, considered that the position was altered by counsel's advice which she received at the time of the settlement, to the effect that the settlement was reasonable and that the medical evidence did not support a claim for continuing lost earnings despite her being unable to obtain employment because of her condition. At [29] Lord Woolf said:

> "Mrs Oakes could properly be regarded by the Judge as being aware that Mr Hopcroft had significantly under-reported her injuries but I see no justification for not regarding her as acting on her counsel and solicitors advice in accepting the settlement. The Judge did not consider, in the manner he should have done, the effect on Mrs Oakes' state of mind of the advice she received. If he had done so, he could not have concluded that when she accepted the settlement she had the necessary knowledge. She had taken all reasonable steps to take and act on advice as required by section 14A(10). She was not in a position to challenge Mr Hopcroft's opinion or the advice she received and it would be unreasonable to expect her to do so."

41. The Lord Chief Justice went on to explain that the claimant was not unreasonable in not taking further advice before March 1988, although she knew that her injury and its effect on her were much worse than the original medical reports had stated. It was reasonable for her to continue to rely on the advice which she had received.

42. Waller LJ, for his part, did not consider the point about counsel's advice to be essential. At [41] he framed the key question as being, not whether any misdiagnosis had been negligent, but simply "whether she was aware of the essence of the omission which had caused the original settlement to be too low ie that there had been a misdiagnosis". On the facts, Waller LJ considered that the claimant was not so aware.

43. Clarke LJ at [49] noted the difficulty of applying section 14A where the alleged negligence consists of an omission:

> "It is not easy to identify what a claimant must know about an omission in order to have knowledge that her loss is capable of being attributable to it."

44. Agreeing with Waller LJ, Clarke LJ said:

> "If one asks what is it that the claimant is essentially complaining about, it is that the defendant failed to diagnose her condition correctly and to advise her that the accident had caused a severe traction injury to the brachial plexus and damage to the radial artery and that her condition would not improve. It was only when she knew both what injuries had been caused by the accident and, importantly, that they would not improve so that she would not (as it were) get better, that to my mind it can fairly be held that she knew that the omission of the defendant to give her that advice caused her damage. The damage was the loss she sustained because she settled for too little. The claimant could not know that she had settled for too little as a result of any failure on the part of the defendant until she knew that she would not get better because it was that fact, namely that her condition would not improve, which essentially caused the settlement to be too low. That is because the essential reason that the settlement is said to have been too low is that it did not include anything to compensate her for not being able to work in the future as a result of the accident.
>
> In these circumstances I agree with Lord Justice Waller that even absent counsel's advice the claimant did not have the necessary knowledge such that it could be said that it would have been reasonable for her to start proceedings against the defendant in, say, 1992 or 1993."

45. *Oakes* is a reminder of the need for careful sifting of the facts in a case of this difficult kind. Although it is tempting to latch onto *Oakes* because it is another claim based on under-settlement because of faulty professional advice, it seems to me that *Oakes* turns on its own facts rather than establishing any discrete point of principle. However, it is consistent with *Haward* as an example of time running not from the giving of wrong advice or from entry into a loss-making transaction, but from the claimant's reasonably becoming aware that the advice was wrong.

46. The Defendants rely on *Boycott v Perrins Guy Williams* [2011] EWHC 2969 (Ch), [2012] PNLR 25. There the claimant bought a property in 1996 for his girlfriend, who was significantly older than he was. They agreed to be joint tenants so that each would have the right of survivorship. The conveyancing was done by the defendant firm, who did not explain to the claimant that either joint tenant could unilaterally sever the joint tenancy at any time. On 9 May 2007 the girlfriend, who by then was terminally ill, served notice to sever the joint tenancy, with the effect that her share of the property would pass to her estate upon her death instead of the claimant becoming sole owner by survivorship. Different solicitors, Knaggs & Co, at that point advised the claimant that her notice was effective, but there was no discussion about what might have been

done differently in 1996. On 16 July 2007 the claimant wrote to the girlfriend, expressing concern that she had broken their agreement and taken away his expectation of owning the property in full. She died in January 2009. In March 2009 the claimant was advised by a third firm of solicitors that he might have a claim against the defendant. He commenced the claim on 2 August 2010, relying on section 14A. Vos J considered the cases at length, before rejecting at [99-101] a submission that the claimant's knowledge was not complete until 2009 when he was advised that the defendant had had a duty to advise him that the joint tenancy was severable. The relevant knowledge was not knowledge of the existence of such a duty, because that would offend against section 14A(9). Instead, in July 2007, the claimant:

> "… knew everything he needed to know, namely that the solicitor had been told of the agreement he had with [his girlfriend], that the agreement had not apparently been put into effect, that he had not been advised that the joint tenancy was severable unilaterally and that it had been so severed, so he had lost half his Property. What more, one might ask rhetorically, did he need to know? He was thrown off the scent by Mr Knaggs, but that is not the defendant's fault. Section14A may not, as others have remarked, work as straightforwardly as might be hoped, but if one sticks to a consideration of what facts the claimant knew and did not know, it is at least reasonably clear in most cases."

47. It does not seem to me that *Boycott* changes the principle as I have identified it. Time ran from when Mr Boycott had, or acquired, reason to consider that the omitted advice – that a joint tenancy was unilaterally severable – should have been given. On the facts, he acquired that reason when the notice of severance was served, because that event alerted (or should have alerted) him to the lack of any prior advice about severability.

*The parties' submissions*

48. Mr Hyam QC, for the Claimant, emphasises that the purpose of section 14A is to avoid the injustice that arises if a cause of action accrues without the person who is entitled to it appreciating that the damage which gives rise to the cause of action has occurred. That proposition may not be controversial, but it is worth adding that limitation provisions in general seek to strike a balance between allowing claimants to pursue valid claims and protecting defendants from having to defend stale claims.

49. Mr Hyam suggests that there is a close parallel between this case and *Oakes*. There, the defendant's relevant "act or omission" was an omission to diagnose the claimant's injuries correctly. Here it was an omission (1) to obtain a plastic surgeon's evidence which would identify the need for a provisional damages claim and (2) to advise the Claimant that he could make such a claim. In both cases, the "damage" was the settling of a claim for less than its true worth. Both Mrs Oakes and Mr Witcomb became aware, more than 3 years before issuing their claims, that their injuries were or had become more serious than the quantum of the settlement reflected. At the time of the settlements, both had been advised by their lawyers that the settlement sums were reasonable. So in the present case, Mr Hyam submits, that original advice continued to resonate in the Claimant's mind. On the facts of *Oakes*, it was reasonable for the

claimant not to seek the "fresh advice" which would open her eyes to the possibility of a claim until 1990. In the present case, Mr Hyam submits, the Claimant reacted to his worsening symptoms in an entirely reasonable way, and when in January 2017 he finally received the shocking advice from Mr Kang that he should consider amputation, that was the first time he reasonably began to consider whether he had reason to question the legal advice which had been given in 2009. Before then (and perhaps until he received further legal advice later in 2017), he did not know that the damage (settlement at an unduly low figure) had been caused by the Defendants' act or omission (the twin omission to obtain a plastic surgeon's report and to give advice about provisional damages).

50. For the Second Defendant, Mr Troman addressed me on the two components of section 14A knowledge, that is to say knowledge of the relevant damage and knowledge that the damage was attributable to the defendant's relevant act or omission.

51. As to the first limb, Mr Troman correctly reminded me that it is essential to make a precise and careful identification of the relevant damage, in order to decide when the Claimant acquired the relevant knowledge. He observed that damage is described in different ways at various points in the pleadings and skeletons, and invited me to summarise the damage as consisting of the fact that the Claimant "did not obtain an order for provisional damages, which would have protected him in respect of various further serious symptoms".

52. The relevant symptoms, Mr Troman argues, were identified by the Claimant's solicitors in a draft wording for a provisional damages order which was supplied in response to a Part 18 request, and which referred to "(i) serious deterioration resulting from non-union of his ankle fracture (including the need for secondary surgery); (ii) serious deterioration resulting from infection (including the need for secondary surgery); (iii) chronic pain; (iv) amputation; (v) death."

53. Mr Troman submitted that time would certainly have started to run under section 14A as soon as the Claimant became aware that any of these symptoms had eventuated, because that would reveal that he had a condition which was not reflected in the settlement sum and against which he was not protected by any agreement or order for provisional damages. But he went further than this, also submitting that it was not necessary for one of these symptoms to eventuate, because time would run from "the moment when the claimant knows there was a risk and he did not have protection against it".

54. Meanwhile Mr Troman pointed out that when the Particulars of Claim turned to the subject of limitation rather than breach of duty, the damage was expressed in narrower terms, referring to "failure to claim provisional damages in respect of risk of amputation of his ankle and foot following surgery". This, he said, was incorrect. The relevant damage was the failure to seek provisional damages, and the relevant knowledge was knowledge that any risk which might have been covered by provisional damages, not just the risk of amputation, (1) existed and (2) was not so covered.

55. Mr Troman summarised his case in this way: "It is not the date when he knew he ought to have got it [i.e. an order or agreement for provisional damages] because that is knowledge that there was a duty to provide him with advice and that duty was breached.

That is knowledge of negligence. It is the date when he knew he did not get what he ought to have got." This was then refined to: "what he needs to know is that he has not got the protection against the risks about which he knows".

56. On that basis, Mr Troman submitted that the Claimant had the necessary knowledge of damage back in December 2009. At the date of the settlement meeting, he knew that he was going to undergo further surgery with risks of serious further symptoms and treatment needed, and that he was not going to get any compensation in respect of it, that being the essence of his claim.

57. The Second Defendant's case is therefore that knowledge of damage was complete in December 2009. The damage, i.e. the lack of protection against risk by way of provisional damages, was indivisible. This limb of section 14A is triggered as soon as any damage occurs which is sufficiently serious to justify instituting proceedings. It is not re-triggered a second time even if, at a later date, far more serious damage is discovered.

58. That last proposition is illustrated by *Hamlin v Evans* [1996] PNLR 398 CA, a claim arising from a negligent surveyor's report. Time started to run under section 14A when the purchaser of the property discovered dry rot which should have been detected by the surveyor and which cost £4,000 to treat. When, 5 years later, the purchaser discovered serious structural damage caused by subsidence which would cost £34,000 to remedy, the claim was time-barred. Waite LJ there referred to an even more dramatic example in *Horbury v Craig Hall & Rutley* [1991] EGCS 81, another surveyor's negligence case where time ran from the discovery of a defect costing £132 to remedy, meaning that a claim was time-barred when the claimant later discovered dry rot which cost £56,000 to remedy.

59. According to Mr Troman, knowledge of future risk of further damage was all that was required in the present case, because the Claimant also knew that he had entered a full and final settlement in which he was not protected against such risk.

60. Turning to the second limb, which has been referred to as causation/identity knowledge, Mr Troman relied on *Boycott*, as I have said, and the ruling by Vos J that Mr Boycott had not needed to know that the solicitors had owed him a duty to give the missing advice. In oral submissions he summarised the point in this way:

> "… what the claimant needs to know in this case is that he has not obtained any protection in respect of the risks he knows he is going to run. He does not need to know that he ought to have been given that advice on his case. He does not need to know that his solicitors and barrister should have advised him that he should seek provisional damages. What he needs to know is that he has not been advised that he can claim any damages in the future. He needs to know that he is entering into a once and for all settlement in circumstances where he risks further loss. That is sufficient to know that the further loss to which he is exposing himself or the risk of further loss to which he is exposing himself is attributable to the advice that he has received."

61. In response to the case of *Oakes*, Mr Troman pointed out that *Haward* expresses the principles in slightly different terms. He also observed that the Court in *Oakes* said that the claimant needed to know the "essence" of her claim i.e. that there had been a misdiagnosis. Applying that test here, the Claimant knew the essence of his claim in December 2009 because he knew that there had been no plastic surgeon's report and that there had been no suggestion of provisional damages.

62. In the alternative, if I were not convinced that the Claimant had the relevant knowledge by December 2009, Mr Troman submitted that he acquired that knowledge when he experienced further serious symptoms for which he would not be compensated, and that this occurred by mid-2016 if not before, when he complained of "terrible" pain.

63. Mr Wilton, for the First Defendant, adopted the position taken by Mr Troman, although his client's Defence (drafted by other counsel) had put the date of knowledge at or about March 2011 i.e. when surgery to remove metalwork from the Claimant's ankle was not entirely successful, or alternatively at or about September 2015 when he complained of worsening pain, or in September 2016 when Mr Allardice referred him to Mr Kang. Mr Wilton continued to rely on those later dates in the alternative.

64. Mr Wilton echoed the need to define the relevant damage carefully as the under-settlement of the claim without due compensation in respect of future risks. The means by which there might have been such compensation (e.g. a claim for provisional damages) was, he submitted, beside the point.

65. He also emphasized the fact that, applying *Haward*, time runs under section 14A from when a claimant knows enough for it to be reasonable to embark on preliminary investigations into the possibility of bringing a claim i.e. in the words of Lord Brown in *Haward* at [90]: "enough … to realise that there is a real possibility of his damage having been caused by some flaw or inadequacy in his advisers' … advice".

66. I asked Mr Wilton what it was that would reasonably have caused the Claimant to start questioning the advice which he had been given. He said that it was the knowledge that his condition was significantly worse than anticipated and that he had not been compensated for that. By mid-2016, he said, the Claimant's situation bore "no sensible relationship to the picture that was painted at the moment of settlement". That, in his submission, was the latest point by which "material facts knowledge" had been acquired.

67. As to the second limb of section 14A, Mr Wilton compared this to a case of a bad investment. By mid-2016, he said, "events have demonstrated to the claimant that his condition is much worse than anticipated and he has no compensation for it". That gave him reason to investigate why he was in this position. Had he done so, he would have found out about the possibility of provisional damages. For time to start running, he did not need to know the fine legal detail of what had gone wrong.

*Discussion*

68. The extended time limit under section 14A does not start to run until a claimant has both of the types of knowledge referred to in subsection (6).

69. The nature of the "damage" is fundamental to both types of knowledge. The first type is knowledge of such facts about the damage was would lead a reasonable person to consider it sufficiently serious to justify instituting proceedings. The second is knowledge that the damage was attributable to the allegedly negligent act or omission. Counsel for the Defendants are therefore right to submit that the damage must be carefully and precisely identified.

70. That is not least because knowledge of the damage and knowledge that the damage is attributable to an act or omission of a defendant can merge into one another. That comment could be applied to *Dobbie*, referred to above. As Lord Walker explained in *Haward* at [62], the removal of a breast was not a matter for complaint unless and until the breast was found to be healthy. Damage and fault were therefore revealed at the same time.

71. However, the two parts of the test are separate. In some cases a person may acquire both types of knowledge simultaneously. In others, he will not.

72. In the present case the second part of the test – knowledge that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence – is crucial.

73. The damage, in my judgment, consisted of the Claimant being left with a full and final settlement which made no provision for the possibility of a serious deterioration in his condition in future.

74. Mr Witcomb knew of that fact when the settlement agreement was reached on 16 December 2009. He had been repeatedly advised that there was a risk of under-settlement if the later operation to remove metalwork revealed more serious problems. Therefore, from then on, he knew that the "damage" existed.

75. It is a moot point whether this means that, on 16 December 2009, he knew "such facts about the damage as would lead a reasonable person … to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability …" as section 14A(7) requires. As has been observed in other cases, subsection (7) requires a rather unreal hypothesis.

76. By mid-2016, nevertheless, the Claimant probably had knowledge about the damage which satisfied that precise test, because he knew not only that there was a risk of under-settlement but also that the risk was eventuating, because of his continuing medical problems. The damage therefore had a significant financial value at that time, and he would have had no reason not to proceed against the hypothetical compliant and solvent defendant.

77. However, in my judgment, that is not when he acquired knowledge that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence.

78. As against the First Defendant, the Claimant's Particulars of Claim allege both acts and omissions, in particular, the act of wrongly advising him that a settlement was necessarily "full and final", and the omission of failing to advise that he could or should advance a claim for provisional damages. Against the Second Defendant the emphasis

is on the omission to give any advice about provisional damages or to include such provision in a settlement agreement. It is also claimed that both Defendants failed to identify or act on the need for plastic surgery evidence, that omission effectively leading to the omission to advise on provisional damages.

79. In a case of this kind, as I said at paragraphs 36-37 above, there will not be knowledge of the kind referred to in subsections (6)(b) and (8)(a), and time will not start to run, until the Claimant has reason to consider that the advice which he received may have been wrong or that any advice which was not given, should have been given.

80. As in *Haward*, the essence of his claim against his lawyers is not that advice was given, but that flawed advice was given: compare paragraph 30 above. His case is that positive advice, that a settlement had to be on a full and final basis, was flawed because there is an alternative of provisional damages under section 32A of the Senior Courts Act 1981, and that the omission to tell him about that alternative was flawed because that alternative was relevant to his personal injury claim.

81. In my judgment, the error in the arguments put forward by both Defendants is to elide the two requirements of section 14A(6), by equating knowledge of the "damage" (a lack of cover against future risk) with knowledge that the damage was attributable to an allegedly negligent act or omission by them.

82. On 16 December 2009, although he knew about the risk of under-settlement, the Claimant had absolutely no reason to suspect that that risk was caused by anything done or not done by his advisers. On the contrary, those very advisers expressly advised him that the risk existed, and reminded him to decide for himself whether it was a risk he was willing to run. On the basis of the advice given (that a settlement would necessarily be full and final), he may have felt critical of the legal system for not providing any alternative solution. But that was not a reason to suspect that it was his advisers who were depriving him of that solution.

83. In my judgment he had no reason to suspect that there had been flawed advice or flawed omissions from the advice, before 2017. When his condition worsened in 2015 and 2016, he was experiencing precisely the kind of post-operative problems which his advisers themselves had referred to in 2009 when they identified the risk of under-settlement. That was not a reason to consider that he might have been wrongly advised.

84. Nor did he necessarily acquire that knowledge as soon as Mr Kang introduced the possibility of amputation on 19 January 2017. It remained the case that the risk of deterioration about which the Defendants had warned him was eventuating, albeit to an unanticipated extent or in an unanticipated way.

85. What happened, nevertheless, is that this momentous development led to his taking new legal advice and discovering that he could have attempted to claim provisional damages.

86. It is not necessary to decide precisely when he first acquired the knowledge referred to in subsection (6)(b) because, on any view, it was not before January 2017 and therefore was within 3 years of his claim being issued. That knowledge was knowledge that the inadequacy of his settlement was attributable to either or both of the Defendants giving flawed advice.

87. As Lord Walker said (see paragraph 32 above), this limited reference to "legal concepts, including what is causally relevant in the context of a negligence action", does not offend against section 14A(9). The Claimant's acquisition of knowledge that the damage was attributable to the Defendant's acts and omissions did not require knowledge that any acts and omissions were negligent as a matter of law.

88. Nor does this mean that the expiry of limitation is indefinitely deferred in a case of this kind. Subsection (10) of course provides that "knowledge" includes knowledge which a person might reasonably have been expected to acquire, including with the help of expert advice.

89. It has not been contended before me that this type of constructive knowledge is relevant in the present case. It was the receipt of the devastating news from Mr Kang that prompted the Claimant to seek new legal advice, and it is rightly not suggested that he acted unreasonably by not taking such advice earlier.

*Conclusion*

90. The Claimant first acquired the knowledge referred to in section 14A(8)(a) of the 1980 Act no earlier than 19 January 2017, and it was probably acquired rather later than that.

91. The preliminary issue of limitation must therefore be resolved in the Claimant's favour.