Medical Malpractice and The Limitation Act 1980

When Lord Woolf was investigating access to the civil justice system in the 1990s, he described the field of medical malpractice litigation as a jurisdiction where it was very difficult to sustain a claim, where more claims were successfully defended at trial than any other jurisdiction, and where the cost of litigating was extremely expensive. That remains the position and the reason is usually the issue of proving causation.

For many acute cases there is a reason why a person is in hospital in the first place, and if something is done or not done by the ambulance team, the paramedic, the A&E staff or the surgeons, the question arises, has it altered the outcome beyond that which was inevitable? Even where there has been a breach of the surgeon’s duty of care (negligence), has it actually worsened the outcome? To put it another way, is there a causal link between the negligence and the injury? Causation remains key to the successful defence of many claims, even where negligence is clear and can be admitted.

Being negligent does not mean being liable. Being negligent and causing an injury means a liability arises. Causation is key.

But what of other procedurally technical defences to a claim for negligence – most notably the defence of limitation?

In the context of medical malpractice claims, limitation is a misunderstood legal concept. Often simplified, the law in this area is complex. There are exceptions to the general rule and a residual discretion that rests with the court, which can disapply or set aside a limitation period that would otherwise bar a claim and offer the defendant a technical defence.

Even where a limitation defence might be relied on by the defendant surgeon, should it be pleaded as a defence? It may seem strange that a defence lawyer might advise (as I have) not relying on what seems at first glance to be a good limitation defence, but as I hope I will explain, raising a limitation defence may offer a defendant surgeon a forlorn hope that they will escape liability. A poorly applied limitation defence will cost time and energy that may be better directed elsewhere, especially if there is an otherwise good defence to the claim on the merits.

So with that possibly contradictory introduction, let us look at the law relating to limitation.

A claim for compensation for personal injury caused by medical malpractice is subject to the Limitation Act 1980 (the Act). The general rule is that the “limitation period” for compensation claims in negligence or breach of
contract, is six years. However, for personal injury claims the period is reduced to three years. Subject to some
caveats we shall look at shortly, the term “limitation period” refers to the time within which a claimant, or their
representative (for example a parent of a child injured during treatment) may start a legal claim for compensation.

If a claimant does not start a claim, that is to say if they do not issue court proceedings within the limitation period,
then subject to the exceptions, and the discretion of the court to disapply the limitation period, the opportunity to
claim compensation is lost forever. A lawyer will say such cases have become “time barred”.

Why bar an otherwise good claim?
The law likes certainty. It has long been public policy that even where a wrong has been done to another, there
should be a period after which the alleged wrongdoer ought to be free from the threat of a claim being made
against them. It would be wrong to allow a sword of Damocles to hang over (in our case) a surgeon, forever. So we
have the Act.

Often cases come to the attention of the lawyers acting for a claimant shortly before the three year limitation period
is due to expire. In such cases, faced with the prospect of the claimant’s right to sue being lost forever, lawyers will
advise the claimant to issue protective court proceedings that will preserve the claimant’s right of action. As an
alternative they may ask the surgeon, or their insurers and lawyers, to agree a “standstill agreement”, during which
they will investigate whether there is in fact a sustainable claim. If a standstill is agreed, this effectively puts on hold
the running of the limitation period, while not prejudicing any limitation defence that might have already accrued to
the defendant. The claimant’s lawyer will know that if they do not do this, then they may end up reporting to their
own professional indemnity insurers that they have lost the claimant (their client) the opportunity of suing another
for damages and may be liable to pay the compensation that the claimant would have recovered, had the
underlying claim been prosecuted, assuming of course that the underlying liability of the surgeon could be
established.

The Limitation Period

When does the three year limitation period start?

In simple terms it starts on the date the injury is caused. In some cases that date will be pretty obvious. A surgeon
negligently nicks a blood vessel or severs a nerve. That will have a reasonably obvious consequence. But what if
the injury does not reveal itself immediately? Consider the case of a misdiagnosis or delayed diagnosis, or a slow
bleed either from a cut during surgery or over anticoagulation. The breach of duty or negligence happened at the
point of misdiagnosis or actual injury, but the negligence may be a continuing breach of duty up to the point that it
is discovered, or could have been discovered by reasonable inquiry.

To deal with this issue of latent problems or insufficient factual information, the Act introduces the concept of
knowledge. And so the starting date for calculating the three year limitation period for medical negligence is the
earliest date upon which the claimant first had the knowledge, which he might reasonably have been expected to
acquire, necessary to bring a legal action. The claimant must therefore have known the material facts, have known
that the injury caused was serious enough to investigate with a view to the issue of legal proceedings and must
have known the identity of the potential parties to the action. This knowledge is required to start the limitation clock
running, and if any part of this knowledge is missing, the limitation period will not have started to run.

The concept of knowledge, for limitation purposes, is complex and usually turns on the specific facts of a case.
Were facts around the injury concealed? Could the claimant have reasonably attributed the injury to the treatment,
even if they did not know the mechanism of the injury or even know that someone had been negligent?
Some cases are easier to consider than others. For example, I have cancer of the right testicle. I come round from surgery to find a left orchidectomy has been performed. Pretty obvious negligence that I will know about immediately. I can attribute the injury to an error by someone involved in my treatment. The limitation clock begins.

Contrast that with a case where I have headaches following the removal of a tumour from my neck, but my bisected carotid artery goes undiagnosed, resulting in a slow bleed and a stroke some time after my discharge. How easy is it to relate my condition to an omission or error on the part of another? When does time start? In the latter case, probably on the date someone tells me my carotid artery was negligently cut during the tumour removal.

In essence, the three year period does not start to run until the claimant finds out about the problem and who the defendant is. In some cases this can be many years after the medical treatment. I shall illustrate this below.

**Exceptions and the court’s discretion**

There are a number of exceptions to the general three year rule that can stop or delay time running for medical negligence claims:

- The limitation period does not start to run for children until they reach the age of 18 years. In law this is the time they reach their majority. This means that the limitation period expires on their 21st birthday.

- People who are under a disability by reason of a lack of capacity (however caused) may be able to issue proceedings at any time, as in severe cases, the three year period may never start to run. The limitation period may however start to run if mental capacity returns.

I can illustrate it with a real example.

A child, having an elective tonsillectomy in 1960 aged three, suffers brain damage during the procedure. His parents are told it’s one of those things. The child, now 22, is being cared for full time by his now ageing parents, who happen to have cause to investigate the matter so long after the event following a television programme. Never told that something had gone wrong, the true facts of the situation were concealed from them. The medical and theatre records that remain, and it was surprising that any did remain, revealed a child presenting for elective surgery with a high and labile temperature, clearly unwell, and where (albeit with the benefit of 20:20 hindsight) the operation should not have proceeded. It did, he developed hyperthermia as a combination of the anaesthetic agent and his fever, and suffered brain damage rendering him incapable of independent living and lacking mental capacity.

In my example, assuming the child had not been brain damaged, the three year limitation period would have started on his 18th birthday, so by the age of 21 his claim would be time barred. As it was he was brain damaged and so treated as a person under a disability, against whom time does not run. Proceedings were commenced against the defendant 25 years after the events that gave rise to the claim. There was no limitation defence.

But I have also referred to the discretion of the court to disapply the limitation period. Bear in mind that a limitation defence does not arise until it is pleaded by a defendant. This means that a claimant may well decide to issue a claim, knowing that it appears time barred, to see if the limitation defence is raised and take a view (if it is) on whether to make an application to the court for an order disapplying the limitation period.

On hearing such an application the court has to balance the prejudice to the defendant in allowing a claimant to bring a claim that is otherwise time barred, taking into account the reasons for the delay and the availability and weight of evidence in support of the claim. Essentially, if the claim looks viable and is not speculative, and
assuming it is still possible to have a fair trial (if records and witnesses are available) then the court may exercise its discretion and disapply the limitation period.

I said above that I have advised defendants not to rely on what looks like a limitation defence. Usually such cases are those where there are good reasons why there has been a delay resulting in the expiry of the limitation period, and a fair trial can take place, and where pleading a limitation defence will result in the claimant seeking a declaration from the court to disapply the limitation period. If they are successful, the defendant will have to meet the costs of that application, which could be significant. It is a question to consider carefully, with expert legal input.

So in summary:

1. Limitation period expires three years after the injury
2. The period will be extended if:
   - The claimant is a minor
   - The claimant lacks capacity
   - Knowledge is lacking
3. The court may still disapply a limitation period if a fair trial can take place and there is a good claim and reasons which explain the delay in issuing proceedings.