Neutral Citation Number: [2023] EWCA Civ 326

Case No: CA-2021-001922

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT,
(QUEEN'S BENCH DIVISION)
Mr Justice Bourne

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/03/2023

Before:

LADY JUSTICE THIRLWALL
LORD JUSTICE BAKER
and
LADY JUSTICE NICOLA DAVIES

- -

Between:

Lee Witcomb	**Claimant/Respondent**
- and -	
(1) J. Keith Park Solicitors	**Defendant/Appellant**

- -
- -

Jeremy Hyam KC and John-Paul Swoboda (instructed by **Fieldfisher**) for the **Claimant/Respondent**
Carl Troman (instructed by **BLM Law**) for the **Defendant/Appellant**

Hearing date: 05.07.2022

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Approved Judgment

This judgment was handed down remotely at 2pm on 24.03.2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LADY JUSTICE THIRLWALL:

Summary

1. This appeal is about the application of Section 14A Limitation Act 1980. The claimant brings proceedings in negligence out of time against a firm of solicitors and a barrister. He relies on Section 14A. Whether the claim was statute barred was tried as a preliminary issue by Bourne J over two days in June 2021. In a judgment dated 20 July 2021, the judge found for the claimant.

2. The defendants were given permission to appeal. The second defendant's appeal was compromised immediately before the hearing, and he took no part in it. Mr Troman, who appeared for the second defendant only below, represented the first defendant (now the defendant) on the hearing of the appeal.

3. The original claim arose out of a road traffic accident in July 2002. The claimant, then 17, was riding his motorcycle when it collided with a car. The collision was caused by the admitted negligence of the driver of the car. The claimant suffered serious injuries to his right leg and foot: a fracture of the femur, a compound fracture of the ankle and foot and soft tissue injuries to the knee. He was in hospital for 6 weeks and underwent a number of operations, including skin grafting. In addition to the physical injuries, he suffered PTSD for two and a half years.

4. Proceedings were issued. Liability was admitted. Quantum was in issue. At a settlement meeting on 16 December 2009, it was agreed that the claimant would receive £150,000 in full and final settlement of his claim. The claimant received no advice about provisional damages. He was advised that, other than a trial, a lump sum payment in full and final settlement was the only option available to him. A report from a plastic surgeon was not obtained, notwithstanding advice from a medical expert that such a report was needed.

5. The claimant's condition deteriorated markedly and much more quickly than had been anticipated. In January 2017 he was advised that he needed a below knee amputation of the right leg. This was the first time amputation had been mentioned. The claimant immediately contacted the defendant and asked whether the claim could be reopened. He was told it could not. He was later advised by one of his doctors to take further legal advice. He did so and these proceedings were issued in December 2019.

The Claim

6. In the Particulars of Claim the claimant acknowledges that the claim is brought outside the primary limitation period and seeks to rely upon the alternative three year period which runs from the date of relevant knowledge, as set out in s14A Limitation Act 1980.

7. The judge summarised the claim thus at [5] of the judgment:

> "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."

8. The defendant denies breach of duty and causation and maintains that there was no more than a negligible chance of the claimant securing an award of provisional damages. The defendant accepts that the claimant was not advised about provisional damages. The defendant asserts that it acted in reasonable reliance upon counsel at the settlement meeting on 16 December 2009. It was asserted on behalf of counsel that his duty was to represent the claimant at the meeting, not to advise him on the amendment of his claim so as to seek provisional damages or to obtain additional expert evidence. In the event, nothing turned on this since the claim against the second defendant was settled.

The Limitation Act 1980

9. The primary limitation period for bringing an action against the defendants was six years from the date of the settlement agreement by operation of sections 2 (claim in negligence) and 5 (claim in contract) Limitation Act 1980. That period expired on 15 December 2015. The claim was issued on 17 December 2019, four years out of time.

10. Section 14A was introduced by the Latent Damage Act 1986 in the wake of the decision in *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1, in which a claim was held by the House of Lords to be statute barred notwithstanding that the claimants did not and could not be expected to know they had suffered damage. So far as is relevant to this case, it provides as follows, in relation to claims in negligence only. The emphasis is mine:

> **"14A Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual.**
>
> (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.
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> …
>
> (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 … 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) … .

(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."

11. There is no issue about the claimant's right to bring such an action nor about the identity of the defendant. The appeal concerns the claimant's knowledge
i) of the material facts about the damage in respect of which damages are claimed (material facts knowledge – subsections (6)(a) and (7)); and
ii) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence (knowledge of attribution- subsections (6)(b) and (8)).

Knowledge that the acts or omissions did or did not involve negligence is irrelevant (subsection (9)).

12. It was and remains the defendant's primary case that the claimant had the necessary knowledge under subsections (6), (7) and (8) at the time of the settlement meeting on 16 December 2009 so that section 14A does not extend the primary limitation period. The secondary case is that the claimant had material facts knowledge by mid, or, possibly, late 2016 and the judge should have found he had knowledge of attribution at the same time. In that event the three year limitation period expired before the claim was issued on 17 December 2019.

The judge's findings

13. There is no complaint about the judge's findings of fact which are described in the defendant's skeleton argument as uncontroversial. I adopt his summary of the essential facts about the claimant's symptoms and treatment before and after he settled the personal injury claim:

> "i) He was advised by Mr Ransford [orthopaedic surgeon instructed in the proceedings] 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.
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> 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 [treating orthopaedic surgeon] 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."

14. The judge explained that the purpose of the summary was "to demonstrate (1) that in mid-2016 the claimant was experiencing serious problems which were worse than, 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."

15. The judge set out the essential facts about the settlement of the personal injury claim at paragraphs [19]-[25] of his judgment. I summarise: the claimant was informed by his solicitor, Mr Crook on 27 November 2008 that there was an offer of settlement of £130,000. He was advised that the settlement would be 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"). The solicitor explained that were he to settle at this stage there was a risk of settling at an undervalue, particularly if the operation he was awaiting was unsuccessful. He was advised in terms then and shortly afterwards, that it was not safe to settle at that time. The claimant accepted the advice.

16. A year later Mr Crook advised that it was unlikely that the court would stay the claim pending an operation to remove metalwork and advised agreeing to a settlement meeting. On 12 November 2009 the claimant agreed. The second defendant was instructed. 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.

17. The settlement meeting took place on 16 December 2009. The defendant repeated the offer of a year earlier, £130,000 plus costs. The claimant made a counteroffer to settle for £180,000. The defendant made a final offer of £150,000. 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. 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". 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. He accepted the offer of £150,000

18. Just over seven years later, on 27 January 2017, shortly after learning that a below knee amputation was necessary, the claimant emailed Mr Cook, the solicitor who had dealt with his claim. He began, "Hello Steven, you helped me with a personal injury claim a number of years ago and I understand that we made a final settlement". He explained that his injuries had become much worse and informed the defendant that, "I was given the option of a below the knee amputation. As this could be the best long-term solution." He then asked, "If you could please advise me if there is any possibility of reopening my case as this was not factored in in the original claim." On 3 February 2017, Mr Crook replied that it was not possible to pursue a claim for further compensation from the driver. Mr Crook did not advise the claimant to take advice from fresh solicitors. That advice came later from one of the claimant's medical experts and proceedings were issued on 17 December 2019.

Summary of Bourne J's conclusions

19. Having reviewed the law, to which I shall return later, the judge concluded that the claimant had knowledge of the material facts in mid-2016 and knowledge of attribution at some stage after January 2017, on any view less than three years before proceedings were issued. He considered it a moot point whether the claimant had material facts knowledge as at the settlement meeting in 2009.

GROUNDS OF APPEAL

20. The grounds of appeal are based on the same arguments as were relied on at first instance. There is no complaint about the judge's findings of fact and little complaint about his approach to the legal principles. It is the defendant's case that the judge misapplied those principles to the facts he had found.

Ground 1

The judge should have concluded that the claimant acquired the knowledge required for bringing an action for damages in respect of the relevant damage pursuant to s14A of the 1980 Act on 16 December 2009, the date the settlement was reached. Both knowledge of material facts and of attribution were present on that day.

Ground 2

Having determined that by mid-2016 the claimant had knowledge about the damage which satisfied the first limb of the test in s14A as per subsections (6)(a) and (7), the judge erred in finding that the second limb of the test as per subsections (6)(b) and (8) was not satisfied until on or after 19 January 2017. The judge should have concluded that the claimant acquired the knowledge required for bringing an action for damages in respect of the relevant damage pursuant to s14A of the 1980 Act by mid-2016, or late 2016 at latest, when it was obvious that his injuries were much more serious than had been expected.

21. Before turning to the argument, I record that,

    i) this is a case about actual knowledge. As the judge observed at [88], constructive knowledge as defined in Section 14A(10) was not raised by the defendants. The judge accepted the claimant's evidence and considered him a truthful witness. The contrary was not argued.

    ii) it is agreed that the claimant was not told at any stage of the possibility of provisional damages nor that a report from a plastic surgeon should be obtained.

    iii) the claimant was advised repeatedly that damages would be a lump sum and, if he settled, the lump sum would be in full and final settlement of his claim. He was further advised that there was a risk that he would be settling at an undervalue were the consequences of his injuries to prove more serious than thought at the time of the settlement. The risk of amputation was not mentioned.

22. Mr Troman's primary submission on Ground 1 remains that S14A does not apply at all here. According to its heading, S14A concerns situations "where facts relevant to cause of action are not known at date of accrual". In this case all facts relevant to the cause of action were known to the claimant on the date of the accrual of the cause of action, 15 December 2009, he argues.

23. Mr Hyam KC and Mr Swoboda did not seek to develop any argument about material facts knowledge at the time of the settlement meeting nor in 2016 because they accepted the judge's decision that the claimant had material facts knowledge more than three years before the issue of the writ. The real issue on the appeal, they say, is the question of knowledge of attribution and it was to that issue that most of the judge's review of the law was concerned.

24. There is little authority about what constitutes material facts knowledge as set out in subsections (6)(a) and (7). It is the second question, knowledge of attribution, which has given rise to a number of decisions, most of which are concerned with the application of section 14 of the Act to which I shall refer later in the judgment.

25. On the question of material facts knowledge Mr Troman submits, as he did below on behalf of the second defendant, that as at 16 December 2009 the claimant knew:-

    i) that he was suffering from ongoing symptoms from the accident and that there were risks he would suffer further symptoms in the future, specifically infection and healing problems.

ii) that he could not claim further compensation in respect of further symptoms suffered in future or any additional treatment he may require and

iii) that the defendants had not advised him that he could or should seek or obtain a settlement or order entitling him to seek further compensation in respect of the further symptoms he knew he was at risk of suffering in the future.

26. The first of these propositions is not in dispute. As to the second, as the judge found, the claimant knew that he had accepted an offer in full and final settlement with no provision for further claims. He also knew there was a risk of settling at an undervalue, should his condition deteriorate.

27. I regard Mr Troman's third proposition (that the claimant knew that he had not been advised that he should seek a settlement which allowed him to make a further claim for damages) as an artificial framing of the claimant's position. As the judge found, the claimant was advised that "the only option was a full and final settlement with no protection against future significant deterioration." He did not know that there was an alternative to that settlement. He did not know about provisional damages. He did not and could not know that he had not been advised about something he knew nothing about. He did not know that the settlement could have protected him against future significant deterioration.

28. Mr Troman further submits that there were only two things the claimant did not know, namely that the defendant was under a duty to advise him to seek an award of provisional damages and that amputation would be the best option for him. Whilst he knew neither of those things, they were not the only things he did not know, some of which I have set out above. The question of whether a duty was owed is irrelevant to the date of knowledge and it was no part of the claimant's case or the judge's reasoning that it was relevant.

29. In developing his arguments Mr Troman submits that Subsections 14(A) (6)(a) and (7) are satisfied if a claimant knows that there is such damage to consider it sufficiently serious to justify his instituting proceedings for damages even if s/he does not know the full extent of the damage. That is an uncontroversial statement of the law. He says that the fact that the claimant did not know in December 2009 of all the possible further symptoms he could suffer or all the treatment he may require, including amputation which no one had foreseen, is irrelevant as that is knowledge of the full extent of the damage.

30. This submission assumes that the claimant knew of some of the damage as at December 2009. This is not correct. The damage in respect of which damages are claimed arises out of the absence of the claim for provisional damages. The claimant knew nothing of that. Mr Troman's submission conflates the risk of under settlement (if the injuries were significantly worse than predicted) of which the claimant was aware, and the certainty of under settlement as a result of the absence of a claim for provisional damages of which he was unaware. That the claimant knew he was at risk of under settlement if his injuries were significantly worse than predicted and that he did not know how bad the deterioration would be is nothing to the point. This claim is not for damages for failing correctly to assess quantum of damages for the injuries, it is for damages for failing to claim/settle/secure provisional damages (see the judge's description at [7] above). The absence of the claim for provisional

damages is the essential material fact about the damage of which the claimant had no knowledge.

31. It follows that neither of the two authorities relied on in support of this proposition is of any assistance to Mr Troman. In *Eagle v Redlime Ltd* [2011] EWHC 838 (QB); the claimant commissioned the construction of a concrete base and silage tanks for commercial kennels on his property. The work was defective. Some relatively minor faults were found and corrected. Further defects were discovered thereafter; the claimant remedied them. Later, much more serious damage was discovered, and the claimant brought proceedings. He relied on Section 14A. The judge ruled that the claim was statute barred; the claimant had material facts knowledge and knowledge of attribution from the earliest discoveries of the faults and long before the discovery of the more serious damage.

32. *Hamlin v Edwin Evans* [1996] PNLR 398, was a case about a survey of a house prior to purchase. Shortly after completion of the purchase dry rot was found in the house. It was reported to the defendants and the potential claim was settled. Some years later a number of other structural defects were found. The claimants brought proceedings more than eight years after the report was provided and more than six years after the discovery of the dry rot. This court upheld the decision of Kay J that the claimants had a "single cause of action which became statute-barred prior to the commencement of these proceedings." In short, at the time the claimants settled their first claim they knew that the report was defective. They had relevant knowledge within Section 14A, years before they began proceedings for the later damage.

33. In this case the judge said [73] and [74] that the "damage" was being left with a settlement which made no provision for future deterioration and that the claimant was aware the "damage" existed. That was not, as is plain from the judgment, a finding that the claimant had knowledge of the material facts about the damage within the meaning of Subsection (7), not least because the claimant did not know that there was an alternative to "the damage".

34. I set out subsections 14A (6) (a) and (7) again, for convenience:
6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both—

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

.....

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.*

36. As at December 2009, the claimant knew nothing about the damage (in respect of which damages are now claimed) that would justify his instituting proceedings. I am satisfied that the claimant did not have material facts knowledge in December 2009.

37. The question of attribution does not therefore arise in respect of that date. When considering that question later in his judgment the judge said at [82], "On 16

December 2009, although he knew about the risk of under-settlement, the claimant had absolutely no reason to suspect that the 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 the solution." The judge was entitled to come to that view. To the judge's findings I would add that at that time the claimant did not know that he had in fact settled at an undervalue (because his claim for provisional damages was not taken into account).

38. In answer to the court's question as to what the claimant should have done on receiving the defendants' advice at the settlement meeting, Mr Troman submitted that he should have sought a second legal opinion. Three points arise:

First, the claimant had no reason to seek a second opinion (or indeed a third, given that he was being advised by both solicitors and counsel). He was being advised by apparently competent and experienced solicitors and counsel whose advice he was entitled to trust. They were not suggesting that a further opinion be obtained.

Second, to require a claimant to seek a second or third opinion in those circumstances would involve placing what Lord Woolf CJ described in *Oakes v Hopcroft* [2000] Lloyds Med Rep at [34] as "an excessive burden" upon a claimant to expect him to question the advice of his lawyers.

Third, to require a litigant who has received advice from competent and experienced solicitors and counsel to incur the expense, delay and disruption of a second/third opinion in case the opinions of both solicitor and counsel (which he has no reason to doubt) were flawed would seriously undermine the effective running of personal injury litigation.

39. It follows that I do not accept that a person in the claimant's position in December 2009 would reasonably have sought a further opinion in the light of the advice he had received from solicitors and counsel.

40. I would reject this ground.

41. There is no complaint from either party about the judge's finding of material facts knowledge in 2016 and I say nothing about it.

42. The principal focus of the judge's detailed consideration of the law was the question of knowledge of attribution to which I shall now turn in considering the second ground of appeal. In addition to the passages referred to by the judge I shall refer to other passages from the principal authorities relied on by the claimant and defendant and to those which are of assistance in determining the issues on the appeal.

43. Bourne J relied principally on the first and only case in which Section 14A has been considered in our highest court: *Haward v Fawcetts* [2006] 1 WLR 682 *(Haward),* a decision of the House of Lords. The claimant had invested in a business pursuant to professional advice, with a view to making a profit. From a very early stage the

business made significant losses which continued notwithstanding further investment. Eventually the losses were investigated, and a claim brought against the advisers for negligent advice. They contended that the claim was statute barred.

44. Material facts knowledge was not in issue. Mr Haward knew he had lost a fortune and knew he had acted on the advice of his advisers. The issue in the case was the date of knowledge of attribution.

45. It is convenient to set out here the terms of Section 14 of the Act, which defines the date of knowledge in cases of personal injury as:

"(1) …the date on which [the claimant] first had knowledge of the following facts—
(a)that the injury in question was significant; and
(b)that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty…."
and further provides:
"(2) For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment."

46. Lord Nicholls considered at [9] the degree of certainty of knowledge required. He considered a number of cases decided under section 14. He began with the guidance given by Lord Donaldson MR in *Halford v Brookes [1991]* 1 WLR 428 and 443 and concluded that "the claimant must know enough for it to be reasonable to begin to investigate further." At [10] he considered how much detail is required, a question mainly considered in the context of knowledge of attribution. He referred, as did Lord Walker at [44] and Lord Scott at [66] to the decision of Purchas LJ in the Opren litigation that "what was required was knowledge of the "essence" of the act or omission to which the injury was attributable": *Nash v Eli Lilly &Co* [1993] 1 WLR 782,799. Lord Nicholls referred also to Brooke LJ in *Spargo v North Essex District Health Authority* [1997] PIQR P235 where he referred to a "broad knowledge of the essence" of the relevant acts or omissions and to the observations of Hoffmann LJ in *Broadley v Guy Clapham & Co* [1993] 4 Med LR 328,333. "One should look at the way the plaintiff puts his case, distil what he is complaining about and ask whether he had in broad terms knowledge of the facts on which that complaint is based."

47. At [11] he observed that a similar approach is applicable to the expression "attributable" in section 14A(8)(a). "The statutory provisions do not require merely knowledge of the acts or omissions alleged to constitute negligence." He concluded, "Thus, paraphrasing, time does not begin to run against a claimant until he knows there is a real possibility his damage was caused by the act or omission in question."

48. Lord Nicholls then considered the provisions of Section 14A(9) which renders irrelevant whether or not the act or omission relied on was negligent. He rejected the view that the language of flaw or error was impermissible. At [17] he said the present case called simply for a careful application of section 14A(8)(a) as interpreted as summarised above. He continued:

> "The judge's approach in the court below was that Mr Haward knew all the material facts as they occurred. He knew the terms

> of Mr Austreng's retainer, he knew the advice Mr Austreng gave him, and he relied on that advice, with the consequence that he lost his money. The causal connection between the advice and the damage was patent and obvious. The only thing Mr Haward did not know was that Mr Austreng's firm was (allegedly) negligent, or that he had a cause of action against the firm; but those matters are irrelevant.
>
> [18] This approach treats knowledge that Mr Austreng's advice might well be flawed as irrelevant. The Court of Appeal held that in so doing the judge fell into error.
>
> [19] I agree with the Court of Appeal that the judge in the present case fell into the same error as the first instance judge in *Hallam-Eames v Merrett Syndicates Ltd [2001]* Lloyd's Rep PN 178. The language and intent of section 14A(8)(a) are clear. As already noted, in addition to having knowledge of the material facts about the damage, a claimant must know there was a real possibility the damage was caused by ('attributable to') the acts or omissions alleged to constitute negligence. The conduct alleged to constitute negligence in the present case was not the mere giving of advice. The conduct alleged to constitute negligence was the giving of flawed advice: Mr. Austreng did not give the advice appropriate to the true financial state of the company's affairs.
>
> [20] This feature of the advice cannot be brushed aside as a matter of detail. Nor can it be treated, as it was by the judge, as a matter going only to particulars. Far from it. This feature is the very essence of Mr Haward's claim. Stated in simple and broad terms, his claim is that Mr Austreng did not do his job properly. Time did not start to run against Mr Haward until he knew enough for it to be reasonable to embark on preliminary investigations into this possibility."

49. Bourne J pointed to Lord Nicholls' observations at [21] of *Haward* that:

> "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."

50. At [23], Lord Nicholls identified that relevant date as "not when Mr Haward first knew he might have a claim for damages but when Mr Haward first knew enough to justify setting about investigating the possibility that Mr Austreng's advice was defective". The claimant ultimately failed, having not attempted to discharge the burden of proof in respect of the relevant date, focussing instead on the date when he first knew he might have a claim for damages.

51. Bourne J quoted Lord Mance (at [118] of *Haward*), who had said:

> "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… 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."

52. I would add that this is particularly the case where, as here, the claimant is unaware that he has lost anything by following apparently sound and reliable advice.

53. It is instructive to look briefly at the decision of this court in *Hallam-Eames v Merrett Syndicates* [2001] 2 Lloyd's Rep. 178 (*Hallam-Eames*) which was cited at length and with approval in *Haward* by Lord Scott and approved by Lord Nicholls and Lord Walker. The claimants were Lloyds Names who brought claims for pure economic loss arising out of the negligence of underwriters. The decision in *Hallam* concerned Section 14A. The court considered decisions under Section 14 namely *Broadley v Guy Clapham & Co* [1993] 4 Med LR 328, to which I have already referred and *Dobbie v Medway Health Authority* [1994] 1 WLR 1234. It is not necessary to rehearse the detail of those cases. At first instance in *Hallam* Gatehouse J interpreted them to mean that a plaintiff need only have known that his damage had been caused by an act or omission of the defendant. He held that the reports, accounts and letters which the Names had received informed them that they had suffered substantial losses in consequence of the run-off contracts entered into by the managing agents. Likewise, he held that the Names had knowledge that they had suffered losses in consequence of the liabilities incurred on the RITCs being substantially greater than the premiums fixed by the managing agents and that the RITCs were based upon the accounts certified by the auditors. Knowledge of these facts was, he said, sufficient to satisfy s14A(8)(a).

54. Hoffmann LJ, giving the judgment of the Court said:

> "In our judgment this is an over-simplification of the reasoning in *Broadley* and *Dobbie.* If all that was necessary was that a plaintiff should have known that the damage was attributable to an act or omission of the defendant, the statute would have said so. Instead, it speaks of the damage being attributable to the act or omission which is alleged to constitute negligence… as Hoffmann LJ said in *Broadley*, the words 'which is alleged to constitute negligence' serve to identify the facts of which the plaintiff must have knowledge. He must have known the facts which can fairly be described as constituting the negligence of which he complains. It may be that knowledge of such facts will also serve to bring home to him the fact that the defendant has been negligent or at fault. But that is not in itself a reason for saying that he need not have known them."

55. Bourne J ultimately drew from *Haward* the following principles at [36]
"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." Mr Troman makes no complaint about this conclusion which is plainly correct. It is also directly relevant to this case.

56. The judge continued at [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."

57. Mr Troman submits that the conclusion at paragraph 37 is wrong, is inconsistent with the decision in *Haward* and would lead to different outcomes under section 14A depending on the way cases are pleaded. I reject that submission. In [37] the judge is not saying (by the use of "should have been given") that the claimant must know that the lawyer was under a duty to give the omitted advice. That would offend against section 14A (9) which the judge had well in mind (see for example [86] of his judgment). He is saying no more than that in a case of omission time will not start to run until a claimant has some reason to consider that the necessary advice has not been given.

58. On the facts here there is no difference between the case based on the assertion that the claimant was wrongly advised that the only option was a lump sum in full and final settlement (which inevitably took no account of the claim for provisional damages), and a case based on the assertion that the defendants failed to advise on and argue for provisional damages. The advice given was flawed. The two ways of putting the case are two sides of the same coin, the underlying particulars of negligence being the failure to obtain a plastic surgeon's report and the consequential failure to consider provisional damages. The outcome, that the claimant settled on a full and final basis (without the provisional damages claim) is the same, whichever route is taken.

59. The essence of the negligence was the giving of flawed advice (whether by act or omission). It was the claimant's evidence, which the judge accepted, that he did not know that the advice he had received was flawed until he was told that was the case by his lawyers in 2017. That was probably the time at which he learned it was negligent too, as envisaged by Lord Hoffmann in *Hallam-Eames*, although this issue does not matter here.

60. Mr Troman's principal submission on knowledge of attribution is that as at 2016 the claimant knew he was left with a full and final settlement which had made no provision for the possibility of a serious deterioration in his condition in future. He had known that there was a risk of settling at an undervalue and he now knew that the risk was eventuating. He points out that the claimant was in great pain, he needed more serious surgery than originally expected and he needed it much earlier than expected. He argues that it follows that he knew enough to make it "reasonable to begin to investigate further" and "to embark on preliminary investigations" and to "start an investigation" relying on the observations of Lord Nicholls at paragraphs 9 and 20 (to which I have already referred), Lord Brown paragraph 90 and Lord Mance at paragraph 126 of *Haward*, all to similar effect. He complains that the judge did not explain why he rejected this submission which, it is to be inferred, was plainly correct. He further submits that, having found that the claimant had material facts

knowledge in mid-2016, he should have found that he had knowledge of attribution at the same time.

61. As to the latter point, the judge's finding that as at 2016 the claimant had knowledge that the damage was serious enough to justify proceedings, given the value of any potential claim, does not equate to or lead inexorably to a finding that the claimant had knowledge that the damage was attributable to the defendant. At what stage the claimant had knowledge of attribution, as explained in the authorities, was a matter of fact for the judge.

62. The judge had dealt with the question of attribution in 2009 at [82], see my paragraph 37 above. At [83] he dealt with the balance of Mr Troman's arguments on this topic:

> "In my judgment [the claimant] 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."

I can see no basis for criticising the judge's finding here. Mr Troman's submission comes down to an assertion that, given the amount of pain he was in, the claimant surely must have thought that his lawyers might have made a mistake. It is indisputable that the claimant did not think that. I do not regard it as unreasonable that he should, as the judge found, have considered that what he was experiencing was exactly what he had been warned about.

63. The judge continued at [84] – [86]:

> "[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."

64. There is no basis for an attack on the judge's findings of fact or his reasoning about their consequences and there is no complaint about the judge's findings on the law (save as I have dealt with above). The fact that the claimant's condition worsened

significantly and sooner than expected might have made him think that his medical experts had got things wrong, but it did not. There was no reason in 2016, any more than there was in 2009, for him to think that he might have been wrongly advised by his lawyers about the nature of the settlement. There was nothing intrinsic to his situation to alert him to the fact that he had received flawed advice. He might, as the judge observed, have thought there were problems with the legal system which did not, as he had been told, allow for a further application for damages, but it did not follow that there might be problems with the advice he had been given. He was in the same position as a claimant would have been before 1985 when provisional damages were introduced by the Senior Courts Act 1981. He believed, as a result of what he had been told, that only a lump sum in full and final settlement was possible.

65. Learning that an amputation was necessary was, as the judge put it, momentous. It is to be noted that the claimant went back to his solicitors to see whether the settlement could be reopened because amputation had not been factored in. There is nothing in his letter to suggest he thought there might have been anything wrong with the legal advice. Nothing in the response from the defendant would have given him that impression either. It was a doctor who advised him to go to fresh solicitors.

66. The judge concluded that his finding did not offend against 14A(9) as the claimant learning that his damage was attributable to the acts and omissions of the defendants did not depend upon knowing that those acts and omissions were negligent as a matter of law. His conclusion was based on what Lord Walker had said in *Haward,* that this limited reference to "legal concepts, including what is causally relevant in the context of a negligence action" did not offend against section 14A(9). He also noted that this result would not indefinitely extend limitation periods, given that s14A (10) means time runs from the point of constructive knowledge, although this had not been contended to be applicable here.

67. Contrary to Mr Troman's submission, the judge's reasons for his conclusions were clear and securely based on his findings of fact and, on a correct application of the statutory provisions which was consistent with the decision of the House of Lords in *Haward.*

68. Mr Troman further relied before the judge and before us on the decision of Vos J in *Boycott v Perrins Guy Williams* [2011] EWHC 2969 (Ch), [2012] PNLR 25. The claimant bought a property for his then girlfriend to live in. They agreed they would be joint tenants so that if one of them died the survivor would own the property. The solicitors did not explain to the claimant that either joint tenant could unilaterally sever the joint tenancy at any time. 11 years after the purchase of the property the woman, who was then very ill, served notice to sever the joint tenancy. As a result, her share of the property would pass to her estate, instead of the claimant becoming owner through survivorship. The claimant was advised by different solicitors that the notice was effective. They did not say anything about the advice that had been given at the time the claimant entered into the joint tenancy. After the woman died, the claimant brought an action against his original solicitors, 14 years after the original transaction.

69. Vos J reviewed the authorities on limitation in detail. He rejected a submission the claimant's knowledge was not complete until 2009 when he was advised that the original solicitors had had a duty to advise him that the joint tenancy was severable.

70. Mr Troman relies in particular on paragraph 100 of the judgment:

> "There was no need in law for Mr Boycott to know that the solicitor owed a legal duty to advise him that the joint tenancy was unilaterally severable (or for that matter to take instructions from him). And the fact that Mr Boycott did not address his mind to the damage having been attributable to the solicitors' omissions is not fatal to his actual knowledge under s14A (8)(A)."

The passage relied on is an uncontroversial statement of the law and, as Bourne J found, adds nothing to the decision in *Haward*.

71. It is instructive to read what Mr Boycott did know, which the judge described as relevant knowledge. 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 [the second solicitors] but that is not the defendant's fault. Section 14A 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"

72. What the claimant knew in *Boycott* is to be contrasted with what the claimant knew in this case. I will not repeat it. *Boycott* does not assist.

73. Mr Troman complains that the burden is upon the claimant to prove the date upon which he gained knowledge of attribution and he has failed to do so. It is right that the judge did not identify a precise date upon which the claimant had knowledge within Section 14A. Instead, he found that knowledge had been acquired at a point no more than three years before the issue of proceedings. On the basis of the facts he had found, the date was no earlier than 17 January 2017, less than three years before the issue of proceedings.

74. There is nothing in this complaint. The claimant must prove that his date of knowledge is within three years of the issue of proceedings. A date no earlier than 17 January 2017 satisfies that requirement in this case. No greater precision is required.

75. Finally, I reject the further submission that the judge's finding was not consistent with the claimant's pleaded case, a submission with which Mr Hyam takes issue. The finding was plainly one that was open to the judge on the evidence he had heard and the pleaded case.

76. I would dismiss this appeal.

Lord Justice Baker

77. I agree.

Lady Justice Nicola Davies

78. I also agree.