

ENGLAND AND WALES / JUDGMENT

A v Hoare

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Neutral Citation Number : [2008] EWHC 1573 (QB) IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION Before: MR JUSTICE COULSON

- ----- Between: "A"
- and - IORWORTH HOARE
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- ----- Case No: HQ04X04155 Royal Courts of Justice Strand, London, WC2A 2LL Date: 8 th July 2008 Claimant Defendant Mr Alan Newman QC and Mr Paul Spencer (instructed by DLA Piper) for the Claimant Mr Andrew McLaughlin (instructed by Atkins Law Solicitors) for the Defendant Hearing date: 30 June 2008
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Judgment

Mr Justice Coulson : A. INTRODUCTION

1. On 22 February 1988, the defendant subjected the claimant to a serious sexual assault in Roundhay Park, in Leeds. At his subsequent trial, the defendant pleaded not guilty and the claimant gave evidence against him. The defendant was subsequently convicted of attempted rape. The defendant had six previous convictions for rape, attempted rape and indecent assault. He was sentenced to life imprisonment for the attack on the claimant.
2. The defendant was released from prison on licence on the 10 May 2004. Three months later, on 4 August 2004, whilst he was still on day release, he won £7million on the National Lottery. The claimant learnt of the defendant's release from prison as a result of the publicity afforded to his lottery win. Shortly thereafter, on 22 December 2004, the claimant commenced civil proceedings against the defendant for damages for assault and battery resulting in psychiatric injury.
3. The first and most formidable hurdle that the claimant faced in bringing these proceedings was the operation of the Limitation Act 1980. There was House of Lords authority¹ for the proposition that claims arising from intentional assaults fell within section 2 of the 1980 Act, which provided for a six year limitation period which was not extendable in any circumstances by the court. The claimant argued that the relevant provision for such claims was section 11 of the 1980 Act. Although this provided for a shorter limitation period of

three years, it was open to extension either by reference to knowledge (section 14) or at the court's discretion (section 33).

4. The issue as to whether an intentional assault gave rise to the three or the six year limitation period went to the House of Lords. In a judgment delivered on 30.1.08² their Lordships accepted the claimant's submissions. They held that section 11 of the Limitation Act 1980 extended to claims for damages in tort arising from trespass to the person, including sexual assault. They held that *Stubblings v Webb* had been wrongly decided. They ordered that the claimant's case: "... be remitted to a judge of the Queen's Bench Division of Her Majesty's High Court of Justice to decide whether the discretion under section 33 of the Limitation Act 1980 should be exercised in the appellant's favour...".
5. On Monday 30 June 2008, having been provided with lengthy skeleton arguments by both sides, I heard oral argument as to the appropriate exercise of the court's discretion under section 33. I was also referred to the following evidence relevant to the exercise of the court's discretion:
 - (a) The claimant's original statement in the criminal proceedings dated 22 February 1988;
 - (b) The claimant's witness statement for the purposes of the section 33 application dated 3 April 2008; 1 . *Stubblings v Webb* [1993] AC 498 2 [2008] UKHL 6; [2008] 2 WLR 311
 - (c) The witness statement from John Atkins, the defendant's solicitor, dated 29 May 2008;
 - (d) The witness statement from Paul Stone, the claimant's solicitor, dated 20 June 2008; and
 - (e) The short further statement from John Atkins, dated 27 June 2008.
6. At the conclusion of the hearing, I reserved judgment and told the parties that judgment would be handed down in writing at 9.30am on Tuesday 8 July. This is that judgment, and it is structured as follows. At Section B below I summarize what seems to me to be the most important evidence relevant to the section 33 application. At Section C below I outline the applicable principles and identify some of the numerous authorities to which I was referred. Thereafter, at Sections D-J below, I identify the particular features of this case which I consider to be relevant to the exercise of my discretion under section 33. At Section K below, I set out my conclusions as to the appropriate exercise of that discretion.
7. It is appropriate at this point to express my thanks to counsel for their considerable assistance. I should pay particular tribute to Mr McLaughlin, whose careful submissions could not have been more clearly presented. B. THE RELEVANT EVIDENCE

8. The detailed evidence relating to the attempted rape of the claimant is set out in her statement of 22 February 1988, which formed the basis of her oral evidence at the criminal trial. Parts of that evidence are repeated in her statement of the 3 April 2008. It is unnecessary for me to set out that evidence in any detail in this judgment. Suffice to say, this was a violent and shocking attack, in a public place, which caused the claimant, in her words, “severe stress... I became a nervous wreck”.
9. The defendant chose to contest the criminal charges against him, and the claimant was therefore obliged to go through what she describes as the “deeply distressing” experience of giving evidence against him in court. Once the defendant was convicted of the attempted rape of the claimant, the judge was informed that he had six previous convictions for rape, attempted rape and indecent assault, going back to 1966. The defendant had spent the majority of his adult life in prison for sexual offences. He was sentenced to life imprisonment for the attempted rape of the claimant. Her understanding was that he would never be released.
10. The claimant’s statement of 3 April 2008 sets out in some detail the consequences of the attack upon her. This evidence is corroborated by the psychiatric report prepared, much later, by Dr Adrienne Reveley and dated 10 May 2005. Dr Reveley concludes that, following the attack, the claimant suffered from “the classic constellation of symptoms associated with post traumatic stress disorder (PTSD), which she attempted to manage herself by ‘blocking it out’”. The report then goes on to explain how and why the claimant’s account of her feelings during the years following the defendant’s attack made it plain that she was suffering from PTSD.
11. After some years, it appears that the claimant had got her life back on track and was coping reasonably well with the effects of the attack. However, the position changed drastically when the defendant was released from prison and won the lottery in August 2004. It was the publicity given to the lottery win that first alerted the claimant to the defendant’s release from prison. The defendant said in her statement of 3 April 2008: “The additional news of his lottery win left me in utter disbelief that he had been released from prison and had been able to buy a lottery ticket. He had in fact, it was said, been on parole for quite some time, and nobody had told me. The fact that I had identified him in a line up and that my evidence had resulted in him being in prison became extremely traumatic to me once again. I became a ‘nervous wreck’. I stayed in my house, shut the curtains and locked the door, terrified that he would either seek me out and attack me again or pay somebody to come and get me. I was immediately taken back to the mental state I was in after the attempted rape. All I wanted to do was stay inside the house. ... the intrusive images of the attack, which I have managed to block out for so many years, returned and did so graphically.”
12. At paragraph 34 of her report, Dr Reveley deals with the recurrence of stress and anxiety in these terms: “Mrs A experienced a complete return of her PTSD symptoms in 2004 after hearing that the man who had attacked her had been released from prison. Because he had won a considerable sum playing the lottery, his picture was in the newspapers, and this

widespread publicity caused Mrs A great distress. Mrs A says the symptoms were probably worse, in 2004, because she was afraid that the man might 'seek retribution' and attack her, or pay someone else to attack her. Mrs A was again fearful, anxious and had intrusive images of what happened to her in 1989. She was unable to go out, and withdrew socially. Mrs A's symptoms are outlined in the paragraphs above. In my opinion, Mrs A had a second period of PTSD at this time, which remains clinically significant, although improved. Mrs A continues to have intrusive imagery and worries about what happened."

13. As to compensation, the claimant states that the police officer in her case had advised her to apply to the Criminal Injuries Compensation Board ("CICB") for compensation. She subsequently received £5,000. It appears from the evidence that no thought was given to pursuing the defendant in the civil courts because he simply would not have been in a position to satisfy any judgment that was made against him. At paragraphs 41 and 42 of her statement of 3 April, the claimant says this: "He was entirely impecunious at the time he attacked me, and was remanded into custody following his arrest before receiving a life sentence for his attack on me at the end of the trial. Pursuing Mr Hoare for compensation at the time did not enter my head, as it would have been a wholly pointless exercise: he was penniless and in prison and in no position to pay compensation. As far as I was concerned he would never be released. He had spent all of his adult life attacking women and I believe when the judge described him as a danger to all women and imposed a life sentence that would mean exactly that..... My motivation for pursuing this claim for civil damages against Mr Hoare is not primarily rooted in wanting to secure a share of his fortune. I very strongly believe he should be held personally accountable to me for his attack on me and the physiological damage the attack has caused me over the years. The attack fundamentally changed me and I am not the person I used to be. I also believe he should be made to personally repay the public purse for the criminal compensation that I received after the attack."
14. Notwithstanding their disagreement on a range of matters, both counsel are agreed on this: that the principal reason why the claimant commenced these proceedings in 2004, and not before, was because of the change in the defendant's financial circumstances in August 2004.
2004. The main question for me therefore is whether, in all the circumstances of this case, that reason should lead the court to exercise its discretion in favour of the claimant under section 33. C. THE APPLICABLE PRINCIPLES C1. Section 33 of the Limitation Act 1980
15. The relevant parts of section 33 of the Limitation Act 1980 provides as follows: "(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which-
- (a) The provisions of section 11 or 11A or 12 of this Act prejudice the plaintiff or any person whom he represents; and

- (b) Any decision of the court under this sub-section would prejudice the defendant or any person whom he represents; the court may direct that those provisions will not apply to the action, or shall not apply to any specified cause of action to which the action relates.
- (3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to-
 - (a) the length of, and the reasons for, the delay on the part of the plaintiff;
 - (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11...;
 - (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
 - (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
 - (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action of damages;
 - (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."
- 16. There are numerous authorities in which this section, and its predecessor (section 2D of the Limitation Act 1939) have been considered by the courts. I summarise below, under appropriate headings, those which I consider to be the most relevant to the issues before me. C2. History/Policy
- 17. The history of, and policy behind, section 2D of the Limitation Act 1939, now section 33 of the Limitation Act 1980, were set out by Lord Diplock in *Thompson v Brown* [1981] 1 WLR 744, in which he explained the attempts to resolve the difficulties in ascertaining when a claimant in a personal injury case had the requisite knowledge for limitation purposes, particularly in cases of long-maturing industrial diseases. The link between this statutory provision and that particular type of personal injury claim was also made by Sir Thomas Bingham MR (as he then was) in *Dobbie v Medway Health Authority* [1994] 2 WLR 1234.
- 18. From the start, there was a tension between those who regarded section 33 as being of limited application, "to provide for the occasional hard case" (see Griffiths J in *Finch v Francis* [unreported] 21 July 1977), and those who regarded the section as providing a wide general discretion and therefore something of a "revolutionary step" which "alters our whole approach to time bars": see Lord Denning MR in *Firman v Ellis*

[1978] QB 886.

19. Whatever these differences of approach, one point that has been repeatedly stressed in the authorities is the importance of the general policy of maintaining clear statutory periods of limitation. For example, in *Dobbie v Medway Health Authority* at 1238 D-F, Sir Thomas Bingham stated: “The ordinary rule is that time begins to run against the claimant when a common law cause of action arises and the cause of action becomes unenforceable if proceedings have not been started before expiry of a period of years prescribed by a statute. This rule may have the harsh effect of defeating what would otherwise be unanswerable claims. But such rules have existed for centuries. They are no doubt designed in part to encourage potential claimants to prosecute their claims with reasonable expedition on pain of being unable to prosecute them at all. But they are also based on the belief that a time comes when for better or for worse defendants should be effectively relieved from the risk of having to resist stale claims....” C3. The Wide Unfettered Nature of the Discretion
20. The parties before me are agreed that section 33 provides the court with a wide and unfettered discretion. In *Nash v Eli Lilly and Co* [1993] 1WLR 782, at 802, the Court of Appeal said that “subject to acting judicially, the discretion of the court is entirely unfettered. The specific matters set out in sub-section (3) are exemplary and not definitive.”
21. In *Horton v Sadler*
[2006] UKHL 27; [2007] 1AC 307, the House of Lords removed the anomaly that a claimant who had commenced proceedings within time but had failed to pursue them was in a worse position than a claimant who had not done anything before the expiry of the limitation period. In the course of his judgment, Lord Bingham of Cornhill said: “32. In resolving an application under section 33, the court must make a decision of which the inevitable effect is either to deprive the defendant of an accrued statute-bar defence or to stifle the claimant’s action against the tortfeasor who caused his personal injuries. In choosing between those outcomes the court must be guided by what appears to it to be equitable, which I take to mean no more (but also no less) than fair, and it must have regard to all the circumstances of the case and in particular the six matters listed in sub-section (3)... In general terms, the House of Lords in *Horton v Sadler* confirmed the broad approach to section 33 adopted by the Court of Appeal in *Firman v Ellis*.”
22. It has been stressed that the court must take into account all of the circumstances specified in section 33 (3), and indeed all the circumstances of the case relevant to its decision, and should conduct a balancing exercise in respect of them. A decision should not be reached on the strength of just one of the relevant circumstances: see *Long v Tolchard and Sons Limited* [2001] PIQR P18, 26, per Roch LJ. C4. The Burden on the Claimant
23. The authorities make plain that the burden of showing that it would be equitable to disapply the limitation period rests with the claimant and that it is a heavy burden. In *Thompson v Brown* above, Lord Diplock pointed out that an order under section 33 was an exception to a general rule and that the onus of showing that, in the particular circumstances of the case, it

would be equitable to make such an exception, lay upon the claimant. He reiterated, however, that, subject to this, the court's discretion to make or refuse an order if it considered it equitable to do so was unfettered.

24. The same point was made by Auld LJ in *KR and Others v Bryn Allyn Community (Holdings) Limited (in Liquidation) and Another* [2003] QB 1441 when, at paragraph 74(ii) of his judgment, he described the making of an order under section 33 as “an exceptional indulgence to a claimant, to be granted only where equity between the parties demands it.”
- C5. Length of Delay
25. Depending on the issues in the action, and the evidence going to them, the longer the delay then the more likely, and the greater, the prejudice to the defendant: see Auld LJ in . Furthermore, in determining whether the primary limitation period should be Bryn Allyn disapplied, any delay on the part of the claimant, both before and after the expiration of the limitation period, must be considered: per Lord Oliver of Aylemerton in *Donovan v Gwentys* [1990] 1 WLR 472, at 479D-480B.
- C6. Reasons for the Delay
26. The principal question for the court under section 33(3) (a) - the reason for delay - is a subjective question: see *Coad v Cornwall and Isles of Scilly Health Authority* [1997] 1 WLR 189; 8 Med LR 155. The court must satisfy itself as to the genuineness of the claimant's reason or reasons for the delay in commencing proceedings. It may also be necessary for the court to consider any question of the claimant's culpability for that delay. However, having done that, the court must go on, under section 33(3)(e), to consider whether or not, in all the circumstances, the reason or reasons for delay advanced by the claimant are sufficient to be given real or decisive weight: see *Buckler v JF Finnegan Limited and Another* [2004] EWCA Civ 920.
27. The underlying factual situation in *Buckler* , as in *Dobbie* and a number of the other cases cited above, is of a claimant who knew or should have known that he could have brought proceedings but failed to do so over a lengthy period. They were cases in which there was no clear or justifiable reason for the claimant's belated change of heart. At paragraph 31 of his judgment in *Buckler*, Potter LJ said: “In such a case, as it seems to me, the approach properly to be applied by a judge, bearing in mind the burden of proof upon the claimant, is whether or not circumstances (including in particular the condition of the claimant), or the claimant's knowledge of such circumstances, have changed to an extent which makes it equitable for the claimant to be permitted to proceed, in a situation where he has previously consciously and deliberately decided not to proceed.”
28. In this context, reference should also be made to *Forbes v Wandsworth Health Authority* [1997] QB 402; [1996] 7 Med LR 175; in which Stuart Smith LJ refused an application under section 33 in a case where there had been no alteration in the claimant's circumstances or condition, and where the belated decision to commence proceedings was a simple change of mind on the part of the claimant. The learned judge went on to consider possible alterations of circumstances that might have triggered a better argument under section 33,

such as the late-developing seriousness of the injury, or the fact that the claimant was deceived or misled into thinking that there was no claim.

29. Finally on this topic, it was apparently common ground before me that the court was entitled to take into account any subconscious reasons for delay on the part of the claimant, in accordance with the decision in *McCafferty v Metropolitan Police District Receiver* [1977] 2 All ER 756 at 770. C7. Cogency of Evidence
30. It is necessary for the court to consider carefully the effect of the delay on the cogency of the evidence. This is the specific matter identified at section 33 (3) (b) of the 1980 Act. It should be borne in mind that “it may often be difficult for a defendant to identify with precision as to why they are prejudiced” when a claim is brought late, and that it may be appropriate to assume that the delay has had at least some adverse effect on the cogency of the evidence that would otherwise have been available to the defendant: see Waller LJ in *Skerratt v Linfax Ltd* [2003] EWCA Civ 695, at paragraph 45. As Parker LJ observed in *Hartley v Birmingham City Council* [1992] 1 WLR 968, at 979, the question of prejudice may be a neutral factor in many cases, and what matters is the effect on the defendant’s ability to defend: “In all, or nearly all, cases the prejudice to the plaintiff by the operation of the relevant limitation provision and the prejudice which would result to the defendant if the relevant provision were disapplied will be equal and opposite. The stronger the plaintiff’s case the greater is the prejudice to him from the operation of the provision and the greater will be the prejudice to the defendant if the provision is disapplied...as the prejudice resulting from the loss of the limitation defence will always or almost always be balanced by the prejudice to the plaintiff from the operation of the limitation provision, the loss of the defence as such will be of little importance. What is of paramount importance is the effect of the delay on the defendant’s ability to defend.”
31. The court should consider, at least in general terms, the strength and weaknesses of the claim and the defence, in order to see if there is a particular aspect of the evidence which has been adversely affected by the delay. In *Nash v Eli Lilly*, Purchas LJ said: “If the case is rightly regarded as a poor case, in regard to the contrast between the complaints now advanced and the absence of any record of complaints by the plaintiff, who is properly regarded as a plaintiff who would have reported such complaints to his doctor if his condition was then as he now recalls it, then, by the disapplication of the bar the defendants are put to the expense of defending, upon its merits, a poor case, which may well cost, upon the issues apart from liability, far more to defend than the case would be held to be worth. The defendants, in short, assert that it is or may be inequitable to secure to a dilatory plaintiff, who has let the limitation period pass without action, the power to claim from the defendants a sum in settlement of a poor claim which sum would reflect as much or more the risk in costs to the defendants as the fair value of the claim. In general we agree with this submission.” C8. Availability of Other Remedies

32. It would appear that, in considering all the circumstances, the court should consider whether or not alternative remedies to the civil proceedings in question have been considered or activated by the claimant. It is one of the relevant circumstances of the case. In *Davis v Jacobs and Others* [1999] All ER (D) 227, the Court of Appeal allowed an appeal from Turner J in which he had refused to disapply the limitation period under section 33. The appeal was allowed on the grounds that, although the judge had attached considerable significance to the existence of an alternative remedy under a non- statutory compensation scheme, he had misunderstood the consequences and effects of that scheme. In his judgment in *Davis*, Brooke LJ cites from the judgment of Stuart Smith LJ in *Forbes* (above), in which the judge referred to the existence of a non-statutory compensation scheme. However, it seems to me that, although these two cases indicate that the existence of an alternative remedy is a factor to be taken into account, there is no authority for the proposition that the existence of such a remedy is or should be a significant, let alone an overwhelming, factor in the exercise of the court's discretion under section 33. C9. The Impecuniosity of the Defendant
33. Both counsel were also agreed that there is no reported authority in which the court has been asked to exercise its section 33 discretion on the ground that the claim was not commenced earlier because the defendant was not previously in a position to meet a substantial award of damages. In *Skitt v Khan and Wakefield Health Authority* [1997] 8 Med LR 105 (LTL 10.12.96) it was the claimant's impecuniosity which was said to be a reason for his failure to get advice and commence proceedings. On the facts of the case, the Court of Appeal did not consider this to be sufficient reason for the delay. However, I consider that there is a big difference between a claimant delaying for years, not knowing whether he had a claim or not and not obtaining the funds to pay for advice that would have told him, and a claimant who makes a conscious decision not to pursue a claim because the defendant has no money to satisfy a judgment.
34. On behalf of the defendant, Mr McLaughlin drew my attention to various passages in the report of the Law Commission No 270 (9 July 2001) in relation to Limitation which dealt with the defendant's financial position. Paragraph 3.27 of that report discussed the possibility of giving the claimant a longer limitation period when the defendant was in financial difficulties, but described this as "hard to justify".
35. However, two points need to be made about this passage. First, no part of this report, which proposed radical changes to the law of limitation, has yet been implemented. Secondly, and more importantly for present purposes, the discussion at paragraph 3.27 was in the context of the test of 'significant injury' under section 14(2) of the Limitation Act 1980 and the assumption made there, which the Law Commission report described as "unrealistic", of a defendant "who did not dispute liability and was able to satisfy a judgment". Accordingly it does not seem to me that the Law Commission report specifically addresses the point which I have to consider, which is the relevance (or otherwise) of the defendant's impecuniosity under section 33.

36. That issue was, however, considered by the House of Lords in the present case, when they decided that section 11 (and therefore section 33) of the Limitation Act 1980 applied to the claimant's claim. Their Lordships stressed that they had not heard detailed argument on the question of discretion, and counsel are agreed that, as a result, their comments must be regarded as obiter dicta. However, at paragraph 88 of the reported speeches, Lord Brown of Eaton-under-Heywood said: "My third and final comment relates most directly to A's appeal and it is this. The definition of 'significant injury' in section 14(2) refers to the justifiability of bringing proceedings against a defendant 'able to satisfy a judgment'. That surely is unsurprising. It would not ordinarily be sensible to sue an indigent defendant. How then should the court approach the exercise of its section 33 discretion in a case like A where suddenly, after many years, the prospective defendant becomes rich. The House is not, of course, itself exercising this discretion. I would, however, suggest that it would be most unfortunate if people felt obliged (often at public expense) to bring proceedings for sexual abuse against indigent defendants simply with a view to their possible future enforcement. (Judgments, although interest-bearing for only six years, are enforceable without limit of time)."
37. Lord Hoffmann, at paragraph 52 of his speech, expressly agreed with Lord Brown and went on to say that he thought that Lord Brown's "observations on the exercise of the discretion are particularly valuable". Furthermore, at paragraph 60 of her speech, Baroness Hale of Richmond said: "Nor am I wholly convinced by the policy argument: it may well be more satisfactory to transfer the question into the exercise of discretion under section 33. Then the injustice to the claimant who may be deprived of his claim, perhaps as a result of the very injuries which gave rise to it, can be balanced against the injustice to a defendant who may be called upon to defend himself a long time after the event when important evidence may no longer be obtainable. I fully support the more generous approach to the exercise of discretion which is adopted in particular by Lord Hoffmann. The reasons for the delay are highly relevant to that exercise, as of course are the prospects of a fair trial. A fair trial can be possible long after the event and sometimes the law has no choice. It is even possible to have a fair trial of criminal charges of historic sex abuse. Much will depend on circumstances of the particular case."
38. For completeness, I should finally refer to the decision of the Court of Appeal in *Albonetti v Wirral MBC* [2008] EWCA Civ 783, which was handed down after the hearing before me on 30 June, but before completion of this judgment. That case has similarities with this one, in that it is a civil claim arising out of a rape that happened many years ago, but the appeal was concerned with the date of knowledge under s.14 of the 1980 Act, which is not an issue that arises here. It was expressly noted in *Albonetti* that the s.33 point had not been argued out, and it was remitted to a single judge on that issue. It is perhaps worth noting that, although there had originally been a concession by the claimant that s.33 did not apply in that case (because the delay went back to 1976, and it was felt that that was 'too long'), Smith LJ said that, as a result of the decision by the House of Lords in this case, "the respondent's case on section 33 would be put rather differently".

39. Accordingly, with the principles set out at paragraphs 17-38 above in mind, I now turn to identify the factors under section 33 relevant to the exercise of my discretion. D. THE NATURE AND EFFECT OF THE UNDERLYING TORT
40. In my judgment, the starting point for any consideration of all the circumstances of this case' must be the serious nature of the underlying tort; the absence of any dispute about liability simpliciter; and the consequences of that undisputed wrong on the claimant's ability to recover substantial damages from the defendant. In my view, these fundamental matters arise for consideration at the outset, before the analysis of the specific matters required by section 33(3). They also provide a convenient overview of the case. There are four points to make: I consider that each of them goes into the balancing exercise under section 33 in the claimant's favour.
41. First, there is the underlying tort in this case. The defendant's violent sexual assault on the claimant was an appalling event. Moreover, in the context of the defendant's previous convictions, it was regarded as so serious by the trial judge as to justify the imposition of a sentence of life imprisonment. The serious nature of this intentional tort must, of itself, be a factor to be weighed in the balance in the claimant's favour.
42. Secondly, because the defendant was convicted of the offence before a criminal court, he can have no grounds for disputing the factual basis of the tort now alleged against him, or his liability for its commission. Although there might be arguments about causation, the defendant's liability for the assault and battery cannot be in issue. Thus the delay can have no effect on that critical aspect of the claimant's civil claim. That is another factor in the claimant's favour.
43. Thirdly, the commission of the tort in this case then created the very circumstances which, on the claimant's case, prevented her from bringing the claim any earlier. As a prisoner serving a life sentence, the defendant would simply never have had the income to be worth pursuing in the civil courts. Thus, if the claimant is right to say that the defendant's impecuniosity prevented her from commencing proceedings, that impecuniosity – and thus the prevention – was a direct result of the tort itself. I deal below with whether this was, in fact, the reason for delay and, if so, whether it was reasonable. But if that was the reason, and the claim cannot be pursued now because of the delay, the result would, I think, be not dissimilar to the example that Baroness Hale gives of the injustice that occurs if a claimant is deprived of his or her claim "as a result of the very injuries which gave rise to it". Moreover, on this analysis, if the claimant were not able to bring her claim now, the seriousness of the underlying tort (because it resulted in a life sentence and thereby created the defendant's impecuniosity) would actually be to her disadvantage. In my view, such a result would properly be regarded as inequitable.
44. Finally, I consider that these particular circumstances make this an exceptional case. A very small proportion of tortious claims revolve around intentional assaults like this. An even tinier proportion of such cases arise out of offences which are so serious that a term of life

imprisonment was imposed, thereby creating the very circumstances which, the claimant maintains, caused her not to pursue the claim originally. The subsequent events, in particular the lottery win, only serve to underline the exceptional nature of this case. This is an issue to which I return in Section K of this judgment. E. THE LENGTH OF AND REASONS FOR DELAY F1. Length of Delay

45. This is one of the matters identified at s.33(3)a). The relevant principles are set out in Section C5 above.
46. The claim form was issued 16 years and 10 months after the assault. That means that it was issued 13 years and 10 months after the expiry of the three year limitation period on 21 February 1991. This is plainly a very long delay, which brings with it the additional burden on the claimant of demonstrating that such a long period should be set aside, as well as the increased risk of prejudice to the defendant.
47. Mr McLaughlin pointed out that, in *Mold v Hayton and Newson* [2000] LTL 17 April 2000, the Court of Appeal referred to a delay of 18 years as “a huge delay” and held that, if such an extension was granted by the court, the judge had a duty to explain his reasons “with meticulous care”. I am not sure anything is added by describing this as a ‘huge’ delay as opposed to a ‘very long’ delay. However, it is right to point out that such periods are not unknown, even within the statutory limitation regime. Pursuant to the Latent Damage Act 1986, the over-riding or long-stop period is 15 years from the date of the negligent act, at the end of which, in certain circumstances, a claim can still be made.
48. Accordingly, it seems to me that what matters most is not the length of the delay itself, but the reasons for that delay and its potentially prejudicial effect. E2. The Reasons for Delay
49. This is the other matter noted at s.33(3)a) of the 1980 Act. The relevant principles are set out in Section C6 above.
50. What was the reason for the claimant’s delay? The evidence is clear: the principal reason why the claimant did not issue civil proceedings against the defendant was because he was in prison, serving a life sentence, and had no money with which to satisfy any judgment which might have been made against him. I find as a fact that that was the principal reason for the delay.
51. For the avoidance of doubt, I also consider that this reason was genuine and entirely understandable. The claimant did not understand that the defendant would ever be at liberty again and was therefore never going to be in a position to meet any judgment that she might obtain. Thus, so it seems to me, the claimant’s main reason for dismissing any prospect of instituting any civil proceedings against the defendant was entirely understandable.

52. There is a further point. It is clear from her statement of 3 April 2008 that, in the years after the assault, the claimant wanted to rebuild her life and try to put the assault and its effects behind her. Dr Reveley described this as ‘blocking it out’. I am quite sure that this was another, subconscious reason why the claimant did not really contemplate the prospect of civil proceedings, and having to go through the relevant events, in a court, for a second time.
- F. COGENCY OF EVIDENCE
53. This is the matter identified at s.33(3)(b). The relevant principles are set out in Section C7 above.
54. As previously noted, the events which underlie the commission of this tortious act are not going to be in dispute. That is because the defendant has been convicted of a criminal offence arising out of the same wrong. Accordingly, liability simpliciter is not in issue and is unaffected by any delay. That, therefore, is a point in the claimant’s favour.
55. It was Mr McLaughlin’s submission that the delay will have had an adverse effect on the cogency of the evidence as to causation (in other words, the claimant’s case that the attack caused her psychiatric injury). He pointed to the fact that the psychiatric report now available deals with the direct consequences of the 1988 attack solely on the basis of what Dr Reveley was told by the claimant. Mr McLaughlin also points out that, because of the delay, the defendant will have been deprived of the opportunity of engaging his own medical expert contemporaneously with the symptoms, so as to examine the claimant and to consider whether she was indeed suffering from PTSD.
56. I accept that, in addition to the general prejudice to the defendant that could be said to arise ordinarily from the very long delay, it is also likely that the delay in commencing proceedings will have had a detrimental effect on the expert evidence which the defendant might wish to adduce on causation, particularly relating to the medical/psychiatric evidence that would otherwise have been available, if a claim had been made contemporaneously, from the period in the months and years after the attack. That is a point to be weighed in the balancing exercise in the defendant’s favour.
57. However, that said, I consider that any such prejudice would not be substantial. There are a number of reasons for this.
58. First, the fact that the existing psychiatric evidence is dependent on the claimant’s recounting of the history to Dr Reveley is not due to the delay in commencing these proceedings. I accept Mr Newman QC’s submission that, even if the claimant had been to see Dr Reveley the month after the attack, the psychiatrist would still have been largely dependant on what she was told by the claimant. So any prejudice to the defendant must be limited to the reliability of the claimant’s recollection now of how she felt in the early 1990’s, and not the fact that the psychiatrist was dependent, to a greater or lesser degree, on the claimant’s version of events: that would always have been the case.

59. Secondly, as I put to Mr McLaughlin in the course of argument, there is the critical evidence from the claimant and in Dr Reveley's report concerning the second bout of PTSD (paragraphs 11 and 12 above). That was triggered by the events in 2004. It is not therefore stale at all. Evidence of this "clinically significant" recurrence of PTSD can be effectively dealt with by any expert instructed by the defendant, if such an expert is permitted by the court, and if the defendant chooses to challenge the evidence of Dr Reveley. Therefore, perhaps unusually for a case of this sort, important medical evidence relating to the claimant's case on causation is capable of being adduced by both sides, because the underlying medical symptoms of the second bout of PTSD are, on the claimant's case, all too fresh.
60. It is also right to note at this point that the defendant has not sought to challenge any aspect of Dr Reveley's evidence, or asked any questions of Dr Reveley. It is therefore difficult to say what, if any, aspect of the claimant's case on causation will be in issue. This omission undermines the force of the defendant's contention that he has suffered prejudice concerning the causation arguments by reason of the delay. It also goes a long way to negating the defendant's complaint that the delay has deprived the court of the evidence of the claimant's partner, who is now dead, but who could have given corroborative evidence about, for example, the effect on the claimant's intimate relations after the attack. Furthermore, this seems to me to be a bad point for the defendant to raise in any event, since the absence of such evidence will undoubtedly cause a greater prejudice to the claimant than to the defendant.
61. As to the likely evidence relating to quantum, that is entirely dependant on the evidence of causation, and no separate issues of prejudice and cogency can arise.
62. In summary, it seems to me likely that the very long delay has caused some general prejudice to the defendant's ability to defend this claim, and that, in particular, the absence of contemporaneous evidence of the PTSD symptoms in the months and years after the attack will make the defendant's case on causation, assuming that it is in issue at all, more difficult. That said, for the reasons I have given, I consider that such detriment is likely to be modest. Because of the second alleged bout of PTSD beginning in 2004, much of the psychiatric evidence will not be stale at all. G. CONDUCT AND DISABILITY
63. These are the two matters which the court is required to consider under sections 33(3)(c) and (d) of the 1980 Act. Neither point arises on the facts of this case. There is no relevant conduct on the part of the defendant and there is no disability on the part of the claimant. These matters are therefore neutral and of no significance in the exercise of my discretion. I reject the submission that, because the defendant's conduct cannot be criticised, this can somehow be regarded as a positive point in his favour in the exercise of my discretion. H. ACTING PROMPTLY AND REASONABLY H1. General

64. This is the matter covered by s.33(3)(e). The relevant principles are dealt with in Section C6 above. In the present case, the reasonableness or otherwise of the claimant's reasons for the delay is perhaps the most important of the matters specifically noted under s.33(3). H2. Before Commencement
65. There was a delay of sixteen years and ten months between the assault and the commencement of the proceedings. That delay was principally due to the defendant's impecuniosity. Was that delay reasonable in all the circumstances? I consider that it was. There are four reasons for that conclusion.
66. First, I consider that it was reasonable for the claimant not to pursue the defendant when he was a prisoner serving a sentence of life imprisonment. Such an action would have been very difficult for the claimant to pursue. The claimant might have sought legal aid, but it is most unlikely that legal aid would have been granted, because no damages were likely to have been recovered from the defendant. For the same reason, the claimant's claim would have been unattractive to a solicitor who might otherwise have been prepared to operate under a Conditional Fee Agreement.
67. Even assuming that the claimant had been able to obtain representation, any claim would have been ultimately futile because there would have been no money at the end of it. A civil action in, say, 1990 would have been a complete waste of time and effort. It would also have been a waste of the court's resources. In such circumstances, a civil trial would have proceeded to the bitter end, but there would not have been any prospect of any damages being recovered.
68. Accordingly, it seems to me that the claimant's delay in commencing proceedings until the defendant went, overnight, from being a penniless prisoner to a multi-millionaire, was reasonable. In reaching that conclusion, I derive some comfort from the fact that my view is the same as that expressed, in his obiter remarks, by Lord Brown of Eaton-under-Heywood (see paragraph 36 above).
69. Secondly, I consider that the delay was reasonable in these particular circumstances, because the claimant's impecuniosity was a direct consequence of his tortious wrong-doing. The reason why the defendant was impecunious was because he had assaulted the claimant; because of that tortious act, he had become a prisoner serving a life sentence with no prospect of ever being in a position to meet a claim for substantial damages against him. When that position changed, the claimant acted promptly and reasonably in commencing proceedings. It would be wrong to allow the defendant to take advantage of his own wrong, and his consequential impecuniosity, to avoid compensating the claimant for the alleged psychiatric damage caused by the assault.
70. Thirdly, I consider that, in order to assess the reasonableness of the claimant's decision not to commence proceedings, it is necessary to consider what might have happened if she had pursued the defendant within the limitation period. If she had followed that course, the very best that the claimant could have hoped for, after a trial (which she would have been obliged

to pay for), was an order for judgment in her favour against the defendant, which order or judgment (because of the defendant's financial position) would have been, in real terms, worthless. The only advantage to the claimant of pursuing this course would have been that when, after such a long period, the defendant won the lottery, she could have dusted off the order and sought to enforce it.

71. I cannot accept the submission that it would have been reasonable for the claimant to incur the costs, and utilise the resources of the court, in order to obtain such an order, on the off-chance that, many years down the line, the defendant would come into some money, but that it was unreasonable for the claimant to wait until the defendant actually did come into some money before commencing proceedings. I consider that to be both illogical and inequitable: it imposes all the risk that the defendant would not become a multi-millionaire upon the claimant. It would also encourage useless proceedings on the grounds that, one day, 'something might turn up'.
72. When legal aid was more commonly available, if a costs order was made against a legally-aided party, such an order would say that it was not to be enforced without the leave of the court. Such orders were commonly referred to in the vernacular as "football pools orders". They were orders based on the possibility that, one day, the party against whom such an order was made might be in a position to pay it. By analogy, it seems to me that it was reasonable for the defendant in the present case not to go through the expensive and traumatic process of a trial, simply for the purposes of obtaining such a potentially valueless order, but instead to wait until, against all the odds, the defendant became rich overnight.
73. Fourthly, I consider that the delay was also reasonable because of the claimant's attempts, in the years after the attack, to put the assault behind her. Although I stress that this was not the principal reason for the delay advanced by the claimant, it is plain to me from the papers that the claimant made every effort to put the consequences of the assault behind her and that, if she had commenced proceedings at the time, she would not have been able to do so. The second bout of PTSD, triggered by the defendant's release from prison and his lottery win, has meant that the claimant's position has changed. Again therefore that seems to me to be a justifiable, albeit secondary and sub-conscious, reason for the delay in commencing proceedings. H3. After Commencement
74. The claimant became aware of the defendant's release and the significant change in his financial fortune in August 2004. She instructed solicitors in late August 2004. Once her solicitors had obtained the necessary papers, she commenced proceedings on 22 December
2004. A psychiatrist was instructed by letter on 12 April 2005 and a report produced on 12 May 2005. All of the time thereafter has been taken up with the delays necessitated by the various appeals, on which the claimant was ultimately successful.
75. In those circumstances, I consider that the claimant has acted promptly and reasonably following the start of proceedings. I. THE STEPS TO OBTAIN ADVICE

76. This is the matter at s.33(3)(f). I have effectively dealt with it under Section H3 above. I consider that the claimant acted reasonably in obtaining the relevant advice, and that no unreasonable delay has occurred once she became aware of the defendant's release from prison and his win on the lottery. J. OTHER MATTERS
77. A variety of other matters were raised by the defendant as being relevant to the exercise of the court's discretion under section 33. I deal with them shortly below.
78. In his witness statement of 29 May 2008, the defendant's solicitor, Mr Atkins, took various points by reference to the Human Rights legislation. Quite properly in my view, these points were not repeated in Mr McLaughlin's skeleton argument, nor were they made orally. I am in no doubt that no potential infringement of the defendant's human rights arises in connection with this application under section 33 of the 1980 Act.
79. Mr McLaughlin pointed to the award of £5,000 from the Criminal Injuries Compensation Board and argued that, as a result, the claimant had already been compensated for the assault. He submitted that that was a relevant factor. In response, Mr Newman QC repeated the statement contained in the claimant's witness statement to the effect that, if the claim against the defendant was successful, she would pay back the money to the CICB.
80. For the reasons set out in Section C8 above, I consider that the fact that a sum of £5,000 has been paid to the claimant is of some relevance in the overall exercise of the court's discretion. However, I reject the suggestion that it is of any great significance. First, it is not a sum of money that has been paid by the tortfeasor, but rather by the British tax payer. It would be contrary to any notion of restorative justice to allow the defendant to place any great weight on a payment which he did not make and has not offered to pay back to the CICB. Secondly, I cannot conclude, on the evidence before me that, as Mr McLaughlin submitted, this award represented the entirety of the value of the claimant's case (including psychiatric injury) at the time. Indeed, the authorities to which I was referred, such as *W v Meah* [1986] 2 All ER 934 and *Griffiths v Williams* (Court of Appeal, 21 November 1995, unreported) suggest the contrary. Accordingly, I conclude that the payment of £5,000 is a factor in the defendant's favour, but not one to which any great weight can be given.
81. In addition, Mr McLaughlin said that there was additional prejudice to the defendant because, now that the claimant's solicitors were operating on a CFA, there would be a larger uplift for him to pay than would have been the case back in 1990. He pointed to the decision of Silber J in *Smith v MOD* [2005] EWHC 682(QB) in which the judge held that that was a potential point of prejudice that he was prepared to accept for the purpose of the balancing exercise, although he made it clear that he made no definitive finding on the point. Adopting the same approach, it seems to me that this is potentially a point of prejudice to the defendant, but it is of little weight in the overall balance.

82. Mr McLaughlin had a further point about an offer which had been made by the defendant to the claimant in the early stages of the proceedings which had apparently been referred to in an article on the Daily Mail Online. It is not clear who the source of the information might have been. However, I reject the suggestion that the reference within the Daily Mail website has had any effect, or could have any effect in the future, on the ability of the defendant to receive a fair trial.
83. I have left until last Mr McLaughlin's principal point on the overall circumstances of the case because, so it seems to me, it demonstrates the very wide gap between the defendant's view of his own position in relation to this claim, and what I consider to be the reality. It was argued on behalf of the defendant that he has served a lengthy term of imprisonment and has become "rehabilitated". It was said that he should be entitled "to put the past behind him"; that he has "a clean slate" and should not therefore "be vexed by this litigation".
84. I emphatically reject that submission. In my judgment, the defendant does not have, nor could ever have, "a clean slate". As someone sentenced to life imprisonment, the defendant is only at liberty pursuant to the express terms of his licence from the authorities. That licence could be withdrawn at any time. For these reasons, such was the seriousness of the defendant's life of sex offending, culminating in his assault upon the claimant, he can never fully "put the past behind him". In those circumstances, the defendant's desire not to be "vexed" with the continuation of these proceedings is hardly an important consideration under section 33. K. CONCLUSIONS AS TO THE EXERCISE OF MY DISCRETION
85. For the reasons set out above, when considering all the circumstances of this case, I have identified a number of factors in the defendant's favour. These include, in particular, the length of the delay, the possible difficulties for the defendant on some aspects of the evidence on causation caused by that delay, and the payment of the £5,000 by the CICB. However, I have concluded that the factors in the claimant's favour are more numerous and of significantly greater weight. They lead me unhesitatingly to conclude that equity requires that the discretion under section 33 be exercised in her favour.
86. Those factors include in particular:
- (a) The nature and seriousness of the underlying tortious wrong;
 - (b) The fact that one of the consequences of that wrong was the defendant's impecuniosity (because he was unable to earn money by which he could otherwise have met a judgment for damages);
 - (c) The fact that, prior to his lottery win, the defendant's impecuniosity meant that he was simply not worth pursuing in an action for damages. This was the principal reason for the claimant's delay and one that I consider to be reasonable on the particular facts of this case;

- (d) The fact that the claimant acted promptly following the defendant's release from prison and his lottery win: (e) The fact that the 'clinically significant' second bout of PTSD in 2004 will be capable of being fully addressed by both parties at any trial.
87. I should make one final point. Although Mr McLaughlin never used the dread word "floodgates" in his submissions, it was implicit in a number of them that, if I exercised my discretion in favour of the claimant under section 33, there was a risk that parties in all aspects of civil litigation would seek to get round the applicable limitation periods by relying on the defendant's impecuniosity, and that there would be huge difficulties in trying to work out the parameters of such a principle. In my judgment, there are a number of answers to that underlying point.
88. First, section 33 only applies to personal injury and fatal accident claims, not other forms of civil proceedings. Such claims have always been the subject of special rules relating to limitation. Secondly, for the reasons outlined in the authorities by countless judges far more eminent than I, no decision under section 33 can be regarded as setting down definitive guidelines that are automatically applicable in another factual situation; any decision under section 33 has to be regarded as a decision on the particular facts of that case, and nothing more.
89. However, the third and pithiest riposte to the 'floodgates' argument is the point that I have outlined in paragraph 44 above. I consider this to be a wholly exceptional case. It will be very rare for a claimant to bring a claim against a defendant for a tortious wrong, in circumstances where that wrong was so serious that it caused the defendant to be sentenced to life imprisonment (thereby creating the impecuniosity which prevented the claimant from bringing proceedings against him in the first place) or brought with it in some other way a financial catastrophe for the defendant which meant that he would not be in a position to meet any judgment against him. It will be even rarer for such a defendant, years later, to buy a lottery ticket, which wins him £7million, or otherwise comes into an unexpected fortune, which makes him suddenly worth pursuing after all. Thus, even if it was appropriate to conclude that section 33 was only applicable in exceptional cases, I am in no doubt that this is indeed such a case.
90. For all these reasons, therefore, I exercise my discretion under section 33 and disapply the relevant limitation period. The claimant is entitled to pursue this claim against the defendant. To that end, I would wish to give directions so as to ensure the speedy trial of this case.

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