

***Horton v Sadler* [2006] UKHL 27**

1. *Walkey v Precision Forgings Ltd* [1979] 1 WLR 606 is no longer good authority, following today's opinions by the Judicial Committee of the House of Lords (Lords Bingham, Hoffmann, Rodger, Carswell and Brown) in *Horton v Sadler* [2006] UKHL 27.
2. In *Horton* the House considered the position where a claimant commences an action for damages for personal injuries by issuing a claim form within the primary limitation period, which first action is doomed to fail (whether, as in *Walkley* because it would have been struck out for want of prosecution or, as in *Horton*, because the claimant failed to fulfil a condition precedent to suing the MIB by giving prior notice of those proceedings to the MIB) and in which the claimant accordingly commences a second action outside the primary limitation period, inviting the Court to exercise its discretion pursuant to section 33 of the Limitation Act 1980 (the Act) to disapply the limitation period.
3. In *Walkley* the House of Lords (comprising *inter alia* Lords Wilberforce and Diplock) had held that the Court had no power under section 33 to

- disapply the limitation period. In essence it was said that the prejudice to the claimant was caused not by the original 3-year period under section 11 of the Act, but by dilatoriness in failing to progress the first action.
4. Rarely can the opinions of so distinguished a Judicial Committee have been so comprehensively trashed by its successors. As Lord Hoffmann said in *Horton*: “...it is with a reluctance verging on disbelief that one is driven to conclude that the deliberate opinions of Lord Wilberforce and Lord Diplock were quite wrong.” Wrong, however, they were, though it took a quarter of a century to remedy the error.
 5. *Walkley* was followed twice by the House of Lords without demur in *Thompson v Brown* [1981] 1 WLR 744, HL and *Deerness v John R Keeble & Son (Brantham) Ltd* [1983] 2 Lloyd’s Rep 260 (see Lord Bingham’s opinion at paragraphs 17 and 18). In the Court of Appeal, however, it was distinguished on many occasions (see Lord Bingham at paragraph 18).
 6. There were three main arguments in favour of overturning *Walkley*, each being accepted. The first and strongest was that the reasoning itself was wrong. Lord Bingham (paragraphs 21 to 23) and in particular Lord Brown (paragraph 63) explain why:

“...in stating that a plaintiff who has already brought a first action in time ‘has not been prevented from starting his action by section [11]...he was able to start his action’ (emphasis added), Lord Diplock appears to have confused or conflated the two separate sets of proceedings: it is not the first action in which the claimant is prejudiced by the time bar but the second; and it is the second action for which the plaintiff seeks the favourable exercise of the court’s section 33 discretion ‘to allow an action to proceed having regard to the degree to which...the provisions of section 11...prejudice [him].’” (Lord Brown at paragraph 63.)

7. The second argument was that the fine distinctions subsequently relied upon by the Court of Appeal in distinguishing *Walkley* constituted evidence of the Court’s reluctance to follow *Walkley* except where absolutely constrained to do so. The anomalous position which Lord Diplock had recognised, between cases where the claimant had issued proceedings within the primary limitation period and those where he had not, was not, ultimately, a rational basis for concluding that claimants in the former were vulnerable on subsequent section 33 applications. (See Lord Bingham at paragraphs 24 and 25.)
8. The third argument was that section 33 of the Act conferred a wide and unfettered discretion, which should not be constrained by technical rules. (See Lord Bingham at paragraphs 26 to 28.)

9. All members who expressed full, albeit short, opinions (ie all except Lord Rodger) took the view that the Trial Judge's views on the exercise of the section 33 discretion were appropriate. Lord Carswell offered some interesting views in general on section 33 (recognising that first instances judges and the Court of Appeal had greater experience of the section than the House of Lords), of which the most important may be his ultimate conclusion that the seriousness of a solicitor's error (in this case the "*very elementary*" error of failing to give notice to the MIB before commencing proceedings) should not go into the balance; it is the prejudice to the respective parties which matters (see Lord Carswell at paragraph 56).

10. The following section 33 points generally are raised, which may be used in future arguments:
 1. The problem underlying section 33 generally is that it treats the claimant and defendant as individuals liable to suffer prejudice rather than recognising that it is usually the competing interests of insurers at stake. Whether one insurer has collected a premium against the risk in question and another has not (ie the MIB) is not material (see Lord Bingham at paragraph 32 and Lord Carswell at paragraph 53(d));

2. The strength of any claim against the negligent solicitors was only one factor, though an important one. In this case the original solicitors' insurers had in fact compensated the claimant, though only after the Trial Judge had given judgment. (see Lord Bingham at paragraph 35 and Lord Carswell at paragraph 53(c));
 3. Where the delay is short and the prejudice to the trial minimal, the limitation period is likely to be disapplied (Lord Bingham at paragraphs 33 and 35). The effect of the delay on the defendant's ability to defend is paramount (see Lord Carswell at paragraph 53(a));
 4. Any suggestion in *Das v Ganju* [1999] Lloyd's Rep Med 198, CA, and *Corbin v Penfold Metallising Co Ltd* [2000] Lloyd's Rep Med 247, CA, that the court is not entitled to take into account against a party failings on the part of his solicitors cannot be sustained. The claimant must bear his own responsibility as against the defendant for any delay (see Lord Carswell at paragraph 53(b)).
11. It seems therefore that on the issue of the exercise of the section 33 discretion, no great change of approach has been signalled. The Court will, as before, have to weigh in the balance all the factors listed in section 33 and, if it does so, an appellate court will be disinclined to intervene.

12. The last word on *Horton* must go to Lord Brown:

“It is for the very reason that the Walkley ruling is so lacking in logic and intrinsically productive of anomalies that the courts have found such difficulty in its subsequent application. There is simply no coherent principle by which to judge its true scope and how in any particular case which raises the smallest factual distinction it should apply. Small wonder that it has given rise to so much unsatisfactory jurisprudence.” (paragraph 64)

“There can be no doubt that both justice and certainty would be advanced by the House now departing from the Walkley ruling. It is certainly no reason to perpetuate it any longer.” (paragraph 65.)

13. The full judgment can be found at:

<http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/horton-1.htm>

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