Neutral Citation Number: [2016] EWHC 3331 (QB)

Case No: HQ15P04920

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2016

Before :

MR JUSTICE GOSS

Between :

KEITH MALCOLM LEWIN — **Claimant**

- and -

GLAXO OPERATIONS UK LIMITED
(sued as GLAXOSMITHKLINE UNLIMITED) — **Defendant**

Simeon Maskrey QC and Adam Korn (instructed by **Leigh Day**) for the **Claimant**
Jonathan Waite QC (instructed by **Clyde & Co**) for the **Defendant**

Hearing dates: 5th and 6th December 2016

Approved Judgment

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

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MR JUSTICE GOSS

MR JUSTICE GOSS :

Introduction

1. The claimant is 59 years of age, having been born on 28th October 1957. He is now severely and permanently disabled. His case is that this is a consequence of his having developed a serious spinal condition known as adhesive arachnoiditis as a result of Myodil being used in a diagnostic myelogram procedure at Whiston Hospital in 1973. Myodil is an oil-based contrast medium that was manufactured and supplied to hospitals by the Glaxo Laboratories Limited ('Glaxo'), of which the defendant is successor. His claim for damages in negligence for personal injuries and consequential loss arising out of his exposure to Myodil is for losses in the region of £1.6 million. Pursuant to the order of Master Fontaine dated 15 June 2016, which was made with the agreement of the parties, I am required to determine as a preliminary issue whether or not the claim has been brought within 3 years of either the accrual of his cause of action or from his 'date of knowledge' for the purposes of sections 11 and 14 of the Limitation Act 1980 ('the Act'), and, if it was not, whether it is equitable to exercise the court's discretion to allow the action to proceed.

2. A letter of claim was sent to the defendant dated 10th March 2015 and these proceedings were issued on 15th October 2015. The claimant was the only witness to give live evidence at this trial of the limitation issue. He also relies on the witness statements of his partner, Judith Mullins, and his mother, and three witness statements produced under a Civil Evidence Act Notice from his neurosurgeon, Mr Martin Wilby, and his solicitors, Jill Paterson and Tom Jervis. None of them was required to be available for cross-examination.

3. The defendant relies on witness statements of Brian Cahill, former manager of the Legal Department at Glaxo, and Anthony Brown and Morag Baird both of Clyde & Co., the defendant's solicitors. The claimant did not agree the contents of the defendant's witness statements but did not seek to cross examine the authors.

4. Myodil was supplied by Glaxo to hospitals between the second half of the 1940s and 1988. Before techniques such as CT scans and MRI were introduced in the 1980s, a myelogram, which involved the injection of Myodil (or other contrast medium) into the sub-arachnoid space in the spine, was an essential diagnostic tool for the medical profession. In particular, it enabled the spinal cord and nerve roots to be better observed on X-rays, thus assisting in the identification of the presence or absence of any surgically treatable spinal lesions. A myelogram is a highly specialised procedure, requiring considerable technical skill by the medical practitioner carrying out the procedure; the orthopaedic surgeons or neurologists usually making the recommendation for a myelogram, and the radiologists or neuro-radiologists usually carrying out the myelogram itself. The product licence for Myodil expired in 1987 and Glaxo made no application for a renewal.

5. The claimant's case is that Myodil should not have been made available at all throughout the period that it was, it being alleged that the product had not been sufficiently tested or it should have only been used in extreme cases, a matter which Glaxo should have warned about, and there should have been a "better" warning that the Myodil should be aspirated at or after the time of performing the myelogram. All three allegations are denied by the defendant.

6. From about the mid 1950s it had been suggested that adhesive arachnoiditis could be caused by Myodil. From at least 1972 Glaxo included a warning in its literature which accompanied Myodil about the possibility of adhesive arachnoiditis occurring.

The Issues

7. There can be no realistic doubt, and the defendant accepts solely for the purpose of trial of the limitation issue, that Myodil was injected into the sub-arachnoid space in the claimant's spine in Whiston hospital in 1973 when a myelogram was performed. He was aged 15 or 16 years at the time. The records from that hospital have been destroyed. It is also not in dispute that his cause of action accrued when the Myodil caused injury and not the date of the injection.

8. The discrete issues to be determined are: -

   i. The date when the cause of action accrued, in other words, when the injury was caused by the Myodil.

   ii. The date of the claimant's knowledge for the purposes of section 14 of the Act. It is not suggested he had direct or actual knowledge until 2012; the defendant's case is that he had constructive knowledge in 1977.

   iii. If the claim has been brought outside the limitation period, whether it would be equitable to allow the action to proceed in accordance with section 33 of the Act.

The Applicable Law

9. Section 11 of the Act provides that an action for damages for negligence causing personal injuries must be brought within 3 years of the date on which the cause of action accrued or the date of knowledge (if later) of the person injured.

10. "Date of knowledge" is defined in section 14 as follows:

> *"(1) References to a person's date of knowledge are references to the date on which he 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*
>
> *(c) the identity of the defendant; and*
>
> *(d) if it alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;*

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.'

(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."

(3) 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 medical or other appropriate expert advice which it is reasonable for him to seek

but a person shall not be fixed under this subsection with 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 a body of case law in relation to these provisions to which I was referred: *Adams v Bracknell Forest Borough Council* [2004] UKHL 29 which was then applied in a number of Court of Appeal cases thereafter, including *Whiston v London Strategic Health Authority* [2010] EWCA Civ 195 and *Johnson v Ministry of Defence* [2012] EWCA Civ 1505.

12. In *Adams* the House of Lords held that the standard by which constructive knowledge under section 14(3) should be assessed is an objective one. In relation to the correct approach to the application of the objective test Lord Hoffman stated at paragraph 51:

"In my opinion there is no reason why the normal expectation that a person suffering from a significant injury will be curious about its origins should not apply to dyslexics [the case concerned the date of knowledge of a dyslexic person]. In the absence of such an expectation there is no reason why the limitation period should not be prevented from running for an indefinite period until some contrary impulse leads to the discovery which brings it to an end."

Lord Phillips said at paragraph 58 that:

"These provisions [referring to the wording of section 14(3)] lend some support to the conclusion that the standard of reasonable behaviour for the purpose of section 14(3) is one which does not have regard to aspects of character or intelligence which are peculiar to the Claimant" and

Lord Scott said at paragraph 73:

> *"In my opinion the approach to section 14(3) constructive knowledge should be mainly objective. What would a reasonable person placed in the situation in which the claimant was placed have said or done?"*

13. In *Johnson* the Court of Appeal considered the concept of curiosity in the context of what was reasonable. Smith LJ stated at paragraph 24

> *"It seems to me that what Lord Hoffman must have meant [at paragraph 47] was that there was an assumption that a person who had suffered a significant injury would be sufficiently curious to seek advice unless there were reasons why a reasonable person would not have done. Such a reason might be that the condition, although in law significant, was something that the claimant had become used to (for example because it had been present from birth or childhood) that a reasonable person would not be expected to be curious about its cause: see for example Whiston v London Strategic Health Authority [2010] EWCA Civ 195. So the degree of curiosity to be expected of the reasonable person will depend upon the seriousness of the condition and the way it manifested itself."*

14. Section 33 of the Act provides

> *"(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 11(a) or 12 of this Act prejudice the plaintiff or any person whom he represents;*
>
> *(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;*
>
> *the court may direct that those provisions shall 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 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 defendant is or is likely to be less cogent than if the action had been brought within the time allowed...*

(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 purposes 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 for 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."

15. It is well established that the starting point under section 33 is to have regard to the purpose of the Act, namely to protect defendants from the injustice of having to fight stale claims where it has become difficult or impossible sensibly to contest the claim: see for example Lord Hoffman in *Adams* at paragraph 54.

The date of accrual of the cause of action

16. Although the records at Whiston Hospital have been destroyed so that the precise symptomology at the time of and the reasons for the decision to carry out the myelogram using Myodil in 1973 are not known, there is a considerable body of evidence and medical records relating to the claimant's condition leading up to and after the procedure. The claimant's statement at paragraphs 9-30 sets out his recollection of events at and around this time. The chronology prepared by the defendant and attached to its Skeleton Argument is a convenient and comprehensive, but not complete, table of extracts from medical and other records. He suffered back pain from the age of about 14 years. No specific incidents or causes could be identified. The myelogram in 1973 was normal, as were laboratory tests. He was treated by traction, medication and lumbar sacral supports. No major abnormality was identified in 1974. By 31st October 1975, when the claimant had just had his 18th birthday, the possibility of a mild ankylosing spondylitis, which had earlier been considered to be the most likely diagnosis, was ruled out. On 9th January 1976 the claimant was involved in a road traffic accident. In consequence, he was referred to Mr Geoffrey Osborne, a Consultant Orthopaedic Surgeon, now deceased, to provide a medical report, it being presumed, reasonably, for the purposes of a claim for damages. Mr Osborne agreed to treat the claimant, who had an epidural injection on 22nd July 1976. On 22nd November 1976 a radiculogram was carried out as it was considered he had a chronic lumbar disc prolapse at L4/5 and the myelogram carried out in 1973 was not thought by Mr Osborne to be "very satisfactory". The claimant reacted badly to the procedure. The Registrar (Dr Rostron) wrote to his GP "*it was felt this was an allergic reaction or arachnoiditis*

due to Dimer X used for the radiculogram". Mr Osborne noted on 20th April 1977 that the myelogram at Whiston and the radiculogram were "*completely normal*". A manipulation under anaesthetic was carried out on 26th April 1977 following which, after discussion with Dr Scarrow, a radiologist, Mr Osborne noted and wrote to Dr Chaudhuri, the claimant's GP on 26th July 1977 that "*We do not feel that any further X-ray investigation is necessary. He may well be a case of 'adhesive arachnoiditis', but this diagnosis could not be confirmed. Unfortunately we cannot totally exclude a functional cause for these symptoms.*" It was requested by Dr Osborne's 'team' that he be prescribed anti-depressants. On 28th September 1977 the claimant was admitted to Whiston Hospital with severe backache, put on traction for two weeks and given an epidural injection. He was a hospital patient for 75 days and discharged with a diagnosis of a prolapsed intervertebral disc. On 14th October 1982 he was involved in another minor road traffic accident and is recorded in his GP notes as having been hit from behind and pulling back muscles. He was prescribed DF 118.

17. Between early 1990 and July 1995 there was ongoing product liability group litigation in relation to Myodil in which settlements were agreed without any admission of liability. There was a good deal of publicity about the litigation in the written media. Over 4000 individuals notified the defendant of claims. In the event, only 426 claims were proceeded with. The claimant read an item about the litigation in the Law Society Gazette, being a solicitor in practice at that time. That was almost certainly a letter from DN Harris relating to the setting of cut-off dates. The claimant conducted his own research using a medical book in his firm's law library. He read that adhesive arachnoiditis was a rare but serious condition affecting the nervous system and spine with severe neurological consequences. None of the symptoms appeared to apply to him. His intermittent back pain had been a feature of his life. The possibility that he had adhesive arachnoiditis or an association with Myodil did not enter his head at that time. I accept his evidence in relation to this.

18. There were intermittent 'flare-ups' (my phrase) of back problems during the 1990s but it was not until November 2007 that the claimant suddenly developed severe pain in his left knee. Other symptoms then manifested themselves over the ensuing years. By about 2011 he was experiencing pain higher up in his back at the level of his mid-chest. He experienced urinary urgency during 2012. Early that year he sought medical help. As a result of an MRI scan he was found, in September 2012, to have an abnormality of his spinal cord which looked like a small cyst at T9 and T11. He was referred to Mr Martin Wilby, a Consultant Neurosurgeon. At a consultation on 22nd October 2012 the potential link between Myodil and the claimant's condition was discussed. The claimant conducted research into adhesive arachnoiditis and approached his solicitors, Leigh Day, on 8th January 2013. Surgery was carried out by Mr Wilby and his Registrar on 19th and 20th February 2013. Mr Wilby, in his report dated 5th March 2015, concludes, from what he observed, that the claimant suffered from post-Myodil adhesive arachnoiditis and that his case was one of the worst cases of adhesive arachnoiditis he has encountered in his career.

19. It is not disputed that Myodil may give rise to late-onset injury. The British Journal of Neurosurgery for December 2010 contains a case report of "widespread arachnoiditis, with the formation of an arachnoid cyst and syrinx in the thoracic

spine, secondary to the use of Myodil four decades previously." Although the claimant's back problems persisted and intermittently deteriorated over the five year period from 1972, the balance of the evidence is that despite the problems persisting into the 1980s and 1990s and that certain events would irritate the pain, there was nothing referable to the thoracic spine. The pain was to the lumbar spine and, occasionally, to the cervical spine. The changing symptomology would suggest a gradual onset of a deteriorating condition in the thoracic spine causing paralysis from 2007 which can be linked to the adhesions to the thoracic spinal cord.

20. Although there is reference in the notes and correspondence of Mr Osborne and his registrar, Dr Rostron, to some features suggesting the presence of arachnoiditis, no diagnosis of adhesive arachnoiditis could be confirmed. It is to be noted that the focus of attention was to the lumbar spine and the arachnoiditis was referable to an allergic reaction to the Dimer X, which eventually effectively resolved and was an unconfirmed diagnosis. There was no suggestion of the arachnoitidis being associated with the myelogram in 1973. There was no steady or progressive deterioration of the spinal problems in the 1980s or 1990s. There was, in any event, no evidence of arachnoiditis from the imaging in the lumbar or cervical spine: the radiculogram in 1977 was entirely normal according to Mr Osborne. There were some features suggestive of the presence of arachnoiditis but this was not in the thoracic spine. What became manifest in much more recent years was injury to the thoracic spine. Moreover, the MRI scan of 4th September 2012, which identified the cystic cavity within the lower cord at T11 and unusual appearance at T9, noted no enhancement being seen elsewhere in the spine and minor degenerative change was to be seen in the cervical spine. In short, the evidence is to the effect that those adhesions in the thoracic spine were not present in the 1970s or 1990s and there is no evidence that adhesions were the cause of his symptoms in the lumbar and cervical spine.

21. It is for the defendant to establish when the cause of action accrued. On the balance of probabilities, I conclude that the damage to the claimant's spine and, in particular to the thoracic spine, was not caused prior to 1977 or for a considerable time thereafter. Although there can be no precision as to timing, on the basis of the available medical evidence and the evidence of the claimant, which I accept to have been given truthfully and not in any intentionally blurred or reconstructed way, I find the damage was probably caused shortly before or in 2007, when there was the sudden event relating to his left knee marking the start of the deterioration of the claimant's condition. Specifically, I do not find any damage had been caused prior to July 1995.

The date of knowledge

22. Nevertheless, I go on to consider the issue of the date of knowledge. The defendant says that by the end of 1977 the claimant knew that he had an injury to his back of sufficient severity to be considered significant. It is the defendant's case that the claimant had been told about arachnoiditis in 1977 either by Mr Geoffrey Osborne or his GP, Dr Chaudhuri, who had received those letters indicating that this was a potential, albeit unconfirmed, diagnosis and this information about arachnoiditis should have prompted him, as a reasonable person, to be curious enough to start investigating what the cause of this might have been in accordance with the test laid

down for constructive knowledge. He had, by then, been suffering with a bad back for more than five years and possibly as many as seven, which had been deteriorating. He had been referred to a number of different consultants, undergone extensive investigations, treatments and tests and had periods of hospitalisation. The significance test was satisfied.

23. The claimant now accepts that he must have been told something about arachnoiditis, which he misheard or wrongly recorded in his diary as 'racnoiditis', in 1977. The defendant points to the disparity between what was pleaded in the Reply as to his total ignorance of the condition and his recent acceptance in his witness statement that someone had told him something about it, or something very similar sounding, and challenges the adequacy of his current account and explanation. The claimant's case is that, with the benefit of hindsight, he was probably told about the arachnoid membrane over the spinal cord and arachnoiditis but that he had forgotten about having been told this before he found his diaries, which he gave to his solicitors and did not refer to or consider before the Reply was signed.

24. I have regard to the situation in which the claimant was, namely a young man with persisting problems with his lumbar spine and, occasionally, cervical spine, who had undergone numerous procedures and yet no clear cause could be found for his symptoms. As he said in evidence, by the end of 1977 / early 1978, he was told, in effect, that "we don't know what's wrong with you, but whatever it is we think it will settle down in time". So he thought nothing was seriously wrong with him and he should go off and do other things; if he paid the price of aggravating his back, that was a price he was prepared to pay. Applying the objective criteria prescribed by section 14 of the Act I do not consider that, even if he should have 'taken on board' that his condition might have been arachnoiditis, in the context of all the circumstances surrounding his history of spinal problems and treatments and the expert opinion he had already been given he should, as a reasonable person, have been even more curious about the cause and pursued the matter. His 'getting on with his life' was not a case of accepting one opinion and not seeking further or alternative advice about a potential claim: he had undergone many investigations and received many opinions. He was told nothing specific could be identified or be done. Accordingly, I do not find that he would have been fixed with constructive knowledge of arachnoiditis or adhesive arachnoiditis consequent upon his myelogram in 1973 as a potential cause of the ongoing back problems.

25. Further, had the claimant sought to pursue the matter further, every indication from the investigations and expressed opinion of Mr Osborne would have been that his lumbar problems had nothing to do with the myelogram in 1973. In fact, if he had made further enquiries, the likelihood is that no reference would be made to the myelogram using Myodil. I reject the defendant's contention that pursuit of the matter further by the claimant would probably have led to identification of arachnoiditis or adhesive arachnoiditis potentially attributable to the Myodil used in the myelogram. Mr Osborne was well aware of the myelogram and never hinted at any link to the claimant's symptoms.

26. Accordingly, I find that the claimant's date of knowledge was not 1980, as principally contended for by the defendant.

27. The defendant's 'fall-back' position is that the claimant is fixed with constructive knowledge from some time shortly after he read the article in the Law Society Gazette about the cut-off date in the Myodil Group Litigation. His explanation for what he did, or rather did not do after reading that article is summarised in paragraph 17 of this judgment. In evidence, he stated he did not look up arachnoiditis; he did look up adhesive arrachnoiditis and I accept his explanation that he did not associate any of the symptoms of the condition with his current or past state or with the fact that he had undergone a myelogram in 1973 when Myodil had been used or that in around 1977 he had heard reference to arachnoiditis. In the early 1990s there had been no significant change in his condition so there was nothing to cause him or a reasonable person to associate his continuing childhood back problems with arachnoiditis or adhesive arachnoiditis.

28. Accordingly, I reject the defendant's case that he could have been expected, particularly as a lawyer, to make some enquiries of the Group Litigation's Lead Solicitors and that, had he done so, his date of knowledge would have been some time in, say, 1993 and, in any event, within time for him to join the Group Litigation.

29. I find that the cause of action arose when Mr Wilby diagnosed that the claimant was suffering from post-Myodil adhesive arachnoiditis. Accordingly, this action was brought within the statutory limitation period.

Section 33 Discretion

30. In the event of my being wrong and the claimant's date of constructive knowledge was more than three years before the commencement of these proceedings, I proceed to consider whether it would, nevertheless, be equitable to allow the action to proceed pursuant to section 33 of the Act.

31. I address each of the matters identified in section 33(3) of the Act.

32. *Length of and reason for delay.* I take account of the full period of the delay. If he had constructive knowledge of his injury consequent upon Myodil, it was a long period of delay and limited weight can be given to the reason for the delay, namely, a decision to 'get on with his life'.

33. *Adverse affect on the cogency of the evidence.* The passage of time inevitably affects the cogency of the evidence that the defendant can produce. I have well in mind the witness statements of Brian Cahill and Anthony Brown and, in particular, the alleged adverse effect on the cogency of the evidence the defendant might now adduce compared to the evidence it was in a position to call had the trial of the Group Litigation gone ahead in the mid 1990s, with the claimant as a participant. Only one of the 15 witnesses of fact, all former employees of Glaxo and from whom witness statements were taken for the group Litigation in the 1990s, is available to give live oral evidence and the evidence of that one witness evidence post-dates the Claimant's myelogram. However, Civil Evidence Act Notices can be served and so their evidence is available in that form and it would be for the trial judge to determine the weight to be attached to it. It is of considerable importance that all the documents from the Group Litigation are still available. I recognise the absence of relevant 'contemporaneous' witnesses of fact in relation to them but the potential disadvantage of such absence would not, in my judgment, be great. Of the

7 experts who provided reports for Glaxo in the Group Litigation in the 1990s, only three have expressed an ability to give evidence in this case. It is submitted their ages are against them, and they are going to be less able to give cogent evidence than they would have been had they been required to give evidence at an earlier date when they were younger. Undoubtedly, the experts willing and able to give evidence would have to 'read back' into the case. This would not be difficult. Other experts, who would have access to all documents, could be instructed for opinions. There could be a 'mix and match' approach to expert evidence and the defendant would not be under any significant difficulty or disadvantage in this regard.

34. No criticism is made of *the conduct of the Defendant* nor was the claimant suffering under any *disability*.

35. *Whether the Claimant acted promptly, and steps taken.* If the claimant had sufficient to trigger an investigation in either 1977/8 or, alternatively, about 1992, he is fixed with constructive knowledge thereafter. He did not seek medical advice at any time in relation to the diagnosis of arachnoiditis, and so did not instruct solicitors until 2013. New symptoms and significant deterioration developed from 2007 and there was delay until 2012. Such prejudice as has been caused by the delay had very largely been established by the time the solicitors were instructed. The delay in the issue of proceedings to 2015 was not unreasonable; some time must be allowed for solicitors, once instructed in 2013, to investigate what on any view is a complex case. In any event, by this time, the "prejudice" from which the defendant suffers was more or less fully established.

36. *Other matters as part of "all the circumstances of the case" in s 33(3)*: The defendant submits there are additional compelling reasons why the limitation period should not be disapplied including:

    (a) The fact that Glaxo/the defendant has already had to "defend" Myodil claims of a similar nature in which it had to expend considerable amounts of money.

    (b) The defence of those claims involved a concerted and generous approach by Glaxo, such as not objecting to latecomers and agreeing a further extension of the original cut-off date, in an attempt to "gather in" all Myodil claims. In part, this was for Glaxo's benefit in that it was anxious to try and ensure that all possible claims were brought within the umbrella of the group Litigation; but there was also the Court's readily understandable desire to avoid claims being *"perpetuated almost literally into the 21st century"* (per May J in the group litigation).

    (c) Had this claim been brought when the defendant says it should have been, Glaxo would have been insured in respect of any liability for damages payable and its own defence costs, as it was for the Group Litigation. The defendant now carries no insurance in relation to a product which it last supplied in the 1980s. It would be put to considerable expense in contesting the claim.

    (d) Glaxo/the defendant reasonably believed that it had disposed of all "Myodil claims" when the Group Litigation was resolved in 1995.

(e) The overall merits of the claimant's case are said to be weak for the reasons set out in the Defence.

(f) This case will place a heavy burden on those resources if it is allowed to proceed. The defendant says that a very stale claim such as this one, with relatively poor prospects of success, should not be allowed to proceed in the absence of wholly exceptional circumstances.

37. It is not easy to assess the overall merits of the case; however, I do not accept a categorisation of 'weak'. The documentary evidence is preserved and any gaps in the expert evidence can be filled. This is not a case where the claimant had direct knowledge of an injury as result of Myodil; if he had knowledge, it was constructive and no expert was pointing him in the direction Myodil. Nor is it a case in which the defendant can be said to be having to fight a stale claim where it has become difficult or impossible sensibly to contest the claim. The main prejudice would be financial. Although I have well in mind all the defendant's contentions, I also have regard to the fact that these matters have already been the subject of a detailed investigation by the defendant and the claimant is now revealed to have suffered the late onset of a very significant injury in respect of which there is clear expert evidence as to its cause. I consider that this is a case in which it would, if necessary, be fair and just to override the statutory time limit.

Conclusion

38. Accordingly, I find that this claim is not statute-barred under the provisions of the Act and were I to be wrong about that, I would exercise my discretion to allow the action to proceed in any event.