



Neutral Citation Number: [2020] EWHC 3384 (QB)

Case No: D14YM909  
Appeal Ref: BM90166A

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**BIRMINGHAM APPEALS CENTRE**

Birmingham Appeal Centre,  
Priory Courts, 33 Bull Street,  
Birmingham, B4 6DS

Date: 10/12/2020

**Before :**

**THE HONOURABLE MR JUSTICE SAINI**

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**Between :**

**SAKANDAR AZAM**

**Respondent**

**- and -**

**UNIVERSITY HOSPITAL BIRMINGHAM NHS  
FOUNDATION TRUST**

**Appellant**

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**Charles Bagot QC and Sham Uddin (instructed by Direct Access) for the Respondent**  
**John Coughlan (instructed by Bevan Brittan) for the Appellant**

Hearing date: 7 December 2020  
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**Approved Judgment**

## MR JUSTICE SAINI :

This judgment is in 7 main parts as follows:

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### **I. Overview**

1. This is an appeal against an Order dated 2 September 2019 made by His Honour Judge Rawlings (“the Judge”) sitting in the County Court at Birmingham. By this Order, the Judge permitted the Respondent (“Mr Azam”, the Claimant below) to proceed with his clinical negligence claim against the Appellant (“the Trust”), despite the expiry of the primary limitation period. The Judge’s Order was made under section 33(1) of the Limitation Act 1980 (“the LA 1980”), following the trial of a preliminary issue as to limitation.
2. The underlying claim arises out of gynaecomastia surgery which took place nearly 25 years ago, on 9 March 1996. The surgical procedure which is the subject of the negligence claim was performed by a consultant surgeon, Mr Duncan Campbell (“Mr Campbell”), at Selly Oak Hospital, an institution for which the Appellant (“the Trust”) has assumed responsibility. Mr Campbell died on 12 April 2014.
3. The claim was issued on 20 July 2017. In summary, Mr Azam complains that the surgery was of a poor standard and undertaken using an inappropriate technique. He says that in consequence he has suffered severe pain as well as chest wall distortion and significant scarring. The Trust has thus far submitted only an outline Defence and relies primarily on a limitation argument.
4. In his succinct judgment, the Judge held that the primary limitation period had expired in March 1999 because Mr Azam had the necessary knowledge for the purposes of section 14 of the LA 1980 almost immediately after the operation. He also held that there was no concealment for the purposes of section 32 of the LA 1980.
5. However, as indicated above, the Judge concluded that it was equitable on the facts before him to give Mr Azam permission to pursue his negligence claim out of time, applying section 33 of the LA 1980.
6. It is against this final conclusion that the Trust appeals. In summary, it argues that although this was an exercise of discretion, the Judge’s decision was manifestly wrong.
7. Mr Azam responds that this is essentially an impermissible appeal against a discretionary evaluation, where no error of law in the Judge’s approach has been identified.

8. Permission to appeal was refused by the trial Judge and by Soole J on the papers on 5 March 2020. Following an oral renewal hearing on 4 June 2020, Martin Spencer J granted the Trust permission to appeal to the High Court.

## **II. The Facts**

9. The operation carried out on 9 March 1996 for the correction of Mr Azam's gynaecomastia was undertaken by performing bilateral subcutaneous mastectomies. Mr Campbell was at that time a senior consultant surgeon at Selly Oak Hospital.
10. On 7 June 1996, Mr Azam was seen by Mr Campbell's senior house officer, a Dr Wong, who wrote to Mr Azam's GP:

“He has an acceptable cosmetic appearance from this. The scars have healed well with no sign of infection. Discharged back to your care.”

(Recorded in a letter sent to Mr Azam's GP, Dr Rajput).

11. In February 1998, Mr Azam saw a Consultant Cardiologist, Dr Beattie who made a note in relation to the mastectomy possibly being “redone”. On receipt of Dr Beattie's clinic letter, on 16 April 1998 Dr Rajput rang Mr Campbell's secretary and, as a result of that telephone conversation, noted: “If needs redo, needs to be re-referred.” This appears not to have been followed up, but is evidence that at least two years post-operatively Mr Azam was dissatisfied with the results of the operation.
12. Mr Campbell died of pancreatic cancer on 12 April 2014.
13. On 12 August 2014, Mr Azam was seen by another surgeon, a Mr Atul Khanna at Sandwell Hospital, who offered revision surgery, albeit expressing significant concerns about the potential difficulties in performing satisfactory correction and describing some of the potential adverse consequences. The offer of revision surgery was not taken up by Mr Azam.
14. In April 2015, Mr Azam entered into a conditional fee agreement with solicitors and an expert's report was commissioned from Mr T E E Goodacre (“Mr Goodacre”).
15. As to his qualifications, Mr Goodacre is a Consultant Plastic, Reconstructive and Aesthetic Surgeon with an NHS appointment at the Oxford University Hospitals. He is past President of the British Association of Plastic, Reconstructive and Aesthetic Surgeons, a member of the British Association of Aesthetic Plastic Surgeons, and past Chair of Professional Standards for British Association of Plastic, Reconstructive and Aesthetic Surgeons, 2012-2015.
16. In his report of 23 May 2016, Mr Goodacre expresses his views as to the surgery in what, it is fair to observe, are forthright terms.
17. In Mr Goodacre's opinion the surgery was of “a very poor standard indeed and falls well below the standard expected of a reasonable body of medical practitioners”. I note that, in particular, Mr Goodacre criticises the use of a form of inverted ‘T’ scar approach to reduce the breast tissue, and states that there has:

“clearly been over-resection of tissue in the central area, accompanied by inadequate resection of peripheral fat/gynaecomastia tissue, as well as inadequate positioning of the nipple/areola complex.”

18. Mr Goodacre further observes:

“I have never encountered a gynaecomastia that could not reasonably be approached using some form of concentric ring technique accompanying the subcutaneous reduction to avoid transverse chest wall scars. I am aware, however, that a certain body of practitioners would adopt such mutilating and scarring inducing approaches, especially using the transverse incisions for some reason or other. However, that does not render the gross loss of tissue and distortion of chest wall acceptable and, in good hands, the use of a transverse scar might be an acceptable sequelae so long as the resulting contour was more satisfactorily delivered than is evident in this case.”

19. On 11 November 2016, a pre-claim letter was sent relying upon Mr Goodacre’s report. On 18 May 2017, the Trust responded and raised the defence of limitation. In this letter the Trust asserted that the primary limitation period expired in 1999 and asserted that there was a discussion with the GP, Dr Rajput, in April 1998 when the notes record a reference to “chasing a redo mastectomy”, which indicated that Mr Azam had “knowledge” for the purpose of section 14 of the LA 1980. The letter also stated:

“We should also point out that the surgeon whom we believe carried out this surgery, Mr Duncan Campbell, died in 2014. Accordingly, if you intend to rely upon the court’s discretion to overcome the limitation position, it is clear that the defendant will be severely prejudiced.”

20. The claim form was issued on 30 June 2017 and Particulars of Claim were served on 10 October 2017. Surprisingly, this statement of case did not plead and rely on section 33 of the LA 1980, but did assert that Mr Azam’s date of knowledge did not arise until 12 August 2014 for the purposes of section 14 of the LA 1980.

21. A Defence was served on 15 December 2017 noting, in terms, that Mr Azam had advanced no application for discretionary disapplication of the primary limitation period pursuant to section 33 of the LA 1980. This was met with a Reply belatedly relying on section 33.

22. On 27 July 2018, District Judge Shorthouse gave permission to Mr Azam to amend the Particulars of Claim, and Amended Particulars of Claim relying additionally on sections 32 and 33 of the LA 1980 were in due course served.

### **III. The Judgment**

23. Sections 33(1) and (3) of the LA 1980 are the main relevant provisions:

“33 Discretionary exclusion of time limit for actions in respect of personal injuries or death.

(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, 11A or 12 of this Act prejudice the plaintiff or any person whom he represents; and

(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 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, by section 11A or (as the case may be) by section 12;

(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 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.

...”

24. The limitation question raised in the Defence was tried as a preliminary issue on 2 September 2019. I emphasise that this was a trial with evidence and not merely an interim hearing. Both parties accordingly had to be prepared to support their cases with factual and, if necessary, expert evidence.
25. The Judge found that the action was statute barred because, for the purposes of section 14 of the LA 1980, Mr Azam:

“...had the necessary knowledge as defined by section 14 of the Limitation Act 1980 almost immediately after the operation had been carried out, that he had suffered a significant injury.”

(Judgment, para.12)
26. The Judge also dismissed the claim that there had been concealment of a fact for the purposes of section 32 of the LA Act (Judgment, para.14). That left only the question of discretion under section 33 of the LA 1980.
27. Having set out the terms of section 33, the Judge proceeded to consider each of the statutory circumstances set out in section 33(3), noting that the burden was on Mr Azam to satisfy him that the discretion should be exercised in his favour but there was an evidential burden on the Trust in relation to prejudice said to have been caused by the delay (in the sense that it was the Trust who would be likely to have evidence as to the extent of the prejudice caused to it by that delay: Judgment, para.16.)
28. In relation to the length of the delay, the Judge found that this was approximately 18½ years beyond the period that the primary limitation period had expired (Judgment, para.17). He accepted, in relation to the cogency of the evidence, that Mr Campbell’s evidence was no longer available to the Trust and that there may be difficulty in tracing witnesses, or, if witnesses could be traced, in such witnesses recalling the events in question.
29. Notably, the Judge was satisfied that there was no conduct on the part of the Trust which could be relied upon by Mr Azam (see section 33(3)(c) of the LA 1980); and he found that Mr Azam was not suffering from any disability that would have prevented him from initiating proceedings or which represented an excuse or reason for him not to have brought proceedings.
30. The next factor he identified was whether Mr Azam acted promptly in obtaining medical and legal advice. The Judge found that Mr Azam did not act promptly after raising the possibility of having the surgery redone in 1998 and, having raised that issue, it should have been at least in his mind that there was some question as to whether the original operation had been carried out in a correct and professional manner.
31. I pause here to note that before he turned to consider section 33 of the LA 1980, the Judge directed himself in accordance with what the parties agreed was the leading case Cain v Francis [2008] EWCA (Civ 1451) at [57]-[69]. I will refer to this decision further below.
32. In relation to a pleaded allegation that Mr Campbell had failed to obtain appropriate informed consent from Mr Azam (a point raised by Mr Goodacre in his report), the

Judge accepted that there might well be significant prejudice to the Trust were the court to allow that claim to proceed. This was because Mr Campbell was no longer available to give evidence that might assist the court in deciding whether or not the consent form was correct (in indicating that he had discussed with Mr Azam the downsides of the operation and the other options available).

33. The Judge therefore refused permission under section 33 of the LA 1980 for that element of the claim to proceed.
34. Given the nature of the arguments made before me on appeal about the claimed errors in the Judge's approach, it is appropriate that I set out precisely what the Judge said about the lack of informed consent claim:

“25. There are essentially two elements to the claim. Firstly, the carrying out of the operation negligently; and, secondly, the failure to obtain informed consent from Mr Azam before the operation. As to the second of those, informed consent, there is a consent form which has been produced which appears to have been signed by Mr Campbell and the claimant Mr Azam. If the action had been brought in time whilst Mr Campbell was still alive he could have given evidence as to his usual practice in completing consent forms, it being the case of Mr Azam that he was not told of the other options or possible downsides of the operation, notwithstanding that the consent form contains a statement to the effect that he was. I accept that in relation to that element of Mr Azam's claim there may well be significant prejudice to the defendant if I were to allow that claim to proceed against it, given that Mr Campbell can no longer be produced to give evidence that may assist the court in deciding whether or not the consent form is correct in indicating that Mr Campbell had discussed with Mr Azam the downsides to the operation and other options that were available. For that reason, balancing factors for and against but giving precedence to the prejudice to the defendant's ability to defend the claim caused by the delay, I will not give permission under section 33 of the Limitation Act 1980 for that element of the claim to proceed”.

35. By contrast, in relation to the performance of the operation itself, the Judge exercised his statutory discretion to allow the claim to proceed. The Judge's reasoning in this regard is the focus of this appeal, and again, I should set out the material parts of the Judgment in full:

“26. As to the performing of the operation negligently, Mr Campbell was very unlikely to recall the operation, even if the claim had been brought within the 3-year limitation period. Mr Azam's expert says that the wrong technique was used in the operation and that the operation was carried out very badly. The evidence as to what was done in the operation and how well it was done remains in effect the appearance of Mr Azam's chest, according to his expert, which was examined by his expert and can be examined by the defendant's expert. The defendant's

expert is able to give an opinion as to whether what happened in 1996 in terms of carrying out this operation both as to technique and as to how well the operation was carried out is compliant with the way in which a reasonable body of surgeons would have carried out that operation in 1996, both in terms of technique and the competence with which the operation was carried out. Mr Campbell's evidence as to his two [sic] standard practice at the time is unlikely to have been much assistance to the court in my view beyond what the experts could say as to whether the operation had been carried out negligently or not. The medical records of the defendant pre-operation and the operation itself and as to what happened thereafter appear on their face to be relatively comprehensive and have been kept and will be available to the court at the trial.

27. I am not satisfied that there is significant real prejudice to the defendant in terms of its ability to defend the claim, that the operation was carried out negligently, by the passage of time beyond the limitation period. The remaining considerations are of relatively minor importance compared to the question of prejudice to the defendant (the length of the delay for which I found that Mr Azam does not have an excuse after February to 1998; Mr Campbell/Mr Wong leading Mr Azam to believe that the operation had been successful; and the depression suffered by Mr Azam in 1997 as a result of the death of his daughter). I will therefore give permission under Section 33 to Mr Azam to pursue his claim against the defendant in relation to the operation on the basis that it was negligently carried out."

#### **IV. Grounds of Appeal**

36. The Trust challenges this exercise of discretion. It says the Judge was "manifestly wrong" in his conclusion. In argument, it relied upon two particular matters but, as I said during oral submissions, they seem to me to be raising essentially the same point. I will summarise the core of the arguments below which were presented as separate grounds.
37. In his attractively presented submissions on Ground 1, Counsel for the Trust argued that the Judge erred in his assessment of "forensic prejudice" and failed to give due weight to the forensic prejudice faced by the Trust in defending the claim. He submitted that early in his Judgment, the Judge appeared to accept that the Trust's forensic prejudice was not limited to the loss of the operating surgeon, Mr Campbell, but in the "staling" of the evidence generally. Counsel submitted that the Judge was right to do so: other clinicians involved in Mr Azam's care are bound either to be unavailable, less available or have a more clouded recollection of events than had the claim been brought in time.
38. It was further submitted that, similarly, the quality of Mr Azam's evidence was bound to have gone stale with time. Reliance was placed on the fact that the Judge had earlier

found against Mr Azam on the section 14 LA 1980 points in relation to date of knowledge, rejecting his evidence (it is argued) as likely to have gone stale.

39. Counsel for the Trust submitted that when (at the end of his Judgment) the Judge came to assessing the forensic prejudice faced by the Trust, he fell into error in two material respects.
40. I summarise the points as follows:
  - (a) First, the Judge was wrong to ignore the collateral forensic prejudice faced by the Trust. The Judge had already found this to be a potential head of prejudice, and was wrong to exclude it from further consideration, alternatively did not afford it appropriate weight. It is complained under this head that the Judge accepted a submission for Mr Azam that medical records were detailed and impressive. In fact, this was not common ground and the operation record contains scant detail. Counsel did however accept when I asked this question, that there was no appeal against this finding of fact as to the state of the medical records.
  - (b) Second, the Judge was wrong to decide that the loss of the operating surgeon as a witness in the case did not amount to any or any significant forensic prejudice. Counsel for the Trust submitted that such a loss is the “very epitome” of forensic prejudice. Were Mr Campbell still alive, it is said he would undoubtedly have been a witness in the case and would have been in a position to provide the experts and the court with an account of his standard practice in 1996, his reasons for advising and undertaking the surgery he did, and his account of the outcome.
41. Basing himself on the above arguments, Counsel for the Trust submitted that (having regard to Cain v Francis [57]) had the Judge taken the proper approach to the forensic prejudice suffered by the Trust in this case, he would have reached a different conclusion as to whether an extension was equitable.
42. Under Ground 2, and in relation to the Trust’s argument that the Judge failed to perform the necessary balancing exercise, it was submitted that although the Judge properly listed the factors that section 33 of the LA 1980 required him to have in mind, he did not (or did not appear to) actually perform a balancing exercise of those factors in coming to his decision. It was argued that had he done so, he would have reached a different conclusion.
43. In particular, it was submitted to me that the Judge should have found that the following list of factors (which I call “the shopping list”) weighed heavily in the Trust’s favour: the length of the delay (s.33(3)(a)) – egregiously long at eighteen years; the reasons for the delay (s.33(3)(a)) – none were advanced, other than that Mr Azam had accepted advice from the surgeons that this was a reasonable cosmetic result; the effect on the evidence (s.33(3)(b)) see above; the Trust’s conduct (s.33(3)(c)) – none, despite Mr Azam’s assertions to the contrary; disability (s.33(3)(d)) – none, despite assertions to the contrary; promptitude (s.33(3)(e)) – entirely lacking; steps taken by Mr Azam to take advice (s.33(3)(f)) – not relevant.

44. Overall it was said that on these facts, had the Judge performed the balancing exercise properly, he would have reached a different conclusion. Counsel said that the points all essentially went one way.
45. On Mr Azam's behalf, Leading Counsel forcefully argued that under each of the Trust's sub-grounds of appeal, the appeal is essentially an attack on the Judge's evaluation of the weight to be given to specific pieces of evidence.
46. It was said that there was no error of law on the part of the Judge and reliance was placed on the established case-law, considered in more detail below, concerning the narrow and confined bases upon which an appellate court can interfere with discretionary assessment of the section 33 LA 1980 type.
47. As to the reliance on the specific sub-factors in section 33(3) (Ground 2), Leading Counsel for Mr Azam said that the Judge clearly had each of these matters in mind when arriving at his conclusion and was entitled to hold that many of them were of relatively minor importance. It was submitted that the Judge was also entitled to give substantial weight to the lack of prejudice to the Trust.

## **V. Appealing discretion**

48. At this stage it is important to restate some basic principles concerning appellate challenges to the exercise of a discretion at first instance.
49. I base my summary on a number of well-known cases including G v G [1985] 1 WLR 647 (HL), Tanfern Ltd v Cameron-MacDonald [2000] 1 WLR 1311 (CA), Chief Constable of Greater Manchester Police v Carroll [2018] 4 WLR 32 (CA), and Kimathi & Ors v Foreign and Commonwealth Office [2018] EWCA Civ 2213 (the latter two cases being concerned specifically with section 33 of the LA 1980).
50. An appellate court will only interfere with a discretionary evaluation where an appellant can identify one or more of the follows errors:
  - (i) a misdirection in law;
  - (ii) some procedural unfairness or irregularity;
  - (iii) that the Judge took into account irrelevant matters;
  - (iv) that the Judge failed to take account of relevant matters; or
  - (v) that the Judge made a decision which was "plainly wrong".
51. Error type (v) requires some elaboration. This means a decision which has exceeded the generous ambit within which reasonable disagreement is possible.
52. So, even if the appeal court would have preferred a different answer, unless the judge's decision was plainly wrong, it will be left undisturbed. Using terms such as "perversity" or "irrationality" are merely likely to cause confusion. What is clear is that the hurdle for an appellant is a high one whenever a challenge is made to the outcome of a

discretionary balancing exercise. The appellate court's role is to police a very wide perimeter and it will be rare that a judge who has exercised a discretion having regard to relevant considerations will have come to a conclusion outside that perimeter. I would add that an appellate court is unlikely to be assisted in such challenges by a simple re-argument of the points made to the judge below. It needs to be underlined that an appellate court in an appeal such as the present is exercising a CPR 52.21(1) "review" power. It is also well-established that the weight to be given to specific factors is a matter for the trial judge and absent some wholly unjustifiable attribution of weight, an appellate court must defer to the trial judge.

## VI. Analysis

53. Before turning to the two Grounds of Appeal, it is important to consider as a preliminary matter whether in the Judge's general approach to the section 33 question, there was any misdirection in law.
54. In my judgment, it is clear there was no misdirection in law:
  - (a) First, the relevant terms of section 33 were set out in the Judgment and it is plain that the Judge had them closely in mind as he went systematically through his analysis.
  - (b) Second, the Judge was correct to direct himself (Judgment, para.16) that the burden was on Mr Azam to establish that it would be inequitable not to extend the relevant time-limit, but the evidential burden of showing that the evidence adduced or likely to be adduced by the Trust was less cogent, was on the Trust: Carroll at [42.5].
  - (c) Third, the key question (and the question which the Judge rightly asked himself in reaching his decision) was whether, stepping back and surveying "all the circumstances of the case" (the opening phrase of section 33(3)), it is "fair and just" (the meaning of "equitable") to allow the action to proceed, relying (as the Judge did) on: Cain at 773D & 775D.
  - (d) Fourth, in fairness and justice, a defendant only deserves to have the obligation to pay damages (if liability is established) removed if the passage of time has significantly diminished its opportunity to defend itself: Cain at 774F. The Judge correctly directed himself on this point: Judgment, para.24.
55. The significance of these preliminary points is that *before* one comes to assess the discrete complaints about the exercise of the discretion (and the Judge's assessment of the individual factors), one starts from the position that the Judge's directions in relation to the approach to the legal test upon which the discretion rested were impeccable.
56. Once that conclusion is reached, the task of the appellate court becomes heavily circumscribed: was the Judge entitled to reach the determination on the basis of the individual factors evidenced before him, stepping back and looking at the overall fairness and justice?

57. I underline that this question does not allow the appellant to lay out its shopping list of factors for and against the exercise of the discretion and to simply seek to reargue the points argued before the Judge on appeal. An appellant's analysis of a route by which, in analysing the section 33 factors, a judge at first instance might have reached a different decision is not an appropriate exercise on appeal.

### **Ground 1: analysis**

58. I reject this ground. Stripped back, it is essentially a thinly disguised attack on the Judge's exercise of his discretion. The Judge's approach to limitation in relation to both the informed consent complaint (where no complaint is made) and the negligence complaint was correct in law and well within his discretion.
59. The starting point is that the Trust's written submissions acknowledge that the Judge referred to the relevant considerations. They argue however that had the Judge taken what they label "the proper approach" to the forensic prejudice suffered by the Trust the Judge would have reached a different conclusion. It is clear to me that the Judge's approach to the issue of prejudice was both justified on the evidence before him and correct in law.
60. A finding under section 33(3)(b) that having regard to the delay (underlining added), "the evidence adduced or likely to be adduced...is likely to be less cogent...", cannot be made in reliance upon bare assertion in submissions. It requires at the very least some evidential or sound inferential basis upon which to make findings about what evidence was not just possible, but likely; and that it was not just possible that it would be less cogent, but "likely" so to be.
61. Putting to one side Mr Campbell's absence, before the Judge the Trust adduced no evidence at all of any steps it had taken to try to trace any other witnesses it had identified (but which it could not trace), let alone any issue with their likely recall of events, if traced. I note in this regard that the witness statement of Ms Morris-Thomas, Legal Officer of the Trust, prepared 4 years after the first notification of a claim, makes no mention of any untraced or untraceable witnesses. These are matters which mandate evidence if a party wishes to assert prejudice given the evidential burden is on the party asserting prejudice: LB Haringey v FZO [2020] EWCA Civ 180 at [114-115]. The need for evidence of prejudice in relation to assertions of witness tracing or recall problems was also highlighted in Carroll at [51].
62. Accordingly, the Trust's assertions concerning other witnesses (repeated on appeal before me) are pure speculation in the absence of evidence, which the Judge would have been entitled to exclude entirely from consideration or weigh against the Trust. But it appears that, benevolently to the Trust, the Judge did bear the point in mind to some extent. He was right to note however that other (factual) witnesses were unlikely to be important concerning whether the surgeon was negligent.
63. As to the submission that the quality of Mr Azam's evidence was bound to have gone stale with time, it is clear that the Judge's reason for finding against Mr Azam on the section 14 date of knowledge issue was not on the basis of a rejection of his evidence as likely to have gone stale. The Judge in fact simply preferred the Trust's submissions that section 14 knowledge (that the injury was significant) did not also require there to

be knowledge that the injury was a negligent caused one or the surgical outcome worse than he could reasonably have expected it to be.

64. I also reject the submission that the Judge ignored or did not give appropriate weight to collateral forensic prejudice and wrongly held that the medical records were detailed and impressive. This does not accurately record the Judge's finding. What he said was: (underlining added): "The medical records of the defendant pre-operation and the operation itself and as to what happened thereafter appear on their face to be relatively comprehensive and have been kept and will be available to the court at the trial" (Judgment, para.26). The underlined words are important. The Judge was not making final findings on how comprehensive the records were, but noting his impression.
65. The Trust has accepted that this is a finding of fact, which cannot be disturbed on appeal. This point accordingly does not advance the appeal.
66. In any event, I found persuasive the submission on behalf of Mr Azam that if the Trust is right that the records contain little detail, any forensic prejudice arising would not have resulted from the delay in commencing proceedings, as it must do to weigh against the exercise of the discretion: Carroll at [48-50].
67. But even ignoring the absence of a link with culpable delay, it would be wrong in principle (as well as very odd), if the Trust could rely upon its own clinician's shortcomings in record keeping as a ground of prejudice in its favour. This would encourage poor practice and make it forensically advantageous, which would be perverse.
68. Even if the claim had been brought before Mr Campbell's death, it would have been difficult for him to add significant information which did not appear in those records because:
  - (a) as the Judge found, it is highly unlikely that he would have recalled the operation, even if the claim had been brought in time; and
  - (b) any such additional information if material should have been recorded in the records.
69. I would add that the care with which the Judge approached questions of collateral forensic prejudice is evident from his decision to refuse the exercise the section 33 discretion in relation to the claim alleging a lack of informed consent. I have set out his reasoning in full above. There was a dispute about whether the consent form was correct in indicating a discussion about the downsides of surgery and other options. Balancing the relevant factors for and against but giving precedence to the prejudice to the Trust's ability to defend, the Judge refused to permit that aspect of the claim to proceed. He was entitled to infer there was obvious prejudice to the Trust arising from the lack of Mr Campbell's evidence.
70. It was open to the Judge to take a different approach in relation to whether the operation was performed negligently. In that regard I can see no error in his approach which was to give weight to the existence of the medical records and to conclude that the issue turned on expert evidence.

71. It is the death of Mr Campbell which the Trust places at the high point of its case, describing this as the “the very epitome of forensic prejudice.” This is to assume that which the Trust bears the evidential burden to establish. Contrary to the implication in this appeal the death of the impugned operating surgeon in a case of alleged negligent surgery does not fall to be treated as *necessarily* prejudicial to the defence of the claim.
72. At the level of principle, prejudice is not self-proving by reason of the death of the clinician or in every such case the section 33 discretion would be automatically exercised in favour of the defendant. It is clearly an important factor and may in some cases be of very substantial weight. In clinical negligence it is not determinative: Mossa’s Estate v Barbara Wise [2017] EWHC 268. But even in abuse cases it is not a trump card for a defendant. I note that in DSN v Blackpool Football Club Ltd [2020] EWHC 595, the defendant’s key witness, a football coach who it was alleged engaged in sexual abuse against the claimant had died after the expiry of the primary limitation period but prior to the claim being issued, and another relevant witness for the defendant, a youth manager, had also died. Despite these two deaths and the claim being issued 22 years out of time, the limitation period was extended at [68].
73. The Trust’s assertions about what assistance Mr Campbell’s evidence would have provided to any Trust expert are a matter of speculation upon which the Trust called no evidence and cannot make out the evidential burden. I was addressed orally by Counsel for the Trust as to what Mr Campbell may have been able to say in his witness statement. However, none of this had any evidential basis and how this would have helped the experts was not a matter on which there was any evidence before the Judge.
74. In this regard, the Judge was entitled to find that Mr Campbell’s account as to his standard practice would have been unlikely to have been of much assistance to the court beyond what the experts say as to whether the operation was carried out negligently or not, especially with the notes available to the Court.
75. The Judge had available to him and was entitled to attach weight to the fact that Mr Azam’s expert, Mr Goodacre said in his report that the wrong technique was used and the operation was carried out very badly. The evidence as to what was done in the operation and how well it was done “remains in effect in the appearance of Mr Azam’s chest, according to his expert, which was examined by his expert and can be examined by the defendant’s expert” (Judgment, para.26).
76. The relevant expert evidence from Mr Goodacre was uncontradicted by any expert evidence for the Trust at the limitation trial. Even if a “full blown” responsive expert report was not called for at this stage on ground of proportionality, a report explaining even in outline terms how the evidence of the operating surgeon would be relevant to the claim could have been commissioned.
77. The Trust chose not to call expert evidence to make good the evidential burden of asserted prejudice. That was a litigation decision open to it, but it carries risks in a trial situation. If it had called such evidence, experts might have opined that Mr Campbell’s factual evidence was needed in order for the Trust’s defence to be properly advanced.
78. But with no such evidence before him, there was no error in the Judge resolving the balancing act against the Trust, bearing in mind Mr Azam’s expert evidence. I emphasise that this was a trial and not an interlocutory hearing. Given the nature of the

type of errors said to have been made by Mr Campbell, the Trust had to establish its case on prejudice flowing from Mr Campbell's death by evidence and not mere assertion. Ground 1 fails.

79. I also have no hesitation in rejecting Ground 2. It proceeds on the ambitious basis that the Judge "failed to perform the balancing exercise". Yet, throughout the material parts of the Judgment, that is exactly what the Judge was doing.
80. First, he undertook that exercise in deciding (in the Trust's favour) that Mr Azam could not pursue the lack of informed consent issue. And he did the same thing in deciding (in Mr Azam's favour) that Mr Azam could pursue the negligence claim. Both of those decisions followed correct directions in law, identification of the material factors and a balancing of those matters.
81. The attack made by the Trust on appeal is simply an attempt to reargue the case on discretion. What the Trust has not been able to persuade me of is that there was any error in the Judge's crucial conclusory paragraph 27.
82. In paragraph 27 of his Judgment, the Judge held that the remaining considerations in the section 33(3) shopping list were of "relatively minor importance", and there was no real prejudice to the Trust as regards its ability to defend the claim. This followed his conclusion at paragraph 26, which I have upheld above, that the death of Mr Campbell was in the circumstances of this case unlikely to have been of much assistance in establishing prejudice.
83. This was not in any event a case where the factors *all* went one way. Even if (contrary to this view) the balance sheet was heavily weighed against Mr Azam, there was no error of law in the Judge's approach to give the lack of prejudice point significant weight. That was a matter for him.
84. I emphasise that what the Judge decided in this case (and what I have decided on appeal) does not set some precedent that stale claims are permissible, even when the treating physician has died. Each case depends on its own facts. I accordingly reject the suggestions made in writing on behalf of the Trust, but not repeated orally, that there would be some form of "floodgates" problem if the Judge's approach in this case to the Section 33 issue is upheld.
85. Overall, I reject the complaint that the Judge failed to conduct the balancing exercise required or that his ultimate conclusion was plainly wrong. There was no need for the Judge (when he came to the negligence claim) to restate all of the legal principles which he had clearly and correctly stated and applied a few paragraphs earlier when dealing with the informed consent claim. The suggestion that he had forgotten and failed to apply those principles when considering the negligence claim is fanciful. Ground 2 fails.

## **VII. Conclusion**

86. The Judgment is unimpeachable. The Judge directed himself correctly in law, identified the relevant considerations on the evidence and these were the considerations which informed the exercise of his section 33 discretion. He also gave clear and succinct

reasons for his conclusions. The Judgment is all the more impressive given that it was delivered *ex tempore*.

87. The appeal is dismissed.