[2001–02 Gib LR 58]

MENICH v. MATHEWS

SUPREME COURT (Schofield, C.J.): April 27th, 2001

Estoppel—representation—detrimental reliance—if claimant refrains from instituting proceedings within limitation period in reliance on defendant's representation that liability admitted, defendant estopped from pleading limitation

Limitation of Actions—extension of time—agreement to extend—no extension of limitation merely on basis of agreement between parties, though agreement may support estoppel

In personal injury litigation, the court was asked to decide the preliminary issue of whether the defendant's earlier acceptance of liability estopped her from pleading limitation.

The claimant was injured by a car driven by the defendant. The defendant's solicitors accepted liability and her insurers made a number of payments to the claimant for special and general damages. Correspondence between the parties' solicitors indicated that they were virtually agreed on liability but had not finalized the quantum and the claimant was induced to believe that if he issued proceedings, liability, including issues of limitation, would not be an issue. The claimant issued a writ outside the three-year limitation period, claiming damages for the injury suffered as a result of the defendant's negligent driving.

The claimant submitted that having accepted liability, the defendant was estopped from denying liability by pleading limitation, as the defendant had in effect contracted not to raise any defence to liability.

The defendant submitted in reply that whilst liability was accepted, it had not been agreed to waive or extend the period of limitation and the writ was time-barred as it was issued outside the three-year limitation period.

Held, ruling in favour of the claimant:

The defendant could not be denied the plea of limitation merely on the basis of an agreement between the parties. Nevertheless, his solicitors had made a representation from which it was reasonably inferred that liability would be admitted, and on that basis the claimant had refrained from instituting proceedings within the prescribed period. The defendant was therefore estopped from escaping liability by pleading that the action was time-barred (para. 28; para. 41).

Cases cited:
(1) *Bird* v. *Birds Eye Walls Ltd*., *The Times*, July 24th, 1987, *dicta* of Ralph Gibson, L.J. referred to.
(2) *Deerness* v. *Keeble & Son*, [1983] 2 Lloyd's Rep. 260; [1983] Com. L.R. 221, distinguished.
(3) *Doran* v. *Thompson & Sons Ltd.*, [1978] I.R. 223, followed.
(4) *Gale* v. *Superdrug Stores P.L.C.*, [1996] 1 W.L.R. 1089; [1996] 3 All E.R. 468, *dicta* of Thorpe, L.J. considered.
(5) *Lubovsky* v. *Snelling*, [1944] 1 K.B. 44; [1943] 2 All E.R. 577, considered.
(6) *Sauria, The*, [1957] 1 Lloyd's Rep. 396, considered.
(7) *Wright* v. *Bagnall & Sons Ltd.*, [1900] 2 Q.B. 240; (1900), 82 L.T. 346, considered.

D. Hughes for the claimant;
S. Triay for the defendant.

1 **SCHOFIELD, C.J.:** On June 27th, 1996, the claimant was riding his motorcycle near the Europa Point roundabout when he was hit by a motor car driven by the defendant. The exact nature of the claimant's injuries have not been made available to me for the purposes of this hearing, as the extent of such injuries is not relevant to the point in issue. However, it is clear from the correspondence between the solicitors that the injuries were serious, requiring surgical procedures to be carried out on the claimant and involving his being away from work for some time.

2 On May 2nd, 2000, the claimant filed a writ claiming damages for pain, suffering, loss of amenity, loss of prospects in the labour market and past and future earnings, suffered as a result of the defendant's negligent driving of her motor car. As early as December 10th, 1996, the defendant's solicitors, representing Sun Alliance (the defendant's insurers) had accepted liability on the defendant's behalf and, indeed, the insurers made a number of payments in respect of special and general damages to the claimant. I understand that the defendant has not resiled from her acknowledgement that the accident was due to her negligence. Nonetheless, say the defendant's legal advisers, the writ was issued outside the three-year limitation period and is thus time-barred. The claimant argues that, having accepted liability, it is not now open to the defendant to deny liability by pleading that the limitation period has expired. It is this preliminary issue that I have been called upon to determine, namely whether the defendant's earlier acceptance of liability prevents her from pleading limitation.

3 Messrs. Phillips and Co., solicitors for the claimant, first wrote to the defendant's insurers on September 5th, 1996, and it seems that by that time the insurers had already settled some claims by the claimant for special damages. On October 14th, 1996, Karen Prescott wrote to Phillips

and Co. indicating that she had been instructed by the defendant's insurers in the matter and seeking certain information. On December 10th, 1996, Mrs. Prescott wrote to Mr. Phillips in the following terms, unequivocally acknowledging liability on the part of the defendant:

> "I can confirm that my client accepts liability in this matter. As is usual in these cases, my client will meet the expense incurred in obtaining necessary and relevant medical reports, although I would be grateful if you would inform me of your intention to solicit the report as and when this arises. Further, I agree that it would be helpful to us if you could inform us of the costs of these reports before they are incurred.
>
> I can confirm that your client's reasonable legal costs will be met by my client. I await to hear from you once you are in receipt of the medical report and have quantified your client's claim."

4 There then followed a substantial exchange of correspondence involving requests for medical reports, and requests for payment for those reports and for the cost of surgical procedures to the claimant's knee. A number of payments were made to the claimant by the defendant's insurers. Perhaps not without significance is Mrs. Prescott's letter of January 27th, 1997 to Mr. Phillips and his reply thereto. Mrs. Prescott's letter reads:

> "I have read the preliminary medical report, which I find is a little short of the detail which would assist in making a realistic estimate on quantum. I await to receive a full medical report so that we might progress the claim as soon as possible.
>
> With regard to your request for £70.00, I require an invoice/request for payment from the Whittington Hospital, so that I might pass this on to my client company, so that the payment might be approved.
>
> One last point. I note that your letter of January 21st, 1997, was not marked 'without prejudice.' Given that all our correspondence to date has been on a 'without prejudice' basis, I am assuming your letter under reply was intended to be marked 'without prejudice' and I am treating it as such."

5 The relevant part of Mr. Phillips's reply, dated January 28th, 1997, reads:

> "My letter of the 21st was not 'without prejudice,' because by your letter of December 10th, 1996, your client accepted liability and the further correspondence is on the basis of your client's admission of liability.
>
> We have not yet got to the point where offers and counter-offers in relation to quantum can be made, and it may be appropriate that

> there should be some 'without prejudice' correspondence at that stage.
>
> For the moment, this correspondence is so far as I am concerned on the record and I do not see any reason why it need be otherwise for the moment."

6 Thereafter, open correspondence was conducted until it became obvious that the parties were having difficulty agreeing the quantum of damages and proceedings were being contemplated.

7 There was a great deal of activity in the case until Christmas 1997. Thereafter, there was a lull until Mr. Phillips's letter to Mrs. Prescott of July 30th, 1998 re-opened correspondence. This is the first letter after the exchange of January 1997, which was marked "without prejudice." The relevant part of the letter which explains the lull in activity, reads:

> "During the last six months, I have been conferring with expert counsel as to the appropriate measure of damages, but I now have the advice which I have been awaiting.
>
> I do not yet have my client's instructions as to whether he will accept the measure of damages contemplated by expert counsel, and I will not have those instructions until after Mr. Menich confers with myself and expert counsel in England, probably about the end of September.
>
> This letter is to advise you of the extent of the damages being sought and to see whether it is in the range that you are willing to negotiate."

The letter then sets out in general terms the claimant's position on damages. In an open letter of the same day, Mr. Phillips asks for a further payment of £2,000 on account of special damages. This amount was paid over by the defendant's insurers.

8 On August 24th, 1998, Mr. Phillips wrote a further letter to Mrs. Prescott in the following terms:

> "I am arranging to have a conference with my client and with expert counsel in the U.K. during the week of September 20th, with a view to firming up the quantum of damages, and having instructions from the plaintiff as to the measure of damages he would accept from the defendant's insurer in settlement of his claims in this case.
>
> As we discussed when we spoke several weeks ago, the size of the claim is such that it is improbable that we shall be able to agree it on an amicable basis.
>
> I am, therefore, having counsel draft the writ and statement of claim, so that we can issue the proceedings without delay and put the question of quantum in front of the judge, for the court to decide.

However, in the interim, I would be grateful if you could progress with your client the question of the sum that they would offer in full and final settlement of my client's claims herein, and consider the figure that your client might decide to pay into court."

9 Mrs. Prescott's reply, dated September 9th, 1998, was as follows:

"I am in the process of making a final determination of the measure of damages in this case and will need to take final instructions upon the same. I am also arranging for a second opinion on my figures, to ensure accuracy and fairness as far as possible. As soon as the assessment is complete, I will let you know my figures for settlement or if a writ is already issued, I will advise of the payment which is to be made into court at the appropriate time.

I take note that it is your intention to issue a writ soon and that is of course your prerogative, although I would first like to concrete my figures to see if a settlement were possible. In the event that you choose to issue, I confirm that my client will be accepting liability and putting your client to proof as to injuries, *i.e*. all that we would address would be quantum. To this end I would ask you please to note that I will be away from Gibraltar on holiday from September 21st, 1998, to October 19th, 1998. As you know I am a sole practitioner and I have no qualified staff to take over my work whilst I am away. In the event that any writ you may issue requires the filing of a defence (along the lines above stated) I would be grateful if you would agree to grant me an extension of time until a few days after my return so that I might progress the matter. Of course the above might prove unnecessary but I prefer to err on the side of caution."

This letter contains a clear indication to Mr. Phillips that if he files suit liability will not be an issue.

10 On November 23rd, 1998, Mr. Phillips wrote to Mrs. Prescott, the relevant portion of such letter reading:

"In fact, after having conferred with my client and expert counsel in England at the end of September, it was decided that additional enquiries were required before a complete schedule of special damages could be drawn up.

It was also decided that an expert report by an occupational rehabilitation and employment consultant would be required.

Arrangements have been made to obtain the further reports, but it is probably going to be some weeks before we have them. I will then be in a position to revert to you as to the issue and service of the pleadings.

In the interim, you were awaiting instructions from your client in relation to what your client might put forward as an offer of settlement, on the basis of the existing medical and other reports available to you."

11 Mrs. Prescott's reply, dated December 16th, 1998, reads:

"Having requested further advice on the question of quantum, I have not yet been able to discuss the matter in its entirety with counsel who advised, and until such a time I will not be in a position to take final instructions from my client on the issue of settlement.

I hope to be able to revert to you in the next few weeks with my client's views on settlement of this claim."

12 There was further correspondence between the parties in December 1998 and a letter from Mrs. Prescott dated February 16th, 1999, seeking certain information on the claimant to enable her to prepare an offer of settlement.

13 For some unexplained reason Mrs. Prescott's letter of February 16th, 1999, went without reply. The case then went to sleep until April 27th, 2000, when Mr. Phillips wrote to Mrs. Prescott in these terms:

"I write further to my letter of December 22nd, 1998.

This is a case where your client made a full acceptance of liability at the outset, but the question of quantum still remains to be agreed.

In my letter of December 22nd, I was pressing you to press your client for instructions as to amicable settlement.

In your letter of December 29th, 1998, you undertook to revert to me as soon as possible, but I have heard nothing more from you during the last year and it is remiss of me not to have pressed you further in the interim.

I was awaiting further documentation to evidence the damages, but I believe I now have everything I need.

Because we have dealt with this matter on the basis of the existing (pre-Woolf) rules, and because the only outstanding matter that may arise will be a calculation of the damages by the court, I am issuing a writ now, before the new Civil Procedure Rules come into effect.

If we can agree the question of quantum, there will be no need for me to serve the writ upon you.

Your client has never asked to have access to the plaintiff for his own medical reports. If that would be required, please come back to me as soon as possible and I will make the arrangements. The plaintiff is now in London.

In the interim, I would be grateful if you would request your clients to agree to make a further payment of interim damages in the sum of £6,000.00. In default of such agreement, an application will be made in court.

I will revert to you shortly, but I would be grateful if you would take up the question of the further payment of interim damages, and seek instructions in relation to an amicable settlement on the question of quantum, without the necessity of taking the point to the court.

I look forward to hearing from you at your earliest convenience."

14 For the sake of completeness, I should recite Mrs. Prescott's reply to that letter, dated May 2nd, 2000:

"You are right to say that in your letter of December 22nd, 1998, you asked me to press my client for instructions on the issue of settlement. However, you omit to say in the same letter of December 22nd, 1998, that you also advised that you were waiting for a schedule of damages and an expert report from an occupation rehabilitation and employment consultant. When you had those further documents you said you would then be in a position to issue and serve the writ and statement of claim, and you said you would revert to me on the service of proceedings and on the possibility of reaching an amicable settlement. I have not heard from you since that letter of December 22nd, 1998.

Notwithstanding, on February 16th, 1999, I wrote to you requesting further information and clarification in relation to your client's salary details and employment and I made the point that the information requested was necessary if we were to seriously attempt to settle. You ignored that letter and, as I said, I have not heard from you since December 22nd, 1998, when you promised to revert to me.

I do not understand your para. 8. My client has always requested sight of the plaintiff's medical reports and you had given me to understand that the defendant had been provided with copies of all reports.

In any event you will be aware that the limitation period in this matter expired on June 27th, 1999, some 10 months ago.

The plaintiff could have issued a writ within the limitation period—or if the supporting documents were not ready he could have issued a protective writ, or at the very least have attempted to agree an extension of time—none of the above was done and you have not contacted us in the one year and four months since your last letter. The defendant has long been entitled to consider this matter at an

> end and has indeed done so. Therefore, given the expiry of the limitation period, my client is unable to entertain any further claims for damages and this matter must be considered at an end.
>
> It is of course a matter for you to consider whether you wish to apply to court for leave to issue proceedings out of time."

15 Mr. Phillips's response was to notify Mrs. Prescott of his opinion that the defendant was estopped from denying liability, having earlier admitted it.

16 Mr. Phillips has testified that he did not consider it necessary for proceedings to be issued within the three-year limitation period because the defendant had contracted not to raise any defence to liability and furthermore, that the defendant was estopped from raising a defence to liability. For him, the limitation period was not an issue. He said that every case has its own rhythm and in this case it was a leisurely one. During 1998 the claimant obtained a qualification in information technology, and anticipated towards the end of the year that he would be in better paying work. This would markedly lower the quantum of damages and he therefore anticipated that the case would be settled without recourse to court proceedings. He did not regard the matter to be urgent because he had an admission of liability. It was only when the implementation of the Woolf reforms loomed that he thought he ought to file action.

17 Mrs. Prescott on the other hand says that whilst liability was accepted, she did not agree to waive or extend the period of limitation. The possibility of raising a defence of limitation was not in her mind when liability was admitted within six months of the accident and she anticipated matters to be settled well within the limitation period. Mrs. Prescott says she did not give a firm commitment to agree quantum without recourse to litigation. By her letter of September 9th, 1998, she sought to confirm what she thought was clearly understood between the solicitors, namely, that it was not necessary for the claimant to establish that the accident had been caused by the negligence of the defendant, although the defendant's liability was still subject to proof of recoverable damage.

18 Mrs. Prescott further says that at no time did the claimant request an extension of time in which to issue and serve proceedings after the expiry of the limitation period. She planned to be away from Gibraltar for periods in September and October 1999, and on September 1st, 1999, she conducted a search in the Supreme Court Registry to ascertain if any writ had been issued in the matter. She then went on leave knowing that the limitation period had expired, but left the matter in the hands of Messrs. Triay & Triay in case any application was made to court whilst she was

away. It did not occur to her that the claimant would attempt to argue that she had agreed to extend the period of limitation or to waive it.

19 I can turn to a number of authorities for guidance. The first is that of *Wright* v. *Bagnall & Sons Ltd.* (7). In that case the plaintiff had a claim for compensation against his employer under the Workman's Compensation Act 1897. The parties agreed that there was statutory liability, but could not agree on the amount to be paid. When the plaintiff filed for arbitration in the county court he was met with an argument, accepted by the judge, that the proceedings were out of time because by s.2(1) of the Act of 1897, a claim for compensation was required to be made within six months of the accident causing the injury. The Court of Appeal held that the judge was in error. Collins, L.J. said ([1900] 2 Q.B. at 244):

> "It seems to me that there was evidence at the hearing in the county court fit to be considered by the judge, and that the judge himself in effect found, that the parties had agreed that there was a statutory liability on the respondents to pay compensation, and that each of them had reserved the right to go to the Court to have the amount determined. Weekly payments were made to the appellant; but there was an argument as to the amount at which the weekly payments should be commuted, and the respondents' manager or foreman said, as appears by the evidence, that if the appellant stood out for so large an amount as 200*l*. they would have to go to the Court. The workman and the masters thereupon forebore to take steps to have the amount assessed, and during the period in which they were negotiating the six months' limit of time ran out. In that state of things there was ample evidence of an agreement that compensation was to be paid, the only question left open being that of amount. If that is the case, the respondents are debarred from raising the point that the statutory limitation applied. In my opinion they have also debarred themselves from raising this point by treating the matter as open to negotiation during the whole time in which they were paying the appellant, and, having allowed the six months to expire while the negotiations were still proceeding, they cannot then turn round and say that the time for claiming compensation has gone by. In my opinion there is ample evidence on which the county court judge might find that the respondents are not entitled to raise the defence of the lapse of the six months, and there is nothing in point of law to prevent him from so finding. The case must therefore go back."

Vaughan Williams, L.J. said (*ibid*., at 244–245):

> "I agree. I think that the result of the evidence is that there was an agreement that the respondents were to be liable to pay compen-

sation, and that if the parties could not agree as to the amount they must go to the Court to have it determined. I think the lapse of time cannot be set up as a bar to the claim."

20 *Wright* was followed in *Lubovsky* v. *Snelling* (5) in which the plaintiff, as administratrix of her husband, claimed damages for the death of her husband which had been caused by the defendant's negligence. The insurers admitted liability, but it was agreed between the parties that they would have to go to court to have the damages approved and apportioned. Under s.3 of the Fatal Accidents Act 1846, proceedings had to be commenced within 12 months of the death of the deceased. A writ was issued within this period but as the plaintiff had not by then taken out letters of administration, it had to be withdrawn. A second writ was issued about six weeks outside the limitation period and was met by a defence of limitation. The judge gave judgment for the defendant and his decision was reversed by the Court of Appeal. Scott, L.J. had this to say ([1944] 1 K.B. at 46):

"The sole issue in the appeal is whether it was open to the defendant, in the circumstances of the case, to raise the plea that the plaintiff's claim was barred by s.3 of the Act of 1846. I have no doubt that the plea was not so open, and to take the point was, in my opinion, discreditable, if not dishonest, on the part of the society. The plain meaning of the agreement made with the representative of the society at the meeting in August, 1941, was that liability in damages to the plaintiff's cause of action for the money loss resulting to the dead man's dependants was once and for all definitely accepted by both the defendant and his insurers, and both of them were thereafter precluded from putting forward any defence whatever which would impeach that liability. It was just as much a contract not to plead s.3 of the Act, as if that undertaking had been put in words; and the society knew it at the time when it caused that plea to be recorded. That is why I have spoken of their conduct in terms of such grave censure.

The arrangement that a writ should be issued was both natural and necessary. It was natural for the plaintiff's solicitors to be glad to be able, in their negotiation for a suitable figure for damages, to say that, if his reasonable demand was not considered, it should be left to the judge. It was necessary for apportionment that the judge should apportion, but the date of the writ did not matter in the least for either of those purposes. It follows, therefore, that it did not matter for any purpose relevant to this appeal whether the writ in the present proceedings was before or after the lapse of the twelve months from the death."

21 Goddard, L.J. said (*ibid.*, at 47):

"There was clearly an agreement made by the representative of the defendant's insurance company with the plaintiff's solicitor that liability was admitted, but that the amount of the damages was to be fixed and apportioned by the court. There was, and would be, no question of the authority to make this agreement, and, in my opinion, s.3 of the Fatal Accidents Act, 1846, does not affect the cause of action but merely prescribes a period of limitation. It in no way differs from the provision in s.2, sub-s. I of the Workmen's Compensation Act, 1897, that the claim for compensation must be made within six months. I can, therefore, see no distinction between this case and that of *Wright* v. *John Bagnall & Sons, Ld.*, which is binding on this court."

22 In *The Sauria* (6), the plaintiffs' motor vessel was struck by the barge *Trent* which was being towed by the tug *Sauria*. Correspondence ensued between solicitors for the plaintiffs and for the defendants in the course of which the defendants' solicitors admitted that the *Trent* had lightly struck the plaintiffs' vessel and that it fell to be decided whether the *Trent* caused the damage claimed and what amount of damage was in fact caused by the collision. The plaintiffs' solicitors then suggested that the question of quantum should be conveniently dealt with by arbitration before a junior counsel. The defendants' solicitors responded that the sole point to be decided was as to how much damage the *Trent* inflicted. In further correspondence the defendants' solicitors repeated that liability was admitted for contact between the *Trent* and the plaintiffs' vessel. There was further correspondence as to the form of arbitration, which was then followed by a period of 16 months' silence. After some further correspondence the plaintiffs' solicitors filed action, just over $3\frac{1}{2}$ years after the collision. The defendants sought to have the proceedings stayed on the ground that the claim was made outside the two-year period of limitation laid down by s.8 of the Maritime Conventions Act 1911.

23 In his judgment in the Court of Appeal, Lord Evershed, M.R. discussed the decision in *Lubovsky* (5) and went on to say ([1957] 1 Lloyd's Rep. at 400):

"Of course that case binds us. But as it seems to me there is this essential distinguishing feature between that case and the present. In *Lubovsky's case* it was an essential part of the bargain made that proceedings in Court were to be commenced for the purpose of ascertaining the *quantum* and the apportionment, whereas in this case it is apparent from the correspondence which I have read that what was being discussed was the proposal that no proceedings in Court would be necessary but that this should be an arbitration before Junior Counsel as the most expeditious and economical way of settling the matter of *quantum*. On that difference in the facts—it

may be a narrow one—I am content to distinguish this case from the other."

24 Lord Evershed then went on to consider whether the correspondence, in fact, involved an admission of liability on the part of the defendants. He then said (*ibid*., at 401):

"Let me assume that the letters do constitute, as I think they do, an unequivocal admission of liability. What are the alleged terms of the contract in this case which Mr. Bucknill claims to set up? I find the greatest difficulty, for my part, in seeing where the consideration for such a contract is to be found. Assume, however, that there was consideration, then what had this admission to do with any right to plead the limited period under Sect. 8 of the Act of 1911? It does not seem to me that that question of limitation can be brought into the alleged bargain at all. For my part, I think this was simply an admission that the plaintiffs, from and after January, 1955, need not concern themselves, in whatever steps would otherwise be necessary, to prove negligent navigation on the part of the owners of the tug. Beyond that, I cannot see that what passed in the correspondence involved any concession which would amount to a promise, an enforceable promise, to waive the right to plead the statute if the plaintiffs did not start proceedings until the statutory period had run out.

I think it might well be, having regard to the very slow speed with which these solicitors appeared to have conducted this correspondence, that, had the summons been issued somewhat late, a week or two after the two years had expired from June 16, 1953, the Court should and would, in the exercise of its discretion under the proviso to the Section, have extended the time accordingly. But what happened? There followed—after the letter of June 14, 1955, which was, be it observed, five months after the admission in January—this long period of total silence; and it was not until January, 1957, that the present proceedings were started. I cannot find any basis for saying that what occurred in the correspondence which I have read amounted to a binding contract not to plead the statute in the circumstances which occurred, namely, the plaintiffs having chosen to delay all that period before commencing these proceedings."

25 Morris, L.J. agreed with Lord Evershed and had this to say (*ibid*., at 403):

"I think that the reasoning in *Lubovsky v. Snelling*, *sup.*, is that the agreement made between the parties in that case was one which contemplated, and indeed which stipulated, that an action would be

brought; and it was an implied term of the agreement that neither side would take any step which would make it impossible to have the matter settled in Court in an action. I cannot see anything of that nature here. I do not think that there was any implied agreement on the part of the defendants to the effect that they would not exercise the rights which they would have if proceedings were not brought within the period designated by Sect. 8."

26 The last authority directly on point to which I was referred is the Irish Supreme Court case of *Doran* v. *Thompson & Sons Ltd.* (3). In *Doran*, the three cases I have referred to above were considered in the course of proceedings before the High Court and the Supreme Court on appeal. The facts in *Doran* were these. On July 20th, 1972, the plaintiff was injured in an accident which occurred while he was working for his employer, the defendant. Shortly after they were consulted by the plaintiff in October 1973, the plaintiff's solicitors wrote to the defendant on behalf of the plaintiff and claimed compensation for his injuries and loss. The defendant's insurers replied on December 18th, 1973, stating that they were investigating the accident and asking for arrangements to be made for the examination of the plaintiff by the insurer's doctor. The plaintiff's solicitors experienced considerable difficulty in making arrangements for the plaintiff's doctor to attend such examination. In May 1975, the insurers were informed by the plaintiff's solicitors that they agreed to the plaintiff's being examined by the insurer's doctor alone provided that they received a copy of the doctor's report. The plaintiff's cause of action became statute barred on July 20th, 1975. The plaintiff was examined by the insurer's doctor on July 29th, 1975. The insurers did not inform the plaintiff's solicitors of the results of the insurers' investigation of the accident or notify the solicitors that liability was being denied, nor did the insurers discuss liability or damages with the plaintiff or his solicitors. The plaintiff claimed damages from the defendant in an action which was instituted in the High Court on February 18th, 1976. The defendant pleaded that the plaintiff's claim was statute barred and the plaintiff replied that the defendant was estopped by the acts and representation of the defendant's insurers from pleading the statute. At the trial of the preliminary point of law raised by the pleadings, it was decided by the High Court that the defendant was estopped from pleading the statute.

27 On appeal to the Supreme Court, it was unanimously decided that, as a matter of fact, the defendant at no time could be said to have admitted liability. Nonetheless, two of the judges were of the view that if there had been an admission of liability, the defendant would have been estopped from pleading limitation. Kenny, J. adopted a more cautious approach and said ([1978] I.R. at 239):

"The question whether an admission of liability without more makes it inequitable to rely on the Statute of Limitations or whether

the admission of liability must have been relied on by the plaintiff's solicitors as a ground for not issuing proceedings was not discussed in argument and, in any event, does not arise. I find it difficult to reconcile the remarks of the former Chief Justice with the reasoning in *The Sauria* on this point, and so I reserve this for future consideration."

28 Be that as it may, the majority view of the court adopted an approach which has been put forward by the claimant's counsel in this case as the correct approach. Henchy, J. had this to say (*ibid*., at 225):

"Where in a claim for damages such as this a defendant has engaged in words or conduct from which it was reasonable to infer, and from which it was in fact inferred, that liability would be admitted, and on foot of that representation the plaintiff has refrained from instituting proceedings within the period prescribed by the statute, the defendant will be held estopped from escaping liability by pleading the statute. The reason is that it would be dishonest or unconscionable for the defendant, having misled the plaintiff into a feeling of security on the issue of liability and, thereby, into a justifiable belief that the statute would not be used to defeat his claim, to escape liability by pleading the statute. The representation necessary to support this kind of estoppel need not be clear and unambiguous in the sense of being susceptible of only one interpretation. It is sufficient if, despite possible ambiguity or lack of certainty, on its true construction it bears the meaning that was drawn from it. Nor is it necessary to give evidence of an express intention to deceive the plaintiff. An intention to that effect will be read into the representation if the defendant has so conducted himself that, in the opinion of the court, he ought not be heard to say that an admission of liability was not intended."

29 Griffin, J. agreed, and said (*ibid*., at 230–231):

"It is with the utmost regret that I also differ from the trial judge. Where one party has, by his words or conduct, made to the other a clear and unambiguous promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, and the other party has acted on it by altering his position to his detriment, it is well settled that the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, and that he may be restrained in equity from acting inconsistently with such promise or assurance. The representation, promise, or assurance must be clear and unambiguous to found such an estoppel: see Bowen L.J. at p. 106 of the report of *Low* v. *Bouverie*. But this does not mean that the representation must be one

positively incapable of more than one *possible* interpretation. Where, however, more than one construction is possible, the meaning relied upon must clearly emerge in the context and circumstances of the case, although in other contexts or other circumstances the same words might possibly have borne a different construction. In addition, the party relying on the representation must show that the representation was *reasonably* understood by him in a sense materially inconsistent with the allegation against which the estoppel is attempted to be set up: see Cairns L.J. at p. 306 of the report of the decision of the Court of Appeal in *Woodhouse Ltd*. v. *Nigerian Produce Ltd*. where he explained and analysed the celebrated passage of Bowen L.J. in *Low* v. *Bouverie*.

If the defendants' insurers had made a clear and unambiguous representation (in the sense I have explained) that liability was not to be in issue, and the plaintiff's solicitor had withheld the issue of proceedings as a result, I would have held that the defendants were estopped from pleading the Statute of Limitations. In my opinion, however, on the agreed facts there was no promise, assurance, or representation made by the insurers to the plaintiff's solicitor, and none can be inferred from the correspondence, the telephone conversations, or the conduct of the insurers. Apart from stating in their first letter that they were investigating the circumstances of the accident, the insurers thereafter made no reference, express or implied, to the circumstances of the accident or the question of liability."

30 Mr. Triay argues that this statement was made *obiter*, but in my judgment the statement, and the passage I have quoted from the judgment of Henchy, J., were statements of law upon which the determination of the facts rested.

31 It is not without significance that this last passage from the judgment of Griffin, J. is recited in *Butterworth's Personal Injury Litigation Service* at Division VI, which deals with the law on limitation. It contains the following paragraphs:

"2. *Waiver by the defendant*

. . .

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. . .

(4) Can he? *Yes*. A defendant can, if he wishes, waive the protection otherwise afforded to him by the Act: *Lubovsky* v. *Snelling* [1944] K.B. 44; [1943] 2 All E.R. 577, C.A.

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. . .

(2) Waiver—how? The defendant will be taken to have waived a limitation period (by estoppel) if he or his insurers have expressly declared to the plaintiff that:

(a) they would not rely on a limitation period, or

(b) they were admitting liability, or

(c) that the issue related only to quantum.

See *Doran* v. *Thomas Thompson and Sons Ltd.* [1978] I.R. 223 . . .”

32 Although Mr. Phillips did not specifically say in his evidence that he relied on this passage in a leading practitioners’ text to found his understanding that once liability had been admitted limitation could not be pleaded, he stated unequivocally that such was his understanding of the law.

33 For the sake of completeness I shall also refer to two further cases cited by defendant’s counsel. In *Deerness* v. *Keeble & Son* (2) the plaintiff was very seriously injured when the car in which she was travelling ran into a lamp standard on a motorway. The plaintiff’s solicitors contacted the defendants’ insurers and negotiations proceeded in a desultory fashion. Liability was not in question after one defendant was convicted, on his plea, to a charge of careless driving. Eventually, the plaintiff’s solicitors issued a writ, but it was not served within 12 months of its issue, nor was any application made for its renewal before the period of limitation expired. Meanwhile, the defendants’ insurers had made an interim payment of damages to the plaintiff. More than $3\frac{1}{2}$ years after the cause of action arose, it was realized that on existing law it was unlikely that an extension of the validity of the writ would be granted. A fresh writ was issued and the insurers denied liability on the basis that the claim was time-barred. The plaintiff applied under a provision of the Limitation Act 1980, which allowed an action otherwise time-barred to be continued in exceptional circumstances. The matter reached the House of Lords, where it was unanimously determined that none of the matters relied on as exceptional circumstances could overcome the limitation bar.

34 I do not derive a great deal of assistance from this case, other than as authority for the proposition that an interim payment of damages by a defendant does not of itself amount to an admission of liability for the following reasons. First, liability was never formally admitted by the defendants’ insurers. Secondly, it was clearly stated by the plaintiff’s solicitors in the pleadings that the delay in serving and re-serving the writ was as a result of oversight on their part. Thirdly, none of the cases I have

referred to above appear to have been cited to their Lordships. Lastly, that the point at issue in this case was argued almost as an afterthought, as is clear from the following passage from the opinion of Lord Diplock with which the other members of the House agreed ([1983] 2 Lloyd's Rep. at 264):

> "My Lords, at the hearing before this House a belated attempt was made by junior Counsel for the plaintiff to invite your Lordships to restore the order of Mr. Justice Comyn on a quite separate ground which had never previously been advanced before the Judge or the Court of Appeal or in the petition for leave to appeal to this House or even in the plaintiff's written case on the appeal. This was that there could somehow be spelt out of the correspondence between the solicitors and Cornhill and the 'interim payment' of £5000, either an agreement by Cornhill not to rely upon the Statute of Limitations, 1980, in any action that the plaintiff might bring at any future time, or a representation by Cornhill that it would not rely upon the statute, by which the solicitors had been induced to refrain from renewing the writ that they had caused to be issued.
>
> No basis for any such argument is to be found in the pleadings. The highest at which any expectations aroused by the conduct of Cornhill are put is in par. 7 sub-par. (*c*) of the amended statement of claim which I have already quoted. It is alleged that the plaintiff herself believed that her claim would be settled without recourse to litigation, not that the defendants would rely on the Limitation Act, 1980, if subsequent delay gave them the opportunity of doing so. On the contrary the statement of claim avers that the cause of the failure to serve or renew the writ was an oversight on the part of the solicitors. There is no suggestion that such oversight was induced by any conduct or representation by Cornhill. Reasons which had nothing to do with Cornhill's conduct were given for it. Furthermore Mr. Crane's affidavit in support of the application under s.33 lays no factual foundation for the existence of any such agreement of estoppel."

35 Defence counsel referred me to the Court of Appeal decision of *Gale* v. *Superdrug Stores P.L.C.* (4) to demonstrate that a defendant can always change his mind and, after admitting liability, withdraw such admission. In *Gale* it was accepted that the test to be applied by the court when faced with a retraction of an admission of liability was that stated by Ralph Gibson, L.J. in *Bird* v. *Birds Eye Walls Ltd*. (1), namely ([1996] 1 W.L.R. at 1096):

> "[W]hen a defendant has made an admission the court should relieve him of it and permit him to withdraw it or amend it if in all the

> circumstances it is just to do so having regard to the interests of both sides and to the extent to which either side may be injured by the change in front."

36 Two points about *Gale* immediately come to mind. First, that there is no suggestion in the instant case that the defendant wishes to withdraw his admission of negligent driving or his admission that his negligent driving caused the plaintiff injury. Secondly, I suggest that if the withdrawal of an admission prevented the claimant from pursuing his claim, that would be an injury to him which would greatly influence the court's decision on whether to relieve a defendant of his admission. Furthermore, I find of particular interest the dissenting judgment of Thorpe, L.J. I should first set out the facts of the case, which were these. The plaintiff was injured in an accident which occurred while she was working in the defendants' store. She alleged negligence against the defendants, and their insurers admitted liability in correspondence and made an interim payment on account of damages. When the matter had still not been settled towards the end of the limitation period, she commenced proceedings to prevent her claim becoming time-barred. The defendants lodged a defence denying all liability and pleaded contributory negligence. The district judge granted the plaintiff's application for the defence to be struck out. The judge dismissed the defendants' appeal, holding that the defendants' withdrawal of their admission of liability had caused the plaintiff prejudice by reason of delay and disappointment.

37 On appeal, Waite and Millett, L.JJ. held that the judge had wrongly exercised his discretion in striking out the defence. The judgment was delivered before the recent civil justice reforms were brought into effect, but at a time when moves were being made towards firmer judicial control of civil litigation. Thorpe, L.J., in his dissenting judgment, had this to say (*ibid*., at 1101–1102):

> "Although his judgment was given some weeks before the issue of the Lord Chief Justice's practice direction calling for much firmer judicial control of civil litigation (see *Practice Direction (Civil Litigation: Case Management)* [1995] 1 W.L.R. 508), it certainly reflects the message of the direction. The civil justice system is under stress and far-reaching reforms are in prospect. There is a public interest in excluding from the system unnecessary litigation and a consequent need to curb strategic manoeuvring. Here the plaintiff presented the defendants insurers with the choice of an admission of liability or service of writ. The defendants insurers, presumably advisedly, chose to admit liability. That admission was the foundation of over two years of continuing search for a compromise on quantum. As Mr. Soole submitted, had the plaintiff

> insisted upon obtaining a consent judgment on the issue of liability before embarking on that protracted negotiation the defendants would have protested that it was a proposal to incur costs to no purpose. I share Judge Wroath's opinion that against that background the defendants explanation for resiling from their admission was 'really a very weak one.'
>
> Although I accept the force of Waite L.J.'s criticisms and although I recognise that this was a robust conclusion in the absence of any specific evidence of prejudice, I ultimately conclude that this was a decision to which the judge was entitled to come in the exercise of discretion and in furtherance of a more disciplinary approach to adversarial manoeuvring which the public interest now requires. I would dismiss this appeal."

38 We are in an era of open litigation where lawyers are expected to deal frankly with each other and with the court. Their Lordships in *The Sauria* (6) were clearly concerned that if an admission of liability were to be taken as a waiver of the limitation period, then the defendant making the admission could be at risk of having to face proceedings long after the limitation period had expired. But it would always be open to a defendant who had admitted liability, and who felt that the passage of time was prejudicing him, to notify a claimant that he would not regard himself to be bound by his admission unless some positive step were taken by the claimant, either to make or accept an offer or to file suit, within a given period. He could avoid the prejudice of any delay by such an open approach.

39 In this case there is no doubt that Mr. Phillips was responsible for an unacceptable delay of over 12 months in the pursuit of the claimant's claim, from about the end of 1998 to April 2000. He has admitted his responsibility for that. Nonetheless, I am satisfied that he was induced by the correspondence, and particularly by Mrs. Prescott's letter of September 9th, 1998, into believing that if he filed proceedings liability would not be an issue. I am also satisfied that on Mr. Phillips's understanding that would include issues of limitation. In the event he was caught by surprise when the defence of limitation was raised. No matter in what terms you put the defence now raised, it amounts to a denial of liability, which is contrary to the undertaking of the defendant's insurers.

40 It was always open to Mrs. Prescott to write to Mr. Phillips to point out that delay in bringing the matter to a conclusion was prejudicing the insurers, and to indicate that her client's position on liability would not hold good indefinitely. Instead, and despite the amount and nature of the correspondence that had passed between the parties, she waited until after the limitation period had expired and made discreet enquiries of the Supreme Court Registry to ascertain whether action had been filed.

41 I do not consider that I can hold the defendant out of his plea of limitation on the basis of an agreement between the parties. However, on the basis of the majority view expressed in *Doran* (3), I find that the defendant is estopped from pleading that this action is time-barred.

Ruling for the claimant.