Insurance & Personal Injury

Am I too late to commence a personal injury claim?

Introduction

The Limitation Ordinance (Cap. 347) ("LO") governs the time limit within which a claim should be brought. In the case of a general personal injury, section 27(4) of the LO provides that such claim shall be commenced within 3 years from the date of the accident or the date of the plaintiff's knowledge whichever is later. However, where a claim is time barred by the said section, the Court has wide and unfettered discretion to allow an action to proceed under section 30 of the LO if the Court thinks it would be equitable. This newsletter serves to give an introduction on when the limitation period of a general personal injury claim starts to run and the circumstances of which the Court would exercise its discretion to allow an action to proceed.

When does the limitation period start?

The plaintiff's knowledge: actual and constructive

As mentioned above, the time limit of 3 years starts to count from the date of the accident or the date of the plaintiff's knowledge. The latter is relatively more complicated as it involves the concept of knowledge. The reference to the date of a person's knowledge is defined in section 27(6) of the LO as reference to the date of which the person first had knowledge of the following:

1. that the injury in question was significant;
2. that that injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;
3. the identity of the defendant; and
4. if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

Furthermore, under section 27(8) of the LO, a person’s constructive or imputed knowledge is also relevant. For instance, in the case of *Ng Keung Lung v the Personal Representative and/or the Executor and/or the Administrator of the Estate of Lam Chik Suen (Deceased)* HCPI 512/2004, the Court held that in regards to the date of a person’s knowledge of the identity of the defendant, that includes the date of his actual knowledge as well as the date at
which he might reasonably have been expected to acquire that knowledge from facts observable or ascertainable by him.

**Is it equitable to allow the action to proceed?**

Factors to be considered by the Court

In order to disapply the limitation period, the burden is on the plaintiff to show that the particular circumstances would render the case equitable to proceed having regard to the respective prejudice likely to be suffered by each party. However, the defendant will also have to prove the prejudice he says he will suffer. In gist, the Court considers the following factors when performing a balancing exercise (see *Mok Lai Fong v Ng Po Sui* [2011] 3 HKLRD 67):

1. the balance of prejudice as to each party, including whether or not the defendant has been disadvantaged by pre- and post-expiry delay and whether or not it will be possible for the defendant to investigate allegations;
2. the six specific but non-exhaustive factors under section 30(3) of the LO which includes the following:
   a. length of delay and reasons by the plaintiff;
   b. effect of any delay on the cogency of the evidence;
   c. conduct of the defendant after the cause of action arose;
   d. duration of any disability of the plaintiff arising after accrual of the case of action;
   e. conduct of the plaintiff; and
   f. diligence of the plaintiff in obtaining medical, legal or other expert advice; and
3. all the circumstances of the case, including whether there is a reasonable prospect of a fair trial and the merit of the plaintiff’s case.

The overall question was whether it would be “equitable” to disapply the limitation provision having regard to the above. In considering whether to exercise the discretionary power under section 30 of LO, the Court would also give weight to the plaintiff’s ignorance of his legal rights when considering the reasons for the delay in bringing the action.

**Conclusion**

Whilst useful guidelines on how the Court exercises its discretion are illustrated in various Court judgments, there’s a need for case-by-case analysis on each claim when deciding the time of when limitation period starts to run and if the claim is statute-barred, whether it would be considered equitable by the Court to allow the action to proceed. As the balancing exercise heavily relies on the factual matrix of each case, prompt and detailed disclosure to your legal representatives regarding your accident is essential as it would affect the Court’s consideration on the circumstances of the claim. Instead of relying on the Court’s discretion...
to override the time limit, however, it is always prudent to seek legal advice and pursue the claim in a timely manner.

For enquiries, please contact our Insurance & Personal Injury Department:

E: insurance_pi@onc.hk
W: www.onc.hk
19th Floor, Three Exchange Square, 8 Connaught Place, Central, Hong Kong

T: (852) 2810 1212
F: (852) 2804 6311

Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

Published by ONC Lawyers © 2018