Case No: KA-2025-BHM-000035
Neutral Citation Number: [2026] EWHC 1089 (KB)

IN THE HIGH COURT OF JUSTICE
BIRMINGHAM DISTRICT REGISTRY

Date: 11th May 2026

Before :

- - The Honourable Mr Justice Wall - -

Between:

DR PAUL DAVID BLAKEMAN **Appellant**
(As Personal Representative of Mr Eric Blakeman, Deceased)

- and -

UNIVERSITY HOSPITALS OF NORTH MIDLANDS NHS TRUST

Respondent

- -
- -

Mr Jonathan Butters (instructed by **Pickering and Butters LLP**) for the **Appellant**
Miss Ruth Costello (instructed by **Weightmans**) for the **Respondent**

Hearing date: 25th March 2026
- -

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand down is deemed to be 10.30am on 11th May 2026

Mr Justice Wall:

1. This is an appeal from an order of Upper Tribunal Judge O'Brien sitting in the county court at Stoke on Trent on 30 May 2025 when he refused the appellant's application to amend his pleadings.

THE FACTS

2. The appellant is the personal representative of his father, Eric Blakeman, who died in the respondent's hospital on 31 October 2018, having been admitted on 28 October.

Throughout his stay, he was treated for sepsis, firstly with IV antibiotics and thereafter with oral antibiotics.

3. The death of the appellant's father led to an inquiry by the Health Service Ombudsman. In the Ombudsman's decision dated 29 January 2021, the Ombudsman concluded that the defendant had failed to follow the sepsis protocol by moving from intravenous antibiotics to oral antibiotics at too early a stage in treatment.

4. Based on this report, in July 2023, the appellant sued the respondent, asserting that the move from intravenous to oral antibiotics was negligent and was causative of his father's death. (It is agreed that proceedings were commenced within the extended limitation period as agreed between the parties and which expired on 30 July 2023). The appellant had previously (in January 2022) notified the respondent of his intention to make a claim on this basis. The respondent, in a letter dated 22 June 2022, admitted this breach of duty but denied causation.

5. Between the time at which the appellant wrote to the respondent in January 2022 and the issuing of proceedings in July 2023, he obtained two expert reports from Dr Gani. Those reports were received by the appellant in October 2022 and April 2023; that is, significantly before proceedings were commenced. In his reports, Dr Gani expressed the view that the change from IV to oral antibiotics had been a reasonable course of treatment in the context of this case. However, he opined that an inappropriate antibiotic had been administered, and the use of this inappropriate antibiotic was causative of the appellant’s father death. His evidence thus refuted any claim based on the proposition that the causative breach of duty consisted of the change from IV to oral antibiotics, but was capable of supporting a claim on the basis that the breach of duty lay in the administration of the wrong medication.

6. Dr Gani’s first report was sent to the respondents in November 2022. In a letter dated 28 March 2023, the respondents disputed the contents of that report.

7. The claim, when issued, was founded on the change from IV to oral medication as the negligent act and made no mention of the assertions made by Dr Gani as to the type of antibiotic used. Despite that, copies of Dr Gani’s reports were attached to the claim form in purported support of the claim as pleaded.

8. The respondent’s defence, filed on 24 October 2023, stood by their earlier acceptance of breach of duty by moving from IV to oral medication, denied causation, and

pointed out that Dr Gani's report did not support the appellant's case as pleaded. They highlighted the inconsistency between the pleaded case and Dr Gani's report to support an indication that they might seek to have the claim struck out.

9. The application, which was heard by Upper Tribunal Judge O'Brien and which is the basis of this appeal, was filed on 8 April 2025. The meat of the application was that the Particulars of Claim which had stood from the time of issue in July 2023 should be amended to remove the original basis of the claim and replace it with a claim based on the alleged negligent use of the incorrect medication; that is, that the claim based on the Ombudsman's report, which it is now accepted cannot succeed, be replaced by a claim based on the reports of Dr Gani, which it is asserted might do so.

10. The application was resisted by the respondents on the basis that the limitation period had by then long expired, and the appellant had been on notice that their original pleaded case was bound to fail before they issued proceedings. They highlighted the lengthy delays in seeking to rectify the position. There was a gap of 2 ½ years between the time of Dr Gani's first report being received and this application which, for the first time, indicated that the appellant was seeking to rely on its contents to establish breach of duty. There was a delay of 18 months in making this application after the respondents had pointed out to the appellant in their defence that Dr Gani's report did not support their pleaded case. There was no credible explanation offered for any of this delay. (It was asserted before Upper Tribunal Judge O'Brien that some of the delay was caused by a wait for funding and some of it due to a delay in receiving counsel's advice. There was no evidence to that effect, and it was conceded before me that, even if accurate, this did not offer a proper reason for this lengthy delay).

THE JUDGMENT

11. Upper Tribunal Judge O'Brien, in refusing the application to amend, noted the delay in making the application and the lack of proper explanation for it. He found that the proposed amendment amounted to "*a fundamental change giving arise to a fresh claim arising from an entirely different duty to that alleged in the original claim*". He cited the respective lengths of the original pleading ("*8 short paragraphs*") and the proposed new pleading (19 paragraphs) as an indication as to how great a change to the case the proposed amendments would represent. He found that there would be real prejudice to the respondents in allowing this application. They would have to obtain

expert evidence to deal with the new allegations. They would have to move from a pleaded case in which breach of duty was admitted to one where breach of duty was likely to be hotly contested. The application was made shortly before the date fixed for trial and that trial date would undoubtedly be lost were the application to succeed. The respondents could not be compensated adequately in costs because this was a QOCS case and any costs ordered were unlikely to be recovered. He recorded that the application to amend was only made on the basis that it should be allowed under CPR 17.4.

THE LAW – THE LIMITATION ACT

12. The normal limitation period for an action such as this is set at three years by s11 and s12 Limitation Act 1980 ("the Act"). This can be extended by agreement between the parties.

13. Section 33 of "the Act" gives the court a right to disapply the limitation period "*(1) if it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which (a) the provisions of section 11 or section 12 of this Act prejudice the plaintiff or any person he represents; and (b) any decision of the court under this subsection would prejudice the defendant or any person 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*".

14. Section 33(3) of "the Act" provides that in deciding whether to disapply a limitation period, the court should consider all relevant factors and in particular:

    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;*

    c. *The conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purposes of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant*;

d. *The duration of any disability of the plaintiff arising after the date of the accrual of the cause of action*;

e. *The extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury as attributable, might be capable at that time of giving rise to an action for damages; and*

f. *The steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received*."

15. Section 35(3) of "the Act" provides that "*except as provided by s33 of this Act or by rules of court, neither the High Court nor the county court shall allow a new claim ... to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim"*. A "new claim" is defined in s35(2) as including "*any claim involving the addition or substitution of a new cause of action*".

THE LAW – AMENDMENT OF PLEADINGS

16. CPR 17 deals with applications to amend pleadings. CPR17.1 allows an amendment to a statement of case once it has been served only by agreement between the parties or with the leave of the court. CPR 17.4 deals with amendments made after the expiry of the limitation period: *"(1) This rule applies where (a) a party applies to amend their statement of case in one of the ways mentioned in this rule; and (b) a period of limitation has expired under (i)the Limitation Act 1980 ... (2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings*".

THE GROUNDS OF APPEAL

17. There are four grounds on which permission to appeal has been granted by Sweeting J and which are now before me. Permission was refused in respect of a further ground and there has been no application to renew. The first (Ground 1) is that the Judge wrongly failed to consider allowing the application under s33 Limitation Act 1980. The second (originally Ground 3) is that the Judge was wrong to find that this was a new claim. The third (originally Ground 4) is that the claim arose out of the same or substantially the same facts. The fourth (originally Ground 5) is that the judge wrongly exercised his discretion. I shall take those grounds in turn.

GROUND 1

18. The Judge did not consider whether he should allow the amendment under s33 Limitation Act. That is unsurprising. He was not asked to do so. Therefore, the appellant now seeks to advance a case on appeal which was not advanced before the judge at first instance.

19. In deciding whether to allow a point which was not argued at first instance to be argued on appeal, I must apply the principles in *Singh -v- Dass [2019] EWCA Civ 360*. The court should be cautious about letting a new point to be raised [16]. A new point should not be raised if it would necessitate new evidence or would have resulted in the case being run differently in the court below [17]. The court should only allow a new point of law to be raised if (a) the other party has had time to deal with the point, (b) the other party has not acted to its detriment on the faith of the earlier omission to raise it, and (c) the other party can be adequately protected in costs [18] .

20. It is not asserted by the respondent that they have not had adequate time to consider the point the appellant now wishes to take. It is asserted that they would have acted differently had the application been made pursuant to s33. In particular, they would have required the appellant to adduce evidence as to the reasons for the delay as part of its case in the court below. They also assert that they cannot adequately be compensated in costs because this is a QOCS case and the appellant is unlikely to be able to meet any costs order made.

21. I do not accept the respondent's arguments. It is usual for an application to extend a limitation period to be accompanied by evidence as to why that is necessary. That was not done here. However, that does not work to the respondent's disadvantage. The

Judge at first instance found that there was no good reason for any delay and the appellant accepted before me that, were I to allow this point to be argued, I should work on the same basis. Second, there is no costs implication were I to consider this point on appeal. The costs have been incurred in any event. Permission has already been granted to argue the case on appeal. This hearing was necessary whether or not I consider this issue.

22. It follows that I will consider this ground of appeal. It was agreed that, were I to allow ground 1 to be argued, I should decide the point and not remit it for further consideration in the court below.

23. I have considered the factors set out in s33(3) of "the Act". They lead me to the firm view that the amendments should not be allowed. I rely for my decision in particular on the following matters:

    a. The length of the delay. The death occurred in 2018. The proceedings were commenced in 2023. The appellant knew or should have known both that he could not succeed in his originally pleaded case and that he had the alternative cause of action he now seeks to advance, before proceedings were even commenced. The respondent notified the appellant that his expert evidence did not support his pleaded case in early 2024. The application was made in April 2025, when the trial was close at hand. There has been a very long delay in making this application.

    b. The reasons for the delay. It is agreed that I must proceed on the basis that there is no good reason for the delay. There is no evidence that justifies it. The matters advanced in argument in the court below do not begin to explain it. There are no good reasons at all.

    c. The potential effects of delay. The delay has encouraged the respondents to prepare their case on the basis they had only to deal with the issue of causation and not breach of duty. Amendment at this stage will mean that the trial date is lost. The respondents will have to approach witnesses of fact whose evidence is irrelevant to the case as currently pleaded. Those witnesses will have to give evidence about issues which are now of some antiquity. I accept that there will be notes to assist them in doing so but it is unrealistic to think that they will have retained clear independent memory of events at this remove of time. The respondents will also have to obtain medical evidence on the new issues.

d. Conduct of the respondents. There has been no suggestion that the respondents have behaved in any way improperly. Indeed, they pointed out to the appellant in their defence that the medical evidence and the pleaded case were at odds. This ought to have alerted the appellant to the need for urgent action. That it did not do so is incomprehensible.

e. Disability. The appellant is the son of the deceased. He was at no stage under any disability which would or might have impeded his ability to advance this case.

f. Whether there was prompt action by the appellant once he realised that there was a need to amend pleadings. The chronology clearly establishes that there was not. The case should never have been pleaded as it was. The expert reports available to the appellant before proceedings were commenced made this clear. Once it was advanced on that basis in error, the respondents pointed out the erroneous approach being taken to the case by the appellant in their defence. Still nothing was done. There was then an inexpiable delay until almost the point of trial before any attempt to regularise the position was made. There has been no prompt action by the appellant at any point.

g. Steps to obtain medical or legal advice. No further medical evidence or legal advice was required to deal with this problem.

Consideration of these factors render unarguable any application to extend time under s33. I am sure both that I should not allow the amendment to be made at this stage and that, had he been asked to consider the s33 point at first instance, Upper Tribunal Judge O'Brien would have been driven to the same conclusion.

GROUND 3

24. The appellant's case is that there was no new claim sought to be advanced. The decision which amounted to the breach of duty was the decision to change the antibiotic regime. This encompassed the decision as to which antibiotic should be used and how that antibiotic should be administered. The original claim and the amended claim are two sides of the same coin.

25. I do not accept that argument. The two decisions (which antibiotic should be used and how to administer antibiotics) were made at a similar stage of treatment but were not one in the same. The originally pleaded case did not rely for its potential success on the type of antibiotic being administered. Conversely, the case advanced in the proposed amendment does not rely on the method of administration for its success. There are no pleaded facts within the proposed amendment which are pleaded in the case at present. The defence case has for a long time been predicated on the breach of duty in changing the method of administration of the drugs being admitted, whereas the amended case would result in a dispute as to breach of duty. In my judgment, the proper way to look at this case is that the original and amended cases each allege a breach of duty by the defendant to the appellant but in a way sufficiently different to render the allegations as set out in the proposed amendments, a new case.

Ground 4

26. The appellant asserts that the new claim arises out of the same facts at that previously advanced and therefore out of the same facts now in issue.

27. Again, I do not accept that submission. The only facts in issue in the pleaded case (breach of duty being admitted) are those relating to causation. It is noticeable that the originally pleaded case did not set out details of the alleged breach of duty. It did not need to do so. The breach of duty had been openly admitted by the respondent, and the appellant needed to do no more that rely on that admission. The amended claim required the appellant to set out fully the issues he sought to establish. None of those had previously been pleaded. The proposed new case opens up wholly new issues. The same factual background to the two alternative cases does not mean that the two pleaded allegations put the same matters in issue.

Ground 5

28. The appellant asserts that the Judge was wrong to exercise his discretion to refuse the application to amend.

29. There are two reasons why this ground must fail. The first is that, having found that the proposed amendments would amount to "*a fundamental change giving arise to a fresh claim arising from an entirely different duty to that alleged in the original claim*", there was no power to allow the amendment. It is prohibited by the terms of CPR 17.4 which only permits an amendment after the expiry of the limitation period where the proposed claim "*arises out of the same facts or substantially the same facts as are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings*". His findings meant that this was not an amendment which it was open to him to make.

30. Second, even if the Judge was wrong about that, he went through the factors which would have been relevant to the exercise of discretion. The discretion afforded by CPR 17 is more open textured than the exercise necessary under s33. The discretionary power under CPR 17 is properly exercised against the background of the overriding objectives of the Rules rather than the criteria set out in s33. Nevertheless, the same matters must carry weight. In particular, this was a very late amendment. There is no reason for delay. The new allegations, if they were to be relied on, could and should have formed part of the originally pleaded case. There is the real potential for the respondents to be prejudiced by any amendment. It would be disproportionate for the case to be allowed to be restarted on a wholly new footing at such a late stage.

31. The appellant argues that, if the application is refused, it would be open to him to make application to bring a new claim out of time. That might be so but such a theoretical possibility cannot outweigh the cogent reasons why the amendment should not be allowed in this case. Were it to be allowed to do so, out of time applications such as this would always be granted. The proper course for me to take is to decide the case before me on the merits and leave any future applications to a judge who might be seized of them in the future. In reality, it might be hard to persuade a judge to extend the limitation period to bring a new claim based on material available before the limitation period expired and for a number of years post its expiry. That, however, is not a matter for me.

Conclusion

32. It follows that this appeal fails on all grounds.