Scottish Law Commission

(SCOT. LAW COM. NO. 64)

REPORT ON SECTION 5 OF THE DAMAGES (SCOTLAND) ACT 1976

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by the Lord Advocate
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SCOTTISH LAW COMMISSION

REPORT ON SECTION 5 OF THE DAMAGES (SCOTLAND) ACT 1976

To The Right Honourable the Lord Mackay of Clashfern, Q.C.,
Her Majesty's Advocate.

In accordance with the provisions of section 3(1)(b) of the Law Commissions Act 1965, as amended,[1] we submitted on 14 May 1968 our Second Programme for the examination of several branches of the Law of Scotland with a view to reform. Item No. 10 of that Programme, which was published on 19 July 1968, requires us to proceed with an examination of the law relating to Damages arising from Personal Injuries and Death.

In pursuance of Item No. 10 we have examined section 5 of the Damages (Scotland) Act 1976. We have the honour to submit our proposals for the reform of this section.

J. O. M. HUNTER
Chairman of the Scottish Law Commission

6 *February* 1981

[1]The Transfer of Functions (Secretary of State and Lord Advocate) Order 1972 (S.I. 1972, No. 2002).

1. In a report[1] published in 1973 we made proposals which sought to modernise and rationalise the law relating to damages for injuries causing death. In paragraphs 53 to 62 of that report, under the heading 'The need to avoid a multiplicity of actions', we made proposals to ensure that, wherever possible, all the potential pursuers would be obliged to conjoin in a single action. In paragraph 58 we said:

> '. . . it should be the duty of any executor or dependant who wishes to raise an action to ascertain the identity of the other persons who have an interest, and to serve a notice upon them in a form and manner to be prescribed by rules of court. If the pursuer fails to serve a notice on any interested party of whose existence he is aware or could with reasonable diligence have become aware, it should be open to the court to dismiss the action if it thinks fit. We so recommend.'

This and other recommendations were modelled on the previous law.[2]

2. The pursuer under clause 6(6) of the draft Bill annexed to the report was required to serve notice of the action:

> 'on every connected person of whose existence and connection with the action the pursuer is aware or could with reasonable diligence have become aware; and if in any action it appears to the court that the pursuer has failed to implement the duty imposed on him by this subsection the court may, if it thinks fit, dismiss the action.'

3. The Commission's recommendations were implemented, with minor modifications, by the Damages (Scotland) Act 1976. Section 5 contains provisions for the avoidance of a multiplicity of actions. The words of clause 6(6) of the draft Bill annexed to the report, quoted above, are reproduced in identical terms in section 5(6) of the Act. In addition to the principal legislation, two Acts of Sederunt were enacted to regulate further the procedure in, respectively, the Court of Session[3] and the sheriff courts[4]. Both Acts of Sederunt require, additionally, the pursuer to send a copy of the summons to each connected person. The words 'of whose existence and connection with the action' were omitted from the Act of Sederunt which applies to the Court of Session. The corresponding Act of Sederunt which applies to the sheriff courts is in markedly different terms. Paragraph 2 repeats the words 'of whose existence and connection with the action' which appear in the principal subsection; and adds '. . . and stating that he is unaware of the existence of any other connected person, or is unable to establish the identity or whereabouts of such person'.

4. The question arises whether there is a duty to serve notices on all those with a title to sue, even if they do not have an interest: in other words, persons who would not in practice be awarded damages if they were sisted as pursuers, because they could not prove loss of support[5] or loss of society[6].

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[1] *Report on the law relating to damages for injuries causing death:* Scot. Law Com. No. 31 (July 1973).

[2] Described briefly in para. 53 of the report.

[3] 1976 S.I. 2020; see also 1977 S.L.T. (News) 12.

[4] 1976 S.I. 2181; see also 1977 S.L.T. (News) 38.

[5] See s. 1(3) of the Act.

[6] See s. 1(4) of the Act.

Although the point has not been judicially determined it has been suggested to us that the duty extends to all those with a title to sue; and it is apparent that the profession has proceeded on this assumption.

5. We received a number of representations that section 5(6) of the Act, and more particularly Rule of Court 75B, paragraph (1),[1] imposes too arduous a burden upon pursuers. Typical among these were comments from a firm of solicitors in Grampian. They sent to us a copy of a Court of Session summons arising out of the death of a man who left a widow and four children. The connected persons on whom the pursuers required to serve notice of the action in terms of section 5(6) included the deceased's parents, brothers and sisters, uncles and aunts, nephews and nieces, cousins, nephews and nieces by affinity, brothers-in-law and sisters-in-law, father-in-law, brothers-in-law by affinity, and uncles and aunts by affinity. In addition intimation in edictal form was required for three further connected persons, two of whom were resident in the Isle of Man; the address of the third was unknown to the pursuers. In all there were seventy-five connected persons, a figure which we understand is not untypical.

6. Accordingly, in 1979, we issued a consultative note, in which we listed the objections to section 5(6) of the 1976 Act and the relevant Acts of Sederunt. The objections to section 5(6) are:

(a) It may be an arduous duty to trace all the dependants who have a title to sue.

(b) The duty extends beyond persons who are likely to have a genuine financial interest in the proceedings.

(c) The duty may be unrealistic, in that the pursuer is required to serve notice on any person of whose *existence* he is aware, when he may not necessarily know or be able to ascertain the connected person's *whereabouts*.

(d) The sanction for breach of the duty is arguably too wide, in that the court's power to dismiss the action may be construed as applying not only to the original pursuer(s) but also to pursuers subsequently sisted.

A further objection has been made to the Acts of Sederunt, namely that the duty to enclose a copy of the summons, in addition to the service of a notice, is an unnecessary refinement which was not specified in the principal Act, and may lead to additional work for solicitors and consequently additional expense.

7. The problem is linked with the wide extension of the class of dependants entitled to claim damages for patrimonial loss. Under the old law the class was limited to parents, spouse, children and (sometimes) grandparents and grandchildren. The procedure before 1976[2] was, accordingly, straightforward: if a pursuer raised an action and stated on record and undertook to prove that the others entitled to claim had given up their claims, or refused to press them, or could not be found, there was no objection to the pursuer going on with the action alone. If the pursuer did not do so, or did not call the other parties as defenders for their interest, the action would be held to be incompetent. If the other relatives intimated that they did not wish to prosecute

[1]Inserted by the Court of Session Act of Sederunt.

[2]See para. 53 of the report.

the claim or were called and did not appear, or were asked to concur and did not, their rights were subsequently barred. Decisions to the above effect meant that in practice the relatives' claims were determined in a single action. But the 1976 Act widened the class of claimants to include, for example, ascendants and descendants as of right; collaterals and their issue; and relatives by affinity.

8. Before identifying what appeared to us to be the main options, we referred in our consultative note[1] to four possibilities which did not commend themselves to us. These were as follows:

(a) To reduce the class of entitled relatives.

(b) To confine a loss of support claim to cases where the dependant was receiving support before the deceased's death—in other words to disallow a claim, even where there was evidence that a dependant would have been supported in the future, if he had not been receiving support in the past.

(c) To amend the limitation laws so as to allow to dependants a fixed period of three years from the date of death in which to commence proceedings.

9. We commented that we regarded all three possibilities as objectionable, in that they sought to remove a substantive right in order to cure a procedural difficulty. (a) would involve a direct reversal of the policy of the 1976 Act, which was to enlarge the category of dependants to include, *inter alios,* brothers, sisters and divorced spouses. (b) would be arbitrary in operation: it could, depending on how it was worded, disqualify a claimant solely because he had not been receiving actual financial support during a specified period before the date of death. (c) would affect all dependants (even where no action had been raised within the triennium) and would prejudice dependants in the rare cases where they could not have known the material facts until more than three years had elapsed since the death.

10. The fourth possibility referred to is to repeal section 5(5) (which preserves the right of a connected person to raise a separate action if he satisfies the court that by reason of lack of knowledge that an action had already been raised, or for any other reasonable cause, he was unable to sist himself as a pursuer in the original action). In our report, when making the recommendation which is implemented by section 5(5), we commented:[2]

> 'We recognise that this Recommendation may cause hardship to defenders who have settled claims for damages on the basis of ascertained dependency. But we think that claims of this class will be rare if our other Recommendations are implemented. The dependant would have to establish loss of future support, and a person who is out of touch with his family is unlikely to be able to prove such loss. He would also have to belong to a narrower class than hitherto if he wished to claim in respect of non-pecuniary loss. His rights, moreover, will be subjected to the operation of the ordinary rules relating to the limitation of actions. Though rare, claims of this class may arise and their satisfaction may cause hardship

[1] At pp. 3–4.

[2] At para. 60.

to defenders. It is necessary, however, to make a choice between the need to protect the interests of such a relative and those of the defender, and we can see no reason to exclude a genuine claim on the part of a relative who did not timeously learn of the existence of the original action'.

11. We invited comment whether, in the light of experience of the working of section 5(6), this reasoning still held good. We took the view that the same objection could be levelled against the fourth possibility as against the other three: that a substantive right should not be removed in order to cure a procedural difficulty.

12. In the event the first possibility was almost unanimously rejected on consultation. The only support for it was based on the view that collaterals' claims should only be admitted where no closer relatives survived. The other possibilities were unanimously rejected.

13. We conclude, accordingly, that a solution to the problem should be sought by amending the existing procedure and not by altering the substance of the law. The main options which we identified in the note[1] whereby the problem might be solved by procedural means were as follows:

(a) To leave the principal subsection unamended, but to omit the duty, prescribed only by the Acts of Sederunt, to enclose a copy of the summons.

(b) To repeal section 5(6) and to abolish the duty placed upon the pursuer to give notice to connected persons.

(c) To retain a general duty to serve notices, but to confer on the courts a discretion to dispense with the duty where it did not appear that a connected person had a genuine financial interest in the proceedings.

(d) To restrict the duty to serve notices in a more practical way, perhaps by limiting it to specifically identified classes of persons, for example all those who were entitled to a loss of society award (spouse, parents and children). In addition, the duty might be extended to include other relatives who the pursuer knew, or ought to have known, had in the past received financial support from the deceased, or otherwise had a genuine financial interest in the proceedings.

14. The note[2] also developed a number of variants on option (d), which included the following:

(i) A pursuer might be required to serve notice on all those entitled to a loss of society award, and all other relatives with a title and interest to sue. In the case of these other relatives, however, the pursuer's duty would be discharged if he averred that, having made reasonable enquiries, he was unaware that any other connected person had been receiving support from the deceased or was likely to receive support in the future.

(ii) A pursuer might be required to serve notice on all those entitled to a loss of society award, and all other relatives who the pursuer was aware or ought to have been aware were being supported by the

[1]At pp. 4–6.

[2]At p. 6.

deceased at the time of his death. This duty would be slightly narrower than option (d), in that a pursuer would not be required to speculate on the possibility that an eligible relative might be supported by the deceased in the future (whether or not he had ever received support in the past).

(iii) A pursuer might be required to serve a notice on all those entitled to a loss of society award, and any other connected person who the pursuer is aware, or ought to be aware, is resident in Scotland (or in another part of the United Kingdom). This solution tends to assume that a relative living in Scotland or in another part of the United Kingdom is more likely to have a genuine financial interest in the proceedings than a relative living abroad, which may not necessarily be so. Also, a relative living abroad is less likely to hear of an action from another source than a relative living in this country.

15. It was further suggested in the note[1] that, if option (d) or one of its variants were adopted, the duty to serve a notice on the relatives entitled to a loss of society award should not be absolute. The pursuer should be entitled to aver that, having made reasonable enquiries, he was unaware of the existence or whereabouts of a relative entitled to a loss of society award. Moreover,[2] the court's power to dismiss the action might be confined to cases where notice had not been served on all relatives entitled to a loss of society award, or where the pursuer had failed to serve a notice on any other person after having been ordained by the court to do so.

16. There was a consensus of opinion on consultation that the present law imposes arduous duties on a pursuer, to trace and serve notice of the action on relatives of the deceased, in the vast majority of cases where no problem of ascertaining the range of genuine claimants arises. We conclude, therefore, that amending legislation is required. In the light of doubts expressed to us on the meaning of section 5(6),[3] it would not be enough to enact new Acts of Sederunt: the principal subsection must be amended or repealed. We have also reached the conclusion that it would be more satisfactory if all the procedural requirements designed to avoid a multiplicity of actions were contained in rules of court. If this were done, any problems which might arise in practice could be swiftly remedied. We therefore recommend that section 5 be repealed and replaced with a statement that provisions for the avoidance of a multiplicity of actions may be made by rules of court. Rules of court should be made, applying in similar terms to the Court of Session and to the sheriff courts, to incorporate the substance of section 5 as modified by the recommendations contained in the following paragraphs.

17. Of the principal options described above, there was virtually no support for option (a)—to omit the duty to enclose a copy of the summons. It was considered that this by itself did not go far enough, and that a more radical solution was required. Moreover, the copying of the summons—given the widespread availability nowadays of photocopying equipment—is not an arduous duty, and there would be little point in requiring a notice to be served

[1]At p. 6.
[2]See p. 7.
[3]See para. 4 above.

if a connected person was not at the same time to be informed of the nature of the claim. We consider that this point outweighs any objection that disclosure of the raising of the action and the sum sued for can in certain circumstances cause distress within the family circle.

18. There was some support for option (b)—to repeal the subsection altogether and to abolish the duty to serve notices on connected persons. We were particularly struck by the observation of the British Insurance Association that 'it is possible that defenders could guard against the possibility of a subsequent claim by obtaining a comprehensive discharge incorporating an indemnity and backed by a guarantee from a bank or an insurance indemnity policy'. We had ourselves remarked in the note[1] that, from the information available to us, it did not seem to be the practice of defenders or their insurers, in settling claims extrajudicially, to attach much weight to the possibility that a later claim might be successfully presented in terms of section 5(5); in particular, we were not aware that pursuers were asked to indemnify the defenders or their insurers, although we understood that sometimes pursuers were asked to declare that they knew of no other potential claimants. The precise legal effect of such a declaration may be uncertain. The majority of those whom we consulted, however, considered that this solution went too far; and although we consider that the proposal has some merit, we are prepared to reject it on the ground that pursuers are in a better position than defenders to ascertain the identity of other potential claimants.

19. There was some support on consultation for option (c)—a general discretion conferred on the courts to dispense with the duty—notably from the Judicial Procedure Committee of the Law Society of Scotland. There were also, however, a number of objections to this option. It was described as too uncertain. It was said that the court would have no means of knowing whether reasonable diligence had been exercised, and would therefore exercise its discretion with undue caution; and that the court would have to pronounce in advance of proof on the validity of a potential claim. Perhaps the strongest objection was that the introduction of a judicial discretion would not relieve the pursuer of the duty to *trace* all the possible claimants; it is this responsibility—rather than the duty to serve notices—which gives rise to the present problem. However, even some of those who were in principle opposed to the introduction of a judicial discretion recognised that there would be advantages in enabling the court to decide, at an early stage in the proceedings, to what extent investigation, intimation and/or advertisement are necessary.[2]

20. Option (d), or its permutations, attracted most support on consultation, although there was no consensus in favour of any particular variant. One view put forward is that any person actually supported by the deceased does not need any intimation. Some regarded as too uncertain any extension of the duty beyond persons of whose entitlement the pursuer was aware, to include persons of whose entitlement he ought to have been aware: there was accordingly some support for restricting the duty to the immediate family. Some commentators felt that there should be some duty to trace: thus it was

[1]At pp. 4–5.

[2]The duty to trace connected persons and to serve notices only arises when legal proceedings are commenced: not at the stage of negotiation. It is, of course, open to a defender to require some investigation before he settles a claim, and he generally does so.

suggested that there should be no duty to serve notices if the pursuer averred that, having made reasonable enquiries, he was unaware that any person outwith the loss of society category had been receiving support or was likely to receive support in the future. Suggestions were made that the duty to serve notices should be restricted to the loss of society category and all other relatives who the pursuer was aware or ought to have been aware were being supported by the deceased at the date of death, or alternatively within a fixed period of six months before the date of death.

21. We do not consider that there is a significant difference of opinion among these commentators, and we have concluded that the elements of a solution are to be found in a combination of options (c) and (d). At the same time we are not convinced, on further reflection, that a reference in rules of court to a smaller class of potential claimants is by itself a satisfactory answer to the problem. Entitlement to a loss of society award does not necessarily imply financial dependence on the deceased; conversely, the possibility that there may be genuine claimants outwith this narrow family circle cannot be ignored. We therefore recommend that the pursuer should be obliged to serve notice of the action on such connected person or persons as the court may require. This solution has the advantage that the court would be able to control, at early stages of the proceedings, both the degree of investigation and the number of notices to be served. It would be incumbent on the pursuer to place all the necessary information before the court: thus the pursuer would generally have to carry out some preliminary enquiries before approaching the court, or would be ordered by the court to do so. He would, for example, have to enquire into the following matters: are there any relatives who have at some time been supported by the deceased, or who were receiving support at the time of his death; are there others, who by virtue of close relationship or otherwise, would have been likely to receive support in the future; are these relatives still alive, and if so where are they? At this stage of the proceedings such enquiries would fall well short of the detailed investigations presently required. It would, however, be insufficient in most cases for a small number of pursuers to make a bland statement that they were the only genuine claimants without having made any preliminary enquiries. The approach which we advocate would avoid the rigidity of the existing rule and the incurring of needless expense.

22. We further proposed in the note[1] that the duty should be reformulated so as to enable a pursuer to aver that, having made reasonable enquiries, he is unaware of the existence or whereabouts of a potential claimant or claimants. This proposal was unanimously welcomed on consultation. We do not envisage that rules of court would need to state this in terms, as it would follow from the implementation of the recommendation contained in the previous paragraph.

23. In order to remove any doubts as to the extent of the court's discretion, we think it would be desirable to omit any reference to the court's power to

[1]At p. 6. The provisional proposal referred only to a relative entitled to a loss of society award, but in the context of our present recommendations the court might previously have ordered intimation to a remoter relative who subsequently could not be traced.

dismiss the action, and we so recommend. We do so not only for the reason mentioned above[1]—that the existing language of the subsection might be construed as extending to pursuers who were subsequently sisted in the action—but because of an observation made to us by the Judicial Procedure Committee of the Law Society of Scotland, that solicitors 'do their utmost to prevent a situation arising whereby the action might conceivably be dismissed'. One commentator added that the provision appears to be draconian at first sight, but in fact is only a discretion.

24. It has been contended that another subsection—(2)—entitles a dependant to be sisted as a pursuer even although his own right of action is barred by virtue of the provisions of Part II of the Prescription and Limitation (Scotland) Act 1973.[2] This contention was rejected by the Lord Ordinary in *McArthur* v. *Raynesway Plant Ltd.*[3] We agree that this is a matter for the law of prescription and limitation, and we envisage that rules of court would be so drafted as to remove any doubts which may be thought to exist.

25. Finally, as the proposed reform is purely procedural, we recommend that the new rules of court should apply to all proceedings currently before the court, including those raised before the new rules come into force.

26. SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

1. In an action of damages for injuries causing death, the present law imposes arduous duties on a pursuer, to trace and serve notice of the action on relatives of the deceased, in the vast majority of cases where no problem of ascertaining the range of genuine claimants arises (paragraph 16).

2. Section 5 of the Damages (Scotland) Act 1976 should be repealed and replaced with a statement that provisions for the avoidance of a multiplicity of actions may be made by rules of court (paragraph 16).

3. Rules of court should be made, applying in similar terms to the Court of Session and to the sheriff courts, to incorporate the substance of section 5 as modified by the following recommendations (paragraph 16).

4. The pursuer should be obliged to serve notice of the action on such connected person or persons (i.e. executors or dependants) as the court may require (paragraph 21).

5. Rules of court should omit any reference to the court's power to dismiss the action (paragraph 23).

6. The new rules of court should apply to all proceedings currently before the court, including those raised before the new rules come into force (paragraph 25).

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[1](d) of para. 6.

[2]Section 5(2) provides in part: 'Where an action to which this section applies has been raised any connected person shall be entitled to be sisted as a pursuer in that action'.

[3]1980 S.L.T. 74. This decision has since been followed in *Marshall* v. *Black*, 20 June 1980 (unreported).

APPENDIX

LIST OF THOSE WHO COMMENTED ON THE CONSULTATIVE NOTE

Messrs. Balfour & Manson, Solicitors, Edinburgh
Messrs. Bird Semple & Crawford Herron, Solicitors, Glasgow
Messrs. Bonar, Mackenzie, W.S., Edinburgh
British Insurance Association
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D. A. O. Edward, Q.C.
W. C. Galbraith, Q.C.
J. A. D. Hope, Q.C.
A. C. M. Johnston, Q.C.
Judicial Procedure Committee of the Law Society of Scotland
Messrs. McCosh & Gardiner, Solicitors, Ayr
Messrs. Macnair Clyde & Ralston, Solicitors, Paisley
Sheriff I. D. Macphail
A. M. Morison, Q.C.
Messrs. Morton, Fraser & Milligan, W.S., Edinburgh
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