Scottish Law Commission

promoting law reform

(DISCUSSION 132)

Discussion Paper on Personal Injury Actions: Limitation and Prescribed Claims

discussion paper

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Professor Gerard Maher, QC
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Mr Colin J Tyre, QC.

The Chief Executive of the Commission is Mr Michael Lugton. Its offices are at 140 Causewayside, Edinburgh EH9 1PR.

The Commission would be grateful if comments on this Discussion Paper were submitted by 31 May 2006. Comments may be made (please see notes below) on all or any of the matters raised in the paper. All correspondence should be addressed to:

Mrs Susan Sutherland
Scottish Law Commission
140 Causewayside
Edinburgh EH9 1PR

Tel: 0131 668 2131
Fax: 0131 662 4900
Email: info@scotlawcom.gov.uk

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[1] Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).
[2] The term of office of Professor Kenneth G C Reid CBE as a Commissioner expired on 31 December 2005 but he took part in discussions at Commission meetings about the draft of this Discussion Paper.

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Part 1 Introduction

Two references

1.1 This Discussion Paper is produced in response to two separate references made by Scottish Ministers. The first reference was made in September 2004 and asked us to examine certain aspects of the current law relating to limitation of actions in claims for damages for personal injuries and claims following the death of a person by reason of personal injuries. The terms of that reference are as follows:

> "To examine the operation of sections 17(2)(b), 18(2)(b) and 19A of the Prescription and Limitation (Scotland) Act 1973 and to make any appropriate recommendations for possible reform of the law."

1.2 During the course of our work on that reference, we received a further request from Scottish Ministers to examine, not the current law, but the consequences of the operation of the long negative prescription of obligations to pay damages for personal injury, which was abolished in September 1984, as respects claims for personal injury extinguished by its operation prior to September 1984. The terms of the second reference are as follows:

> "To consider the position of claims for damages in respect of personal injury which were extinguished by operation of the long negative prescription prior to 26 September 1984; and to report."

1.3 While the two references thus raise very different issues and are not inter-dependent, it was felt that since they came within the same general domain of claims for damages for personal injuries and the consequences in law of the passing of time, discussion and consultation could, in accordance with the wishes of Scottish Ministers, be better effected by the production of a single Discussion Paper.

Scope of the first reference

1.4 The current provisions of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act") relating to limitation of actions are set out in Appendix A. Section 17(2) contains the principal rules on time-bar in actions of damages where the damages claimed consist of, or include, damages for personal injuries[1] and lays down a three year limitation period within which the action must be raised. It provides for a number of possible starting dates for the three year period.

1.5 Paragraph (a) of section 17(2) contains the earliest of the possible dates, namely the date upon which the injuries were sustained. In most cases, such as road accidents or accidents at work, this will be the relevant date. Paragraph (a) also addresses the case where the injury – for example, a disease such as asbestosis – is the result of a continuing act or omission. In that event, since the harm will have been suffered gradually, or at some indeterminate time, the relevant date is the date when the act or omission ceased.

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[1] As defined in s 22(1) of the 1973 Act.

1.6 Paragraph (b) of section 17(2) – which is one of the provisions with which our first reference is concerned – also provides for two possible starting dates, namely (if later than any date in paragraph (a)) either the date on which the pursuer in the action became aware of certain facts or the date on which, in the opinion of the court, "it would have been reasonably practicable for him in all the circumstances to become, aware" of those facts. Although not expressly stated, of the two dates in paragraph (b) the applicable date is obviously the earlier. The specified facts are listed in paragraph (b) of section 17(2) as follows:

> "(i) that the injuries in question were sufficiently serious to justify his [the pursuer's] bringing an action of damages on the assumption that the person against whom the action was brought did not dispute liability and was able to satisfy a decree;
>
> (ii) that the injuries were attributable in whole or in part to an act or omission; and
>
> (iii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person."

1.7 Section 17(3) of the 1973 Act provides that in the computation of the period specified in section 17(2) there has to be disregarded any time during which the person who sustained the injuries was under legal disability by reason of nonage or unsoundness of mind. So, in the case of injury suffered by a child, time does not begin to run until he attains legal capacity.[2]

1.8 Section 18 of the 1973 Act is concerned with actions where death has resulted from personal injuries and damages are claimed in respect of either the death (for example, an action brought by a relative of the deceased) or the injuries themselves (for example, a claim brought by the deceased's executor). Again provision is made for a three year limitation period with different possible starting dates. The earliest date from which time may run in such an action is the date of death (section 18(2)(a)). Paragraph (b) of section 18(2) – with which the reference is concerned – makes provision for two other possible dates, namely either the date upon which the pursuer in the action became aware of certain specified facts or the date upon which, in the opinion of the court, "it would have been reasonably practicable for him in all the circumstances to become, aware" of those facts. Again, although the provision does not say so expressly, the applicable date is of course the earlier of those two. The specified facts are:

> "(i) that the injuries of the deceased were attributable in whole or in part to an act or omission; and
>
> (ii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person."

Where the deceased could himself have claimed damages for his injuries but the claim became time-barred under section 17 prior to his death, no action may be brought by any relatives or his executor in reliance on the provision of section 18(2).[3]

1.9 The third statutory provision mentioned in the reference is section 19A of the 1973 Act. This provision may be invoked where an action is time-barred under either

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[2] Under the Age of Legal Capacity (Scotland) Act 1991, s 1, this is at the age of 16.
[3] 1973 Act, s 18(4).

section 17 or section 18 as the case may be.[4] Under section 19A the court may, "if it seems equitable to do so", allow the otherwise time-barred action to proceed.

1.10 From the foregoing account of the statutory provisions it will be seen that the terms of the first reference cover two principal topics, namely (i) the "date of knowledge" or, as they are sometimes called, the "date of discoverability" provisions in sections 17(2)(b) and 18(2)(b); and (ii) the discretionary power given to the court under section 19A to override the time-bar.

General background to the first reference

1.11 The first reference was prompted by concerns expressed by practitioners engaged in the field of personal injury litigation and others concerned with claims for compensation for occupational diseases that the date of knowledge test in Scotland is too restrictive. In particular, the test is less generous to the claimant than the statutory date of knowledge provisions in England and Wales. Central to those concerns is the way in which the legislation, and the courts in applying it, approach the issue of "constructive knowledge", that is to say, the knowledge which the claimant did not actually have but which it is said he ought to have had, or is deemed to have had, and which thus provides a starting date for the running of time earlier than his acquisition of actual knowledge.

1.12 There is an interaction between the date of knowledge provisions and a general discretion given to the court to allow an action which is time-barred to proceed. The more ready the rules are to attribute constructive knowledge to the claimant, the more it becomes necessary for the claimant to rely on the court exercising its discretion in the claimant's favour. Whereas in Scotland section 19A of the 1973 Act gives the court an unqualified discretion, in England and Wales the legislation contains a list of factors to which the court is directed to have regard when invited to exercise its discretion. The view has been expressed that the presence of a similar catalogue in the Scottish legislation would provide guidance to the court which would encourage a more liberal exercise of discretion than is currently the case.

Scope of the second reference

1.13 As already indicated, the second reference is not related to the way in which, in its current form, the 1973 Act operates. It is concerned with the fact that prior to 26 September 1984 claims for damages for personal injury were subject not only to the statutory three year limitation period but also the long negative prescription which had the effect of extinguishing any obligation which had existed for 20 years. Accordingly, the second reference is concerned with claims which, in legal terms, ceased to exist at some date prior to 26 September 1984. And since the reason for the extinction was the lapse of 20 years from the date when any obligation to pay damages was incurred, it follows that in all the cases with which this reference is concerned the act or omission in question took place over 40 years ago, namely at some date, or over some period, prior to 26 September 1964. An issue under this reference is whether it would be appropriate to create, retrospectively, new liabilities on individuals, companies, institutions, local authorities or central government departments in relation to events occurring at least 40 years ago.

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[4] It also applies where an action for defamation or an action of harassment has become time-barred.

General background to the second reference

1.14 In relatively recent years some concerns have been voiced about the position of individuals who received education or care in institutions run by local authorities or religious orders or other charitable bodies and who may have been subject to physical abuse or sexual abuse, or both, at the hand of members of staff but whose claims for redress prescribed prior to 26 September 1984. In August 2002 a petition was presented to the Scottish Parliament by Mr Christopher Daly.[5] In that petition the Scottish Executive was requested to institute a public inquiry. In view of, among other things, the sense of injustice expressed on behalf of the petitioner, Scottish Ministers decided to make the second reference.

Prescription and limitation: a brief comparison

1.15 While the law of limitation of actions and the law of negative prescription usually produce a similar practical result in that once the requisite period of time has elapsed the defending party has a defence to a claim which is based on the effluxion of time, prescription and limitation are conceptually different. Limitation is essentially a procedural rule relating to remedies. Even after the expiry of a limitation period the obligation to pay damages technically continues to exist. But if limitation is established by the defending party the court will not allow it to be enforced by means of a court action. Limitation rules are applied in English law, and in systems derived from English law, not just for personal injury claims, but as respects most forms of claim. By contrast, prescription is a rule of substantive law. The conceptual basis of prescription is that after the elapse of the requisite period of time the obligation is wholly extinguished. Thus where an action is subject to a limitation time-bar the defending party may choose to waive the limitation defence; but prescription being a matter of substantive, not procedural law, the court itself may take notice of the fact that prescription has operated.[6] In Scotland most obligations other than obligations to pay damages for personal injury or defamation are subject to negative prescription rather than limitation.

History of the legislation

1.16 The law relating to limitation and prescription has been subject to a number of changes. It may therefore be helpful to give a brief account of the development of the law in this area. With certain exceptions, prior to 1954 claims for damages for personal injury and claims arising out of death through personal injury were not subject in Scotland to any limitation period. However, any right to damages was subject to extinction by operation of the long negative prescription on the expiry of a period of 20 years from the date when the right of action arose.[7] The principal exception was actions against certain public authorities, including local authorities, where a six month limitation period applied under the Public Authorities Protection Act 1893. Following the Reports of the Monckton Committee[8] and Tucker Committee[9] the statutory provisions on limitation of actions in England and Wales[10]

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[5] Scottish Parliament Public Petition PE 535.
[6] Walker, *Prescription and Limitation of Actions* (6th edn, 2002), p 5; Macphail, *Sheriff Court Practice* (2nd edn, 1998) Vol 1, para 2.114.
[7] Prior to the enactment of the 1973 Act the long negative prescription was based on the Prescription Act 1469 (c 4), the Prescription Act 1474 (c 9) and the Prescription Act 1617 (c 12). The period was reduced from 40 years to 20 years by the Conveyancing (Scotland) Act 1924, s 17.
[8] Final Report of the Departmental Committee on *Alternative Remedies*, Cmd 6860 (1946).
[9] Report of the Committee on *The Limitation of Actions*, Cmd 7740 (1949).
[10] Limitation Act 1939.

were amended by the Law Reform (Limitation of Actions &c.) Act 1954 to provide for a three year limitation period in actions for damages in personal injury cases. The 1954 Act also made provision for Scotland by introducing an equivalent three year limitation period for actions of damages in which the damages claimed consisted of or included personal injuries. The Public Authorities Protection Act 1893 was repealed. Accordingly, after the 1954 Act came into force on 4 June 1954, personal injury claims in Scotland were subject to both the three year limitation period and the 20 year negative prescription.

1.17 The 1954 Act provided for only one starting date for the running of the three year period namely "the date of the act, neglect or default giving rise to the action"[11] which was interpreted as meaning the date when an act or omission by the defender resulted in injury to the pursuer.[12] The 1954 Act contained no date of knowledge provision. This absence presented particular problems in relation to diseases such as pneumoconiosis and asbestosis in which symptoms may only be noticeable some time – even many years – after damage has been done to the affected organ of the body. In a number of cases it was held, particularly by the House of Lords in *Cartledge and Others v E Jopling & Sons Ltd*,[13] that a cause of action accrued when injury was sustained as a result of the act or omission in question and it did not matter that the claimant did not and could not discover the existence of the injury until some years after it had been sustained.

1.18 Following the Report of the Edmund Davies Committee,[14] the Limitation Act 1963 introduced a "knowledge date" whereby a pursuer was treated as being in justifiable ignorance if there were "material facts ... of a decisive character"[15] which were outside his actual or constructive knowledge. On the acquisition of knowledge of those facts (at a date three or more years from the accrual of the cause of action) a period of 12 months was available within which to raise proceedings. On the separate recommendations of both the Law Commission and the Scottish Law Commission the 12 month period was increased to three years by the Limitation Act 1971.

1.19 In 1970 the Scottish Law Commission published its Report on *Reform of the Law Relating to Prescription and Limitation of Actions*.[16] Our predecessor Commissioners considered whether personal injury claims should be subject to the new short five year prescription (as well as the 20 year negative prescription) rather than a limitation regime, but concluded, primarily in the interest of consistency in the treatment of personal injury claims in Scotland and in England and Wales, that the existing limitation rules should continue but should be re-enacted in a comprehensive Scottish statute.[17] That recommendation was implemented in the 1973 Act, Part II of which consolidated the provisions of the 1954, 1963 and 1971 Acts insofar as applying to Scotland.

1.20 To the extent that they were concerned with the date of knowledge, the provisions thus consolidated in the original Part II of the 1973 Act proved unsatisfactory and were the subject of judicial criticism.[18] One of the particular difficulties with the drafting was its lack of

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[11] 1954 Act, s 6(1)(a).
[12] *Watson v Fram Reinforced Concrete Co (Scotland) Ltd and Another* 1960 SC (HL) 92.
[13] [1963] AC 758.
[14] Report of the Committee on *Limitation of Actions in Cases of Personal Injury*, Cmnd 1829 (1962).
[15] 1963 Act, s 8(3).
[16] Scot Law Com No 15 (1970).
[17] *Ibid* at para 113.
[18] *Central Asbestos Co Ltd v Dodd* [1973] AC 518 at 529 E-F (Lord Reid) commenting on the 1963 Act provisions; *Kerr v JA Stewart (Plant) Ltd and Another* 1976 SC 120 at 131 (Lord Cameron).

clarity on the issue of whether the "material facts … of a decisive character" included knowledge on the part of the pursuer that he had a worthwhile cause of action: in other words, that the act or omission which gave rise to the pursuer's injury was delictual and gave the pursuer a legal remedy.

1.21 In England and Wales, the problem was examined by the Lord Chancellor's Law Reform Committee in its Twentieth Report.[19] The Committee concluded that time should begin to run from the date upon which the claimant first knew, or could reasonably have ascertained, the nature of his injury and its attributability to an act or omission on the part of the defendant, but that the claimant's ignorance of whether there was legal liability on the defendant's part should not be relevant and should not prevent the running of the limitation period.[20] The Committee also recommended that the court be given a discretion to disapply the time limit in cases where, an action not having been commenced within three years of the date of knowledge, the claim was time-barred.[21] Effect was given to the Committee's recommendations in the Limitation Act 1975 which did not, however, extend to Scotland. The provisions of the Limitation Act 1975 were consolidated in the Limitation Act 1980, which contains the current rules in England and Wales.[22]

1.22 The divergence which thus arose between the law in Scotland and England and Wales, together with the continuing dissatisfaction with the provisions consolidated in Part II of the 1973 Act, prompted this Commission to publish in April 1980 a consultative Memorandum on *Time-Limits in Actions for Personal Injuries*.[23] Shortly thereafter an amendment was tabled in the House of Commons to the Bill which was subsequently enacted as the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980. Section 23 of the 1980 Act inserted into the 1973 Act the current section 19A giving the court discretion to override the three year limitation period. The proposed section 19A was described to the House of Lords by the then Lord Advocate, Lord Mackay of Clashfern, as an "interim solution" pending the reform of the underlying structure of the 1973 Act.

1.23 Following the Commission's subsequent Report on *Prescription and the Limitation of Actions*[24] amendment of the 1973 Act was effected by the Prescription and Limitation (Scotland) Act 1984 ("the 1984 Act"). Among other things, the 1984 Act substituted for the original rules on limitation contained in the 1973 Act the provisions which are currently in operation.[25] The 1984 Act also removed personal injury actions from the ambit of the long negative prescription[26] and accordingly, since 1984, such actions are subject only to the rules on limitation contained in Part II of the 1973 Act. In contrast to the limitation rules, the long negative prescription ran from the date of accrual of the cause of action irrespective of the pursuer's state of knowledge. The 1984 Act disapplied prescription to all claims which had not already prescribed when it came into force on 26 September 1984, that is, to all claims in which the cause of action arose after 26 September 1964. Claims arising prior to

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[19] Law Reform Committee Twentieth Report – Interim Report on *Limitation of Actions in Personal Injury Claims*, Cmnd 5630 (1974).
[20] *Ibid* at recommendation (5) and para 53.
[21] *Ibid* at recommendation (6) and paras 56 to 58 and 69(2)(*b*) and (5).
[22] See Appendix B.
[23] Memorandum No 45 (1980).
[24] Scot Law Com No 74 (1983).
[25] Section 2 of the 1984 Act substituted new ss 17-18 in place of ss 17-19 of the 1973 Act. The principal changes involved replacing the heavily-criticised phrase "material facts … of a decisive character" and specifying the relevant facts of which knowledge on the part of the pursuer would start the running of the limitation period.
[26] Schedule 1, para 2 amended s 7 of the 1973 Act.

26 September 1964 had already prescribed (by operation of the 20 year negative prescription) when the 1984 Act came into force.

The purpose of rules of limitation and prescription

1.24 It may also be helpful to set out the purpose or policy reasons for having rules which bar the bringing of proceedings or extinguish obligations after the elapse of a certain period of time. Such rules exist in most legal systems and have been known for a long time.

1.25 The historical and modern rationales of prescription are discussed in Johnston on *Prescription and Limitation*.[27] Among the many discussions of the rationale of limitation statutes is the relatively full account given by McHugh J in the High Court of Australia in *Brisbane Regional Health Authority v Taylor*.[28] In the following paragraphs we endeavour to summarise the factors commonly mentioned as justifying or necessitating the existence of rules of limitation of actions or negative prescription of obligations.

1.26 Legal rules setting time limits for raising actions or extinguishing obligations through the operation of prescription are often seen simply as a protection for a defender against stale claims. However, they also serve a wider purpose. There is a general public interest in the efficient administration of justice and for a number of reasons it is important, in the interests of the efficient administration of justice, that claims should be brought and decided promptly.

1.27 In the first place, the quantity and quality of the evidential material available to a court in reaching a decision on a claim is likely to diminish with the passage of time. Sometimes the loss of evidence will be obvious – for example, where a known witness dies or documents, known to have existed, have been lost or destroyed. Commonly, the recollection of a witness will become incomplete or less reliable when there is a long interval between the events and the giving of his evidence. Sometimes however the loss of evidence may be less noticeable. Particularly after a lengthy period of time, people may be unaware that evidence which is no longer available ever existed or the significance of a known fact may cease to be fully appreciated. If evidence is lost, or its quality is diminished, the ability of a court to do justice may be impaired. The loss of evidence or the reduction in its quality may of course be to the disadvantage of the claimant in that he may have difficulty in establishing his case. Time limits thus assist the administration of justice in prompting the initiation of proceedings at a time when the evidence available is relatively fresh and complete.

1.28 Further, it is a general principle in most legal systems that the legal consequences of past events should be assessed or determined according to the contemporary standards applying at the time of the events.[29] Thus, for example, whether a form of medical treatment given to a patient in the past constituted medical negligence has to be assessed in the light of the state of medical knowledge at the time when the treatment was given and of what was regarded as proper medical practice at that time. If a long time has passed between the giving of the treatment and the making of the claim it may be difficult to establish the state of

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[27] David Johnston, *Prescription and Limitation* (1999) paras 1.31 to 1.63.
[28] [1996] 186 CLR 541. The relevant passages are quoted at length by Lord Drummond Young in *B v Murray (No 2)* [2005] CSOH 70; 2005 SLT 982 at para [21].
[29] Cf Alan Rodger, "A Time for Everything Under the Law: Some Reflections on Retrospectivity" (2005) 121 LQR 57 at 63.

knowledge and proper practice applying at the time of treatment. Even once those matters have been researched, it may be difficult for medical experts to discard all awareness of subsequent developments in medical science and place themselves in the thinking of medical practitioners at the time when the treatment was given. Limitation periods thus also contribute to the proper administration of justice by facilitating assessment by contemporary standards.

1.29 A further reason for making provision for limitation of actions or the negative prescription of obligations is that of legal certainty. It is appropriate that there should come a point at which businesses, public authorities and insurance companies should be able, in reasonable safety, to "close their files" and dispose of records. People have an important interest in being able, after the lapse of a particular period of time, to arrange their affairs with some confidence that claims can no longer be made against them.

Structure of the Discussion Paper

1.30 Parts 2, 3 and 4 of this Discussion Paper are devoted to the first reference. Part 5 is concerned with the second reference. In Part 2 we examine, in successive order (i) whether in principle there should be a knowledge test; (ii) the facts which should be known; (iii) what is involved in actual awareness; (iv) the current provision on constructive awareness;[30] and (v) the extent to which a constructive knowledge or awareness test should be subjective or objective. However, since there is an inter-relationship between provisions on date of knowledge or awareness (particularly in regard to constructive knowledge) and the existence of a judicial discretion, our discussion of the knowledge test is resumed in Part 3, after our examination, in that Part, of judicial discretion, when we canvass a number of options for consideration by consultees. We also discuss whether the length of the limitation period should be increased. Part 4 is concerned with certain miscellaneous points of practice and procedure. The position of claims extinguished by prescription prior to 26 September 1984, which is the subject of the second reference, is considered in Part 5. Part 6 contains a list of the proposals and questions on which we invite comments. For ease of reference, the relevant provisions of Part II of the 1973 Act are set out in Appendix A and the relevant provisions of the Limitation Act 1980 which apply in England and Wales are in Appendix B.

Acknowledgements

1.31 In preparing this Discussion Paper we have been assisted by members of our advisory group of lawyers with expertise in the field of personal injury law and practice.[31] We are very grateful to the members of the group for the valuable assistance they have given us. Their comments on the issues which arise in practice have been particularly helpful to us and we appreciate very much their willingness to give of their time to assist in this project.

Legislative competence

1.32 Both references are concerned with Scots private law and neither involves any matter reserved to the UK Parliament under the Scotland Act 1998. In our view none of the proposals made in respect of the first reference raises any question of incompatibility with

[30] That is to say knowledge or awareness which the pursuer did not in fact have but which he is deemed to have had or ought to have had.

[31] Robert Carr (Anderson Strathern WS); David Johnston QC; Ranald Macdonald (NHS Scotland Central Legal Office); Robert Milligan (Advocate) and Fiona Moore (Drummond Miller WS).

the European Convention on Human Rights or with European Union law. The European Court of Human Rights has recognised that limitation periods are not incompatible with the Convention.[32] However, we consider that the second reference does raise issues of possible incompatibility with the European Convention on Human Rights and these are discussed in detail in Part 5.[33]

[32] *Stubbings v UK* [1996] 23 EHRR 213.
[33] Paras 5.10 and 5.11.

Part 2 Date of knowledge

Introduction

2.1 In this Part of the Discussion Paper we look in detail at the issues surrounding the "date of knowledge" provisions in the 1973 Act. Having first concluded that it is desirable to retain a "date of knowledge" test (sometimes also referred to as a "discoverability" test) we then consider the elements that make up such a test, that is to say, the statutory facts and both actual and constructive awareness. In discussing the statutory facts consideration is also given to whether subjective elements should be taken into account when deciding, in the situation where new injuries emerge from the same delict or an existing injury is exacerbated, whether the initial injury was sufficiently serious to justify proceedings. The discussion relating to knowledge or awareness focuses on the balance to be struck between a purely objective and a purely subjective test.

Retaining a knowledge date

2.2 The first matter to be considered is whether it is appropriate in principle that the legislation on limitation of actions in personal injury cases should contain a provision whereby the limitation period runs from the date upon which the pursuer acquired, or ought to have acquired, the factual knowledge necessary to pursue an action for damages. In our view the clear answer is that the legislation should contain such a provision. The only other possible dates, namely the date of accrual of the cause of action or the cessation of the act or omission, both present the difficulty that in the case of latent or insidious disease, for example asbestosis, the limitation period may expire before it is possible to discover the existence of the injury. This difficulty existed under the original provisions in the 1954 Act and is exemplified in *Cartledge and Others v E Jopling & Sons Ltd*[1] in which the House of Lords remarked upon the injustice of that legislation which obliged the court to dismiss the action as time-barred even though it had not been possible for anyone to discover the existence of the disease within the three year limitation period.

2.3 While it would be possible to attempt to cater for that injustice by means of a judicial discretion to disapply the time-bar, we would not favour reliance solely on such a power. The exercise of a discretion inevitably risks inconsistency. It might be expected that the court would normally exercise its discretion in favour of the pursuer who was excusably ignorant of a relevant fact during the course of the limitation period and who raised proceedings promptly once the requisite knowledge was acquired. However, notions of promptness may legitimately vary. If, as we believe, it is right in principle that time should not run while a pursuer excusably lacks the requisite knowledge and that an appropriate period should be allowed in which to take proceedings after he ceased to be excusably ignorant, we consider that the principle should be given effect in statute. The legislative experience in the United Kingdom has been that defining the extent of what the "requisite knowledge" should be for these purposes and framing the test for excusability of ignorance, are not without some difficulty. But the principle is relatively clear. The current legislation in

[1] [1963] AC 758.

England and Wales provides for a limitation period from the date of knowledge[2] in personal injury actions. In its Report on *Limitation of Actions*[3] the Law Commission recommended that the date of knowledge (as defined in statute) should be the starting point of a three year limitation period in personal injury actions and other types of proceedings as well. All Australian states and the Canadian provinces[4] whose legislation we have examined make provision for a date of knowledge as a starting point for the running of time, although naturally there are variations in the particular legislative terms.

2.4 We recognise that in some cases the application of the test involved in a date of knowledge rule will give rise to factual disputes and hence the potential to add to the length or complexity of personal injury litigation. However, similar factual disputes would often arise if the pursuer were to be dependent on a favourable exercise of a judicial discretion to override the time-bar, since the length of time for which the pursuer had been excusably unaware of the requisite facts would inevitably be an important consideration in the exercise of that discretion. We would add that although we are aware of criticisms of the way in which the current Scottish provisions on date of knowledge operate, it has not been suggested that they should be abolished.

2.5 Accordingly we propose that:

1. The legislation on limitation of actions in personal injury cases should continue to include a "date of knowledge" as a starting date for the running of the limitation period.

2.6 On the view that there should continue to be a date of knowledge or discoverability test, we turn next to the elements which make up such a test. We propose to consider first the matters of which a pursuer is required to have actual or constructive awareness – that is to say, the "statutory facts" – before turning to examine what is involved in actual awareness and the provisions relating to constructive knowledge.

The statutory facts

2.7 Under section 17(2)(b) of the 1973 Act the facts specified as requiring to be known, actually or constructively, by the pursuer before time runs from the knowledge date are:

> "(i) that the injuries in question [to the pursuer] were sufficiently serious to justify his bringing an action of damages on the assumption that the person against whom the action was brought did not dispute liability and was able to satisfy a decree;
>
> (ii) that the injuries were attributable in whole or in part to an act or omission; and
>
> (iii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person."

In claims where death has resulted the relevant statutory facts, listed in section 18(2)(b) are only two, namely:

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[2] Limitation Act 1980, ss 11 and 14.
[3] Law Com No 270 (2001).
[4] Alberta, British Columbia and Saskatchewan.

> "(i) that the injuries of the deceased were attributable in whole or in part to an act or omission; and
>
> (ii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person."

It may be noted that it is not necessary for the pursuer to have any awareness or belief that the act or omission of the defender which has caused his injury (or the injury to the deceased) was wrongful and gives rise to legal liability to make reparation. We shall return to this matter later.[5]

Sufficiently serious injury

2.8 Since all damages sought in respect of a given wrongful act or omission must be recovered in a single action,[6] section 17(2)(b)(i) is intended to protect a pursuer who sustains an injury which is relatively minor or slight and not worth pursuing but which later turns out to be more serious than was foreseeable. The date upon which the pursuer acquires the knowledge or awareness to start the running of time will only occur once the pursuer was aware or ought to have been aware that the injuries were more serious than initially thought.

2.9 The test by which the injury is to be judged sufficiently serious is whether it would warrant suing on the assumptions (a) that liability is admitted and (b) the defender could satisfy any decree. In light of the statutory assumptions, it might be thought that this sets a very low threshold of seriousness since, in economic terms, if it is known that liability is admitted, there is little to be risked in pursuing even a very small claim other than such expenses as might be irrecoverable. In that regard, it may be noted that no expenses may be awarded in a small claim the value of which is less than £200; and in other small claims the maximum amount of expenses which may be awarded is £75.[7] The view has also been expressed judicially (at first instance) that, in addition, regard should be had to the time, inconvenience and general worry which would be occasioned by litigation.[8]

2.10 While the statutory assumptions involve an hypothesis which is in some ways artificial and produces a relatively low threshold, an alternative, satisfactory definition of the significance or seriousness of the injury is not readily apparent. In its Consultation Paper on *Limitation of Actions*,[9] the Law Commission, when reviewing the equivalent English provision, canvassed various possible alternatives to the statutory hypothesis. But in its Report on *Limitation of Actions*[10] the Law Commission concluded that none of those alternatives was satisfactory. We quote the following paragraphs from that Report:

> "However it is not possible for the definition of 'significance' to reflect accurately all the factors which would be taken into account in deciding whether or not to bring proceedings. The factors would differ for every claimant. The most important factor, in many cases, would be the chances of success of the claim. To ask the court to decide when the claimant should have known that the claim was more likely to succeed than otherwise would require a trial of the merits of the claimant's case

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[5] See below, para 2.26.
[6] *Stevenson v Pontifex & Wood* (1887) 15 R 125; *Dunlop v McGowans and Others* 1980 SC (HL) 73.
[7] The Small Claims (Scotland) Order 1988 (SI 1988/1999).
[8] *Blake v Lothian Health Board* 1993 SLT 1248.
[9] Law Com No 151 (1998).
[10] Law Com No 270 (2001).

every time the defendant raised a limitation defence. It is also hard to justify giving the claimant a longer limitation period when the defendant is in financial difficulties. Unrealistic though the assumptions undoubtedly are, they provide a measure of protection necessary for defendants.

We have also carefully considered, albeit to reject, some different tests. For example, the definition could provide that a claim is significant if the recoverable damages are (1) more than nominal; (2) more than a fixed sum; or (3) less than a set proportion of the total award. In the first case, we consider that reliance on 'nominal damages' might set too low a threshold. In any event, 'nominal damages' is a legal term of art which, strictly speaking, refers to damages being awarded where there is no loss at all.

The other two possibilities attempt to set a tariff. However it would be extremely difficult to quantify a 'significant' amount which would be considered to be fair. If a sum was identified, it would need to be constantly reviewed (or perhaps index linked). Further it would require the court to ascertain precisely the probable quantum of damages and costs which the claimant might recover at a particular date. This would not necessarily increase the certainty of the definition.

The same objection applies to any attempt to define the significance of the claim by reference to a proportion of the damages recoverable (so that the claim would be insignificant until the claimant knew of at least, for example, loss giving rise to ten per cent of the damages ultimately recoverable). Any percentage chosen would be arbitrary. The court would again be required to calculate the damages which would have been awarded at two different points in time. A more fundamental objection is the fact that, where the claimant has a very large claim, even a small proportion of that claim (such as five per cent) may be a large amount.

We have concluded that there is no alternative to defining 'significance' by reference to the point when the facts establish that it is worth making a claim in civil proceedings. We are, therefore, following the approach of the current law on this issue."[11]

2.11 For our part we agree with the Law Commission that there is no better alternative to defining the requisite degree of seriousness or "significance" of the injury by regard to whether the injury warranted bringing proceedings. However, there is, in our view, a tension within the current formulation of the general notion of an injury sufficiently serious to justify proceedings. That tension arises in that the initial phrasing of the provision, with its reference to "sufficiently serious", suggests that one is looking for an injury which is in some sense "serious", whereas the statutory assumptions of a solvent defender and admission of liability invite the bringing of a claim for minor, "non-serious" injury. Of the two assumptions, that relating to the solvency of the defender is the less troublesome. It appears a reasonable one to make for the purposes of this exercise. In most personal injury actions the defending party is insured. The difficulty arises, we think, with the admitted liability assumption. An alternative statutory assumption might be that the claim has a reasonable prospect of success (without any finding of contributory negligence). We recognise that the concept of a reasonable prospect of success is not a precise one. But it is one with which litigation lawyers are familiar and it appears elsewhere (though in a different context) in legislation.[12] It is a more realistic assumption to make if one is trying to set a standard of seriousness by reference to whether the injury is of sufficient importance to warrant instituting proceedings.

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[11] Law Com No 270 (2001), paras 3.27-3.31.
[12] Eg The Immigration and Asylum Appeals (Procedure) Rules 2000 (SI 2000/2333).

We would stress that for limitation purposes one would not be concerned with the actual prospects of success in the action in question. It would simply be assumed, for the purposes of judging the sufficiency in the severity of the injuries that a claim in respect of those injuries had a reasonable prospect of success. We believe that making the assumption of a reasonable prospect of success rather than admitted liability would raise the threshold to the benefit of pursuers who suffer relatively minor initial injuries but which subsequently become more serious. We therefore pose the following question:

2. Should the current statutory assumption of admitted liability be replaced by an assumption that the action had a reasonable prospect of success?

2.12 **Subjective elements.** Some discussion is called for on the extent to which the question whether the injuries were sufficiently serious to justify bringing proceedings involves subjective considerations or elements. We think it is clear that the gravity of the injury must be judged by reference to its physical and patrimonial consequences for the particular pursuer. A minor scar on the thigh might be seen as insignificant to an ordinary middle aged person but of great importance to a film star or model; injury to the left little finger of someone who has had the earlier misfortune to have lost the use of his right hand will plainly be of greater significance to that person than to most people. Accordingly, the personal situation and characteristics of the pursuer should be taken into account to the extent that they affect the amount of damages which might be awarded to that pursuer for his patrimonial and non-patrimonial loss. Should, however, wider personal circumstances, such as an exceptional reluctance to take proceedings against the particular defender, be taken into account? The current version of section 17 of the 1973 Act has been interpreted as embracing only those subjective elements which relate to the severity of the injury and hence effectively its quantum of damages. In *Carnegie v Lord Advocate*[13] Lord Johnston (with whom on this aspect of the case the other members of the Extra Division agreed) said:

> "However, I do not consider that subjectivity can be left out of the matter if there are factors present which weigh upon the gravity of the particular injury to the particular pursuer. Thus, while a sturdy rugby player may ignore, to all intents and purposes, the effect of a bruise, to a haemophiliac it would be of the utmost gravity. Equally it may be that a particular injury which may have a particular bearing on a particular career, such as damage to a finger to a potential or actual surgeon, may also bear upon the question of gravity or seriousness. I am, however, satisfied that it is not appropriate to go beyond these physical characteristics or personal relevant characteristics in relation to the actual injury to look at the context of the environment upon which the injury was sustained and it is certainly not relevant to take into account such factors as whether or not it was reasonable not to sue for fear of losing one's job."[14]

We consider that it is right that in deciding whether injuries sustained were sufficiently serious to warrant suing, the personal circumstances of the particular pursuer should be taken into account only in so far as they would affect the quantum of damages and that other circumstances which might act to inhibit the injured person from suing – such as a wish to maintain a good relationship with the potential defender for personal or occupational reasons – should be left out of account. It would be inappropriate that the limitation period be

[13] 2001 SC 802.
[14] *Ibid* at 812 F-G.

extended perhaps for many years, simply on the ground that the pursuer had continued during that time to work for the defender.

2.13 On this aspect of the current legislation it is also appropriate to consider briefly its application in respect of claims in which, typically, the pursuer alleges that in his childhood he was subject to physical or sexual abuse and in later life developed a psychiatric condition which is then attributed to the assaults suffered in childhood. Although we use the adverb "typically" we use it loosely, since it must be recognised that in their details the cases coming within this general category vary substantially and have to be treated individually.[15] It will, of course, be appreciated that for the purposes of limitation of actions, the running of time is suspended while the pursuer is subject to nonage.[16] Depending on the actual facts at the point in time at which the age of legal capacity is reached, the physical abuse suffered might be judged – by the standards then prevailing – to be of insufficient gravity to warrant taking proceedings and time would not run until the more serious psychiatric difficulties emerged. Judgment by the standards prevailing on attaining legal capacity is, we think, currently implicit in the legislative provisions.[17] In construing the equivalent, though differently worded, provision of the Limitation Act 1980 in England, in *KR and Others v Bryn Alyn Community (Holdings) Ltd (in liquidation) and Another*,[18] the Court of Appeal took the view that the test of whether the injury was "significant" was sufficiently subjective to require the gravity of the injury to be assessed, on achieving legal capacity, in accordance with how a person of that age and viewing matters in accordance with the standards of the time would regard it.

2.14 **New starting date.** A further important matter which may conveniently be addressed under our discussion of this statutory fact is whether the emergence of a new or exacerbated form of injury creates a new starting date for a claim respecting the new or exacerbated injury. In other words, notwithstanding the fundamental rule that a single indivisible right of action arises on the occurrence of both the wrongful act ("*injuria*") and the sustaining of any loss or injury ("*damnum*"), does the law on limitation of actions entitle a pursuer, whose initial injuries were sufficiently serious to warrant the taking of proceedings, to pursue a claim for later emerging injuries even though he neglected to sue timeously for the initial injuries?

2.15 In *Shuttleton v Duncan Stewart & Co Ltd*[19] the pursuer's case was that as a result of exposure to asbestos he contracted three medical conditions, namely pleural plaques, pleural thickening and asbestosis. Each of those conditions could be caused by exposure to asbestos but it was held on the evidence led at a preliminary proof that each was distinct and not a development or progression of an initial injury. However, damages were principally sought for asbestosis, pleural plaques being symptomless. The Lord Ordinary (Prosser) held that the pursuer was not in fact aware, and could not reasonably practicably have become aware, until a date within the triennium preceding the raising of the action that he had injuries sufficiently serious to warrant litigation. However, the Lord Ordinary went on to comment *obiter* that:

> "It appears to me that if one can identify two separate diseases or impairments of physical condition, even if caused by the same delict, relevant knowledge, or imputed knowledge, of the one will not bar one from pursuing a claim in respect of the other.

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[15] Cf *KR and Others v Bryn Alyn Community (Holdings) Ltd (in liquidation) and Another* [2003] QB 1441.
[16] 1973 Act, ss 17(3) and 18(3); Age of Legal Capacity (Scotland) Act 1991, s 1.
[17] Alan Rodger, "A Time for Everything Under the Law: Some Reflections on Retrospectivity" (2005) 121 LQR 57.
[18] [2003] QB 1441.
[19] 1996 SLT 517.

> There may therefore be circumstances in which one must decide whether the particular changes in physical condition are to be regarded as separate diseases or impairments, or merely features of a single disease or impairment. While that may be necessary, it appears to me that it may also be quite unreal. For what it is worth, it appears to me upon the evidence that the plaques, if to be regarded as a disease or impairment at all, are sufficiently distinct from either pleural thickening or asbestosis as to qualify as a 'separate' disease or impairment. That being so, I would not regard knowledge of plaques as barring claims based on either thickening or asbestosis."[20]

2.16 What was said by the Lord Ordinary in *Shuttleton* was relied upon before the Extra Division in *Carnegie v Lord Advocate.*[21] In that case the pursuer alleged that he had been the subject of assaults and maltreatment while a serving soldier between July 1991 and March 1992, but that thereafter, within three years prior to his raising the action in March 1995, he developed psychological injuries consequent upon his earlier mistreatment. The physical injuries sustained prior to the triennium were held to have been sufficiently serious to have justified proceedings.[22] However, the court allowed the action to proceed to proof in relation only to the claimed psychological injury. Having referred to part of the above comments of Lord Prosser in *Shuttleton*, Lord Johnston (with whom the other members of the court agreed), stated:

> "I take from that decision the recognition by his Lordship that for the purposes of the 1973 Act as amended a wholly distinct injury, albeit arising from the same delict, can be sued upon in a separate claim and therefore can create a separate triennium not starting from when there was original awareness of the original symptoms which are distinguishable but rather from when at the earliest, the injury basing the action emerged to the knowledge of the pursuer.
>
> Applying that approach to the present case I reject the argument that such physical anguish and fear that the pursuer may have suffered during the bullying period up to 1991 is merely a precursor of the same type of psychological injury that developed in the spring of 1992. In my opinion, upon the averments, the psychological injuries developing in May 1992 were a separate or distinct injury. They were obviously serious and if the pursuer had not sued within three years of May 1992 he might not thereafter have been able to rely upon sec 17(2)(b). However, as matters stand, he does not have to rely on that subsection because he has sued timeously for an injury, namely psychological injury, within three years of the date when it was sustained, namely May 1992, which is thus the appropriate starting point of the relevant triennium, in terms of sec 17(2)(a)."[23]

2.17 In a subsequent case[24] in which the action was raised one week after the expiry of the triennium, the court indicated approval of a concession by the defender that psychological symptoms emerging one month after the pursuer had sustained serious physical injury in a road accident were not time-barred, whereas recovery of damages in respect of the physical injuries was excluded by operation of the law of limitation.

2.18 This development in the law raises a number of issues. It proceeds upon the basis that a delict has given rise to two or more injuries, each "sufficiently serious", which are

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[20] 1996 SLT 517 at 518 F-H.
[21] 2001 SC 802.
[22] *Ibid* at 809.
[23] *Ibid* at 813 G-814 A.
[24] *Hill v McAlpine* 2004 SLT 736.

distinct and separate from each other. No doubt a single delictual act can produce "sufficiently serious" injuries which are separate and distinct, as when the victim of a road accident sustains both a broken arm and a broken leg. But in other circumstances, and particularly where injury or symptoms emerge consequentially in time, it may be difficult to determine whether injuries are separate and distinct. By way of example, it may be asked whether a depressive reaction to having sustained a slow-healing physical injury is something distinct from, or merely a consequence of, suffering that physical injury. Is the late and unforeseen development of arthritis following the fracture of a limb wholly separate and distinct from the fracture? Presumably not. But this produces the anomaly that the arthritis sufferer, having neglected timeously to sue in respect of the fractured limb, is also time-barred as regards the arthritis whereas a pursuer in the situation of *Carnegie v Lord Advocate*[25] can sue for the later part of his injuries as of right. Moreover, if the arthritis sufferer had timeously pursued his claim for damages for the broken limb and been awarded damages, he could not sue later for further damages since it is clear that a second action cannot be brought in respect of the same delict.

2.19 The concept of a single delict giving rise to one form of personal injury which is time-barred and another form which is not so barred is not without difficulties in practice. Thus, by way of example, if both injuries affect the pursuer's ability to work, the question arises whether his claim for loss of wages is excluded or admissible. If the pleadings for a pursuer, in listing or describing the injuries sustained, omit to mention one of the pursuer's injuries, the issue may arise whether a later attempt, outwith the triennium, to amend the pleadings to include the omitted injury may be opposed on the basis that it is a "distinct" injury in respect of which damages are being claimed after the expiry of the limitation period. The question may also be posed whether, if a claim in respect of the later injury is allowed to proceed on the basis that the injuries which emerged earlier are excluded from the claim as time-barred, an earlier injury which was not sufficiently serious to warrant proceeding is also excluded when the later, serious injury emerges.

2.20 We would add that the approach followed in *Carnegie* of treating the psychological injury as something wholly separate and distinct from the abuse which preceded and led to its emergence is inconsistent with what we understand to be the position in England and Wales. In the *Bryn Alyn*[26] case (involving claims of physical and sexual abuse during childhood followed by psychiatric illness much later in life) the Court of Appeal observed in regard to section 14 of the Limitation Act 1980 (the equivalent to the date of knowledge provision in section 17 of the 1973 Act):

> "... section 14, depending on the circumstances, may preserve or bar the recoverability of damages for the later of two injuries however late the date of knowledge of it, or enable recovery for the earlier of two injuries which, but for the claim for the second, would have been statute-barred.
>
> Thus, here, if the judge correctly found in the case of any claimant that he or she had the requisite knowledge within three years after majority, that knowledge would operate to bar not only the claim for damages for the immediate injuries caused by the abuse, but also the long term psychiatric injury of which he or she first acquired knowledge much later. If the judge was wrong in that finding, the operative date of knowledge would be that of the long term psychiatric abuse which, if within the

[25] 2001 SC 802.
[26] *KR and Others v Bryn Alyn Community (Holdings) Ltd (in liquidation) and Another* [2003] QB 1441.

limitation period, would enable the claim for both the earlier immediate injuries caused by the abuse and the long term psychiatric injury."[27]

2.21 Despite an initial attraction, the approach adopted in *Carnegie* presents a number of practical difficulties and is liable to produce anomalous results. We think it is in conflict with the decision in *Cartledge and Others v E Jopling & Sons Ltd*[28] and with the well-established principle that a cause of action accrues when there is concurrence of *injuria* and *damnum*. In the case of *K v Gilmartin's Executrix*[29] damages were claimed for physical and psychological harm from the executrix of a teacher and the local council in respect of childhood abuse averred to have been suffered by the pursuer between 1955 and 1961. The argument was advanced that there could be different dates for the concurrence of *injuria* and *damnum* where there were separate and distinct injuries, namely physical and psychological injuries. In its opinion the First Division of the Inner House stated that, at least in the context of prescription, the later development of a psychiatric illness which flowed from earlier abuse cannot be regarded as a separate *damnum* or as giving rise to a separate obligation to make reparation. As respects limitation the court did not require to express any view. In these circumstances we invite consultees for their comments on our provisional view that:

3. If a claim for sufficiently serious injury is not pursued timeously, the subsequent emergence of additional injury, even if distinct, should not give rise to a fresh date of knowledge and a further consequential limitation period for a claim for that additional injury.

Attributable to an act or omission

2.22 The second statutory fact, of which a pursuer must have actual or constructive knowledge before time begins to run, is that his injuries are "attributable in whole or in part to an act or omission." In death cases this provision is mirrored, except that the reference is to the injuries to the deceased. There is little reported Scottish authority on what is meant by "attributable". In *Nicol v British Steel Corporation (General Steels) Ltd*[30] the Lord Ordinary (Coulsfield) said:

> "It seems to me obvious that injuries can only be said to be attributable to an act or omission if they were caused by such an act or omission. An act or omission not causally connected in some way with the injuries could have no relevance to the claims of the injured party. It may, in some circumstances, be possible to say, in a particular case, that injuries must have been caused by some act or omission, even though it is not possible to say precisely what the act or omission was or what precise mechanism connected it to the accident."[31]

2.23 The equivalent English provision[32] also refers to the injury being "attributable in whole or in part to an act or omission" but it states expressly what is implied in the Scottish text, namely that the act or omission in question is the one subsequently averred to have been delictual. What is meant by "attributable" has been considered by the Court of Appeal in

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[27] *Ibid* at paras 57-58 B-D.
[28] [1963] AC 758.
[29] 2004 SC 784.
[30] 1992 SLT 141.
[31] *Ibid* at 144 C.
[32] Limitation Act 1980, s 14(1)(b).

England on several occasions.[33] In his judgment in *Spargo v North Essex District Health Authority*,[34] Brooke LJ set out the principles to be drawn from those cases as follows:

> "(1) The knowledge required to satisfy section 14(1)(b) is a broad knowledge of the essence of the causally relevant act or omission to which the injury is attributable;
>
> (2) 'Attributable' in this context means 'capable of being attributed to', in the sense of being a real possibility;
>
> (3) A plaintiff has the requisite knowledge when she knows enough to make it reasonable for her to begin to investigate whether or not she has a case against the defendant. Another way of putting this is to say that she will have such knowledge if she so firmly believes that her condition is capable of being attributed to an act or omission which she can identify (in broad terms) that she goes to a solicitor to seek advice about making a claim for compensation;
>
> (4) On the other hand, a plaintiff will not have the requisite knowledge if she thinks she knows the acts or omissions she should investigate but in fact is barking up the wrong tree; or if her knowledge of what the defendant did or did not do is so vague or general that she cannot fairly be expected to know what she should investigate; or if her state of mind is such that she thinks her condition is capable of being attributed to the act or omission alleged to constitute negligence, but she is not sure about this, and would need to check with an expert before she could be properly said to know that it was."[35]

It does not appear that those principles are in any way dependent on or affected by the fact that the English legislation does not leave to implication that the act or omission in question is the one founded on in the action.

2.24 The notion of attributability is thus seen as being less precise or less rigorous than clear knowledge of causation. Our current view is that it is right that the broad causal relationship between the injury and the act or omission of the defender required to start the running of time should be set at that looser standard. It has to be borne in mind that the acquisition of actual or constructive awareness of attributability simply starts the running of a limitation period of three years during which the pursuer has the opportunity to make such further investigations as may be necessary to place him in a position in which he hopes to be able to prove the causal link to the requisite standard of proof.

The identity of the defender

2.25 The third statutory relevant fact of which a person must have actual or constructive awareness is the identity of the defender as the person directly or vicariously responsible for the act or omission in question. One situation in which section 17(2)(b)(iii) (or section 18(2)(b)(ii) in death cases) may come into play is the "hit and run" driver.[36] It may also be relied on where, as occasionally happens, there is confusion as to which company within a

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[33] *Halford v Brookes and Another* [1991] 1 WLR 428; *Nash and Others v Eli Lilly & Co and Others* [1993] 1 WLR 782; *Broadley v Guy Clapham & Co* [1994] 4 All ER 439; *Dobbie v Medway Health Authority* [1994] 1 WLR 1234; *Smith v Lancashire Health Authority* [1995] PIQR 514 and *Forbes v Wandsworth Health Authority* [1996] 4 All ER 881.

[34] [1997] PIQR 235 at 242.

[35] *Ibid*.

[36] And also other road traffic accidents – see for instance *Elliot v J & C Finney* 1989 SLT 208.

group of companies is the employer.[37] This particular statutory fact is relatively straightforward and we do not understand the provision to present problems in practice.

Knowledge of the wrongful quality of the act or omission

2.26 One issue which arose under the provisions introduced in 1963,[38] and in force until the commencement of the 1984 Act, was whether the "material facts of a decisive character" included knowledge that the act or omission relied upon constituted a negligent or wrongful act. On the recommendation of the Law Reform Committee, the Limitation Act 1975, which applied to England and Wales, put the matter beyond doubt by stating expressly that knowledge that any acts or omissions did or did not as a matter of law involve negligence, nuisance or breach of duty was irrelevant.[39] The matter was settled – to similar effect – as regards Scotland by the decision of the House of Lords in *McIntyre v Armitage Shanks Limited.*[40] In its Report on *Prescription and the Limitation of Actions* this Commission recommended against changing this position:[41]

> "Nevertheless, to make ignorance of fault or liability a relevant fact in all cases would in our view go too far. It would also create undue uncertainty in the law and would increase the incidence of stale claims. It was the view of most commentators that such a change in the law would be undesirable. We do not, therefore, recommend any change in the present law, though we consider that the legislation should contain a specific provision on this point."

Hence, when the 1973 Act was amended in 1984, there was included in section 22(3) a provision that for the purposes of section 17(2)(b), or section 18(2)(b), "knowledge that any act or omission was or was not, as a matter of law, actionable, is irrelevant."

2.27 We adhere to the view thus expressed by our predecessors in this Commission. Inclusion of knowledge of actionability as a statutory relevant fact would lead to great uncertainty. There is not only the problem of the injured person who simply fails to seek legal advice, but also the problem of the injured person who is advised that his claim is unsound. It does not seem appropriate that he has an indefinite period thereafter in which to consult a number of legal advisers until he finds one willing to give positive advice or that, on learning perhaps a long time later that the original advice was unsound, he should then be able to raise proceedings as of right. We would add that having consulted on this matter, the Law Commission in its Report on *Limitation of Actions* recommended against including knowledge of legal liability in the relevant facts.[42] Accordingly, we ask whether consultees agree with our view that:

4. Knowledge that any act or omission was or was not as a matter of law actionable should continue to be irrelevant in the date of knowledge test.

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[37] *Comer v James Scott & Co (Electrical Engineers) Ltd* 1978 SLT 235; cf *McClelland v Stuart Building Services* 2004 SLT 1011.
[38] By the Limitation Act 1963.
[39] The provision is currently to be found in s 14 of the Limitation Act 1980.
[40] 1980 SC (HL) 46.
[41] Scot Law Com No 74 (1983), para 3.14.
[42] Law Com No 270 (2001), para 3.35 ff.

Actual awareness

2.28 The current provisions on date of knowledge in section 17(2) (and, in fatal cases, section 18(2)) of the 1973 Act provide as a possible starting point for the running of time the date upon which the pursuer "became ... aware" of the specified facts. In employing the term "aware", sections 17(2) and 18(2) differ from the corresponding English legislation which refers to the plaintiff's having "knowledge". The legislation which we have examined in other jurisdictions[43] having a discoverability date also uses the term "knowledge" or its cognates. In its original form the 1973 Act also spoke of material facts being "outside the knowledge" of the pursuer. The legislative change in terminology from "knowledge" to "awareness" occurred when the 1973 Act was amended in 1984. The terminology of "awareness" rather than "knowledge" was adopted by our predecessors in this Commission in their Report on *Prescription and the Limitation of Actions*.[44] There is no discussion of the adoption of that differing terminology and the Report seems to regard the terms as synonymous.

2.29 We have not found any judicial discussion of what is meant by "awareness" in this context. In *Comer v James Scott & Co (Electrical Engineers) Ltd*[45] the Lord Ordinary (Maxwell) in considering the then current provision, which referred to "knowledge", said:

> "... whether a person 'knows' a fact seems to me to involve a question of degree. I do not consider it advisable to attempt to define it, but at least I think it involves something approximating more to certainty than mere suspicion or guess. Moreover, in my opinion ... some information, suspicion or belief falling short of knowledge is not transformed into knowledge if it happens to be correct. I accept that a person cannot be said to 'know' a fact if the thing which he believes with whatever conviction is not in accordance with the truth. But I do not think that the converse is correct. I do not think that any information or belief, however uncertain, necessarily amounts to knowledge within the meaning of para (a) merely because it happens to coincide with the truth."[46]

In *Halford v Brookes and Another*[47] Lord Donaldson of Lymington, MR said of the equivalent English provision that:

> "In this context [of the purpose of the section] 'knowledge' clearly does not mean 'know for certain and beyond possibility of contradiction.' It does, however, mean 'know with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence.' Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice."[48]

The New Shorter Oxford English Dictionary (1993) gives as one of the definitions of "aware" the following:

> "Conscious, sensible, not ignorant, having knowledge,...well-informed, responsive to conditions etc."

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[43] All Australian states and the Canadian provinces of Alberta, British Columbia and Saskatchewan.
[44] Scot Law Com No 74 (1983), Recommendation 4 and Draft Bill.
[45] 1978 SLT 235.
[46] *Ibid* at 240.
[47] [1991] 1 WLR 428.
[48] *Ibid* at 443 E-F.

It is, we think, clear that in this particular context one is not talking of knowledge which is definite or certain. Indeed it may be that in a given case one or more of the statutory facts may be in dispute: for example, the back injury which the pursuer attributes to lifting a heavy weight at work may in truth be attributable to weekend gardening. In our view what one is concerned with is belief or understanding held with a certain degree of confidence or conviction, sufficient to prompt the initiation of the prosecution of a claim for damages, or, in the words of Lord Donaldson, providing "sufficient confidence to justify embarking on the preliminaries to the issue of a writ".[49] Insofar as there may be a semantic difference between "knowledge" and "awareness" we believe that the term "awareness" better expresses the notions which the judicial observations on knowledge were seeking to convey.

2.30 The concept of a person being actually "aware" of a fact is, we believe, relatively straightforward and the absence of judicial discussion of the concept is consistent with our understanding that in the practical application of section 17(2) of the 1973 Act no particular difficulty arises in respect of the concept of the pursuer's actual awareness of the specified relevant fact. Our provisional view is that there is no need to or advantage in changing the current terminology, but we would ask consultees for their views on our proposal that:

5. In formulating any amended provisions relating to a pursuer's state of knowledge it remains appropriate to continue to use the terminology of "awareness".

Constructive awareness

2.31 One of the principal criticisms of the operation of the current rules on limitation relates to the provisions in section 17(2) of the 1973 Act concerned with constructive awareness. Since the same formulation for constructive awareness is used in section 18(2) in regard to claims arising on death, the criticisms are logically applicable to that provision, albeit that in practice the difficulties or criticisms emerge in the non-fatal cases. Before turning to those criticisms, however, it is appropriate to deal with the logically prior issue of whether in principle there should be a constructive test or whether the law should proceed solely on what a pursuer actually knew, ignoring what he ought to have known or could reasonably have found out.

2.32 The policy reasons for having a constructive awareness test are not difficult to see. It is in the public interest that claims should be prosecuted promptly and it is thus appropriate to expect a person who has some ground for believing that he may have a claim to proceed with reasonable diligence. To rely on actual awareness alone would allow a claimant to postpone the start of the limitation period by delaying – either deliberately or through indifference or sloth – the putting in hand of reasonable enquiries or investigations and to overlook facts which should have been apparent to him. By thus delaying the start of the limitation period, he acquires a right to bring an action even though the claim might be very stale. All the other jurisdictions having a knowledge date whose legislation we have examined include in their rules a constructive awareness test. The absence of a "long-stop" provision such as that formerly found in the 20 year negative prescription (but disapplied to personal injury claims as a result of the amendments effected by the 1984 Act) is a further

[49] [1991] 1 WLR 428 at 443 E-F.

factor in support of the inclusion of some form of constructive awareness test. We therefore ask whether consultees agree with our proposal in principle that:

6. The legislation on date of knowledge should continue to contain a constructive awareness test.

Reasonably practicable

2.33 Under the current provisions of section 17(2) of the 1973 Act, the date of a pursuer's constructive knowledge of the relevant statutory facts is the date "on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become, aware" of those facts. As already mentioned a similar formulation is used in section 18 for fatal cases. The provision reflects the text of the draft Bill annexed to this Commission's 1983 Report which in turn reflected recommendation 4 of that Report.[50] Having noted that the then existing legislation adopted a test for constructive knowledge which was partly subjective and partly objective – since it referred to whether the person in question "... had taken all such action (if any) as it was reasonable for him to have taken ..." for the purpose of ascertaining a relevant fact or obtaining advice – the Report went on to state:

> "In the consultative memorandum we invited comment whether the legislation should refer specifically to the seeking of advice. There was general approval for the view that it should not. One judge considered that references to seeking 'appropriate advice' were unnecessary and served only to complicate matters, and that the test of constructive knowledge might reasonably be expected to be developed judicially. We agree with this view. Moreover, the Court of Session judges urged us to adopt a test which allowed the court
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> '... a modicum of discretion directly related to the pursuer's state of knowledge at a critical time'
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> and suggested that one way to achieve this result would be to refer in legislation, not to the date on which the injured person could reasonably have become aware of the relevant facts but to the date on which, in the opinion of the court, it was reasonable *for him* in all the circumstances to have become so aware - in other words, a formula of the kind which already appears in the statute. A formula along these lines would seem to afford the courts the desired degree of flexibility, and would have the further merit of not attempting to regulate the test of knowledge in too much detail. It would enable the court to take account of the differing circumstances of individuals and the differing nature of their injuries. It would enable the court, where appropriate, to attribute to an injured person facts in the possession of an adviser, such as a solicitor or a trade union official. Accordingly we endorse the judges' suggestion, and *recommend:*
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> *4. The date of the injured person's knowledge should be the date on which he became aware, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become aware, of the relevant facts. The legislation should not contain any references to seeking 'appropriate advice'*." [51]

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[50] Report on *Prescription and the Limitation of Actions* (Scot Law Com No 74) (1983), pp 40 and 49.
[51] *Ibid* at para 3.7.

2.34 In the interpretation and application of the current statutory provision there has been a tendency to place emphasis on what steps might have been practicable for the pursuer to take. Thus in *Elliot v J & C Finney*[52] the pursuer was the driver of a car involved in a road traffic accident with a lorry. He suffered physical injury requiring his immediate admission to hospital. His action was commenced six days after the third anniversary of the accident. It was contended on behalf of the pursuer that the action was not time-barred because he was not aware and it was not reasonably practicable for him to become aware of the identity of the driver of the lorry until after his discharge from in-patient care, which took place more than six days after the accident. Two days after the accident the pursuer had been visited in hospital by a police officer who took a statement from him. Had the pursuer asked the police officer about the identity of the other driver involved, the police officer would have provided that information. It was accepted that at the time the pursuer was in considerable discomfort and much more concerned about his recovery and being satisfied that he was not to blame than about trying to find out precise details of the identity of the lorry driver. There was also evidence from medical staff that patients suffering from injury following accidents did not normally enquire as to the particulars of the other party. The argument for the pursuer was that although it was in the ordinary sense of the word practicable for him to have obtained the information from the police officer, it was not reasonably practicable for him to have done that because of his state of mind. This was rejected. The Lord Ordinary (Sutherland) said:

> "The question that has to be decided is not whether the pursuer had a reasonable excuse for not asking the material questions but whether it would have been reasonably practicable for him to do so. In my opinion it would be reasonably practicable for a pursuer to become aware of necessary information if he would be able to do so without excessive expenditure of time, effort or money." [53]

The defenders in due course reclaimed the Lord Ordinary's decision to allow the action to proceed under section 19A of the 1973 Act but when the case came to be heard before the Second Division the pursuer did not insist in his cross appeal regarding the decision on section 17(2). [54]

2.35 A similar approach was adopted in *McArthur v Strathclyde Regional Council*[55] in which a motorist sought damages for injuries suffered when his car collided with an obstruction associated with road works. He initially presented his claim in correspondence to the roads authority. In the course of that correspondence the roads authority disclosed that the road works had been carried out by independent contractors. Proceedings were commenced against the contractors more than three years after the accident but less than three years after the date upon which the authority had disclosed that the road works had been executed by contractors. It was contended by the pursuer that until that disclosure it had not been reasonably practicable for him to become aware of the identity of the defending contractors. In rejecting that argument the Lord Ordinary (Abernethy) expressed agreement with what had been said in *Elliot*. He went on to say that the averments, as they stood, seemed to him "…to do no more than provide a reasonable excuse for not asking the question which would have led him [the pursuer] to become aware that the second defenders [the contractors] were persons to whose act or omission his injuries were

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[52] 1989 SLT 208.
[53] *Ibid* at 210 L-211 A.
[54] 1989 SLT 605.
[55] 1995 SLT 1129.

attributable."[56] In *Little v East Ayrshire Council*,[57] even though it was not then the policy of ear, nose and throat surgeons to volunteer information as to the cause of deafness, and many people in the pursuer's position would not have asked the reason for their condition, it was held to have been reasonably practicable for the pursuer to have asked his consultant surgeon about the cause of his deafness. It may be added that in a number of first instance decisions the pursuers failed to establish that their claims were not time-barred because their pleadings, while possibly indicating circumstances in which the omission to acquire the relevant knowledge might be excusable, did not address the test of reasonable practicability. Examples of these decisions include *Cowan v Toffolo Jackson & Co Ltd*[58] and *Nimmo v British Railways Board*.[59]

2.36 The approach adopted at first instance in *Elliot* and subsequent cases was approved at appellate level in the decision of the Extra Division in *Agnew v Scott Lithgow Ltd* (*No 2*).[60] In delivering the opinion of the court Lady Cosgrove, having referred to *Elliot*, stated:

> "It is incumbent on a pursuer to take all reasonably practicable steps to inform himself of all the material facts as soon as he is put on notice of the existence of any of these. And the onus is on the pursuer to establish that he has done so. The question is not whether he had a reasonable excuse for not taking steps to obtain the material information but whether it would have been reasonably practicable for him to do so (*Elliot v J & C Finney*, Lord Sutherland at p 210)." [61]

2.37 The rationale for having a date of knowledge or the semantic alternative of a date of awareness is that a person should have a reasonable opportunity to learn of the facts underlying his claim and that time should not run against him for so long as he is excusably ignorant of those facts. It appears to us that as interpreted and applied, the current test under section 17(2) of the 1973 Act of whether it was "reasonably practicable" for a pursuer to become aware of the relevant facts may sometimes not be consistent with that underlying principle. The "reasonably practicable" test involves asking whether there was a step which the pursuer could have taken and which would have provided awareness of the fact at issue and if so, whether that step could have been taken without an excessive expenditure of money, time or effort. However, it does not always follow that a person who did not pursue a means of acquiring awareness which did not involve an excessive amount of time, money or effort acted unreasonably. There may, for instance, have been nothing to prompt the person in question to take that particular reasonably practicable step. It therefore appears to us that in order to operate consistently with the underlying rationale of a date of knowledge test it would be necessary also to ask whether the omission to take the reasonably practicable step to acquire the relevant awareness was reasonable or excusable. However, it is clear from the cases to which we have referred that under the current provisions the existence of a reasonable excuse – even if an objectively justified reasonable excuse – is regarded as irrelevant. While recognising the provenance of the text now contained in section 17(2)(b) (and section 18(2)(b)) of the 1973 Act, it appears to be unsatisfactory in that it can fix a pursuer with constructive awareness at a date upon, and after which, he remained

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[56] 1995 SLT 1129 at 1134.
[57] 1998 SCLR 520.
[58] 1998 SLT 1000 at 1002.
[59] 1999 SLT 778 at 781.
[60] 2003 SC 448.
[61] *Ibid* at 454 A-B.

reasonably and excusably unaware of one or more of the statutory facts. We accordingly ask consultees whether they agree with our provisional conclusion that:

7. The current statutory test of whether it was "reasonably practicable" for the pursuer to become aware of a relevant fact is not a satisfactory test.

Subjective or objective test

2.38 On the assumption that the current provision on constructive awareness is not satisfactory, the question then arising is, what should replace it. An issue in the formulation of any legislative text on constructive knowledge or awareness is whether the test should be objective, that is to say applying the standard of a reasonable person who has suffered the particular injury in question, or whether it should also include subjective elements, such as the pursuer's mental capacity, state of education, financial resources or special features of his personality. In many cases it may not matter whether the test is purely objective since the pursuer will usually be of normal intelligence, education and personality. However, in the case, for example, of a pursuer of limited intelligence, a purely objective test may be unfair. On the other hand, a wholly subjective approach may be unfair to the defender by greatly extending the time in which he remains unprotected from having to answer a stale claim. In discussing the extent to which the current provisions may be seen as objective or subjective, Johnston points out the ultimate theoretical difficulties:

> "Taken to either extreme, the provision degenerates into meaninglessness. Suppose, for example, that the pursuer is of limited intelligence and therefore is not actually aware of one of the statutory facts. Apply a purely subjective test. If constructive and actual awareness are assessed according to precisely the same standard – a pursuer of limited intelligence – then the constructive awareness test adds nothing to the actual awareness test. The pursuer of limited intelligence is neither aware, nor is it reasonably practicable for him or her to become aware, of the statutory fact.
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> Conversely, if a purely objective test is applied, which takes no account of the pursuer's limited intelligence, then the constructive awareness test destroys the whole point of the actual awareness test. Lip service is paid to the fact that this pursuer of limited intelligence did not know the statutory fact. But on an objective test of what was reasonably practicable for a person of ordinary intelligence, it can be said that it was reasonably practicable for the pursuer to become aware of the statutory fact. An approach of this sort risks undermining the policy of the section, which is to prevent time starting to run before the actual pursuer knew the facts."[62]

2.39 In its 1983 Report on *Prescription and the Limitation of Actions* this Commission took the view that the then current provisions adopted a test which appeared to be partly subjective and partly objective since they referred to the person having "...taken all such action (if any) as it was reasonable for him to have taken" for the purposes of ascertaining a relevant fact or obtaining advice.[63] The Report recommended the retention of a "reasonable for him" formula in the legislative text.

2.40 The equivalent, similarly worded provisions in England and Wales[64] had earlier been interpreted as being subjective. Thus in *Newton v Cammell Laird & Co (Shipbuilders and*

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[62] David Johnston, *Prescription and Limitation* (1999) paras 10.30 and 10.31.
[63] Scot Law Com No 74 (1983), para 3.6.
[64] Limitation Act 1963, ss 1 and 7.

Engineers) Ltd[65] the Court of Appeal adopted a subjective approach. In the words of Lord Denning, MR:

> "You have to ask yourself: At what date was it reasonable *for him* – for the sick man himself – to have taken advice and found out that his illness was due to his employers' negligence or breach of duty. You do not ask: At what date would *a reasonable person* have taken advice? You ask: At what date was it reasonable *for this man* to take it. In other words, at what date ought he to have taken advice and found out that he had a worthwhile action?"[66]

That approach was again followed by the Court of Appeal in *Smith and Others v Central Asbestos Co Ltd and Another*[67] and was approved when the case reached the House of Lords.[68] In his speech Lord Reid said:

> "I agree with the view expressed in the Court of Appeal that this test is subjective. We are not concerned with 'the reasonable man'. Less is expected of a stupid or uneducated man than of a man of intelligence and wide experience."[69]

2.41 Following the legislative recasting which took place in England and Wales with the Limitation Act 1975 (subsequently consolidated in the Limitation Act 1980)[70] there arose a judicial difference of view on whether the test included subjective elements. In *Nash and Others v Eli Lilly & Co and Others*[71] it was regarded as necessary to take into account the personal characteristics and circumstances of the plaintiff. In delivering the judgment of the court, Purchas LJ explained that:

> "... the proper approach is to determine what this plaintiff should have observed or ascertained, while asking no more of him than is reasonable. The standard of reasonableness in connection with the observations and/or the effort to ascertain are therefore finally objective but must be qualified to take into consideration the position, and circumstances and character of the plaintiff."[72]

However, in *Forbes v Wandsworth Health Authority*[73] a majority of the Court of Appeal[74] took a different view. The plaintiff in that case, a man with a history of circulatory problems, had two bypass operations carried out on his leg on two succeeding days but in the event the operations were not successful and the limb was amputated. It was alleged that the second operation was delayed to an extent that was negligent. The action was commenced some 10 years later, following the plaintiff having consulted a solicitor about his financial position, when a report from a vascular surgeon was obtained. Reversing the decision at first instance to the effect that the plaintiff had neither actual nor constructive knowledge of the relevant fact until that report was obtained, Stuart-Smith LJ found that a reasonable man in the plaintiff's position, knowing the operation to have been unsuccessful and to have resulted in a major injury, should and would take advice reasonably promptly if he was minded to make a claim at all. He observed in relation to the passage from the judgment in

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[65] [1969] 1 WLR 415.
[66] *Ibid* at 419 C-D.
[67] [1972] 1 QB 244.
[68] *Sub nom Central Asbestos Co Ltd v Dodd* [1973] AC 518.
[69] *Ibid* at para 530.
[70] See above, para 1.21.
[71] [1993] 1 WLR 782; see also *Ali v Courtaulds Textiles Ltd* (2000) 52 BMLR 129.
[72] [1993] 1 WLR 782 at 799 F-G.
[73] [1997] QB 402.
[74] Stuart-Smith LJ, Evans LJ, with Roch LJ dissenting on the basis that *Nash* was binding.

Nash and Others v Eli Lilly & Co and Others[75] that he had difficulty in seeing how the individual character and intelligence of the plaintiff could be relevant in an objective test.[76] In a later passage he stated that "[i]t does not seem to me that the fact that a plaintiff is more trusting, incurious, indolent, resigned or uncomplaining by nature can be a relevant characteristic, since this too undermines any objective approach".[77] Earlier in his judgment Stuart-Smith LJ noted that any other construction would make the 1980 Act unworkable by effectively giving a plaintiff in such a case a right indefinitely to delay seeking expert advice and thus an absolute right to sue without any question of control by means of judicial discretion being involved. By contrast, section 33 of the 1980 Act (discretion to disapply time-bar) was designed to give the court the ultimate discretion. Evans LJ stated:

> "I agree with Stuart-Smith LJ that it is relevant to consider the scheme of the Act, taking account both of the postponed start of the limitation period under section 11 and the discretionary power to extend it under section 33. Since there is a wide discretionary power to extend the period in circumstances which Parliament has defined in section 33, there is no clear requirement to construe the knowledge provisions in section 14 narrowly or in favour of individual plaintiffs. I therefore consider that they should be interpreted neutrally so that in respect of constructive knowledge under section 14(3) an objective standard applies."[78]

2.42 In 1998 in its Consultation Paper on *Limitation of Actions*,[79] the Law Commission gave as its provisional view that "(1) constructive knowledge should include a large subjective element so that it should be defined as 'what the plaintiff in his circumstances and with his abilities ought to have known had he acted reasonably'; and (2) no more elaborate definition of constructive knowledge is required."[80] Before making that proposal the Law Commission stated:

> "As it is fairer to plaintiffs and would not create significant extra uncertainty, we also consider that the test for constructive knowledge should contain a large subjective element: what ought the plaintiff, in his circumstances and with his abilities, to have known had he acted reasonably? The question should not be what a reasonable person would have discovered, but what the plaintiff himself would have discovered if he had acted reasonably. The personal characteristics of the plaintiff, such as his or her level of education and intelligence, and the plaintiff's resources, would therefore be relevant to the question whether the plaintiff acted reasonably, in contrast to what now appears to be the position under the current law ...".[81]

The Law Commission also noted[82] that law reform agencies in New Zealand, Western Australia and Ontario had favoured a subjective standard. In its subsequent Report on *Limitation of Actions*,[83] the Law Commission rejected an entirely objective test stating *inter alia* that the purpose of a constructive knowledge test was "…to fix the claimant with the knowledge he or she would have had if he or she had acted reasonably, not to fix the

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[75] [1993] 1 WLR 782 at 799.
[76] [1997] QB 402 at 414 C.
[77] *Ibid* at 414 F.
[78] *Ibid* at 422 F-G.
[79] Law Com No 151 (1998).
[80] *Ibid* at para 12.57.
[81] *Ibid* at para 12.54.
[82] *Ibid* at para 12.53.
[83] Law Com No 270 (2001).

claimant with knowledge which he or she could not possibly have."[84] The Law Commission then went on to say:

> "The circumstances of the claimant will be relevant to his or her constructive knowledge. The circumstances of the claimant will include the claimant's financial resources, if information could not reasonably be available to the claimant unless expensive expert or other investigations have been carried out. The abilities of the claimant will also be relevant. 'Abilities' for this purpose encompasses any capacity of the claimant which might affect the date on which he or she could be expected to know the relevant facts. Most obviously, the claimant's intellectual abilities will be relevant.
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> We recommend that the claimant should be considered to have constructive knowledge of the relevant facts when the claimant in his or her circumstances and with his or her abilities ought reasonably to have known of the relevant facts." [85]

2.43 Since the publication of the Law Commission's Report in 2001, the divergence of views in the Court of Appeal which was discussed in that Report has been settled in favour of the objective approach by the House of Lords in *Adams v Bracknell Forest Borough Council*.[86] Having referred to certain passages and the reasoning in the judgments of Stuart-Smith LJ and Evans LJ in *Forbes v Wandsworth Health Authority*,[87] Lord Hoffmann stated:

> "I find this reasoning persuasive. The Court of Appeal did not refer to the decisions on the 1963 Act which had taken a more subjective view. While it is true that the language of section 7(5) of the 1963 Act was not materially different from that of section 14(3) of the 1980 Act, I think that the Court of Appeal in *Forbes* was right in saying that the introduction of the discretion under section 33 had altered the balance. As I said earlier, the assumptions which one makes about the hypothetical person to whom a standard of reasonableness is applied will be very much affected by the policy of the law in applying such a standard. Since the 1975 Act, the postponement of the commencement of the limitation period by reference to the date of knowledge is no longer the sole mechanism for avoiding injustice to a plaintiff who could not reasonably be expected to have known that he had a cause of action. It is therefore possible to interpret section 14(3) with a greater regard to the potential injustice to defendants if the limitation period should be indefinitely extended."[88]

Having disapproved the dicta of Lord Reid in *Central Asbestos*[89] and Purchas LJ in *Nash and Others v Eli Lilly & Co and Others*[90] which we have quoted above, Lord Hoffmann went on to say:

> "It is true that the plaintiff must be assumed to be a person who has suffered the injury in question and not some other person. But, like Roch LJ in *Forbes* [1997] QB 402, 425 I do not see how his particular character or intelligence can be relevant. In my opinion, section 14(3) requires one to assume that a person who is aware that he has suffered a personal injury, serious enough to be something about which he

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[84] Law Com No 270 (2001), para 3.48.
[85] Law Com No 270 (2001), para 3.49.
[86] [2005] 1 AC 76.
[87] [1996] 4 All ER 881.
[88] [2005] 1 AC 76 at 89, para 45.
[89] [1973] AC 518 at 528-534.
[90] [1993] 1 WLR 782.

would go and see a solicitor if he knew he had a claim, will be sufficiently curious about the causes of the injury to seek whatever expert advice is appropriate."[91]

Lords Philips of Worth, Scott of Foscote and Walker of Gestingthorpe were either wholly or in substantial agreement with Lord Hoffmann. Baroness Hale of Richmond was more in favour of some element of subjectivity.

2.44 There has thus been a clear shift in England and Wales towards a more objective approach of judging the pursuing party's conduct by the standard of a hypothetical reasonable person who is assumed simply to have suffered the same significant injury as a result of the negligent act or omission in question. We would add that in assessing the significance or seriousness of the injury, a hypothetical reasonable person will no doubt be assumed to be in the same situation (for example, in relation to his occupation or pre-existing disability) as the claimant respecting factors directly relevant to that assessment. But other features of the particular claimant, such as his lack of education or resources, or particular features of his personality, such as his being of an uncomplaining, incurious or feckless nature, are left out of account in determining whether he could reasonably have acquired knowledge of the relevant facts. However, such factors may be pertinent to an application made to the judicial discretion to disapply the time limit.

2.45 It should also be noted from the opinions delivered in the House of Lords in *Adams* that the adoption of the objective approach does not turn on the particular wording or phraseology used in the "date of knowledge" provisions in section 14 of the Limitation Act 1980, but on what may be described as policy considerations arising from the introduction in 1975 of the general discretionary power to disapply the time limit if equitable to do so. Given that the Scottish legislation confers a similar power on the court to override a time-bar if equitable to do so, it may now be arguable that similar reasoning should apply in relation to the current Scottish provisions (although, in many respects, the interpretation given by the court to the phrase "reasonably practicable" may have produced a test which may be even more objective).

2.46 The question whether in framing provisions on constructive awareness one should favour a subjective or an objective test is thus linked to the existence and extent of any judicial discretion to disapply the limitation period and allow a time-barred action to proceed. A further factor which may be relevant to the policy to be adopted in relation to constructive knowledge is the length of the limitation period itself. Some legal systems have, in addition to a short limitation period with a discoverability provision, a "long-stop" limitation period of greater length, which is not subject to any discoverability provision.[92] In general terms, it might be said that the need for a generous knowledge test diminishes with a longer limitation period.

2.47 While there may thus be an interlinking of the possible subjective or objective nature of the awareness test with both the existence and extent of a general judicial discretion to allow time-barred claims to proceed and the length of the primary limitation period, we are conscious that in some ways the awareness test may be the more fundamental. In other

[91] [2005] 1 AC 76 at 89-90, para 47.
[92] For example, the State of Victoria now has a six year period running from the date of discoverability and a 12 year "long-stop" period running from the date of accrual of the cause of action.

words, does one focus on "*this* man"[93] or the "reasonable man"? We would be grateful for views, in general, on the two approaches and therefore, before turning to the length of the primary limitation period, ask:

8. As a matter of general approach, should an awareness test incline towards subjectivity rather than objectivity?

Length of the limitation period

2.48 The current limitation period of three years was introduced by the Law Reform (Limitation of Actions &c.) Act 1954 following the reports of the Monckton Committee[94] and Tucker Committee[95] in preference to the then existing English limitation period. Prior to that Act, personal injury claims were not distinguished from other delictual claims for damages and in England and Wales were subject to the general limitation period for tortious claims of six years, unless directed against a public body covered by the Public Authorities Protection Act 1893, when a one year[96] limitation period applied, or against certain nationalised industries, such as the National Coal Board, when a three year period applied. The 1954 Act therefore increased the very short period under the Public Authorities Protection Act and reduced the six year period which applied generally and which was seen as being too long in the case of personal injury litigation, in which it was important for the recollections of witnesses to be fresh. The three year period was thus something of a compromise, although some support for its selection was found in the evidence to the Tucker Committee of the Scottish Motor Traction Co Ltd to the effect that 90 per cent of accident claims against it were raised within three years (although only subject to the 20 year prescription). However, while three years may have been a reasonable period in 1954 it may now be that in changed conditions some 50 years later there may be arguments for having a slightly longer period.

2.49 Since 1954 there has been a marked decline in the number of people employed in heavy industry and this has led to changes in the nature of personal injury litigation practice, with perhaps a greater proportion requiring expert reports to establish liability. Experts may not always be able to produce reports for forensic purposes within tight timescales. In cases which do not involve any claim for damages for personal injury, a five year prescription (along with a discoverability provision) applies under section 6 of the 1973 Act. In its 1970 Report, which was implemented by the 1973 Act, this Commission said:

> "We do not find it easy to justify the distinction made between cases of personal injury and cases of loss of or damage to property, and we considered recommending a uniform period applying to all actions based on delict. The reason for our not so recommending is that the legislature recently (1954 and 1963) curtailed the English six-year period for all actions founded on *inter alia* tort to three years where the damage caused consisted of personal injuries, and also applied this rule to Scotland; and in view of this legislation which, we think, rightly applies the same period of limitation on each side of the Border, we feel precluded from recommending at this time a change in the period which would apply to Scotland only. If, however, it were thought fit to amend the law so as to assimilate the limitation periods for claims in

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[93] Lord Denning MR in *Newton v Cammell Laird & Co (Shipbuilders and Engineers) Ltd* [1969] 1 WLR 415 at 419 C (cf para 2.40 above).
[94] Final Report of the Departmental Committee on *Alternative Remedies*, Cmd 6860 (1946).
[95] Report of the Committee on *The Limitation of Actions*, Cmd 7740 (1949).
[96] In Scotland the period was six months.

respect of personal injuries and other claims for damages, we should welcome such assimilation."[97]

Having a five year limitation period also for personal injuries would remove the current anomaly that a claim confined to damage to property may be pursued within five years, whereas if the same claim includes any element of damages for personal injury it must be raised within three years.[98] And while retaining a period of three years as the limitation period in personal injury actions would continue the existing harmonised rules throughout Great Britain, we would observe that the risk of "forum shopping", were Scotland to have a different personal injury limitation period, is now diminished by section 23A of the 1973 Act, which was inserted in 1984[99] and which would oblige a Scottish court to apply English limitation rules to a claim governed by English law. However, we recognise that if the current three year period is appropriate for the large majority of personal injury claims, increasing the period simply to assist in a small minority may be inexpedient since it might result in increased delay in the prosecution of many of the claims falling within that large majority.

2.50 Although we have not been requested in terms to consider whether the length of the three year limitation period should be altered, we think that this Discussion Paper affords an opportunity for consultees to express their views on this question. We therefore invite consultees, particularly practitioners, to respond to the following query:

9. To what extent are significant practical difficulties commonly encountered in investigating and commencing claims within the current three year limitation period?

2.51 We consider that both the length of the basic limitation period and the nature of the test for constructive knowledge are bound up with the existence and nature of any discretionary power of the court to disapply the time-bar. This is because all these elements may be combined to produce a limitation scheme which endeavours to strike an appropriate balance between the interests of pursuers and the interests of defenders. If, for example, there is a short limitation period with a stricter, more objective constructive knowledge test then the arguments in favour of a judicial discretion are stronger, whereas if the limitation period and constructive knowledge test are more generous to pursuers then a judicial discretion may not appear to be so necessary. For this reason we think it preferable to defer further discussion of the policy issues arising from these elements until the conclusion of our examination of the operation of the current provision on judicial discretion in Part 3 of this Discussion Paper.

Unsoundness of mind

2.52 Although perhaps peripheral to the central issues arising in regard to the date of awareness, it is convenient at this point to discuss the terms of subsection (3) of section 17 of the 1973 Act which provides that:

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[97] Report on *Reform of the Law Relating to Prescription and Limitation of Actions* (Scot Law Com No 15) (1970), para 114.

[98] For a recent example of the difficulties which the existence of dual time limits may present see *Thomson v Newey & Eyre Ltd* [2005] CSIH 21, 2005 SLT 439.

[99] Prescription and Limitation (Scotland) Act 1984, s 4.

"(3) In the computation of the period specified in subsection (2) above there shall be disregarded any time during which the person who sustained the injuries was under legal disability by reason of nonage or unsoundness of mind."

The reference to nonage means, in terms of section 1(2) of the Age of Legal Capacity (Scotland) Act 1991, those under the age of 16 years and we do not consider any issue to arise under this branch of subsection (3). As respects the second branch of the subsection, namely suspension of the running of time on the basis of "unsoundness of mind", it has been suggested to us by our advisory group that the term "unsoundness of mind" is now outdated; potentially offensive to those to whom it might be applied; and may present possible difficulties to mental health practitioners who operate in the context of different, more modern statutory provisions.

2.53 We agree with the suggestion that the reference in section 17(3) of the 1973 Act to "unsoundness of mind" requires review. The term was used in the 1973 Act as originally enacted. It was not defined. The Report of this Commission which preceded the 1973 Act does not discuss the phrase but treats it as synonymous with insanity. The principal legislative measure in force in 1973 in the field of mental health, namely the Mental Health (Scotland) Act 1960, did not use the term. The central concept of that Act was "mental disorder".[100] The term "unsoundness of mind" was however encountered in petitions to the Court of Session for the appointment of a *curator bonis* to someone incapable, on that account, of managing his affairs or giving directions for their management. The term "unsoundness of mind" in the 1973 Act relates to a pursuer's mental capacity to organise his affairs, including the mental capacity to take the decision to set in train the making of a claim for damages.[101] The requisite "unsoundness of mind" thus broadly equiparates with the test for the appointment of a *curator bonis*.

2.54 The position of adults suffering from mental incapacity is now governed by the Adults with Incapacity (Scotland) Act 2000 which makes incompetent the future appointment of a *curator bonis*.[102] Section 1 of that Act sets out, in terms of the headnote, "general principles and fundamental definitions". For present purposes the important subsection is subsection (6) which provides:

"incapable" means incapable of-

(a) acting; or

(b) making decisions; or

(c) communicating decisions; or

(d) understanding decisions; or

(e) retaining the memory of decisions,

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[100] Defined by s 6 of the 1960 Act as meaning "mental illness or mental deficiency however caused or manifested".
[101] *Bogan's Curator Bonis v Graham* 1992 SCLR 920 at 924-925.
[102] 2000 Act, s 80.

as mentioned in any provision of this Act, by reason of mental disorder[103] or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise); and

"incapacity" shall be construed accordingly."

Since the justification for the suspension of the running of time for limitation purposes by reason of mental incapacity must, in our view, be a mental disorder rendering the pursuer incapable of taking a decision to proceed with a claim there is an obvious attraction to replacing the current reference to "unsoundness of mind" with a reference to the pursuer's having been "incapable" within the terms of section 1(6) of the 2000 Act. However, that definition of incapacity refers to the making, communicating, understanding, or retaining memory of decisions as a generality and it may be for consideration whether, in importing the incapacity definition provided by the 2000 Act, the decision in issue should be specified as the decision to pursue a claim for damages. On the whole we would not favour such a restriction. The general test of incapacity, by reason of mental disorder, should suffice for limitation purposes. We would add that there is Outer House authority for the view that no causal relationship between the mental incapacity and the delay in raising the action need be established.[104]

2.55 While we currently do not favour any requirement for a direct causal link between the incapacity and the delay in bringing proceedings, there may be a question whether the suspension of the running of time should cease on the making of a guardianship order under the 2000 Act. Given that a guardian is subject to a measure of supervision by the Public Guardian it may be thought that a guardian will act promptly in bringing the claim for damages and that specific provision starting the running of time is not necessary in practical terms. Experience in the past was reported to us by the advisory group as being to the effect that if a *curator bonis* was appointed to an *incapax*, proceedings were normally instituted promptly.[105]

2.56 We would add that in its Report on *Limitation of Actions*[106] the Law Commission proposed[107] for England and Wales that adult disability (suspending the running of time for limitation purposes) should be defined in terms of the lack of capacity contained in the general definition recommended in its Report on *Mental Incapacity.*[108] Having canvassed in its earlier Consultation Paper[109] whether the definition of disability should make specific provision for psychological incapacity suffered by victims of sexual abuse, the Law

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[103] "mental disorder" is defined in section 87(1) of the 2000 Act.
[104] *Sellwood's Curator Bonis v Lord Advocate* 1998 SLT 1438, following *Paton v Loffland Brothers North Sea Inc* 1994 SLT 784 in preference to *Brogan's Curator Bonis v Graham* 1992 SCLR 920.
[105] *Sellwood's Curator Bonis v Lord Advocate* 1998 SLT 1438 may be an exception.
[106] Law Com No 270 (2001).
[107] *Ibid*, para 3.123.
[108] Law Com No 231 (1995), paras 12.123-12.125. The definition is in these terms: A person is without capacity if at the material time: (a) he or she is unable by reason of mental disability to make a decision for himself on the matter in question or (b) he or she is unable to communicate his [or her] decision on that matter because he or she is unconscious or for any other reason."
[109] Law Com No 151 (1998).

Commission recommended against any such provision, the great majority of consultees being against such a provision.[110]

2.57 We accordingly propose that:

10. (a) The reference in the 1973 Act to legal disability by reason of unsoundness of mind should be replaced by a reference to the pursuer's being an adult with incapacity within the meaning of section 1(6) of the Adults with Incapacity (Scotland) Act 2000;

And we ask the following questions:

(b) Should the reference to incapacity be qualified by its being confined to the adult concerned being incapable (by reason of mental disorder or physical disability) of making, communicating, or understanding decisions respecting the making of a claim for damages for the personal injury in question?

(c) Should the appointment of a guardian lift the suspension of the running of time by reason of the incapacity of the adult in question?

[110] Law Com No 270 (2001), para 3.125.

Part 3 Judicial discretion

Introduction

3.1 In this Part we examine section 19A of the 1973 Act which gives the court power to override the three year limitation period if it seems equitable to do so. We consider whether the discretionary power should be retained, and, if so, whether it should be subject to a time limit. We also consider whether, if discretion is retained, the statutory provisions should be amended to add a list of factors to which the court should have regard in exercising its discretion.

Background to the judicial discretion

3.2 The possibility of introducing provision for such a judicial discretion was considered by the Edmund Davies Committee in the context of its review of the Law Reform (Limitation of Actions &c) Act 1954, which until 1973 regulated the law of limitation north and south of the border. The Committee recognised the simplicity of such a provision in enabling hard cases to proceed if it seemed equitable to the court. However, in its Report,[1] published in 1962, the Committee took the view that an unfettered discretion was undesirable. One objection taken by the Committee was that the law should be certain and accordingly any judicial discretion should be narrowed as far as possible. The Committee thus rejected the idea of giving the courts complete discretion and recommended that a judicial discretion should be subject to "certain reasonably objective conditions."[2]

3.3 As mentioned in Part 1,[3] in 1970 this Commission published its Report on *Reform of the Law Relating to Prescription and Limitation of Actions*,[4] the main recommendation of which was that the law of Scotland as regards prescription and limitation, both statutory and common law, should be stated in one comprehensive statute. Effect was given to this recommendation by the 1973 Act. However, the Report made no recommendations about a judicial discretion.

3.4 The issue of judicial discretion was considered again by the Lord Chancellor's Law Reform Committee in its Twentieth Report in 1974.[5] The Committee considered that the introduction of a judicial discretion was fairer to both parties to an action. The Report recommended that to achieve consistency in the application of the court's discretion, the legislation should prescribe "guidelines" for the courts. The Committee also considered but rejected the possibility of giving the courts power to impose conditions on the exercise of the discretion. For example, the court might allow the action to proceed on the basis that the pursuer should recover only a proportion of the damages to which he would otherwise be entitled.

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[1] Report of the Committee on *Limitation of Actions in Cases of Personal Injury*, Cmnd 1829 (1962).
[2] *Ibid* at para 32.
[3] See above, para 1.19.
[4] Scot Law Com No 15 (1970).
[5] Law Reform Committee Twentieth Report – Interim Report on *Limitation of Actions in Personal Injury Claims*, Cmnd 5630 (1974).

3.5 As mentioned in Part 1,[6] the recommendations of the Law Reform Committee were implemented as regards England and Wales in the Limitation Act 1975. The provisions concerned were re-enacted in section 33 of the Limitation Act 1980. Later that year, a judicial discretion was introduced in Scotland by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, which inserted a new section 19A in the 1973 Act.

3.6 The introduction of the judicial discretion in Scotland came after the publication in April 1980 of this Commission's Consultative Memorandum on *Time-Limits in Actions for Personal Injuries*.[7] At that time the Commission did not favour the introduction of a fixed limitation period along with a judicial discretion on the grounds that it would lead to uncertainty and divergence of approach on the part of the judges.[8] Neither was the Commission attracted to the approach adopted in England.

3.7 In the subsequent Report on *Prescription and the Limitation of Actions*[9] our predecessor Commissioners stated that, while consultees had not been in favour of a judicial discretion, their comments had been made against the background of the pre-1980 law. Commissioners took the view that "it would be wholly inappropriate to recommend the repeal of a provision such as this [section 19A of the 1973 Act] until experience of its working has been gained over a much longer period."[10] However, while making no formal recommendation on the matter, the Report concluded that guidelines should not be added to section 19A in view of the experience in England with the operation of the discretion under section 33 of the Limitation Act 1980. The Report also commented that guidelines referred to matters which "…when relevant, would be taken into consideration by the court."[11]

The current provision

3.8 At present section 19A provides that the court may allow a pursuer to bring an action which would otherwise be time-barred under section 17 (actions in respect of personal injuries not resulting in death) or section 18 (actions where death has resulted from personal injuries), if it seems to the court that it is equitable to do so.[12] By contrast with the judicial discretion in England and Wales,[13] the Scottish legislation does not include a list of factors to which the court must have regard in exercising its power. Subsection (4), which was added in 1984,[14] provides that cases which are allowed to proceed under section 19A are not to be heard by a jury.

3.9 Following the introduction of a judicial discretion to disapply the time-bar, the manner in which it should be exercised and factors relevant to that exercise were considered by the court in a number of decisions. Particularly as a result of certain appellate decisions in the Inner House some propositions can now be regarded as settled. These are conveniently

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[6] See above, para 1.21.
[7] Consultative Memorandum No 45 (1980).
[8] *Ibid* at para 2.24.
[9] Scot Law Com No 74 (1983).
[10] *Ibid* at para 4.9.
[11] *Ibid* at para 4.10.
[12] Section 19A also applies to actions under ss 18A (defamation and related actions) and 18B (actions of harassment) which are outwith the scope of the Commission's current remit.
[13] Limitation Act 1980, s 33(3); see below, Appendix B.
[14] By the Prescription and Limitation (Scotland) Act 1984, s 6(1), Sch 1, para 8(b).

and succinctly set out by the Lord Ordinary (Drummond Young) in *B v Murray (No 2)*[15] as follows:

> "Section 19A has been the subject of considerable judicial discussion. The same is true of its English equivalent, s 33 of the Limitation Act 1980; s 33 is framed differently from s 19A, but it fulfils the same essential function and the authorities on its interpretation are accordingly of assistance in Scotland: *Donald v Rutherford*, 1984 SLT 70. A number of matters have been clearly established. First, the court has a general discretion under section 19A; the crucial question that must be considered has been stated to be 'where do the equities lie?': *Forsyth v AF Stoddard & Co Ltd*, 1985 SLT 51 at 55, per Lord Justice Clerk Wheatley; *Elliot v J & C Finney*, 1989 SLT 605 at 608F per Lord Justice Clerk Ross. Secondly, the onus is on the pursuer to satisfy the court that it would be equitable to allow his claim to proceed: *Thompson v Brown*, [1981] 1 WLR 744, at 753 per Lord Diplock. Thirdly, the conduct of a pursuer's solicitor may be relevant to the exercise of the court's discretion, and the pursuer must take the consequences of his solicitor's actings: *Forsyth*, *supra*, at 1985 SLT 54. Fourthly, relevant factors that the court may take into account include, but are not restricted to, three matters identified by Lord Ross in *Carson v Howard Doris Ltd*, 1981 SC 278, at 282; these are '(1) the conduct of the pursuer since the accident and up to the time of his seeking the Court's authority to bring the action out of time, including any explanation for his not having brought the action timeously; (2) any likely prejudice to the pursuer if authority to bring the action out of time were not granted; and (3) any likely prejudice to the other party from granting authority to bring the action out of time'. Fifthly, each case ultimately turns on its own facts, a principle which applies even if a number of claimants present similar claims against the same person."[16]

3.10 Although the courts have thus stressed the unfettered nature of the discretion enjoyed under section 19A and the need to decide each case on its own facts it is perhaps not surprising that some common themes or issues often arise.

3.11 First, in balancing the prejudices likely to be suffered by the respective parties, it is clear that, if the court allows the action to proceed, the defender loses what is sometimes described as a "cast iron" defence, namely the protection of the time-bar, and is then exposed to the risk of being found liable in damages. Conversely, if the court refuses to allow the action to proceed, the pursuer suffers the equally obvious prejudice of not being able to pursue a potentially good claim. These obvious prejudices are, in a sense, self-cancelling and the search must therefore be taken wider in a quest for factors which either diminish or increase the prejudice suffered by each party.

3.12 In the case of a pursuer, one factor which may diminish the prejudice to him is the existence of a remedy against a third party – normally a solicitor instructed by the pursuer who failed to commence the litigation in time. The existence of a clear case of neglect on the part of the pursuer's solicitor or former solicitor in failing to proceed with the action is a not infrequent ground for refusing to allow the time-barred claim to proceed.[17] We would observe in passing that the existence of the discretionary power has the consequence that, even where the claim has become time-barred through the undoubted negligence of a solicitor, it may still be necessary first to take proceedings against the original wrongdoer inviting exercise of the discretionary power in order to counter any argument from the

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[15] [2005] CSOH 70; 2005 SLT 982.
[16] *Ibid* at para [29].
[17] See eg *Donald v Rutherford* 1984 SLT 70; *Forsyth v AF Stoddard & Co Ltd* 1985 SLT 51; *Morrice v Martin Retail Group Limited* 2003 SCLR 289.

solicitor's professional indemnity insurer that the pursuer has not established loss. However, the existence of a possible claim against a professional adviser does not always mean that the court declines to disapply the time-bar. Where the claim against the third party is complicated, likely to be difficult to pursue, or likely to lead to lengthy delay in the pursuer obtaining damages, less weight will be given to the factor of a possible alternative remedy. Likewise, a minor slip by a solicitor which results in the action being raised only slightly late will not usually be regarded as a reason for refusing to exercise the discretion favourably to the pursuer. However, where it is plain that the reason for the pursuer's claim having become time-barred is culpable professional negligence on the part of the pursuer's solicitors, it is generally thought appropriate that he should be responsible for the consequences of that negligence. The existence of a claim against a solicitor or professional adviser is a relevant factor in England and Wales though not included in the list of statutory matters in section 33(3) of the Limitation Act 1980.[18]

3.13 In the case of a defending party, the prejudice involved in the loss of the time-barred defence may be aggravated if, by reason of the passage of time, the defender's ability to investigate the claim and defend it has been demonstrably impaired because, say, records have been lost or destroyed or witnesses have died or become untraceable. On the other hand, if the pursuer's claim was intimated promptly to the defender, who was thus able to investigate the claim properly within the triennium, and the delay after the action became time-barred is relatively short, the loss to the defender of the time-bar protection will generally be seen as less prejudicial to him than the prejudice to the pursuer were the pursuer not allowed to proceed with his action.

3.14 The conduct of the parties is also relevant to the exercise of the discretion. Since it is for the pursuer to show that it would be equitable to allow him to proceed with his action he is required to explain the circumstances which led to the action not having been commenced in time. If excusable or comprehensible, lack of knowledge of the existence of a right in law to claim damages may be a relevant factor in respect of the exercise of discretion under section 19A (though not under the knowledge tests of section 17(2)).[19] The conduct of any solicitor acting for the pursuer will also be attributable to the pursuer himself. Accordingly, in a question with the defender pleading time-bar, a pursuer has to accept responsibility for the action – or inaction – of his solicitor. As already mentioned, when considering prejudice where the failure to meet the time-bar arises through the clear neglect of the pursuer's solicitor, an exercise of the discretion favourable to the pursuer will normally be refused. On the other hand, the solicitor's failing may be pardonable or lacking in any great culpability and have resulted in relatively short delay.[20] In such circumstances, where the conduct is not particularly culpable and the defender's ability to defend the action is not materially impaired, the action will normally be allowed to proceed. The conduct of the defender may also be relevant, and the actings of a defender's solicitor or other agent will be attributable to the defender as, for example, where the reason for the action being time-barred was the

[18] See *Thompson v Brown and Another* [1981] 1 WLR 744.
[19] *Comber v Greater Glasgow Health Board* 1989 SLT 639; *B v Murray (No 2)* [2005] CSOH 70, 2005 SLT 982, Lord Drummond Young at para [30].
[20] See eg *Ferguson v McFadyen* 1992 SLT 44 (defender incorrectly described with his father's first name); *Nicol v British Steel Corporation (General Steels) Ltd* 1992 SLT 141 (action two days late as a result of "oversight"); *Stephen v North of Scotland Water Authority* 1999 SLT 342 (action raised timeously against employers at the time of the incident, but in ignorance of the statutory transfer to the water authority of their liability).

failure of solicitors acting for the defender to honour an agreement reached with the pursuer's solicitor.[21]

Issues arising

3.15 The principal issues which we see arising for consideration in regard to the discretionary power conferred on the court by section 19A of the 1973 Act are threefold. First, there is a question, linked no doubt with the knowledge test, whether the court should continue to have a discretionary power to override a time-barred defence and allow the action to proceed. Secondly, if such a discretionary power is retained should it be available indefinitely or be subject to some further time limit? The third issue for consideration is whether, if a discretionary power is retained, it should continue to be couched in the same or similar statutory terms as the current section 19A or whether the statute should seek to stipulate the matters to which the court should have regard in exercising the discretion.

Should judicial discretion be retained?

3.16 We have already mentioned[22] that when the current section 19A was inserted in the 1973 Act in 1980 the introduction of a judicial discretion was presented to Parliament as being a temporary solution pending a recasting of the provisions relating to awareness or knowledge. On the other hand, it should be noted that in England and Wales the introduction of the discretion to disapply the time-bar in personal injury actions followed on a recommendation of the Law Reform Committee and was intended as a permanent feature. A general discretion to allow a time-barred personal injury action to proceed if just and equitable to do so is not a universal feature of the Commonwealth jurisdictions which we have examined.[23] There is a school of thought that a discretionary power is, or ought to be, unnecessary if the knowledge or discoverability test is adequately formulated.[24] Put shortly, if that test is framed in terms which are sufficiently subjective as to be favourable to a pursuer there should be no necessity for a judicial discretion. It is accordingly necessary for us to consider whether a judicial discretionary power to override a time-bar should be retained in our law.

3.17 The chief disadvantage of the existence of a discretionary power to disapply the time-bar is that it produces uncertainty (greater than the uncertainty inherent in a knowledge test). A party who is exposed to being sued for damages cannot be certain that, after the expiry of a particular period of time, a claim can no longer be pursued. Such a party may remain unsure as to when he may safely dispose of records or documents and he may have to incur the expense of maintaining indemnity insurance for a prolonged period. The existence of a judicial discretion of this kind also has consequences for insurers who cannot be certain that no liability, or no further liability, may yet emerge from a given incident or activity for which they were at risk. Further, since the power is discretionary, to be exercised according to the judge's conception of what is equitable, there will inevitably be uncertainty as to how it will be exercised in individual cases. It is indeed inherent in a discretion that different decision-

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[21] *McCluskey v Sir Robert McAlpine & Sons Ltd* 1994 SCLR 650.
[22] See above, para 1.22.
[23] In Australia, only Victoria and the Australian Capital Territory have such an unrestricted power. In New South Wales the power is restricted to cases of latent disease and in Tasmania the power may only be exercised within six years of the date of accrual of the cause of action. Of the Canadian provinces whose legislation we examined (Alberta, British Columbia and Saskatchewan) none had a judicial discretion to extend the limitation period.
[24] See for example the discussion in David Johnston, *Prescription and Limitation* (1999) paras 12.31-12.34.

takers may have different views each of which may be properly held. We would add that the existence of the discretionary power sometimes has the effect that, before advancing a perhaps unanswerable claim against the solicitor for having neglected to raise proceedings timeously, the time-barred pursuer may feel it is necessary first to sue the original wrongdoer and apply for a favourable exercise of the discretionary power albeit that the prospects of success in that application are poor. Expense and further delay in the payment of compensation are thereby incurred and further demands are placed on the court system.

3.18 On the other hand, the chief advantage of providing for a judicial discretion is its flexibility. It enables justice to be done to a pursuer whose omission to sue timeously is explained by factors not taken into account in the knowledge or discoverability test but which excuse or mitigate the failure. The existence of a judicial discretion may also temper the arbitrariness of a cut-off date by allowing actions to proceed where the time-bar date is overshot by only a short period, without any material impairment of the defender's ability to resist the claim, and the bar to the action can be seen as technical or arbitrary.

3.19 As has already been remarked, the arguments for or against providing a judicial discretion to disapply the limitation period are linked to the existence and nature of the knowledge or discoverability test. If there were no provision for a date of knowledge, and time ran from the date of accrual of the cause of action, a discretionary power of relief would be the only way in which justice could be done in cases of latent disease. Likewise, if the knowledge test is narrowly conceived, that is to say objectively, the existence of judicial discretion may be necessary to allow justice for a particular pursuer whose omission to sue timeously may be excusable and whose court action will not present particular difficulties, by reason of the effluxion of time, for the defence. If, however, the knowledge test is framed generously to a pursuer, the argument for not having a judicial discretion becomes much stronger. By definition, the pursuer has had three years since the date when he knew of all the necessary facts or the date when that particular pursuer could reasonably have acquired that knowledge, and it may be argued that there is no reason why he should have the prospect of obtaining further time through the exercise of a judicial power with all the uncertainty for a defender that is entailed.

3.20 Our provisional view is in favour of retaining some measure of judicial discretion. Plainly, if the knowledge test was formulated objectively, in the way in which the current English provisions were interpreted by the House of Lords in *Adams v Bracknell Forest Borough Council*,[25] retention of the judicial discretion would be appropriate. Indeed, the very existence of the discretionary power in the same statute was an important element in the reasoning whereby the House of Lords came to the conclusion that the statute should be construed as setting an objective knowledge test. In policy terms, the balance which was discerned as having been struck by the legislature was in favour of a stricter knowledge test and hence a shorter time in which the claimant had a right to start proceedings with the court being able thereafter to control whether proceedings might be commenced. The court could thus protect defendants against stale claims in which the passage of time might have created evidential difficulties for the defending party.

3.21 However, even if the knowledge test were formulated in subjective terms, we would still incline to the retention of the provision for judicial discretion to override the time-bar. It

[25] [2005] 1 AC 76.

has to be recognised that many personal injury actions are raised only towards the end of the triennium because of a desire to settle the claim without litigation. It has also to be recognised that in the process of commencing proceedings there is scope for things going wrong. The cases contain examples of the time-bar date being missed by relatively short periods as a result of mistakes such as using the wrong first name of the defender.[26] Similarly, where the pursuer was employed by a company within a group of companies,[27] or by a business entity which operates under a trading name similar to that of an associated company,[28] the wrong entity within the business grouping may be sued, particularly where the issue of the identity of the defender has not emerged in prior correspondence with insurers. Moreover, an action is only "commenced" when it is served upon the defender.[29] If the intended defender moves address, service at the old address will fail, and even on making diligent and expeditious enquiry about the new address, the pursuer's solicitors may be unable to effect service in time. Similarly, a business may have closed the branch at which initial service is attempted and later service at another branch may come a day or two late. We are also advised that in some cases there may be difficulty in ascertaining the date from which time runs. For example, there may be some misunderstanding as to the date upon which an accident occurred, particularly if the incident was relatively minor and not immediately logged in an accident book. Even if recorded in an accident book, the record will normally be held by the defender, and the pursuer, proceeding only on his recollection of the date of the accident, may have the wrong week or month.

3.22 In the field of personal injury it may be thought unsatisfactory that a claim should fail on the technical ground of such mistakes or mishaps even although the mistake or mishap is rectified expeditiously when it comes to light. While this type of case would sometimes involve a degree of fault on the part of the pursuer's solicitor, that may not always be so. Even if there is some minor fault on the part of the solicitor it may be unsatisfactory to require the client to sever his relationship with the solicitor, to find new legal advisors and pursue a claim against his former solicitor, who may well have knowledge of the weaknesses of the pursuer's case against the original defender acquired as part of the solicitor-client relationship. At least as a means of dealing with those technical or accidental cases of missing the time limit, the judicial discretion to override the time-bar seems desirable.

3.23 We also note that in its Report on *Limitation of Actions*[30] the Law Commission, having earlier proposed in its Consultation Paper[31] that there should be no discretionary power to override a time-bar, came to the view that in the case of personal injury actions, the existing discretion should be retained. Among the factors prompting the Law Commission to recommend retention of the judicial discretion was the fact that it had been available to the courts since 1975 and that it was "difficult to turn the clock back."[32] Additionally, and more importantly, a personal injury was generally a more extreme form of injury than damage to property or economic loss[33] and the Law Commission was also concerned that the proposals

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[26] *Ferguson v McFadyen* 1992 SLT 44.
[27] *Comer v James Scott & Co (Electrical Engineers) Ltd* 1978 SLT 235.
[28] *McClelland v Stuart Building Services* 2004 SLT 1011.
[29] *Erskine* III VI 3; *Smith v Stewart & Co Limited* 1960 SC 329 at 334; *Barclay v Chief Constable, Northern Constabulary* 1986 SLT 562.
[30] Law Com No 270 (2001).
[31] Law Com No 151 (1998), para 12.196.
[32] Law Com No 270 (2001), para 3.161.
[33] *Ibid*, para 3.160.

might not operate fairly in all cases, for example in some sexual abuse cases, unless there were a discretionary power.[34]

3.24 Child sexual abuse cases may indeed be an important reason for retaining judicial discretion. Such cases present a number of difficulties. By definition the alleged wrongful act or acts took place during childhood, and experience in recent years in Scotland and in other jurisdictions has been that some claims for damages may first be advanced many years later – and well after the expiry of a period of three years from the attaining of the age of legal capacity. There are a number of reasons for this, including no doubt a change in public awareness and attitudes, but the reason or reasons will vary from case to case. We are also conscious that among certain psychiatrists and psychologists there are disputed views as to the possible consequences of sexual activity in childhood for subsequent ability to recall or recount that activity.[35] A further difficulty is that, particularly in the case of children having received institutional care, complaints of sexual abuse may be allied with complaints of non-sexual abuse.

3.25 In some Canadian provinces the approach adopted in the last decade of the twentieth century was to exclude certain sexual abuse cases from any limitation rule.[36] That exclusion however usually took place in the context of a limitation regime which did not provide for a discretion to override the (often very short) time-bar. For our part we would not favour any special rule excluding claims of alleged sexual abuse during childhood from the law of limitation of actions. We naturally recognise that sexual abuse of a child is a serious matter and may have serious consequences for later mental health. However, the primary aim of limitation of action rules is to protect a defending party against stale claims which, by reason of the antiquity of the claim, he may be prejudiced in defending. That rationale applies just as much to allegations of sexual misconduct as to allegations of other wrongful acts or omissions, which may often also have serious consequences. While sexual abuse of a child is of course criminal, the facts giving rise to many other actions for damages for personal injuries may also be potentially criminal.[37] Moreover, many claims for damages for child sexual abuse are directed against the employer of the alleged primary perpetrator (or the employer's statutory successor) on the basis of alleged negligence in the management of the institution or some vicarious responsibility for the acts of the alleged abuser. Since it cannot be assumed that the making of a claim, whatever its nature, implies its factual correctness we think it important that claims for damages for personal injury said to have been caused by sexual activity should not be excluded from limitation rules. An allegation of sexual misconduct will commonly be a very serious matter not only for the person claiming to have suffered the abuse but also the person against whom the allegation is made (and for any person or body against whom vicarious or indirect responsibility is alleged) and the passage of time may, as in other cases, seriously prejudice the defending party in refuting the allegation. In that regard we are informed by our advisory group that in a number of actions brought against religious orders there has been included among the defenders individuals who gave gratuitously of their time to serve on management committees or similar bodies.[38] Such individuals may have no insurance against such claims and may face particular personal difficulty in responding to alleged events which took place long ago. We

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[34] Law Com No 270 (2001), para 3.162.
[35] *B v Murray (No 2)* [2005] CSOH 70; 2005 SLT 982 at paras [59]-[92].
[36] For example, Alberta, British Columbia and Saskatchewan.
[37] For example, contraventions of the Road Traffic Act 1991 and the Health and Safety at Work etc Act 1974.
[38] Cf *AM v Hendron and Others* [2005] CSOH 121.

would add that in its Consultation Paper[39] the Law Commission canvassed the question whether special provision was required for sexual abuse cases but in its Report, following consultation, concluded that with a discretion to override the time-bar special rules could not be justified.[40]

3.26 As already indicated[41] an awareness test may, in some cases, enable a person claiming to have developed psychiatric illness later in life as a result of childhood sexual abuse to bring an action for damages as of right. For example, it may be that the pursuer, while aware of having been the subject of sexual activity with an adult during his or her childhood, could reasonably have regarded the experience as one not inflicting personal injury sufficiently serious to warrant suing until the later emergence of psychiatric illness and advice of its attributability to the childhood sexual activity. But in other cases the existence of judicial discretion may be a useful and pragmatic way of coping with the existence of disputed psychiatric views (both as a general thesis, and in the application of a thesis to the particular case) regarding the consequences of sexual abuse in childhood, particularly respecting the ability to recall and associate. We therefore propose that:

11. Judicial discretion to allow a time-barred action to proceed should be retained.

Restriction of judicial discretion

3.27 As already stated, the principal drawback to the existence of a judicial discretion to disapply the time-bar is that a potential defender can never have the certainty that after the lapse of the given period no action can be pursued in respect of a past incident or event. In the case of some industrial diseases, such as asbestosis or noise-induced hearing loss, and in some sexual abuse claims the knowledge or discoverability test will produce a measure of uncertainty for the potential defender. That element of uncertainty stems effectively from the nature of the injury and to that extent may have to be accepted in order to do justice to the claimant. However, in very many cases the injured party will have all the necessary knowledge at or very shortly after the accident or event and even in the case of insidious disease or sexual abuse there will be a point in time when the claimant will have, or ought reasonably to have, that necessary knowledge. It can be argued that, even with a judicial discretion, there should come a point in time at which it can be said with certainty that no proceedings can be instituted.

3.28 We indicated earlier[42] that, coupled with a subjective awareness test, a role for the exercise of judicial discretion may be in practice to give relief where, through some misunderstanding or mishap, the time-bar date has been missed but the proceedings are commenced relatively shortly thereafter. If that view were adopted, it can then be argued that, once the time limit has been passed by a significant amount of time, there is little scope for a proper exercise of judicial discretion and that the power may therefore be made subject to a temporal limit. Thus, if the statute provided that an application for the exercise of judicial discretion to allow the action to proceed might only be made within, say, five years of the action becoming time-barred there would be a final cut-off date. In other words, after a

[39] Law Com No 151 (1998), paras 3.19-3.25.
[40] Law Com No 270 (2001), paras 4.25-4.32.
[41] See above, para 2.20.
[42] See above, para 3.18.

pursuer became actually or constructively aware (applying a subjective test) of the relevant statutory facts he would have a period of three years in which he would have a right to sue followed by a period of five years during which he might sue if he could satisfy the court that it was equitable that he should be allowed to proceed. On the lapse of the latter quinquennium, the potential defender could be certain that no proceedings could thereafter be brought. We have not formed a view on such a proposal other than to think that it is worthy of further consideration. We would therefore welcome the views of consultees on the following question:

12. Should the exercise of judicial discretion be subject to a time limit and if so, what should the time limit be?

Guidelines on the exercise of judicial discretion

3.29 In contrast to section 19A of the 1973 Act, the provisions of the Limitation Act 1980 (which confer a discretion on the court in England and Wales to disapply the time-bar) contain a list of factors to which the court should have regard in exercising its discretion. The list is contained in section 33(3) and is as follows:

> "(a) the length of, and the reasons for, the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11, by section 11A or (as the case may be) by section 12;
>
> (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
>
> (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

3.30 In addition to those factors, the court must have regard to the respective prejudice to the parties were the application to be granted or refused.[43] Notwithstanding the existence of the catalogue of matters to which the court is directed to have regard, it is now well established that the discretion is unfettered[44] and that the court may look at any other relevant factors. Among other factors to which the courts in England have consistently had regard is whether the claimant has an alternative remedy. In its Report on *Limitation of Actions*, the Law Commission recommended the addition to the statutory list of "any

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[43] Limitation Act 1980, s 33(1).

[44] *Thompson v Brown and Another* [1981] 1 WLR 744; *Conry v Simpson and Others* [1983] 3 All ER 369; *Donovan v Gwentoys Limited* [1990] 1 WLR 472 and *Halford v Brookes and Another* [1991] 1 WLR 428.

alternative remedy or compensation available to the claimant".[45] The Law Commission also recommended the inclusion in the list of "the strength of the claimant's case" with the further recommendation that, in addition, the court should be empowered to consider any other relevant circumstances.

3.31 It has been suggested that a similar list might be included in the legislation applicable in Scotland.[46] One reason advanced in support of that suggestion is that:

> "In England under section 33(3)(b) of the Limitation Act 1980, critical importance is given to the cogency of the evidence available for trial [See *Hartley v Birmingham City Council* 1992 2 All ER 213, a decision of the Court of Appeal].
>
> What this means is that in England the question of evidential prejudice is considered principally insofar as it has arisen *since* the expiry of the primary limitation period (ie the date of [actual or constructive] knowledge). Judges in England are obliged to consider this in terms of the statute."[47]

3.32 While it is of course true that the Scottish legislation does not place an express duty on the court to consider evidential prejudice, we would comment first that if the presence or absence of evidential detriment has been relied upon by either of the parties' legal representatives it will be taken into account in Scotland as a factor,[48] and an omission to take into account such a relevant factor may be a ground for appealing the judge's decision. Secondly, it should be noted that in its Report the Law Commission recommended[49] that the current provision in section 33 should be changed so that the delay to be taken into account should not be confined to the period subsequent to the expiry of the primary limitation period. Having pointed out that the expiry of the primary limitation period may take place some years after the events giving rise to the claim, the Law Commission observed that it would be unreasonable for a claimant to be able to argue that because so much time had already elapsed by the end of the limitation period, the defendant had suffered no further disadvantage because of an additional delay. The Law Commission went on to recommend that "the court should be obliged to consider the effect of the passage of time since the events giving rise to the claim on the defendants' ability to defend the claim."[50]

3.33 It is clear that the factors are simply matters which, if applicable, the court may consider in reaching its decision on whether it would be equitable, having regard to the respective prejudices, to allow the action to proceed. There is no hierarchy and the statute does not in any way suggest that one factor be given greater weight than another. The list is not exhaustive since the court may have regard to any other relevant matter. The power has accordingly been described in England and Wales as being "unfettered".

3.34 It does not appear to us that the matters mentioned in section 33(3) of the Limitation Act 1980 include any factor to which the courts in Scotland would not have regard if it were applicable in the particular case and relevant or material to providing the answer to the question, identical in both jurisdictions, whether it is equitable to allow the action to proceed.

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[45] Law Com No 270 (2001), para 3.169.
[46] Ronald E Conway, "Time out of Joint: Limitation in Industrial Disease Cases" 2000 SLT (News) 31, 35; Scottish Parliament Public Petition PE 836.
[47] Scottish Parliament Public Petition PE 836, p 12.
[48] As an example of a case in which evidential prejudice was extensively considered, see *B v Murray (No 2)* [2005] CSOH 70; 2005 SLT 982.
[49] Law Com No 270 (2001), paras 3.167.
[50] *Ibid* at para 3.167.

The general approach to be adopted towards the exercise of the discretionary power under section 19A has been settled through judicial discussion and decision. Currently we do not see any advantage in having a non-exhaustive statutory list of matters along the lines of the provision in England and Wales. However, we would welcome views on the matter and accordingly pose the questions:

13. (a) Assuming judicial discretion to disapply the time-bar is retained, should the legislation include a non-exhaustive list of matters to which the court should give consideration when asked to exercise its discretion?

(b) If so, should the guidelines-

(i) include any factor additional to those listed in section 33(3) of the Limitation Act 1980?

(ii) omit any factor listed in section 33(3)?

Options

3.35 As we indicated earlier[51] legislation on limitation of actions has to strike a balance between on the one hand, the avoidance of stale claims which is an aspect of the public interest in the efficient administration of justice and, on the other hand, fairness to pursuers in allowing a sufficient period to acquire the necessary factual awareness and bring proceedings. Particularly since various elements may be put together in constructing a limitation regime there are obviously several possible options which we set out below. In light of our discussion of the various aspects of these elements in this and the preceding Part of this Discussion Paper we would be grateful for the views of consultees on these options. We therefore ask consultees:

14. Which of the following options is preferred, and why?

[A] Subjective test:

An awareness test which provides for a subjective test of constructive knowledge(along the lines expressed in *Smith and Others v Central Asbestos Co Ltd*)[52] with -

Option (1) -

(a) a *three* year period following the date of acquisition of constructive awareness in which to institute proceedings and

(b) *no* judicial discretion to disapply that time-bar.

Option (2) -

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[51] See above, paras 1.23-1.26.

[52] *Smith and Others v Central Asbestos Co Ltd* [1972] 1 QB 244; *Central Asbestos v Dodd* [1973] AC 518; cf para 2.40 above.

(a) a *five* year period following the date of acquisition of constructive awareness in which to institute proceedings and

(b) *no* judicial discretion to disapply that time-bar.

Option (3) -

(a) a *three* year period following the date of acquisition of constructive awareness in which to institute proceedings and

(b) *temporally unlimited* judicial discretion to disapply that time-bar.

Option (4) -

(a) a *five* year period following the date of acquisition of constructive awareness in which to institute proceedings and

(b) *temporally unlimited* judicial discretion to disapply that time-bar.

Options (5) -

(a) a *three* year period following the date of acquisition of constructive awareness in which to institute proceedings and

(b) judicial discretion limited to a period of time (say five years) after the action became time-barred.

Option (6) -

(a) a *five* year period following the date of acquisition of constructive awareness in which to institute proceedings and

(b) judicial discretion limited to a period of time (say five years) after the action became time-barred.

[B] Objective test

An objective test of constructive awareness with-

Option (7) -

(a) a *three* year period following the date of acquisition of constructive awareness in which to institute proceedings and

(b) *temporally unlimited* judicial discretion to disapply the time-bar.

Option (8) -

(a) a *five* year period following the date of acquisition of constructive awareness in which to institute proceedings.

(b) *temporally unlimited* judicial discretion to disapply the time-bar.

Options (9) -

(a) a *three* year period following the date of acquisition of constructive awareness in which to institute proceedings and

(b) judicial discretion limited to a period of time (say five years) after the action became time-barred.

Option 10 -

(a) a *five* year period following the date of acquisition of constructive awareness in which to institute proceedings.

(b) judicial discretion limited to a period of time (say five years) after the action became time-barred.

We do not claim that the foregoing is an exhaustive list of options but we hope that it may be helpful in focussing the issues which we have raised in this and the preceding Parts of this Discussion Paper.

Part 4 Practice and procedure

Introduction

4.1 In this Part of the Discussion Paper we examine briefly certain matters relating to litigation practice and procedure. The first of these is onus of pleading and (if need be) proof in relation to limitation of actions. Secondly we touch on the complaint which has on occasion been voiced that limitation defences are often disposed of simply on the basis of written pleadings or documents lodged in the case without any oral evidence being heard. Thirdly, although we consider it is properly a matter for the Court of Session Rules Council, we also touch briefly on whether the new procedure for personal injury actions in the Court of Session introduced in April 2003[1] might usefully be amended to clarify how time-bar pleas, and averments made in response, should be made and to enable time-bar issues to be dealt with expeditiously and efficiently.

Initial onus

4.2 It is clear that in the law of limitation of actions it is for the defending party to plead that an action should not be entertained after the expiry of the limitation period. The existence of a limitation period does not extinguish the obligation but simply gives the defending party the option of invoking the limitation defence. So, we believe, it must necessarily follow that invoking the time-bar should continue to be a plea for the defender to take in the first place.

Onus subsequently: actual and constructive knowledge

4.3 Prior to the entry into force of the 1984 Act it was clear from the text[2] of the legislation that where a defender had pled time-bar, and the action was prima facie time-barred under the primary (accrual of cause of action) time-bar, it was for the pursuer to establish that he lacked actual and constructive knowledge of the "material facts". Accordingly, where the defender tabled a plea of time-bar on the basis that more than three years had elapsed from the date of accrual of the cause of action, the onus then passed to the pursuer to establish his lack of knowledge. The replacement text inserted by the 1984 Act[3] is less clear, but in a number of first instance decisions[4] in the Court of Session it has been consistently held that it is for the pursuer to aver, and if need be in due course prove, that he lacked both actual and constructive knowledge until a date within the three years preceding the raising of the action. Although it is sometimes said that a pursuer is thus being asked "to prove a negative" our current view is that these decisions are sound. We take that view for the

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[1] By Act of Sederunt (Rules of the Court of Session Amendment No 2) (Personal Injury Actions) 2002 (SSI 2002/570).

[2] "The requirements of this subsection are fulfilled in relation to a right of action *if it is proved* that the material facts relating to that right of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the pursuer until a date which was not earlier than three years before the date on which the action was brought." (1973 Act, section 18(3), as enacted) (emphasis added).

[3] See below, Appendix A, ss 17 and 18.

[4] *Hamill v Newalls Insulation Co Ltd* 1987 SLT 478; *Webb v BP Petroleum Development Ltd* 1988 SLT 775; *McArthur v Strathclyde Regional Council* 1995 SLT 1129; *Agnew v Scott Lithgow Ltd* 2001 SC 516.

following reasons. First, the statutory provisions on absence of awareness are conceived in favour of a pursuer and there is a general rule of interpretation of statutes that a provision conceived in favour of one party implies that the onus is on that party to establish the facts necessary to bring himself within the ambit of that provision.[5] Secondly, the date or dates on which a pursuer acquired awareness of various matters is something of which he has first hand knowledge. It seems only right that he should have the task of averring, and if need be proving, the dates upon which he acquired the knowledge. Similarly it seems correct that it should be at least initially for the pursuer to aver circumstances from which it may be inferred that he should not be held to have constructive awareness. There is of course a difference between actual awareness, which is a matter of specific fact, and constructive awareness which is to be inferred from surrounding facts. So what may be required of a pursuer as respects constructive awareness may sometimes be only averments of sufficient facts to negative an inference which might otherwise be drawn.[6] However, while there is thus an onus on the pursuer, the defender may also assume an onus of proof and in practical terms may be required to assume an onus of proof. For example, a defender may respond to an averment by the pursuer that knowledge was acquired on a particular date by averring specific facts from which it may be inferred that the pursuer acquired knowledge at an earlier date. If those averred facts are disputed by the pursuer it will then be for the defender to prove those facts and persuade the courts that the proper inference to be drawn from them is that knowledge was acquired at an earlier date.

Onus subsequently: section 19A

4.4 So far as section 19A of the 1973 Act is concerned, it is generally accepted that the onus is on the pursuer to persuade the court that it is equitable to allow the action to proceed despite it being time-barred.[7] Since an application to the discretionary power under section 19A proceeds on the basis that the action is time-barred it seeks to make an exception to the general rule and since the exception sought is one in favour of the pursuer it follows, we think, that it must be for the pursuer to aver, and if need be prove, the circumstances which make it equitable that an exception is made in his favour.

4.5 In these circumstances we believe that the law respecting onus in regard to limitation issues is satisfactory but we ask consultees whether they agree with that view and our provisional conclusion that:

15. No statutory alteration to the present law on onus of averment and proof in relation to limitation issues should be made.

Pleading

4.6 What might be described as the "traditional" form of pleading in Scotland requires the parties to the action to set out in their respective pleadings averments of the facts upon which they respectively rely. This enables the court to decide questions of relevancy, namely whether the facts averred (which, for issues of relevancy, are assumed to be true) would give rise to the legal result which is claimed. Since a party is required to answer the other party's averments by stating which averments are admitted and which are not

[5] Bennion, *Statutory Interpretation* (4th edn, 2002) p 938.
[6] *Agnew v Scott Lithgow Ltd* 2001 SC 516 at 520.
[7] *Clark v McLean* 1995 SLT 235; *Thomson v Brown and Another* [1981] 1 WLR 744; *KR and Others v Bryn Alyn Community (Holdings) Ltd (in liquidation) and Another* [2003] QB 1441, para 74.

conceded, it is sometimes possible for time-bar issues to be decided also on the basis of admitted facts. The proper approach to an application under section 19A of the 1973 Act was described in *Clark v McLean*[8] as follows:

> "The onus being on the pursuer to satisfy the court that the terms of s 19A(1) should be applied, the court must first determine whether the pursuer's case in relation to the application of that section is relevant. If the case is relevant, the court must consider whether or not there is sufficient agreement between the parties on material facts for it to decide upon the application of the section."[9]

Although that approach was set in the context of a section 19A application it is simply an exemplification of the Scottish approach to pleading and would likewise apply to a case made under the awareness provisions of section 17(2)(b) and 18(2)(b). We would observe that the desirability of resolving time-bar issues as a preliminary matter has also been stressed in England.[10] We think that the approach decided in *Clark v McLean* is sound and that whether it is necessary to hear evidence in order to determine a limitation argument should properly be left to the court to decide according to the circumstances of the individual case and the state of the pleadings and the other materials before it.

4.7 However, that said, we are aware, through our advisory group, of some discussion among Court of Session practitioners as to how limitation issues are best addressed in actions proceeding under the procedure introduced with effect from April 2003[11] - the "Coulsfield" procedure. Under that procedure the defences are not permitted to contain pleas-in-law in the customary fashion;[12] the pleadings are intended to be brief; and the aim is to proceed directly to inquiry on the merits without any preliminary debate. But, as already indicated, it will normally be expedient to determine as a preliminary matter whether the action is time-barred and whether any discretionary relieving power should be exercised. It may therefore be necessary, for that purpose, to plead the facts and circumstances relating to the state of awareness of the pursuer, or to the exercise of the discretion more fully than was envisaged in the Coulsfield procedure. Although this is essentially a matter for the rules of procedure of the Court of Session and court practice, and without wishing to trespass on the functions of the Personal Injury Actions Consultative Committee we think this Discussion Paper may present a useful opportunity for practitioners to express their view.

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[8] 1995 SLT 235.
[9] *Ibid* at 237 J.
[10] *KR and Others v Bryn Alyn Community (Holdings) Ltd (in liquidation) and Another* [2003] QB 1441, paras 19 and 74(vi).
[11] By Act of Sederunt (Rules of the Court of Session Amendment No 2) (Personal Injury Actions) 2002 (SSI 2002/570).
[12] *Alexander v Metbro Ltd* 2004 SLT 963.

4.8 We therefore invite consultees, particularly those with experience of dealing with time-bar issues under the new procedure, for any views which they may have on the following question:

16. Should any changes be made to the procedure in personal injury actions in the Court of Session to facilitate resolution of limitation issues as a preliminary matter?

Part 5 Prescribed claims

Introduction

5.1 In this part of the Discussion Paper we consider the second reference from the Scottish Ministers. For convenience we repeat the terms of the reference:

> "To consider the position of claims for damages in respect of personal injury which were extinguished by operation of the long negative prescription prior to 26 September 1984; and to report."

Prescription

5.2 As we explained in Part 1[1] prior to 26 September 1984 claims for damages for personal injury (including claims in death cases) were subject to both the three year limitation period and the 20 year long negative prescription.[2] Prior to 1976 the long negative prescription was based on the Prescription Act 1469 (c 4); the Prescription Act 1474 (c 9) and the Prescription Act 1617 (c 12), as amended by the Conveyancing (Scotland) Act 1924 which reduced the period from 40 to 20 years. Those Prescription Acts were included among the statutes repealed by the 1973 Act, which made fresh provision – in section 7 – for the 20 year negative prescription of obligations. The relevant provisions of the 1973 Act came into force on 25 July 1976. As originally enacted section 7 of the 1973 Act applied to claims for damages for personal injuries (and death cases) but the section was amended by the Prescription and Limitation (Scotland) Act 1984 so as to exclude from its ambit any obligation to make reparation in respect of personal injuries, or in respect of the death of a person as a result of such injuries. The amendment was not retrospective. Section 5(3) of the 1984 Act provided that the amendment to section 7(2) of the 1973 Act should have effect as regards any obligation which had not been extinguished before the coming into force of the 1984 Act.

5.3 Under the long negative prescription the running of the 20 year period is not suspended by nonage or unsoundness of mind.[3] Moreover, under the law of prescription time runs from the date of accrual of the cause of action and is not postponed by lack of knowledge, even excusable, on the part of the pursuer. It was therefore conceivable that in the case of some industrial disease in which the initial damage was latent and took over 20 years to become patent, the claim would be extinguished by prescription before the three year limitation period had expired. Although unaware of any case in which that had happened, the possibility of that occurring was the principal reason for this Commission's recommendation in its 1983 Report that the 20 year prescription should cease to apply in personal injury cases, notwithstanding that the Commission recognised "…the value of the prescription as a general principle of law, in that it acts as a 'longstop' to extinguish stale

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[1] See above, para 1.13.
[2] But in a case in which the cause of action accrued before 4 June 1954 only prescription applied. See s 7 of the Law Reform (Limitation of Actions &c.) Act 1954.
[3] The plea of *non valens agere cum effectu* ("unable to sue effectively") in so far as it might suspend the running of time, would require very exceptional circumstances cf *Abernethy v Sister Bernard Mary Murray & Others*, Temporary Judge T G Coutts QC, Outer House, 20 August 2004, unreported.

claims…".[4] We would mention that many jurisdictions have a "longstop" provision in personal injury claims.[5] As we explained in Part 1[6] negative prescription is conceptually different from limitation of actions. With prescription, on the elapse of the requisite period of time the obligation is wholly extinguished (if no relevant claim has been made and the claim has not been acknowledged[7]) and ceases to exist, whereas, with limitation, the obligation continues to exist but the person subject to the obligation may plead limitation as a defence to court proceedings. It is also clear that in the case of prescription time runs from the first concurrence of *injuria* and *damnum* and is not postponed by the emergence of a later separate illness, such as psychiatric injury.[8]

Cases with which the reference is concerned

5.4 The cases which we are asked to consider are those in which any obligation to pay damages for personal injury (in which expression we include obligations arising out of the death of any person by reason of personal injuries) was extinguished by the long negative prescription prior to 26 September 1984, which was the date on which the 1984 Act came into force. With the extinction of the obligation the right to compensation necessarily also ceased, as a matter of law, to exist. Since we are concerned with claims in which the 20 year period expired at some date prior to 26 September 1984 it will be appreciated that the claims in question are those in which the right of action arose at some date prior to 26 September 1964. (Claims which arose between 26 September 1964 and 26 September 1984 would not have been extinguished when the amendment came into force but were of course subject to the limitation rules and might already be time-barred by that date). Extinction of claims arising before 26 September 1964 was brought about by the operation of a rule of law which no longer applies to personal injury claims and has not now applied to such claims for over 21 years.

5.5 Although we appreciate that the second reference arose from concerns voiced on behalf of a number of people who claim to have suffered physical or mental harm while receiving institutional care in schools or children's homes, we are asked to consider extinguished personal injury claims as a generality. It is, in our view, right that any concern over the extinction of personal injury claims by operation of the negative prescription should first be examined in regard to that generality. Since the cases with which the second reference is concerned are cases in which any obligation to pay damages has ceased to exist, it is clear that to effect any change in the position would involve passing primary legislation creating a new liability. We have to say at the outset that such legislation presents substantial difficulties.

Retrospectivity

5.6 The first difficulty is that since the events potentially giving rise to any new entitlement and correlative liability took place at least 41 years ago, any legislation to

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[4] Report on *Prescription and the Limitation of Actions* (Scot Law Com No 74) (1983), para 2.6.
[5] By way of example, under s 50C(1)(b) of the New South Wales Limitation Act 1969, a 12 year long-stop limitation period applies and a similar position obtains in Victoria. In addition to a three year period running from the date of discoverability, German law also provides for a 30 year prescription of personal injury claims, irrespective of the pursuer's state of knowledge – see BGB art 199(2) – although in sexual abuse cases the start of the running time is delayed until the pursuer achieves the age of 21 years.
[6] See above, para 1.15.
[7] 1973 Act, s 7(1).
[8] See above para 2.21; *K v Gilmartin's Executrix* 2004 SC 784.

innovate upon or disturb the current legal situation would require to be retrospective or perhaps more accurately retroactive.[9] A retrospective statute has been described, with judicial approval, as one which:

> "…takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."[10]

Any imposition of a new liability – even if mirroring the liability extinguished by the operation of the long negative prescription – comes within that definition since it must necessarily reverse the extinguishing effect, in the past, of the law of negative prescription.

5.7 Retrospective legislation within that description has long been recognised as highly undesirable. That is manifestly so in the case of the criminal law, and retrospective legislation imposing criminal liability is expressly contrary to the ECHR.[11] While there are of course examples in which the UK Parliament has enacted retrospective legislation in the fields of civil or constitutional law[12] retrospective legislation remains undesirable in principle since it is unfair, and destructive of legal certainty, to disturb past legal relationships where people have, naturally, conducted their affairs on the basis of the then existing law. As it was put in *Phillips v Eyre*:[13]

> "Retrospective laws are, no doubt, prima facie of questionable policy, and contrary to the general principle that legislation by which conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."[14]

The presumption against retrospective legislation is clearly stated by Bennion:

> "It is a principle of legal policy that, except in relation to procedural matters, changes in the law should not take effect retrospectively."[15]

Craies on Legislation[16] observes that successive governments have accepted the principle that retrospective legislation should be avoided and quotes the statement in the House of Lords of Baroness Hollis of Heigham:

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[9] The terms "retrospective" and "retroactive" are commonly used interchangeably in this context but a distinction has been drawn between true retroactivity and a retrospective interference with vested rights. See J Paul Salembier – "Understanding retroactivity: When the past just ain't what it used to be" (2003) HKJL 99. To reverse the extinguishing effect of prescription of past claims arising prior to 26 September 1964 would be retroactive, and also interference with vested rights, in the sense used by Salembier.

[10] See Daniel Greenberg, *Craies on Legislation* (8th edn, 2004), para 10.3.1 n 28. Judicial approval was given by Sir Thomas Bingham MR in *L'Office Cherifien des Phosphates and Another v Yamashita–Shinnihon Steamship Co Ltd The Boucraa* [1993] 3 All ER 686 at 692.

[11] Article 7 provides that "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

[12] For example the War Damage Act 1965, removing the Crown's common law liability to pay compensation for war damage, was passed to reverse retrospectively the finding in *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* 1964 SC (HL) 117.

[13] (1870) LR 6 QB 1.

[14] *Ibid* at 23.

[15] Bennion, *Statutory Interpretation* (4th edn, 2002), p 689.

[16] Daniel Greenberg, *Craies on Legislation* (8th edn, 2004), para 10.3.3.

"It is a general principle of English and Scottish law that retrospective legislation should be avoided wherever possible".[17]

5.8 A further reason why retroactive legislation is undesirable is that it may result in past events being judged or examined by present standards, which is contrary to the general principle that events or activities should be judged according to the then contemporary standards rather than those of a different, modern era. To reverse the extinguishing effect of the negative prescription and create new liability for personal injury claims arising out of actions or omissions necessarily occurring at some time before September 1964 (and perhaps a very long time before 1964[18]) would be a striking example of retroactive legislation. It would undo the legal certainty which has prevailed for – at the very least – 21 years and would present the difficulty, for courts and practitioners, of endeavouring to set aside current standards and attitudes and to apply the standards and attitudes of a former era. Normal and proper practice in factories, schools or hospitals in the 1950s may have been very different to such practice at the present time and the difficulty of investigating and trying to establish what practices and standards were followed decades ago may add substantially to the costs of litigation.

5.9 The practical difficulties of investigating events which occurred at the very least 41 years ago need little underscoring. It is inevitable that potential witnesses will have died. Even if a witness is still available the witness' ability to recall will have been affected, as will the accuracy and reliability of recall. Documentary records are likely to have been disposed of (and no criticism can be made of a potential defender who did so, since he was entitled to treat any potential claim as having prescribed). It may be impossible for a company or an institution or a successor local authority to establish whether any liability insurance was in force at the relevant time.

Human rights issues

5.10 Retrospective legislation imposing criminal liability is contrary to the European Convention on Human Rights.[19] Although no express prohibition of retroactive legislation is to be found in the Convention in regard to civil law, retroactive legislation affecting rights under the civil law may sometimes be contrary to other provisions of the Convention. For example, in *Stran Greek Refineries and Another v Greece*[20] the applicant had obtained an arbitration award in its favour having claimed damages for breach of contract. Legislation enacted thereafter whereby the award (and the claim) were nullified was held by the European Court of Human Rights to be an unjustified interference with the applicants' property (being their entitlement under the award) and thus contrary to Article 1 of the First Protocol to the Convention.[21] In other words, the claim for damages formed part of the applicant's patrimony. Similarly in *Pressos Compania Naviera SA and Others v Belgium*[22] shipowners complained of legislation passed with express retrospective effect which

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[17] *Hansard*, HL, Vol 605, col 502 (13 October 1999).
[18] We are aware of at least one action recently commenced in which the complaints relate to treatment received between 1932 and 1939.
[19] ECHR, Art 7.
[20] (1995) 19 EHRR 293.
[21] Article 1 provides that "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."
[22] (1995) 21 EHRR 301; cf also Application No 46356/99 *Smokovitis & Others v Greece* (Judgment of 11 April 2002).

removed their legal entitlement to recover damages from pilots and pilotage authorities where they had suffered loss by reason of the negligence of a pilot. The European Court of Human Rights held that accrued rights to recover damages in respect of pilots' negligence constituted part of the shipowners' property ("possessions") and that, while the State might legislate prospectively to exempt pilots and pilotage authorities from negligence, retrospective legislation to that effect constituted an interference with the shipowners' property which could not be justified in the public interest and that accordingly Article 1 of the First Protocol had been infringed.

5.11 In light of the ECHR case law we can conceive of an argument that to impose retrospectively a liability on a person upon whom no liability currently exists for events occurring in the past is an interference with the peaceful enjoyment of his "possessions" (that is, property) since it requires him to part with funds. In other words, if, as in *Pressos*, a legislative act retrospectively removing the creditor's right to damages is an interference in his property or patrimony the converse legislative act of retrospectively imposing liability would constitute an interference in the property or patrimony of the debtor in the retrospectively created liability. We do not say that this argument would necessarily succeed. However were it to be upheld then, in order to avoid a violation of Article 1 of the First Protocol, it would be necessary that the interference could be justified as pursuing a general community interest or social policy with a fair balance having been struck between the general interest and the protection of the individual's fundamental rights.[23] In these circumstances we do not say that any form of retrospective legislation in the current area would necessarily be incompatible with the Convention but we apprehend that there are potential human rights issues.

Scottish Parliament's power to legislate retrospectively

5.12 We would also add that in a recent academic work[24] doubt has been expressed as to whether, assuming it to have power to legislate retrospectively, the Scottish Parliament has power to enact legislation which has retroactive effect prior to 1999.

Application of limitation rules

5.13 A further aspect which has to be borne in mind is that if one postulates a decision in principle to reverse the effect of the negative prescription, the limitation rules would presumably come into play. On the assumption that those rules applied to the revived liabilities virtually every case would have been time-barred many years ago (whether a subjective or objective awareness test is applied) and the prospective pursuer would require to persuade the court that it was just and equitable for the action to proceed. However, that is likely to be a difficult task for the pursuer since the very antiquity of the claim will normally mean that the discretion must be exercised in favour of the defending party, who will be able to demonstrate actual prejudice in the shape of the difficulty in investigating and defending claims made respecting events said to have occurred decades previously. In practical terms therefore reversing the extinguishing effect of prescription may not produce any benefit for most claimants with prescribed claims, whereas defending parties would require to

[23] For an example of an interference in the property rights of one category of citizen, namely landlords, for the benefit of another, namely tenants, being justified as pursuing a legitimate social policy see *James v UK* (1986) 8 EHRR 123 which was concerned with legislation giving certain private sector tenants a "right to buy" at a price determined according to certain statutory criteria.

[24] C M G Himsworth and C M O'Neill, *Scotland's Constitution: Law & Practice* (2003), p 168.

investigate claims to at least some extent, even if only to contest the claimant's application for a favourable exercise of the judicial discretion. On the other hand, exempting the re-created liabilities from the normal limitation rules (even if a period were set for pursuing the newly re-created liability) would be inconsistent with the legislative policy underlying those rules.[25] It would also produce the anomaly that an action respecting a claim which was over 41 years old could be brought as of right, whereas one which was four years old could not.

A special regime?

5.14 As we remarked earlier[26] while the terms of the second reference relate in general terms to all personal injury claims extinguished by prescription we are of course aware that the reference is prompted by concerns expressed in public on behalf of a number of people who say that they suffered abuse in residential institutions.[27] We understand also that a number of actions (which may not always raise questions of prescription, as opposed to limitation) have been commenced against a number of religious orders and charitable institutions.[28] It is also our understanding that many, if not all, of those actions were commenced following articles in the press and television programmes respecting conditions in the children's homes run by one of those orders.[29] Implicit in the background to this reference[30] is a suggestion that cases of alleged abuse in residential institutions may be worthy of special rules and it is appropriate that we should give consideration to that suggestion.

5.15 The initial challenge presented by that suggestion is definitional, namely by what criteria does one settle the category of claims to which any special rule might apply.

5.16 One criterion upon which it is sometimes contended that cases of sexual abuse in childhood are worthy of special provision is that the commonly encountered delay in advancing a claim has a psychological or psychiatric basis. A number of theories have been put forward. For example, particularly in North America, some have contended for recovered memory theories and the virtues of repressed memory therapy.[31] Dissociation amnesia is another theory advanced as a reason for delay in disclosure.[32] Another explanation on similar lines proffered by some in the field[33] is that abuse may produce a particular disorder called "disorder of extreme stress not otherwise specified".[34] However, as we understand it[35] these theories are controversial and are far from receiving general acceptance among members of the relevant profession. It is difficult to use in a legislative text the criterion of a psychological or psychiatric condition the existence of which or the relevance of which to alleged childhood sexual abuse is disputed within the profession.

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[25] See above, paras 1.26-1.29.
[26] See above, para 5.5.
[27] Scottish Parliament Public Petitions PE 535 and PE 888.
[28] Cf *B v Murray (No 2)* [2005] CSOH 70; 2005 SLT 982, (Lord Drummond Young) para [1].
[29] *Ibid*, paras [43]-[48].
[30] And the terms of the petitions to the Scottish Parliament.
[31] See Law Com No 151 (1998), paras 13.22-13.23. The theory is that abuse can lead victims to forget what happened to them and repress all memory of it.
[32] Chu & others, "Memories of childhood abuse: dissociation, amnesia, and corroboration", Arn J Psychiatry 1999 May 156(5): 749-755). Dissociation or dissociative amnesia is said to be a defence mechanism whereby the victim of trauma, such as sexual abuse, dissociates himself by repressing memory.
[33] For example, Van der Kolk, McFarlane & Weiseath – "*Traumatic Stress*" (1996).
[34] DESNOS is claimed to be a residual category of disorder for those who have suffered severe ill-treatment early in life. Van der Kolk's theory is that it is common for people to forget childhood abuse but for the abuse to manifest itself in other ways, for example, dreams or behaviour.
[35] Cf *B v Murray (No 2)* [2005] CSOH 70; 2005 SLT 982, paras [59] to [92].

Furthermore, even if a particular psychological disorder were selected as the criterion of admissibility of a revived claim, there is bound to be dispute whether the condition is present in a given claimant.

5.17 The particular cases which have formed the background to the second reference are claims against religious orders or charitable organisations respecting treatment in residential schools or children's homes. However, the fact that the recent public focus has been on such establishments does not offer an attractive criterion. To define the scope of the re-created duty of care by reference to the identity of the defender is, we think, discriminatory (and open to question under the ECHR on that account).

5.18 Sexual abuse of a child is, for most people, particularly abhorrent and the sentiment that irrespective of the passage of time the abuser should not escape the consequences of his abuse is understandable. As a possible category one might therefore select claims for damages for sexual abuse suffered in childhood directed against the actual abuser. While having some attraction such an approach nonetheless presents difficulties. First, assuming the alleged abuser still to be alive, an allegation of sexual abuse is likely to be a serious matter, in financial, emotional and reputational terms, for the person against whom the challenge is made and the passage of over four decades is inevitably prejudicial to his ability to challenge and refute the allegation. Secondly, in many cases, the abuser will by now be dead, or, if alive, have little resources and accordingly a re-created right of action against the individual will often be of little practical value.[36] No doubt for that reason actions in respect of childhood abuse are usually brought against the charitable or religious order or other organisation (or their successors) which operated the relevant institution. But the delictual act alleged ceases to be the criminal act of sexual abuse by the defender and essentially becomes one of negligence in the management of the institution. A further matter to be borne in mind is that, in such cases, complaints of sexual misconduct by one individual are often combined with complaints of mistreatment of a non-sexual nature by other individuals and, particularly where some psychiatric condition has subsequently emerged, disentanglement of the different types of mistreatment may be very difficult.

5.19 Assuming however that a satisfactory and workable definition of the special category can be found, the issue then arises whether, within the field of personal injury claims, it is appropriate as a matter of policy that there should be a special class of injured person whom the law of delict treats more favourably than others. While there is a recognition that, at least in some cases, sexual abuse during childhood (and even in adulthood, for example as a consequence of rape) may contribute to serious psychiatric illness in later life, it is difficult to say that such illness is of a peculiar kind or of such an extraordinary magnitude as to distinguish it clearly from other serious injuries, including mental harm, suffered as a result of some act of negligence rather than sexual abuse. Moreover, the degree of injury will vary from case to case.[37] It is difficult to justify in principle an exception based on the magnitude of the injury (in the sense of its being worth more than a particular sum)[38] and the test would be difficult to operate in practice since only after a full hearing could it be said that the jurisdictional criterion was satisfied.

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[36] Victims of sexual crime may be able to claim from the Criminal Injuries Compensation Authority but there is a time limit of two years.

[37] By way of example, the awards in the *Bryn Alyn* case as were successful ranged between £12,000 and £68,000.

[38] Cf para 2.10 (in discussion about serious injury).

5.20 We are conscious of the argument that those who suffered childhood sexual or physical abuse were inhibited from claiming damages because in the social climate of the time people in their situation would not think of making such a claim. While that view is one which is more readily appreciable in respect of childhood abuse, other people not within that category may have been similarly inhibited by social attitudes and personal circumstances from making claims prior to 1984. For example, there are no doubt instances in which a victim of a road traffic accident took no proceedings during the prescriptive period because the culpable driver was a spouse or other close relative and, in the then prevailing culture, it would not have occurred to the victim to initiate proceedings against a spouse or close relative (albeit that the claim was covered by insurance). There may also be cases of asbestosis which prescribed before September 1984 but in which the sufferer is still alive, or ordinary industrial accident victims who, in a less litigious culture than the contemporary world, simply accepted what had occurred as part of the normal ups and downs of life. So despite its initial attraction, the notion of re-creating liabilities in respect of childhood sexual abuse cases alone presents problems of unfairness to those who suffered injury in a different context. (We would add that in so far as there is discrimination in favour of a particular category of claimant, to the exclusion of other categories of claimant, there is the correlative effect of discriminating among defenders).

5.21 A further consideration is that the case law has moved on since 1984 and now acknowledges claims which were not recognised prior to that year. Thus, a form of vicarious responsibility for criminal acts closely connected with employment was upheld by the House of Lords in *Lister and Others v Hesley Hall Ltd*,[39] albeit that such had never previously been recognised. A claim for damages for failure by a school to identify and respond appropriately to dyslexia was upheld in *Adams v Bracknell Forest Borough Council*.[40] *Carnegie v Lord Advocate*[41] (a claim for damages for psychiatric injury stemming from abuse during military service) illustrates that claims respecting institutional abuse are not confined to treatment of juvenile inmates of children's homes but may extend into adult life experience. We acknowledge that claims arising out of military service prior to 15 May 1987 could be met by the defence of Crown immunity (since the removal of that immunity by the Crown Proceedings (Armed Forces) Act 1987 was not retrospective)[42] but if it is contemplated providing compensation for those who are now thought to have been wrongly treated in an earlier era, there is inevitably a number of categories of person also worthy of sympathy and indeed, the Crown immunity respecting military service might now be seen as unfair. Put shortly, the point is that in an exercise of re-writing legal history for the benefit of one category of claimant, the claims of other categories arguably equally deserving cannot be ignored.

5.22 We well appreciate that a victim of childhood institutional abuse may now feel a strong sense of injustice. But, however sympathetic one may be to that sense of injustice, it must be recognised that the events concerned occurred at least 41 years ago and that the re-creation of civil law liabilities would present substantial objection from the viewpoint of general legal policy. Legal certainty is a principle underpinning the rule of law. The functioning of society would be impaired if it were accepted that many years after the event

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[39] [2001] UKHL 22; [2002] 1 AC 215.
[40] [2004] UKHL 29; [2005] 1 AC 76.
[41] 2001 SC 802.
[42] The reasons why the repeal was not retrospective are explained in *Hansard*, HC, Vol 110, col 572 (13 February 1987). They included the unfairness of imposing retrospective liabilities and the difficulties of assessing old cases.

the rules governing relationships between its members can be changed retrospectively, since people cannot readily have confidence in the law as it applies at any particular time. The objection of retrospectivity is, in our view, powerful and we are not currently persuaded that any coherent basis exists for the creation of a special category of claims for damages for childhood abuse which escapes that fundamental objection.

5.23 In summary, it is our view that:

(i) Any legislation undoing retrospectively the extinguishing effect of the negative prescription on claims for damages for personal injury which accrued prior to 26 September 1964 would be objectionable on account of that retrospectivity.

(ii) Any such legislation might be incompatible with the European Convention on Human Rights.

(iii) Legislation re-creating obligations in respect only of claims arising out of sexual abuse during childhood presents definitional problems but, more importantly, may be unfair to other categories of potential claimant (and objectionable on that discriminatory ground).

(iv) Simply removing the extinguishing effect of the negative prescription, on the view that only the law of limitation of actions should apply, would not produce practical benefit for most claimants with prescribed claims since it is clear that the prescribed claims are almost certainly claims which were time-barred a long time ago and could only proceed by virtue of a favourable exercise of judicial discretion. The very antiquity of the claims means that normally the court could not, in the proper exercise of that function, make that favourable exercise.

5.24 We therefore propose that:

17. Claims in respect of personal injury which have been extinguished by negative prescription before 1984 should not be revived.

Part 6 List of proposals and questions

1. The legislation on limitation of actions in personal injury cases should continue to include a "date of knowledge" as a starting date for the running of the limitation period.

(Paragraph 2.5)

2. Should the current statutory assumption of admitted liability be replaced by an assumption that the action had a reasonable prospect of success?

(Paragraph 2.11)

3. If a claim for sufficiently serious injury is not pursued timeously, the subsequent emergence of additional injury, even if distinct, should not give rise to a fresh date of knowledge and a further consequential limitation period for a claim for that additional injury.

(Paragraph 2.21)

4. Knowledge that any act or omission was or was not as a matter of law actionable should continue to be irrelevant in the date of knowledge test.

(Paragraph 2.27)

5. In formulating any amended provisions relating to a pursuer's state of knowledge it remains appropriate to continue to use the terminology of "awareness".

(Paragraph 2.30)

6. The legislation on date of knowledge should continue to contain a constructive awareness test.

(Paragraph 2.32)

7. The current statutory test of whether it was "reasonably practicable" for the pursuer to become aware of a relevant fact is not a satisfactory test.

(Paragraph 2.37)

8. As a matter of general approach, should an awareness test incline towards subjectivity rather than objectivity?

(Paragraph 2.47)

9. To what extent are significant practical difficulties commonly encountered in investigating and commencing claims within the current three year limitation period?

(Paragraph 2.50)

10. (a) The reference in the 1973 Act to legal disability by reason of unsoundness of mind should be replaced by a reference to the pursuer's being an adult with incapacity within the meaning of section 1(6) of the Adults with Incapacity (Scotland) Act 2000;

(b) Should the reference to incapacity be qualified by its being confined to the adult concerned being incapable (by reason of mental disorder or physical disability) of making, communicating, or understanding decisions respecting the making of a claim for damages for the personal injury in question?

(c) Should the appointment of a guardian lift the suspension of the running of time by reason of the incapacity of the adult in question?

(Paragraph 2.57)

11. Judicial discretion to allow a time-barred action to proceed should be retained.

(Paragraph 3.26)

12. Should the exercise of judicial discretion be subject to a time limit and if so, what should the time limit be?

(Paragraph 3.28)

13. (a) Assuming judicial discretion to disapply the time-bar is retained, should the legislation include a non-exhaustive list of matters to which the court should give consideration when asked to exercise its discretion?

(b) If so, should such guidelines-

(i) include any factor additional to those currently listed in section 33(3) of the Limitation Act 1980?

(ii) omit any factor listed in section 33(3)?

(Paragraph 3.34)

14. Which of the following options is preferred, and why?

[A] Subjective test:

An awareness test which provides for a subjective test of constructive knowledge (along the lines expressed in *Smith and Others v Central Asbestos Co Ltd*[1]) with-

[1] [1973] AC 518 – cf para 2.40 above.

Option (1) -

(a) a *three* year period following the date of acquisition of constructive awareness in which to institute proceedings and

(b) *no* judicial discretion to disapply that time-bar.

Option (2) -

(a) a *five* year period following the date of acquisition of constructive awareness in which to institute proceedings and

(b) *no* judicial discretion to disapply that time-bar.

Option (3) -

(a) a *three* year period following the date of acquisition of constructive awareness in which to institute proceedings and

(b) *temporally unlimited* judicial discretion to disapply that time-bar.

Option (4) -

(a) a *five* year period following the date of acquisition of constructive awareness in which to institute proceedings and

(b) *temporally unlimited* judicial discretion to disapply that time-bar.

Options (5) -

(a) a *three* year period following the date of acquisition of constructive awareness in which to institute proceedings and

(b) judicial discretion limited to a period of time (say five years) after the action became time-barred.

Option (6) -

(a) a *five* year period following the date of acquisition of constructive awareness in which to institute proceedings and

(b) judicial discretion limited to a period of time (say five years) after the action became time-barred.

[B] Objective test

An objective test of constructive awareness with-

Option (7) -

(a) a *three* year period following the date of acquisition of constructive awareness in which to institute proceedings and

(b) *temporally unlimited* judicial discretion to disapply the time-bar.

Option (8) -

(a) a *five* year period following the date of acquisition of constructive awareness in which to institute proceedings.

(b) *temporally unlimited* judicial discretion to disapply the time-bar.

Options (9) -

(a) a *three* year period following the date of acquisition of constructive awareness in which to institute proceedings and

(b) judicial discretion limited to a period of time (say five years) after the action became time-barred.

Option 10 -

(a) a *five* year period following the date of acquisition of constructive awareness in which to institute proceedings.

(b) judicial discretion limited to a period of time (say five years) after the action became time-barred.

(Paragraph 3.35)

15. No statutory alteration to the present law on onus of averment and proof in relation to limitation issues should be made.

(Paragraph 4.5))

16. Should any changes be made to the procedure in personal injury actions in the Court of Session to facilitate resolution of limitation issues as a preliminary matter?

(Paragraph 4.8)

17. Claims in respect of personal injury which have been extinguished by negative prescription before 1984 should not be revived.

(Paragraph 5.24)

Appendix A Prescription and Limitation (Scotland) Act 1973

This Appendix includes the text of sections 17, 18, 19A and 22 of the Prescription and Limitation (Scotland) Act 1973 as currently in force.

Part II

Limitation of Actions

Part II not to extend to product liability

16A. This Part of this Act does not apply to any action to which section 22B or 22C of this Act applies.

Actions in respect of personal injuries not resulting in death

17. (1) This section applies to an action of damages where the damages claimed consist of or include damages in respect of personal injuries, being an action (other than an action to which section 18 of this Act applies) brought by the person who sustained the injuries or any other person.

(2) Subject to subsection (3) below and section 19A of this Act, no action to which this section applies shall be brought unless it is commenced within a period of 3 years after –

(a) the date on which the injuries were sustained or, where the act or omission to which the injuries were attributable was a continuing one, that date or the date on which the act or omission ceased, whichever is the later; or

(b) the date (if later than any date mentioned in paragraph (a) above) on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become, aware of all the following facts –

(i) that the injuries in question were sufficiently serious to justify his bringing an action of damages on the assumption that the person against whom the action was brought did not dispute liability and was able to satisfy a decree;

(ii) that the injuries were attributable in whole or in part to an act or omission; and

(iii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person.

(3) In the computation of the period specified in subsection (2) above there shall be disregarded any time during which the person who sustained the injuries was under legal disability by reason of nonage or unsoundness of mind.

Actions where death has resulted from personal injuries

18. (1) This section applies to any action in which, following the death of any person from personal injuries, damages are claimed in respect of the injuries or the death.

(2) Subject to subsections (3) and (4) below and section 19A of this Act, no action to which this section applies shall be brought unless it is commenced within a period of 3 years after –

(a) the date of death of the deceased; or

(b) the date (if later than the date of death) on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become, aware of both of the following facts –

(i) that the injuries of the deceased were attributable in whole or in part to an act or omission; and

(ii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person.

(3) Where the pursuer is a relative of the deceased, there shall be disregarded in the computation of the period specified in subsection (2) above any time during which the relative was under legal disability by reason of nonage or unsoundness of mind.

(4) Subject to section 19A of this Act, where an action of damages has not been brought by or on behalf of a person who has sustained personal injuries within the period specified in section 17(2) of this Act and that person subsequently dies in consequence of those injuries, no action to which this section applies shall be brought in respect of those injuries or the death from those injuries.

(5) In this section "relative" has the same meaning as in Schedule 1 to the Damages (Scotland) Act 1976.

Limitation of defamation and other actions

18A. (1) Subject to subsections (2) and (3) below and section 19A of this Act, no action for defamation shall be brought unless it is commenced within a period of 3 years after the date when the right of action accrued.

(2) In the computation of the period specified in subsection (1) above there shall be disregarded any time during which the person alleged to have been defamed was under legal disability by reason of nonage or unsoundness of mind.

(3) Nothing in this section shall affect any right of action which accrued before the commencement of this section.

(4) In this section –

(a) "defamation" includes *convicium* and malicious falsehood, and "defamed" shall be construed accordingly; and

(b) references to the date when a right of action accrued shall be construed as references to the date when the publication or communication in respect of which the action for defamation is to be brought first came to the notice of the pursuer.

Actions of harassment

18B. (1) This section applies to actions of harassment (within the meaning of section 8 of the Protection from Harassment Act 1997) which include a claim for damages.

(2) Subject to subsection (3) below and to section 19A of this Act, no action to which this section applies shall be brought unless it is commenced within a period of 3 years after –

(a) the date on which the alleged harassment ceased; or

(b) the date, (if later than the date mentioned in paragraph (a) above) on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to have become, aware, that the defender was a person responsible for the alleged harassment or the employer or principal of such a person.

(3) In the computation of the period specified in subsection (2) above there shall be disregarded any time during which the person who is alleged to have suffered the harassment was under legal disability by reason of nonage or unsoundness of mind.

Power of court to override time-limits etc

19A. (1) Where a person would be entitled, but for any of the provisions of section 17, 18, 18A or 18B of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision.

(2) The provisions of subsection (1) above shall have effect not only as regards rights of action accruing after the commencement of this section but also as regards those, in respect of which a final judgment has not been pronounced, accruing before such commencement.

(3) In subsection (2) above, the expression "final judgment" means an interlocutor of a court of first instance which, by itself, or taken along with previous interlocutors, disposes of the subject matter of a cause notwithstanding that judgment may not have been pronounced on every question raised or that the expenses found due may not have been modified, taxed or decerned for; but the expression does not include an interlocutor dismissing a cause by reason only of a provision mentioned in subsection (1) above.

(4) An action which would not be entertained but for this section shall not be tried by jury.

Actions for recovery of property obtained through unlawful conduct etc

19B. (1) None of the time limits given in the preceding provisions of this Act applies to any proceedings under Chapter 2 of Part 5 of the Proceeds of Crime Act 2002 (civil recovery of proceeds of unlawful conduct).

(2) Proceedings under that Chapter for a recovery order in respect of any recoverable property shall not be commenced after the expiration of the period of twelve years from the date on which the Scottish Ministers' right of action accrued.

(3) Proceedings under that Chapter are commenced when –

(a) the proceedings are served,

(aa) an application is made for a prohbiting order, or

(b) an application is made for an interim administration order,

whichever is the earliest.

(4) The Scottish Ministers' right of action accrues in respect of any recoverable property –

(a) in the case of proceedings for a recovery order in respect of property obtained through unlawful conduct, when the property is so obtained,

(b) in the case of proceedings for a recovery order in respect of any other recoverable property, when the property obtained through unlawful conduct which it represents is so obtained.

(5) Expressions used in this section and Part 5 of that Act have the same meaning in this section as in that Part.

Interpretation of Part II and supplementary provisions.

22. (1) In this Part of this Act –

"the court" means the Court of Session or the sheriff court; and

"personal injuries" includes any disease and any impairment of a person's physical or mental condition.

(2) Where the pursuer in an action to which section 17, 18 or 18A of this Act applies is pursuing the action by virtue of the assignation of a right of action, the reference in subsection (2)(b) of the said section 17 or of the said section 18 or, as the case may be, subsection (4)(b) of the said section 18A to the pursuer in the action shall be construed as a reference to the assignor of the right of action.

(3) For the purposes of the said subsection (2)(b) knowledge that any act or omission was or was not, as a matter of law, actionable, is irrelevant.

(4) An action which would not be entertained but for the said subsection (2)(b) shall not be tried by jury.

Appendix B Limitation Act 1980

This Appendix contains the text of sections 11, 11A, 12, 13, 14, 28 and 33 of the Limitation Act 1980, as currently in force.

Actions in respect of wrongs causing personal injuries or death

Special time limit for actions in respect of personal injuries

11. (1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

(1A) This section does not apply to any action brought for damages under section 3 of the Protection from Harassment Act 1997.

(2) None of the time limits given in the preceding provisions of this Act shall apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below.

(4) Except where subsection (5) below applies, the period applicable is three years from –

(a) the date on which the cause of action accrued; or

(b) the date of knowledge (if later) of the person injured.

(5) If the person injured dies before the expiration of the period mentioned in subsection (4) above, the period applicable as respects the cause of action surviving for the benefit of his estate by virtue of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 shall be three years from –

(a) the date of death; or

(b) the date of the personal representative's knowledge;

whichever is the later.

(6) For the purposes of this section "personal representative" includes any person who is or has been a personal representative of the deceased, including an executor who has not proved the will (whether or not he has renounced probate) but not anyone appointed only as a special personal representative in relation to settled land; and regard shall be had to any knowledge acquired by any such person while a personal representative or previously.

(7) If there is more than one personal representative, and their dates of knowledge are different, subsection (5)(b) above shall be read as referring to the earliest of those dates.

Actions in respect of defective products

11A. (1) This section shall apply to an action for damages by virtue of any provision of Part 1 of the Consumer Protection Act 1987.

(2) None of the time limits given in the preceding provisions of this Act shall apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period of ten years from the relevant time, within the meaning of section 4 of the said Act of 1987; and this subsection shall operate to extinguish a right of action and shall do so whether or not that right of action had accrued, or time under the following provisions of this Act had begun to run, at the end of the said period of ten years.

(4) Subject to subsection (5) below, an action to which this section applies in which the damages claimed by the plaintiff consist of or include damages in respect of personal injuries to the plaintiff or any other person or loss of or damage to any property, shall not be brought after the expiration of the period of three years from whichever is the later of –

(a) the date on which the cause of action accrued; and

(b) the date of knowledge of the injured person or, in the case of loss of or damage to property, the date of knowledge of the plaintiff or (if earlier) of any person in whom his cause of action was previously vested.

(5) If in a case where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries to the plaintiff or any other person the injured person died before the expiration of the period mentioned in subsection (4) above, that subsection shall have effect as respects the cause of action surviving for the benefit of his estate by virtue of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 as if for the reference to that period there were substituted a reference to the period of three years from whichever is the later of-

(a) the date of death; and

(b) the date of the personal representative's knowledge.

(6) For the purposes of this section "personal representative" includes any person who is or has been a personal representative of the deceased, including an executor who has not proved the will (whether or not he has renounced probate) but not anyone appointed only as a special personal representative in relation to settled land; and regard shall be had to any knowledge acquired by any such person while a personal representative or previously.

(7) If there is more than one personal representative and their dates of knowledge are different, subsection (5)(b) above shall be read as referring to the earliest of those dates.

(8) Expressions used in this section or section 14 of this Act and in Part I of the Consumer Protection Act 1987 have the same meanings in this section or that section as in

that Part; and section 1(1) of that Act (Part I to be construed as enacted for the purpose of complying with the product liability Directive) shall apply for the purpose of construing this section and the following provisions of this Act so far as they relate to an action by virtue of any provision of that Part as it applies for the purpose of construing that Part.

Special time limit for actions under Fatal Accidents legislation

12.- (1) An action under the Fatal Accidents Act 1976 shall not be brought if the death occurred when the person injured could no longer maintain an action and recover damages in respect of the injury (whether because of a time limit in this Act or in any other Act, or for any other reason).

Where any such action by the injured person would have been barred by the time limit in section 11 or 11A of this Act, no account shall be taken of the possibility of that time limit being overridden under section 33 of this Act.

(2) None of the time limits given in the preceding provisions of this Act shall apply to an action under the Fatal Accidents Act 1976, but no such action shall be brought after the expiration of three years from -

(a) the date of death; or

(b) the date of knowledge of the person for whose benefit the action is brought;

whichever is the later.

(3) An action under the Fatal Accidents Act 1976 shall be one to which sections 28, 33 and 35 of this Act apply, and the application to any such action of the time limit under subsection (2) above shall be subject to section 39; but otherwise Parts II and III of this Act shall not apply to any such action.

Operation of time limit under section 12 in relation to different dependants

13. (1) Where there is more than one person for whose benefit an action under the Fatal Accidents Act 1976 is brought, section 12(2)(b) of this Act shall be applied separately to each of them.

(2) Subject to subsection (3) below, if by virtue of subsection (1) above the action would be outside the time limit given by section 12(2) as regards one or more, but not all, of the persons for whose benefit it is brought, the court shall direct that any person as regards whom the action would be outside that limit shall be excluded from those for whom the action is brought.

(3) The court shall not give such a direction if it is shown that if the action were brought exclusively for the benefit of the person in question it would not be defeated by a defence of limitation (whether in consequence of section 28 of this Act or an agreement between the parties not to raise the defence, or otherwise).

Definition of date of knowledge for purposes of sections 11 and 12

14. (1) Subject to subsection (1A) below, in sections 11 and 12 of this Act references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts -

(a) that the injury in question was significant; and

(b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and

(c) the identity of the defendant; and

(d) 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;

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

(1A) In section 11A of this Act and in section 12 of this Act so far as that section applies to an action by virtue of section 6(1)(a) of the Consumer Protection Act 1987 (death caused by defective product) references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts -

(a) such facts about the damage caused by the defect as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment; and

(b) that the damage was wholly or partly attributable to the facts and circumstances alleged to constitute the defect; and

(c) the identity of the defendant;

but, in determining the date on which a person first had such knowledge there shall be disregarded both the extent (if any) of that person's knowledge on any date of whether particular facts or circumstances would or would not, as a matter of law, constitute a defect and, in a case relating to loss of or damage to property, any knowledge which that person had on a date on which he had no right of action by virtue of Part I of that Act in respect of the loss or damage.

(2) For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(3) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire -

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek;

but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

Extension of limitation period in case of disability

28. (1) Subject to the following provisions of this section, if on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period of limitation has expired.

(2) This section shall not affect any case where the right of action first accrued to some person (not under a disability) through whom the person under a disability claims.

(3) When a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to another person under a disability, no further extension of time shall be allowed by reason of the disability of the second person.

(4) No action to recover land or money charged on land shall be brought by virtue of this section by any person after the expiration of thirty years from the date on which the right of action accrued to that person or some person through whom he claims.

(4A) If the action is one to which section 4A of this Act applies, subsection (1) above shall have effect -

(a) in the case of an action for libel or slander, as if for the words from "at any time" to "occurred)" there were substituted the words "by him at any time before the expiration of one year from the date on which he ceased to be under a disability"; and

(b) in the case of an action for slander of title, slander of goods or other malicious falsehood, as if for the words "six years" there were substituted the words "one year".

(5) If the action is one to which section 10 of this Act applies, subsection (1) above shall have effect as if for the words "six years" there were substituted the words "two years".

(6) If the action is one to which section 11 or 12(2) of this Act applies, subsection (1) above shall have effect as if for the words "six years" there were substituted the words "three years".

(7) If the action is one to which section 11A of this Act applies or one by virtue of section 6(1)(a) of the Consumer Protection Act 1987 (death caused by defective product), subsection (1) above -

(a) shall not apply to the time limit prescribed by subsection (3) of the said section 11A or to that time limit as applied by virtue of section 12(1) of this Act; and

(b) in relation to any other time limit prescribed by this Act shall have effect as if for the words "six years" there were substituted the words "three years".

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

33. (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 11A or 12 of this Act prejudice the plaintiff or any person whom he represents; and

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.

(1A) The court shall not under this section disapply -

(a) subsection (3) of section 11A; or

(b) where the damages claimed by the plaintiff are confined to damages for loss of or damage to any property, any other provision in its application to an action by virtue of Part I of the Consumer Protection Act 1987.

(2) The court shall not under this section disapply section 12(1) except where the reason why the person injured could no longer maintain an action was because of the time limit in section 11 or subsection (4) of section 11A.

If, for example, the person injured could at his death no longer maintain an action under the Fatal Accidents Act 1976 because of the time limit in Article 29 in Schedule 1 to the Carriage by Air Act 1961, the court has no power to direct that section 12(1) shall not apply.

(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to -

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11, by section 11A or (as the case may be) by section 12;

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

(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

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

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

(4) In a case where the person injured died when, because of section 11 or subsection (4) of section 11A, he could no longer maintain an action and recover damages in respect of the injury, the court shall have regard in particular to the length of, and the reasons for, the delay on the part of the deceased.

(5) In a case under subsection (4) above, or any other case where the time limit, or one of the time limits, depends on the date of knowledge of a person other than the plaintiff, subsection (3) above shall have effect with appropriate modifications, and shall have effect in particular as if references to the plaintiff included references to any person whose date of knowledge is or was relevant in determining a time limit.

(6) A direction by the court disapplying the provisions of section 12(1) shall operate to disapply the provisions to the same effect in section 1(1) of the Fatal Accidents Act 1976.

(7) In this section "the court" means the court in which the action has been brought.

(8) References in this section to section 11 or 11A include references to that section as extended by any of the preceding provisions of this Part of this Act or by any provision of Part III of this Act.

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