The Law on Limitation

As a practitioner I suggest that the current law on limitation is in need of reform.

The problems are put into sharp relief by two recent asbestos related cases , namely the apparently conflicting decisions in *Quinn* and *Kelman.* Both are high value cases involving fatal injury with very similar facts. What is noteworthy are the radically different approaches both to s.17, and perhaps more importantly,to s.19A of the Prescription and Limitation (Sc.) Act 1973.

It is a signal mistake to believe that the problems on limitation are restricted to asbestos related or even occupational disease cases. Particular areas of difficulty are;

1. Section 17(2) of the 1973 Act , and the reasonable practicability test for constructive knowledge The test is unduly stringent, leading to situations where a claimant can act reasonably yet be fixed with constructive knowledge at a far earlier date than actual knowledge.

2. The apparent lack of any judicial acceptance that in very many cases, attributability can only be obtained via expert evidence and an acknowledgement that time does not run until such evidence is obtained. This relates both to s.17 and to s. 19A .

3. Lack of coherent guidance on what criteria are to be applied to s19A cases.

4. There is now a clear divergence between Scotland and England on the equitable discretion. See *Cain* v *Francis* [2009] 3WLR 551 and the comprehensive review of case law undertaken by Smith LJ , and the definitive statement on s.33 of the Limitation Act 1980 discretion. The settled law in England is now that where there is a colourable reason for delay, evidential prejudice is the primary test for exercise of the equitable discretion.

The stark differences in *Quinn* and *Kelman* are irreconcileable on any principled basis. It is currently well nigh impossible for practitioners to foresee outcomes

both at trial and at settlement discussion. Mr. Kelman and family were extremely well served by his agents who must have been sorely tempted to settle or abandon.

The present reality is of a judicial lottery.

The previous Law Commission Discussion Paper and Report in 2006 and 2007 respectively

In the Introduction to the 2007 Report it is stated;

"Background to the references

1.1 The first reference arose from concerns expressed by practitioners involved in personal injury litigation in the Scottish courts and others representing people with claims for compensation for occupational diseases that certain provisions of the Prescription andLimitation (Scotland) Act 1973 were not operating fairly. In particular they were concerned that the test for establishing the date from which the limitation period starts to run (known as the "date of knowledge test") was too restrictive, and that the effect of the test was less favourable to claimants in Scotland than the equivalent statutory test in England and Wales. A petition was presented to the Scottish Parliament on behalf of the Association of Personal Injury Lawyers calling for a review of sections 17 and 19A of the 1973 Act.

1.2 Practitioners also expressed the view that the judicial discretion provisions in section 19A of the Act were in need of amendment. That section gives the court an unqualified discretion to allow an otherwise time-barred action to proceed. By contrast, in England and Wales the equivalent provision contains a list of factors to which the court must have regard in exercising its discretion. The view of several members of the profession was that the

[1] Under the Law Commissions Act 1965, s 3(1)(e).
[2] By the Prescription and Limitation (Scotland) Act 1984, Schedule 1, para 2.
[3] Scottish Parliament Public Petition PE 836, presented by Mr Ronald E Conway on behalf of APIL, April 2005.
[4] Limitation Act 1980, s 33(3).

introduction of similar factors in the Scottish legislation would be of assistance and would encourage the court to exercise its discretion more liberally than at present."
The problems identified in 2006 and 2007 continue to this day, and if anything have worsened.

How did we get here?

In the interests of brevity, may I direct the Commission members to paragraphs 2.28 – 2.47 of the 2006 Discussion Paper. These sections persuasively illustrate both the problems with the s.17 reasonable practicablity test, and the possible solutions, far more lucidly than I ever could.

But a brief historical overview is instructive.

In 1970 the Scottish Law Commission published "Report No. 15 – Prescription and Limitation" which was implemented by the Prescription and Limitation (Scotland) Act 1973. The Scottish Law Commission revisited the matter and a further Report No. 74 was submitted by the Commission in 1980, and the 1973 Act was amended to its present form. (subject to changes for historic abuse cases)

The 1980 Commission's legislative proposals were adopted word for word in the current s.17 of the Act. However it is revealing to look at the contents of the 1980 Report. It deals with the date of constructive knowledge at paragraphs 3.6 and 3.7. In particular the date of constructive knowledge should be :-

> 1.6"The date on which in the opinion of the court it was *reasonable* for him in all the circumstances to become so aware………" (my italics)
>
> Unfortunately this *reasonable* test seems to have been completely lost in translation, and with one leap we are onto *reasonable practicability.*
>
> 3.7"A formula along these lines would seem to afford the courts a 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 courts to take account of the differing

> circumstances of individuals and the differing nature of their injuries"

The Commission rejected the idea that legislation should refer specifically to the seeking of advice (as in the English legislation) as being unnecessary, although it was contemplated that this would become a part of the judicial development of the law. The Commission then went on to recommend the formula which has been adopted word for word in s.17(2)(b).

It is clear that the authors of the report did not envisage any rigid dichotomy between what was *reasonable* for a person to become aware of, and what was *reasonably practicable* for him to become so aware. The explanatory note to Section 17(2)(b) states:-

> "The words "reasonably practicable for him in all the circumstances" are designed to reflect that the test of knowledge is mainly objective but not wholly so. This will afford the courts a certain degree of flexibility in order to take account of the different circumstances of individuals and the differing natures of their injuries".

It is this gap between the hand the eye which was then developed by the defender's bar to highlight and extend the difference between what is *reasonable* and what is *reasonably practicable* .(See eg *Cowan v Toffolo Jackson 1998* SLT 1000; *Little v East Ayrshire Council* 1998 SCLR 520.)

I suspect the authors of the 1980 Report would be surprised if they could see the ways in which their law reform has been applied. They clearly expected some element of flexibility in the approach to expert evidence. I rather doubt they foresaw the marked contradiction between reasonable behaviour and what is reasonably practicable.

In particular there is no equivalent of the English tests in the Limitation Act 1980 which states at s.14.3

Section 14(3) provides:-

"For the purposes of this section a person's knowledge includes knowledge <u>which he might reasonably</u> 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 appropriate expert advice which it is reasonable for him to seek.

but a person shall not be fixed under this sub-section with knowledge of a fact ascertainable only with the help of expert advice <u>so long as he has taken all reasonable steps to obtain</u> and, where appropriate, to act on that advice". (Emphases added).

<u>**The problem solved—the problem shelved**</u>

It was anticipated that legislation would follow the 2006 Discussion Paper and the 2007 Consultation document. A draft Bill was produced and incorporated in the Report. Time would not run whilst a pursuer was *excusably unaware* of the material facts, a test which is much closer to the 1980 Report recommendations and which would have met the criticisms contained in the 2006 Discussion Paper Unfortunately, for reasons which were never clear, the decision was taken by the Law Commission to change the triennium to a quinquennium. I have to say that I had not noticed any particular enthusiasm amongst practitioners on either side of the bar for any such a proposal. It would mean a significant change in the law, a marked divergence from England, (with all kinds of forum shopping opportunities) whilst it would not address the long tail conditions.

It is difficult not to speculate that the legislature simply took fright, leaving us with all the difficulties identified in 2006 – 2007, but none of the solutions. There is currently no prospect that the Draft Bill will ever be brought onto the statute book. Meantime, we have had the piecemeal reform for historic child abuse, and now a further proposed reform restricted only to asbestos litigation via the latest Damages Consultation.

The problem made worse

In 2007, there seemed good prospects for the kind of overhaul the system required. Nothing has eventuated . The case law is then further weaponised with the wholesale adoption of the Australian decision of *Brisbane Regional Health Authority v Taylor* 1996 CLR 541, for 19A cases.

The Scottish courts appear to have adopted the premises

1. That there is a presumption against the exercise of the discretion
2. That the passage of time inevitably leads to evidential prejudice against a defender. It creates "unknown unknowns" which are *a priori* prejudicial to defenders. This is simply a resort to magical thinking of the worst kind. It removes the requirement to exercise any granular analysis of the evidence and inevitably leads to a dismissal eg *Quinn* , a death claim worth £800,000.00, where liability was admitted.

There is no other area in Scots Law which operates in this way. The child abuse legislation now asks if there can be a fair trial, and sometimes the answer is no. Pleas of mora for delays of around 20 years have failed. As I write there are newspaper reports of criminal proceedings against a religious order with some events taking place in the 1960's.

Proposals for Reform

In *B -v- Murray (No.2)* 2005 SLT 982 Lord Hope embedded *Brisbane* in Scots Law
It is not clear whether by "prejudice" in the House of Lords judgement, he meant evidential prejudice, or some other prejudice. It has certainly been interpreted as meaning something other than evidential prejudice and as setting up a presumption for dismissal.

The Scottish Courts have effectively been painted tinto a corner with the wholesale adoption of *Brisbane*. The clamour of public interest in relation to

historic child abuse cases meant that the legislature had to intervene. The only way to sever connections with *Brisbane*, is to legislate anew.

The current problems call once again for the legislature to intervene on the basis of the 2006 and 2007 proposals and draft Bill. (absent quinquennium)