

Scottish Law Commission

Eleventh Programme of Law Reform

A response by the Association of Personal Injury Lawyers

June 2022



Introduction

APIL welcomes the opportunity to respond to the Scottish Law Commission’s consultation on its Eleventh Programme of Law Reform. We believe that there are two areas where there is a pressing need to reform:

- Limitation
- The Third Parties (Rights Against Insurers) Act 2010 in the context of historic claims

We reiterate the need for reform in relation to limitation. We believe that the current provisions are unfair, and that the current interpretation of “constructive knowledge” and the (lack of) exercise of discretion by the courts is prejudicial to pursuers. We recommend that the case of *Aitchison* should be reversed for all personal injury cases, not just those relating to pleural plaques, and that the Scottish Government’s proposals to introduce a list of exemptions that the court should take into account when deciding whether to extend the limitation period, and an amended definition of constructive knowledge, should be introduced without further delay.

Given the benefit of the Third Parties (Rights Against Insurers) Act 2010 does not apply in historic cases, defenders are able to raise technical arguments to prevent historic claims being brought where, for example, a children’s home has changed hands several times or the Trust that owned it has since been wound up. Even where an insurer has been traced and funds are available to meet the claim, defenders are escaping liability for technical reasons. We suggest that the England and Wales practice of identifying a “nominal” defender in these circumstances, should be introduced.

Limitation

While we welcome the Scottish Law Commission’s recent proposals to amend the law on limitation specifically in relation to cases involving pleural plaques, more must be done in this area to address the unfairness around the current law. It is not just in those cases involving pleural plaques where there is unfairness – as set out below, the current framework is not fit for purpose in general, and prevents worthy pursuers from obtaining the justice they deserve.

Constructive knowledge

The current law provides that time begins to run in relation to the limitation period from the date of the injury, or a later date which is either the date of actual knowledge of a sufficiently serious injury and attributability and identity of the defender, or the date of constructive knowledge, which is the date that it was reasonably practicable for the pursuer to have

acquired the knowledge¹. The courts have interpreted the constructive knowledge requirement using stringent and unrealistic standards for the discoverability of injury, and the pursuer can be deemed to have constructive knowledge far earlier than actual knowledge. The courts also often attribute to pursuers medical and legal knowledge that they simply do not possess. Case law demonstrates that defenders have successfully erased the distinction between what ought to have been done (what is reasonable), and what could have been done (what is reasonably practicable), with pursuers being held to often unattainable objective standards.

For example, in the case of *Little v East Ayrshire Council*², it was held that a pursuer who had been told by an examining specialist that he had hearing loss, should have immediately established from him whether or not it was noise induced. In *Elliott v J and C Finney*³, the pursuer was the driver of a car involved in a serious road traffic accident with a lorry. He was detained as an in-patient, and was interviewed by police while in hospital. It was held that it would have been reasonably practicable for him to have obtained the identity of the lorry driver from the interviewing policeman. These decisions are simply not reflective of reality – in *Elliott*, for example, the pursuer submitted that although it was practicable, in the ordinary sense of the word, for him to have obtained information about the lorry driver from the police officer, it was not reasonably practicable for him to have done so because of his state of mind. In *Little*, 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.

There is currently no allowance or consideration as to whether the failure to acquire the knowledge was excusable. In *Cowan v Toffolo Jackson & Co Ltd*, the pursuer claimed that he had been exposed to asbestos at varying times during his working life, as an employee of Toffolo Jackson, until his retirement in 1986, and he developed asbestosis. He did not know that he was suffering from the disease until his doctor told him in 1991, and he started proceedings to bring a claim for compensation in 1993. The claim was held to be time barred, as the pursuer claimed that he had asbestosis caused by his employment when he retired in 1986, and he could not explain why it was not reasonably practicable for him to have discovered the relevant facts before 1991.

There is also no recognition that expert evidence either by way of medical or liability report might be required before a stateable claim can be made or an action raised. The unsuitability of the current “reasonably practicable” assessment is highlighted particularly well in clinical negligence cases. The recent focus of Scottish Government initiatives has been on patient complaints being addressed and institutional learning from adverse events. These are welcome moves, but they often delay patients thinking they need to obtain legal advice. Sometimes the procedures will resolve issues, but frequently they do not. There is no facility as part of these initiatives for damages to be paid, and access to legal services is still required for compensation to address for example lifelong loss of earnings, and care.

The stated aim of an internal inquiry or Serious Adverse Event Review (AER) is that they do not seek to attribute blame. Therefore, a patient or representative of a deceased person may learn that something has gone wrong, but will not have anywhere near the sufficient

¹ Prescription and Limitation (Scotland) Act 1973 Section 17 (2)

² 1989 S.C.L.R. 520

³ 1989 S.L.T 605

evidence to say that there was negligence. Often an adverse event report will be prepared, which takes a lengthy time, and then a meeting is offered to the family. Due to clinical commitments this can also take a long time to arrange. Only then are patients potentially aware that something might have occurred that wasn't just unfortunate, but potentially negligent. The patient will not usually consult a solicitor in Scotland until they have been through that process. Sometimes they are told that if they do seek legal advice, that will interfere with the process and so again, they hold off. It is often years after the incident before a solicitor is consulted and investigations into negligence can be made.

One APIL member provided an example in which a baby suffered injuries at birth. The mother was not aware until the AER that there were criticisms of her labour and delivery. She was shocked, emotionally distressed, coping with a baby with cerebral palsy, and then told the time for a complaint had expired, and to seek legal advice. By the time records were recovered, and then the critical ones that were missing were subsequently recovered, the normal limitation period of three years was past. The first liability report had not yet been received. While the limitation period was not an issue in this case, as it is a case involving a baby, but this demonstrates the length of time that gathering evidence takes, particularly in cases involving potential clinical negligence.

In *Young v Borders and Health Board*⁴ the pursuer alleged clinical negligence following an operation for a leg injury. She believed from the time of discharge that something had gone wrong. A complaint letter was sent to the Health Board in February 2008. An action was raised in February 2011, out of the primary limitation period. The court upheld the defender's arguments on reasonable practicability and held that the time ran, if not from discharge, from the letter of complaint and that she was put on notice from discharge to find out more. Effectively, there was a presumptive evidential prejudice to the defender and this had not been displaced. It was ignored that clinical negligence claims cannot be advanced until the pursuer is in possession of a report that satisfies the *Hunter v Hanley* test. Obtaining such reports routinely takes significant period of time.

On these cases, the Scottish Law Commission previously commented⁵:

"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

⁴ [2016] CSOH 13

⁵ Scottish Law Commission – Report on Personal Injury Actions: Limitation and Prescribed Claims (December 2007)

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.”

The Scottish Government, in its response to the draft Civil Law of Damages – Issues in Personal Injury Bill in 2013, said that the “reasonably practicable” assessment in the date of knowledge test would be replaced by a more subjective assessment of whether or not the pursuer was “excusably aware”. We understand that the reform was shelved and the focus instead was shifted to the removal of the limitation period for historic child abuse claims. Again, while this was very welcome, the piecemeal approach to reform of limitation fails to address the root cause and inadequacies of the current limitation framework, and the overall unfairness remains. The more subjective test of whether or not the pursuer was “excusably aware” must be implemented.

Reluctance by courts to exercise discretion

In addition, case law demonstrates that the Scottish courts are reluctant to exercise the discretion that exists in section 19A of the Prescription and Limitation Act 1973. This reluctance appears to stem from a belief that any waiver of the limitation period is simply an indulgence to the pursuer. The case of *B v Murray (No 2)* embedded the Australian High Court decision of *Brisbane South Regional Health Authority v Taylor* in Scots law, and defenders routinely use the decision to persuade against a waiver of the limitation period. The *Brisbane* judgment sets out various rationales for the primary limitation period, including that an extension of limitation is automatically prejudicial to a defender – i.e. there is a presumption against the exercise of discretion.

We call for the Scottish Government to bring forward its proposals to introduce a non-exhaustive list of factors for the court to take into account when exercising its discretion as to whether to waive the limitation period in any particular case. It is hoped that the list of factors will empower the courts to exercise discretion more readily in cases that require it. The non-exhaustive list was set out in the Scottish Government’s consultation on their proposed draft Civil Law of Damages Bill:

Recommendation 15

Section 19A of the 1973 Act should be amended to include the following non-exhaustive list of matters to which the court may have regard in determining whether to allow an action to be brought:

- (a) the period which has elapsed since the right of action accrued;*
- (b) why it is that the action has not been brought timeously;*
- (c) what effect (if any) the length of time that has passed since the right of action accrued is likely to have had on the defender's ability to defend the action, and generally on the availability and quality of evidence;*
- (d) the conduct of the pursuer and in particular how expeditious he was in seeking legal and (where appropriate) medical or other expert advice and in intimating a claim for damages to the defender;*

- (e) *the quality and nature of the legal and (where appropriate) medical or other advice obtained by the pursuer;*
- (f) *the conduct of the defender and in particular how he has responded (if at all) to any relevant request for information made to him by the pursuer;*
- (g) *what other remedy (if any) the pursuer has if he is not allowed to bring the action;*
- (h) *any other matter which appears to the court to be relevant; and there should be no hierarchy among the matters listed*

We strongly suggest that the wording at the beginning of the list should be changed from “to which the courts may have regard” to “to which the courts shall have regard”, if there is to be real confidence that the courts will, in fact, take the list into consideration. We also recommend that there should also be wording within this section to highlight that there is no presumption in law either for or against the exercise of this discretion.

The need for a reversal of Aitchison for all cases

The effect of *Aitchison* can be felt in a wide range of personal injury cases, particularly cases involving industrial disease. For example, a 44 year-old man who had worked as a pipe fitter was negligently exposed to excessive noise levels without adequate hearing protection. Medical evidence confirmed that when tinnitus developed around 20 years later, it was likely to be caused by noise exposure. The man had been aware of increasing deafness, but as is typical in these cases, deafness caused by noise exposure develops slowly and becomes more noticeable with age. Due to the gradual nature, it is not something that someone would be likely to consider claiming compensation for, and people may also be unlikely to seek medical help. Because of *Aitchison*, the man would likely be time-barred from claiming compensation for the tinnitus, which is likely to have a huge effect on his day to day living from this relatively young age.

The effects of *Aitchison* lead to the highly undesirable situation whereby people who would otherwise make a positive choice not to pursue compensation for what they consider to be minor injuries, into a position where they are forced to pursue compensation in the first instance to “insure” themselves against more serious illness or disease which may arise from that original injury in the future. The current rules also assume a high degree of knowledge from the pursuer, or at least access to legal help to ensure that they are aware that this is what they will need to do in order to prevent themselves from being time-barred. It is simply unrealistic to expect people to have this level of knowledge in most cases.

We maintain that there should be a full reversal of *Aitchison*, and a return to the law as established in *Carnegie v Lord Advocate*, where a pursuer who could establish that the emergence of a further injury was wholly separate and distinct to an earlier injury would have the right to raise an action for the later injury even if they had not done so for the earlier injury.

The current situation as regards limitation in general heavily favours insurers and negligent employers, while punishing the most deserving and stoic pursuers, most of whom will not automatically think to rush to the doctor or the courts to seek reparation for what they would class as minor injuries.

Third Parties (Rights against Insurers) Act 2010 and historic claims

A further issue we would invite the Law Commission to consider is in relation to the Third Parties (Rights Against Insurers) Act 2010 and historic cases. We believe legislation should be introduced to allow identified insurers on risk for the period of abuse to be sued directly where the identity of the appropriate party to sue is difficult to ascertain or where that party no longer exists. The benefit of the Third Parties (Rights against Insurers) Act 2010 does not apply in historic cases. Even the useful Section 11 Notice to try and trace insurers cannot be used in cases where it is particularly needed.

The issue arising can be demonstrated in the Supreme Court case of *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56. The case proceeded against the “managers” of the school *and* the religious order involved in the running of the school. The case was about physical and sexual abuse at St William’s School, Market Weighton, in the Roman Catholic Diocese of Middlesbrough. Unlike in Scotland, in England there was a transfer of liabilities from “the managers” (often respected local dignitaries) to the Archdiocese. It is for this reason that the claim could proceed against “the Middlesbrough defendants (the Archdiocese)”. By contrast in Scotland no such transfer of liabilities took place and therefore although there should, by law, be a record of these “managers”, in practice the records may no longer exist or cannot be traced. In this particular case, the “managers” are now to be sued care of the insurance company. Our members report that it is often the case that technical arguments are raised about the competence of actions because the legal entity that ran for example, the children’s home or school in question, has changed over time and sometimes more than once, or has been wound up. For example, the boarding school Fort Augustus was run by a now wound up Trust. Insurance has been traced by the defender seeks to strike out the claim on the basis that the Trust is wound up. This means that despite there being insurance in place to meet any potential claim, pursuers may not obtain the compensation that they need and deserve simply because of technical arguments raised by the defender.

A similar issue arises in the context of industrial disease cases where the latency period means that claims are pursued often decades later. There is a mechanism that allows dissolved companies to be restored to the register of companies to be pursued for the sole purpose of engaging the insurer in the process to defend and make payment if the claim is successful. Difficulties arise where the entity is not a company capable of being restored. Again, insurers are traced and there will be insurance in place to meet any claim, but because the correct legal personality to sue cannot be traced or is difficult to ascertain, the insurer or defender seeks to evade liability and payment. Pursuers are denied the ability to bring a claim and obtain the compensation to which they are entitled, due to technical arguments.

In England & Wales there is the option of identifying a "nominal" defendant in the proceedings, particularly where historical liability insurance has been traced to meet any award for damages. Such defendants are considered "nominal" in the sense that it is a defendant against whom any judgement can still be enforced, notwithstanding the fact the named defendant may not be an extant legal entity and /or the person(s) or entity in existence at the time of the alleged abuse with whom any vicarious liability would have rested.

This is not a perfect solution but the ability to pursue an identified insurer directly would cut away a lot of technical argument and expedite the process for survivors. We therefore

recommend that a similar option to identify a “nominal” defendant should be introduced in Scotland.

-Ends-

Any queries about this response should be, in the first instance, directed to:

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