



Scottish Law Commission  
*promoting law reform*

## Report on Personal Injury Actions: Limitation and Prescribed Claims

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965  
Laid before the Scottish Parliament by the Scottish Ministers

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<sup>1</sup> Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).



# SCOTTISH LAW COMMISSION

*Report on a reference under section 3(1)(e) of the Law Commissions Act 1965*

## **Report on Personal Injury Actions: Limitation and Prescribed Claims**

To: Mr Kenny MacAskill MSP, Cabinet Secretary for Justice

We have the honour to submit to the Scottish Ministers our Report on Personal Injury Actions: Limitation and Prescribed Claims.

(Signed) JAMES DRUMMOND YOUNG, *Chairman*

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12 November 2007



# Contents

	<i>Paragraph</i>	<i>Page</i>
<b>Part 1</b>	<b>Introduction</b>	
References from Scottish Ministers	1.1	1
Background to the references	1.3	1
Rules of limitation and prescription	1.6	2
Purpose of rules of limitation and prescription	1.8	2
History of the legislation	1.9	4
Advisory group	1.10	4
Summary of our main recommendations	1.11	4
Historic Abuse Systemic Review	1.18	5
Legislative competence	1.19	6
<b>Part 2</b>	<b>Date of knowledge</b>	
Introduction	2.1	7
Retaining the knowledge date	2.2	7
The statutory facts	2.7	8
<i>Sufficiently serious injury</i>	2.9	9
<i>Subjective elements</i>	2.15	12
<i>Separate dates for "distinct" injuries</i>	2.17	13
<i>Attributable to an act or omission</i>	2.25	15
<i>The identity of the defender</i>	2.28	17
Knowledge of the wrongful quality of the act or omission	2.29	17
Actual awareness	2.31	18
Constructive awareness	2.35	19
<i>Reasonably practicable test</i>	2.38	20
<i>Subjective or objective test</i>	2.45	23
Length of the limitation period	2.54	27
Unsoundness of mind	2.61	31
<b>Part 3</b>	<b>Judicial discretion</b>	
Introduction	3.1	35
Background	3.2	35
The current provision	3.7	36
Issues arising	3.15	39
<i>Should the discretionary power be retained?</i>	3.16	39
<i>Restriction of judicial discretion</i>	3.25	42
<i>Guidelines on the exercise of judicial discretion</i>	3.29	43
<b>Part 4</b>	<b>Practice and procedure</b>	
Introduction	4.1	48
Initial onus	4.2	48

# Contents (cont'd)

	<i>Paragraph</i>	<i>Page</i>
Onus subsequently: actual and constructive knowledge	4.3	48
Onus subsequently: section 19A	4.4	48
Pleading	4.6	49
<b>Part 5</b>	<b>Prescribed claims</b>	
Introduction	5.1	51
Prescription	5.2	51
Cases with which the reference is concerned	5.6	52
Retrospectivity	5.8	52
<i>General</i>	5.8	52
<i>Human rights issues</i>	5.12	53
<i>The Scottish Parliament's power to legislate retrospectively</i>	5.14	54
Application of limitation rules	5.15	55
A special regime?	5.16	55
<b>Part 6</b>	<b>List of recommendations</b>	60
<b>Appendix A</b>		
Draft Limitation (Scotland) Bill		63
<b>Appendix B</b>		
History of the legislation		72
<b>Appendix C</b>		
List of consultees who submitted comments on Discussion Paper No 132		75



# Part 1 Introduction

## References from Scottish Ministers

1.1 This Report is produced in response to two separate references<sup>1</sup> from the Scottish Ministers, the terms of which were:

"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."

"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."

1.2 The first reference, which we received in September 2004, calls for consideration of the current law relating to limitation of actions in claims for damages for personal injury. The second reference, which we received while working on the first, involves consideration, not of the current law, but rather of the effect of long negative prescription of obligations to pay damages for personal injury (which was abolished in 1984<sup>2</sup>) in respect of claims which were extinguished by operation of prescription before 1984. Although the terms of the two references raise different issues, it was felt that as they both related to the general area of damages for personal injury, it would be appropriate to undertake work on them as a single project.

## Background to the references

1.3 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 and Limitation (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.<sup>3</sup>

1.4 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.<sup>4</sup> The view of several members of the profession was that the

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<sup>1</sup> Under the Law Commissions Act 1965, s 3(1)(e).

<sup>2</sup> By the Prescription and Limitation (Scotland) Act 1984, Schedule 1, para 2.

<sup>3</sup> Scottish Parliament Public Petition PE 836, presented by Mr Ronald E Conway on behalf of APIL, April 2005.

<sup>4</sup> 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.

1.5 The second reference arose from concerns voiced in recent years about the position of people who may have been subject to abuse while they were children in educational institutions run by local authorities or religious orders or other charitable bodies, but whose claims for damages were extinguished by the long negative prescription prior to 26 September 1984.<sup>5</sup> A petition was presented to the Scottish Parliament in August 2002 calling for an inquiry into the matter.<sup>6</sup> In response to the sense of injustice expressed in the petition, Scottish Ministers decided to make a second reference to the Commission. During the course of our work on that reference, two further petitions relating to those who have alleged they suffered institutional child abuse, were presented to the Scottish Parliament in 2005 and 2006 respectively.<sup>7</sup>

### **Rules of limitation and prescription**

1.6 The practical effect of the rules relating to limitation and prescription is very similar, but the rules are conceptually different. Limitation is essentially a procedural rule. Its effect is to bar an action from proceeding in court after the lapse of the period of time during which the law provides that it must be brought. The time limit for bringing an action of damages for personal injury is governed by sections 17 and 18 of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). It is for the defender to raise the defence of time-bar and if successfully pled, the court will not allow the action to proceed. Where an action is time-barred, however, the defender may choose to waive the limitation defence, in which case the action can proceed.

1.7 By contrast, prescription is a rule of substantive law. The law relating to negative prescription, with which the second reference is concerned, provides that after the requisite period of time an obligation to pay damages is wholly extinguished unless an action has been raised during that period of time or the subsistence of the obligation has been acknowledged. Because prescription is a matter of substantive law, the court itself may take note of the fact that prescription has operated and grant decree of absolvitor, bringing the action to an end.<sup>8</sup>

### **Purpose of rules of limitation and prescription**

1.8 We outlined the rationale for rules of limitation and prescription in our Discussion Paper on Personal Injury Actions: Limitation and Prescribed Claims.<sup>9</sup> Perhaps the most

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<sup>5</sup> The Prescription and Limitation (Scotland) Act 1984 (which came into force on 25 September 1984) amended the Prescription and Limitation (Scotland) Act 1973 to remove personal injury actions from the ambit of the long negative prescription. As a consequence of this amendment personal injury actions are subject only to the rules of limitation contained in Part II of the 1973 Act.

<sup>6</sup> Scottish Parliament Public Petition PE 535, presented by Mr Christopher Daly, August 2002.

<sup>7</sup> Scottish Parliament Public Petitions PE 888, presented by Mr Christopher Daly, September 2005 and PE 976, presented by Mr Peter Kelly, June 2006.

<sup>8</sup> Walker, *Prescription and Limitation of Actions* (6<sup>th</sup> edn, 2002), p 5; Macphail, *Sheriff Court Practice* (3rd edn, 2006), para 2.114.

<sup>9</sup> Discussion Paper No 132 (2006), paras 1.24-1.29.

helpful discussion of this matter is that by McHugh J in *Brisbane South Regional Health Authority v Taylor*.<sup>10</sup>

"For nearly 400 years, the policy of the law has been to fix definite time limits ... for prosecuting civil claims. The enactment of time limitations has been driven by the general perception that '[w]here there is delay the whole quality of justice deteriorates': *R v Lawrence* ([1982] AC 510, at 517, per Lord Hailsham of St Marylebone LC). Sometimes the deterioration in quality is palpable, as in the case where a crucial witness is dead or an important document has been destroyed. But sometimes, perhaps more often than we realise, the deterioration in quality is not recognisable even by the parties. Prejudice may exist without the parties or anybody else realising that it exists. As the United States Supreme Court pointed out in *Barker v Wingo* (407 US 514 at 532 (1972)), 'what has been forgotten can rarely be shown'. So, it must often happen that important, perhaps decisive, evidence has disappeared without anybody 'knowing' that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose. A verdict may appear well based on the evidence given in the proceedings, but, if the tribunal of fact had all the evidence concerning the matter, an opposite result may have ensued. The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose.

...

The effect of delay on the quality of justice is no doubt one of the most important influences motivating a legislature to enact limitation periods for commencing actions. But it is not the only one. Courts and commentators have perceived four broad rationales for the enactment of limitation periods. First, as time goes by, relevant evidence is likely to be lost (*Jones v Bellgrove Properties Ltd* [1949] 2 KB 700 at 704). Second, it is oppressive, even 'cruel', to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed (*RB Policies at Lloyd's v Butler* [1950] 1 KB 76 at 81-82). Third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them (New South Wales Law Reform Commission, *Limitation of Actions for Personal Injury Claims* (1986) LRC 50, p 3; Law Reform Commission of Western Australia, *Limitation and Notice of Action*, Discussion Paper (1992) Project No 36, Pt II, p 11). Insurers, public institutions and businesses, particularly limited liability companies, have a significant interest in knowing that they have no liabilities beyond a definite period (in *Limitation of Actions for Latent Personal Injuries* (1992) Report No 69, p 10, the Law Reform Commissioner of Tasmania said: "The need for certainty can be justified in many cases. For example, manufacturers need to be able to 'close their books' and calculate the potential liability of their business enterprise with some degree of certainty before embarking on future development. Under modern circumstances, an award of damages compensation may be so large as to jeopardise the financial viability of a business. The threat of open-ended liability from unforeseen claims may be an unreasonable burden on business. Limitation periods may allow for more accurate and certain assessment of potential liability."). As the New South Wales Law Reform Commission has pointed out (*Limitation of Actions for Personal Injury Claims* (1986) LRC 50, page 3):

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<sup>10</sup> [1996] 186 CLR 541, at 551-553; the quoted passage was approved in *B v Murray* [2007] CSIH 39, at para [82].

'The potential defendant is thus able to make the most productive use of his or her resources (Kelley, "The Discovery Rule for Personal Injury Statutes of Limitations Reflections on the British Experience", *Wayne Law Review*, vol 24 (1978), 1641, at p 1644) and the disruptive effect of unsettled claims on commercial intercourse is thereby avoided ("Developments in the Law, Statutes of Limitations", *Harvard Law Review*, vol 63 (1950) 1177 at p 1185). To that extent the public interest is also served'.

Even where the cause of action relates to personal injuries, (The vast majority of defendants in personal injury actions are insured. Consequently, the amount of the verdict will not be met by the defendant. Nevertheless, it is a charge on the revenue of the insurer for the relevant year and is ultimately met by the shareholders of the insurer or the individual proprietors of the insurance business if the insurer is not incorporated. Although the burden of the plaintiff's claim is spread in such cases, the consequences for the proprietors of the insurance business can be significant. When a large number of claims are allowed to be brought out of time, as has been the case in respect of some types of injuries or in some industries in recent years, the financial consequences for an insurer can be drastic), it will be often just as unfair to make the shareholders, ratepayers or taxpayers of today ultimately liable for a wrong of the distant past, as it is to refuse a plaintiff the right to reinstate a spent action arising from that wrong. The final rationale for limitation periods is that the public interest requires that disputes be settled as quickly as possible (New South Wales Law Reform Commission, *Limitation of Actions for Personal Injury Claims*, (1986) LRC 50, p 3; Law Reform Commission of Western Australia, *Limitation and Notice of Actions*, Discussion Paper, (1992) Project No 36, Pr II, p 11)."

## History of the legislation

1.9 As we mentioned in our Discussion Paper, the law relating to limitation in personal injury claims has been the subject of considerable changes since the introduction of legislation in 1954.<sup>11</sup> Before 1954, with certain exceptions, actions of damages for personal injury and for death arising from personal injury were not subject to any limitation period. However the right to claim damages for personal injury was subject to the rules of long negative prescription, which meant that the right was extinguished after a period of 20 years from the date when the right of action arose. In effect, the rules of prescription operated as a time-bar on claims being made. For ease of reference, Appendix B repeats the outline of the development of the legislation since 1954 which appeared in our Discussion Paper.<sup>12</sup>

## Advisory group

1.10 We are grateful to the members of the advisory group of practitioners with experience of this area of law for the help and advice which they have given us.<sup>13</sup> Their contribution is much appreciated.

## Summary of our main recommendations

1.11 We make a number of recommendations as regards the first reference. Consultees were broadly satisfied with the basic structure of the limitation scheme in relation to personal

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<sup>11</sup> By the Law Reform (Limitation of Actions etc) Act 1954.

<sup>12</sup> Discussion Paper No 132 (2006), paras 1.16–1.23.

<sup>13</sup> Robert Carr (Anderson Strathern WS); David Johnston QC; Ranald Macdonald (NHS Scottish Central Legal Office); Robert Milligan (Advocate) and Fiona Moore (Drummond Miller WS).

injury claims. Our recommendations seek to make improvements to that system while retaining the basic scheme.

1.12 We recommend that the legislation should continue to include a date of knowledge test to determine the starting date for the running of the limitation period and provision for judicial discretion to allow time-barred actions to proceed where it is considered equitable to do so.

1.13 After further consideration, however, we recommend in Part 2 that the length of the limitation period should be extended from three to five years for all personal injury actions. This is a fairly major change but one which we consider will be helpful to all parties involved in personal injury litigation.

1.14 As regards the judicial discretion, in view of the comments from consultees we have decided to recommend that section 19A of the Act should be amended to include a list of factors which the court may take into account in exercising its discretion. We believe that such a list will be of particular benefit to the parties' legal representatives in pleading before the court. While on the one hand guidelines may be seen as unnecessary in the Court of Session, nevertheless they might bring some benefit in certain cases.

1.15 Although we recognise the arguments in favour of a separate injury giving rise to a new starting date for the running of the limitation period, we have decided to adhere to the proposal in our Discussion Paper. As we explain in Part 2, if a claim for a sufficiently serious injury is not pursued timeously, we take the view that the subsequent emergence of an additional injury should not give rise to a new date of knowledge and a further limitation period for a claim in respect of that injury.

1.16 In Part 4 we recommend that there should be no changes to the present law on onus of averment and proof in relation to limitation issues and no change to the current procedure in the Court of Session to facilitate resolution of limitation issues as a preliminary issue.

1.17 In Part 5 we deal with the second reference concerning prescribed claims. After further consideration we recommend no change in the current position. In our view claims in respect of personal injury which were extinguished by the long negative prescription before 1984 should not be revived. As we explain in Part 5, most consultees agreed with our proposal and we have therefore seen no need to change our view.

### **Historic Abuse Systemic Review**

1.18 We should mention that we are aware that an independent expert was appointed by Scottish Ministers in August 2005 to identify what regulatory requirements and powers were in place from 1950 to 1995 relating to the provision, regulation and inspection of residential schools and children's homes in Scotland, and to identify and review the adequacy of any systems intended to ensure compliance with those requirements.<sup>14</sup> We have had no

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<sup>14</sup> Historic Abuse Systemic Review. Following the then First Minister's statement in the Scottish Parliament on 1 December 2004, Mr Peter Peacock the then Minister for Education and Young People, appointed Mr Tom Shaw to undertake the review and to report to Scottish Ministers; (see Official Report available online at <http://scottish.parliament.uk/business/officialReports/meetingsParliament/or-04/sor1201-02.htm#Col12390>); We are also aware of the independent inquiry into institutional child abuse in Kerelaw school in Ayrshire, announced in the Scottish Parliament on 1 November 2007 (See Scottish Government news release available online at <http://www.scotland.gov.uk/News/Releases/2007/11/01160526>).

involvement in this review. To some extent it covers matters discussed in Part 5 of this Report; nevertheless the terms of reference of the two reports are different, and the issues that arise are completely distinct. Consequently the two reports should be treated independently of each other.

### **Legislative competence**

1.19 The subject matter of both references relates to Scots private law and neither involves any matter which is reserved to the United Kingdom Parliament under the Scotland Act 1998. We take the view that none of the recommendations in this Report relating to the first reference raises any question of incompatibility with the European Convention on Human Rights or with European Union law. As we pointed out in our Discussion Paper, the European Court of Human Rights has recognised that limitation periods are not incompatible with the Convention.<sup>15</sup> However, we remain of the view that the second reference does raise issues of possible incompatibility with the Convention and we outline our concerns in Part 5 of this Report.

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<sup>15</sup> *Stubbings v UK* (1996) 23 EHRR 213.

## Part 2            Date of knowledge

### Introduction

2.1     In this Part of the Report consideration is given to the provisions of sections 17(2) and 18(2) of the Prescription and Limitation (Scotland) Act 1973 that relate to the date of knowledge of the pursuer. We conclude first that it is desirable to retain a "date of knowledge" test (sometimes also referred to as a "discoverability" test). Thereafter we consider the elements that make up such a test; at present these are the statutory facts specified in section 17(2)(b) of the 1973 Act, as amended. We consider that the present test is too restrictive and should be amended in significant respects. We recommend that the present assumptions that are made for the purposes of the test, that liability is not disputed and that the defender is able to satisfy a decree, should be abolished. The result would be to make the statutory test focus exclusively on the seriousness of the pursuer's injuries. We go on to consider whether, if a claim for a sufficiently serious injury is not pursued timeously, the subsequent emergence of another injury should give rise to a fresh date of knowledge. We conclude that it should not. Thereafter we consider other aspects of the "date of knowledge" test. These include the notion of actual and constructive awareness of the statutory facts. In relation to constructive awareness of such facts, we conclude that the test should contain an element of subjectivity and that the limitation period should not run during any period when the pursuer was in the opinion of the court excusably ignorant of the statutory facts. We then consider the length of the limitation period, and conclude that it should be increased from three to five years. Finally, we propose certain minor amendments to sections 17(3) and 18(3) to update the provisions of those subsections dealing with the mental incapacity of the pursuer.

### Retaining the knowledge date

2.2     The first issue raised in our Discussion Paper was whether it was appropriate in principle that the legislation on limitation of actions in personal injury cases should contain a "date of knowledge" test. More precisely, the question is whether the legislation should contain a provision whereby the limitation period runs from the date on which the pursuer acquired, or ought to have acquired, the factual knowledge necessary to pursue an action for damages. In the Discussion Paper we suggested that it was clear that the legislation should contain such a provision. The only other possible dates were the date of accrual of the cause of action or the date of cessation of the act or omission; both of these presented the difficulty that in the case of latent or insidious disease, such as asbestosis, the limitation period might expire before it was possible to discover the existence of the injury. This difficulty had existed under the original provisions of the 1954 Act,<sup>1</sup> and in *Cartledge and Others v E Jopling & Sons Ltd*<sup>2</sup> the House of Lords noted the injustice of the legislation; because of the terms of the statute the court was compelled 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.

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<sup>1</sup> Law Reform (Limitation of Actions etc) Act 1954.

<sup>2</sup> [1963] AC 758.

2.3 One possible means of dealing with that injustice is to make use of a judicial discretion to disapply the time-bar. We did not favour that approach because it inevitably risked inconsistency. It seemed to us that it was right in principle that time should not run as long as a pursuer excusably lacked the requisite knowledge, and that an appropriate period should be allowed in which to take proceedings after the pursuer ceased to be excusably ignorant. Consequently, we considered that that principle should be embodied in the statute. The history of legislation in the United Kingdom has indicated that defining the extent of what the "requisite knowledge" should be may present considerable difficulties; the same is true of the test for determining whether ignorance is excusable. Nevertheless, the principle itself is relatively clear. The current legislation in England and Wales provides for a limitation period from the date of knowledge.<sup>3</sup> In its Report on *Limitation of Actions*<sup>4</sup> 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. In all of the Australian states and Canadian provinces whose legislation we have examined provision is made for the date of knowledge as a starting point for the running of time, although naturally there are variations in the terms of the particular legislation.

2.4 In the Discussion Paper we recognised that in some cases the application of a date of knowledge test gives rise to factual disputes and may accordingly add to the length or complexity of personal injury litigation. Nevertheless, similar factual disputes would often arise if the pursuer were to be dependent on the 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 should add that, although the way in which the current Scottish provisions on date of knowledge operate has been criticised, it has not been suggested that they should be abolished. On this topic, the views of consultees were unanimous: a date of knowledge test should be retained.

2.5 We accordingly recommend that:

1. **The Prescription and Limitation (Scotland) Act 1973 should continue to include a "date of knowledge" as the starting date for the running of the limitation period.**

(Draft Bill, section 1(2))

2.6 On the assumption that a "date of knowledge" test should continue to exist, consideration is now given to the elements that 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". Thereafter we will examine the notion of actual awareness and the provisions relating to constructive knowledge.

### **The statutory facts**

2.7 At present the facts that must be known, actually or constructively, by the pursuer before time runs are set out in section 17(2)(b) of the 1973 Act. This provides as follows:

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<sup>3</sup> Limitation Act 1980, ss 11 and 14.

<sup>4</sup> Law Com No 270 (2001).



"(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:

"(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 should 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 return to this matter at a later point.<sup>5</sup>

2.8 All of the damages sought in respect of a wrongful act or omission must be recovered in a single action.<sup>6</sup> Consequently 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 sufficient knowledge or awareness to start the running of time will only occur once the pursuer is aware or ought to be aware that the injuries are more serious than initially thought. It seems to us that the protection of a pursuer who sustains a relatively minor injury which turns out to be more serious is of importance in the scheme of section 17, and in the following paragraphs we consider the best means of affording such protection. The critical point, it seems to us, is that the *injury* sustained by the pursuer should be sufficiently serious to warrant his considering legal proceedings; the injury is what the pursuer experiences, and it is when that injury appears relatively serious that a normal pursuer will be induced to seek legal or medical advice with a view to possible legal proceedings.

#### *Sufficiently serious injury*

2.9 The first element in section 17(2)(b)(i) is based on the seriousness of the pursuer's injury, in particular whether the injury would warrant suing. It proceeds, however, on two assumptions, namely that (a) liability is admitted and (b) the defender could satisfy any decree. On the statutory assumptions, it might be thought that the paragraph sets a very low threshold of seriousness; 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. An alternative definition of the significance or seriousness of the injury is not obviously apparent, however. Various alternatives were considered in England by the Law Commission in its Consultation Paper on *Limitation of Actions*,<sup>7</sup> but in its subsequent Report

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<sup>5</sup> See below, para 2.29 et seq.

<sup>6</sup> *Stevenson v Pontifex & Wood* (1887) 15 R 125; *Dunlop v McGowans and Others* 1980 SC (HL) 73.

<sup>7</sup> Law Com No 151 (1998).

on the same subject<sup>8</sup> the Law Commission concluded that none of the alternatives was satisfactory. The critical point was that the definition of "significance" could not reflect accurately all of the factors that would be taken into account in deciding whether or not to bring proceedings. Those factors would differ for every claimant. In many cases the most important would be the prospects of success of the claim. If the court were asked to decide when the claimant should have known that the claim was more likely to succeed than otherwise, however, that would require a trial of the merits of the claimant's case every time a limitation defence was raised. In addition, it was hard to justify giving the claimant a longer limitation period when the defendant was in financial difficulties. Consequently the Law Commission concluded that the assumptions that the claim would succeed and that any award would be satisfied appeared to be justified.<sup>9</sup>

2.10 We agree with the Law Commission that the most satisfactory test should be based on the degree of seriousness or "significance" of the injury, and should address that question according to whether the injury warranted bringing proceedings. As explained above, we consider that the seriousness of the injury is primary, in the sense that the injury is what the pursuer experiences, and it is in the light of the significance of that injury that an ordinary person can be expected to decide whether or not to take advice about raising proceedings. Nevertheless, we are of opinion that a tension exists within the current formulation of the general notion of an injury sufficiently serious to justify proceedings. On one hand, 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"; on the other hand, 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 of less concern. It seems a reasonable assumption for the purposes of the present exercise. In most personal injury actions the defender will be insured. The assumption of admitted liability, by contrast, appears to create difficulties. In particular, it tends to set a very low threshold for the seriousness of the injury that will start the limitation period running. That seems to us to be unfair; moreover, it does not seem sound policy that the law should, even indirectly, encourage people to sue for relatively minor injuries. In our Discussion Paper we canvassed the possibility that the current statutory assumption of admitted liability should be replaced by an assumption that the action had a reasonable prospect of success.<sup>10</sup>

2.11 Eleven consultees addressed this issue. Of these five were in favour of the suggested amendment to the statutory assumptions. These included the Association of Personal Injury Lawyers and the Law Society of Scotland, which suggested that the test should be whether or not there was a reasonable prospect that the action would be successful on the balance of probabilities. Arguments in favour of the *status quo* were that the current assumption of admitted liability had worked without difficulty in practice, and that admission of liability is a clear concept, whereas a reasonable prospect of success is much less precise. Two consultees questioned whether the statutory assumptions were necessary at all, and suggested that the test of sufficiently serious injury was adequate without them.

2.12 Ultimately we have taken the view that the critical point should be the seriousness of the pursuer's injuries and that the statutory assumptions should be deleted from the test. On

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<sup>8</sup> Law Com No 270 (2001).

<sup>9</sup> *Ibid*, paras 3.27-3.31.

<sup>10</sup> Discussion Paper No 132 (2006), para 2.11 and proposal 2.

that basis, we are of opinion that section 17(2)(b) should refer to the date on which the pursuer became aware that his injuries were sufficiently serious to justify his bringing an action of damages, and that in considering that matter no account should be taken of the prospects of success in such an action or whether any person against whom it was brought would be able to satisfy a decree. In this way the statutory assumptions are effectively taken out of the test. Our primary reason for this conclusion is that stated above:<sup>11</sup> in deciding whether to seek legal or medical advice with a view to possible proceedings, it is the seriousness of the injury that is likely to be the primary consideration taken into account by an ordinary pursuer. Consequently that, by itself, should be adopted as the criterion. The new formulation that we recommend thus concentrates on what appears to us to be the essential question. The statutory assumptions, especially that relating to admitted liability, give rise to the tension referred to above.<sup>12</sup> That tension will be removed by our recommendation. In addition, the assumptions tend to set a very low standard for the seriousness of the injury that is required to trigger the time-bar. We consider this unfair, and our recommendation will, we think, set a more appropriate standard. In addition, the new formulation involves a simpler test. The court simply has no regard to either prospects of success or the solvency of the defender.

2.13 We consider that the notion of injuries which are "sufficiently serious" to justify bringing an action of damages is sufficiently precise. Various alternatives were considered by the Law Commission in its Report on *Limitation of Actions*.<sup>13</sup> In essence, these involved an extended definition of seriousness; thus it might be provided that a claim was significant if the recoverable damages were more than nominal, or more than a fixed sum, or less than a set proportion of the total award. It was felt, however, that none of these added precision to the statutory test, and that they might in some cases produce unfair results if, for example, the tariff (in the form of a fixed sum) were set too low or too high. We agree with the Law Commission's conclusion. No doubt in some cases it may be difficult to know on which side of the line a particular case lies, but the function of a court is precisely to decide those difficult cases. We do not think that adding to the definition would increase its precision; it is framed in plain English, and the difficulties in its application merely arise out of the fact that borderline cases arise on any definition.

2.14 We accordingly recommend that:

**2. The test in section 17(2)(b)(i) of the 1973 Act should be replaced by the following test:**

**"that the pursuer's injuries were sufficiently serious to justify his bringing an action of damages (no account being taken, for the purposes of this sub-paragraph, of the prospects of success in that action or of whether any person against whom it was brought would be able to satisfy a decree)".**

(Draft Bill, section 1(2))

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<sup>11</sup> See para 2.8 above.

<sup>12</sup> See para 2.10 above.

<sup>13</sup> Law Com No 270 (2001).

### *Subjective elements*

2.15 In our Discussion Paper we considered the extent to which the question whether injuries are sufficiently serious to justify bringing proceedings involves subjective considerations or elements. We expressed the view<sup>14</sup> that it was clear that the gravity of the injury must be judged by reference to its physical and patrimonial consequences for the particular pursuer. Thus a minor scar on the thigh might appear insignificant to an ordinary middle-aged person but of great importance to a film star or model, and an injury to the left little finger of someone who had earlier lost the use of his right hand would plainly be of great significance to him. Consequently, 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. The question arises as to whether wider personal circumstances, such as an exceptional reluctance to take proceedings against the particular defender, should be taken into account. The current version of section 17 has been interpreted as embracing only those subjective elements which relate to the severity of the injury and hence to the likely quantum of damages. In *Carnegie v Lord Advocate*<sup>15</sup> Lord Johnston (with whom on this point the other members of the Extra Division agreed) said:<sup>16</sup>

"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."

In the Discussion Paper we expressed the view that it was right in deciding whether injuries were sufficiently serious to warrant suing that the personal circumstances of the particular pursuer should be taken into account only in so far as they would affect the quantum of damages; 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. Thus it would be inappropriate that the limitation period be extended, perhaps for many years, simply on the ground that the pursuer had continued during that time to work for the defender. We remain of that opinion.

2.16 A further consideration applies in cases where a pursuer has suffered injury in childhood; in such cases the limitation period does not start to run until the pursuer has attained full capacity. This may apply in particular to pursuers who claim to have suffered physical or sexual abuse in childhood. In such cases we consider that it is implicit in the

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<sup>14</sup> Discussion Paper No 132 (2006), para 2.12.

<sup>15</sup> 2001 SC 802.

<sup>16</sup> *Ibid* at 812 F-H.

present legislation that the gravity of the injury suffered by the pursuer should be judged at the time when he or she attains legal capacity.<sup>17</sup>

#### *Separate dates for "distinct" injuries*

2.17 In *Carnegie v Lord Advocate*<sup>18</sup> the court construed the existing legislation as permitting separate starting dates for "distinct" injuries produced by the same wrong. 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 limitation period were held to have been sufficiently serious to have justified proceedings.<sup>19</sup> The court nevertheless allowed the action to proceed to proof in relation only to the alleged psychological injury. Lord Johnston (with whom the other members of the court agreed) referred to the earlier decision of Lord Prosser in *Shuttleton v Duncan Stewart & Co Ltd*,<sup>20</sup> and continued:<sup>21</sup>

"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."

It followed that the action in respect of the psychological injuries had been raised timeously. A similar approach had been taken by Lord Prosser in *Shuttleton*, where pleural plaques were held to be sufficiently distinct from either pleural thickening or asbestosis to qualify as a "separate" disease or impairment. Consequently, knowledge of plaques would not have barred claims based on either thickening or asbestosis. A similar approach was taken, by concession, in *Hill v McAlpine*.<sup>22</sup>

2.18 This development in the law proceeds upon the basis that a delict has given rise to two or more injuries, each "sufficiently serious", which are distinct and separate from each other. Clearly 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. In other circumstances, however, particularly where injuries or symptoms emerge consequentially in time, it may be difficult to determine whether injuries are separate and distinct. One example is a depressive reaction to a slow-healing physical injury: is that distinct from, or merely a consequence of, the original physical injury? Is the late and unforeseen development of arthritis following the fracture of a limb wholly separate and

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<sup>17</sup> Discussion Paper No 132 (2006), para 2.13.

<sup>18</sup> 2001 SC 802.

<sup>19</sup> *Ibid* at 809.

<sup>20</sup> 1996 SLT 517.

<sup>21</sup> 2001 SC 802 at 813 G-H.

<sup>22</sup> 2004 SLT 736.

distinct from the fracture? In both these cases it would seem that the later consequences are not wholly separate and distinct. Nevertheless, this produces the anomaly that the arthritis sufferer, having neglected to sue timeously for the fractured limb, is also time-barred as regards the arthritis, whereas the pursuer in *Carnegie v Lord Advocate*<sup>23</sup> can sue for the later part of his injuries as of right. It is also clear that, if the arthritis sufferer had timeously pursued his claim for damages for the broken limb and had 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 In addition, practical difficulties arise if a single delict gives rise to one form of personal injury which is time-barred and another form which is not time-barred. If, for example, both injuries affect the pursuer's ability to work, the question arises whether his claim for loss of wages is excluded or admissible. Problems may also arise if an attempt is made to amend pleadings outwith the limitation period to include an injury that was omitted from the earlier version of the pleadings; in such a case the amendment may be opposed on the basis that the further injury is "distinct", and that damages are being claimed after the expiry of the limitation period.

2.20 The problems that can arise from the principle in *Carnegie v Lord Advocate*<sup>24</sup> are illustrated in the context of physical abuse in a residential school in *McE v Hendron*.<sup>25</sup> In that case the pursuer averred that he suffered abuse in a List D school as a result of which he sustained both physical and psychological injury. The physical abuse that was alleged was serious, and included punching and kicking and other plainly abusive activities. Damages were sought on the basis of the assaults themselves and also on the basis of the psychological injury. It was averred that the pursuer was depressed as a 12 year old and suffered psychological problems from time to time thereafter. No attempt was made to invoke the *Carnegie* principle; according to the pleadings the psychological injuries flowed seamlessly into their alleged psychological consequences.<sup>26</sup> In these circumstances it is difficult to see how *Carnegie* could ever have helped the pursuer. If, however, the psychological problems had only manifested themselves in later life, it is possible that the principle could have been invoked. This seems arbitrary, and clearly illustrates the anomalies that *Carnegie* can create.

2.21 Although the approach adopted in *Carnegie* may appear initially attractive, it presents a number of practical difficulties and is liable to produce anomalous results. We think that it conflicts with the decision in *Cartledge and Others v E Jopling & Sons Ltd*,<sup>27</sup> and also 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*<sup>28</sup> 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 psychiatric illness which flowed from

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<sup>23</sup> 2001 SC 802.

<sup>24</sup> *Ibid.*

<sup>25</sup> [2007] CSIH 27.

<sup>26</sup> *Ibid* at paragraphs [171]-[172].

<sup>27</sup> [1963] AC 758.

<sup>28</sup> 2004 SC 784.

earlier abuse cannot be regarded as a separate *damnum* or as giving rise to a separate obligation to make reparation. The court did not require to express any view on the question of limitation.

2.22 Against the foregoing background, we suggested in our Discussion Paper that the emergence of additional injury, even if distinct, should not give rise to a fresh date of knowledge and a further limitation period for a claim for the additional injury.<sup>29</sup> Five consultees disagreed with this proposal. Of the professional bodies who responded, the Faculty of Advocates and the Law Society of Scotland supported the proposal while the Scottish Law Agents Society opposed it. Five other consultees agreed with the proposal.

2.23 Those who opposed the proposal relied in large part on the unfairness which they thought arose in the event that a pursuer could not claim in respect of a later emerging injury. The Association of Personal Injury Lawyers raised the question of a victim of asbestos exposure who sustained asbestosis but neglected timeously to sue for that injury; they thought it unfair that such a person should be barred from obtaining damages for mesothelioma if that were later to emerge. In favour of the proposal, it was pointed out that under the approach in *Carnegie* multiple dates of knowledge could be argued for in a single case, which would be undesirable.

2.24 We have concluded that the decision in *Carnegie* cannot be readily reconciled with the principle that following a delictual act one cause of action arises, in which all damages must be sought. Moreover, the difficulties discussed above<sup>30</sup> cannot simply be set aside. We should add that the notion that a claim for damages for personal injury can be split up into different heads with different starting dates is not to be found in English law, or in any other system of law that we have examined. We accordingly conclude that the effect of *Carnegie* should be reversed, and we recommend 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.**

(Draft Bill, section 1(4))

*Attributable to an act or omission*

2.25 The second statutory fact in section 17(2)(b) of the 1973 Act of which the 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 in section 18(2)(b) of the Act, except that the reference is to 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*<sup>31</sup> the Lord Ordinary (Coulsfield) said:<sup>32</sup>

"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

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<sup>29</sup> Discussion Paper No 132 (2006), para 2.21 and proposal 3.

<sup>30</sup> See para 2.21 above.

<sup>31</sup> 1992 SLT 141.

<sup>32</sup> *Ibid* at 144 C.

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."

2.26 The equivalent English provision<sup>33</sup> also refers to the injury's 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 England on several occasions.<sup>34</sup> The principles to be drawn from those cases were summarised by Brooke LJ in *Spargo v North Essex District Health Authority*:<sup>35</sup>

"(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 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, she 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 properly be said to know that it was."

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

2.27 The notion of attributability is accordingly seen as being less precise or less rigorous than clear knowledge of causation. We are of opinion that it is right that the broad causal relationship between the injury and the act or omission of the defender which is required to start the running of time should be set at that looser standard. The acquisition of actual or constructive awareness of attributability simply starts the running of a limitation period 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

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<sup>33</sup> Limitation Act 1980, s 14(1)(b).

<sup>34</sup> *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 West Lancashire Health Authority* [1995] PIQR 514 and *Forbes v Wandsworth Health Authority* [1997] QB 402.

<sup>35</sup> [1997] PIQR 235 at 242.



the requisite standard of proof. It is accordingly unnecessary that the pursuer should have knowledge of any definite causal link at the outset of that period.

### *The identity of the defender*

2.28 The third statutory relevant fact in section 17(2)(b) of the 1973 Act of which the pursuer 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. In fatal cases this provision is mirrored in section 18(2)(b)(ii) of the Act. 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.<sup>36</sup> It may also be relied on where, as occasionally happens, there is confusion as to which company within a group of companies is the employer.<sup>37</sup> This particular statutory fact is relatively straightforward, and we do not understand that it presents problems in practice.

### **Knowledge of the wrongful quality of the act or omission**

2.29 Under the legislation in force from 1963<sup>38</sup> until the commencement of the 1984 Act,<sup>39</sup> one issue which arose 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.<sup>40</sup> The matter was settled in Scotland to similar effect by the decision of the House of Lords in *McIntyre v Armitage Shanks Ltd*.<sup>41</sup> In its 1983 Report on *Prescription and the Limitation of Actions* this Commission recommended against changing this rule:<sup>42</sup>

"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."

Consequently, 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."

2.30 We adhere to that view. If knowledge of actionability were to be one of the statutory relevant facts, that would lead to great uncertainty. One problem is that of an injured person who simply fails to seek legal advice. Another is an injured person who is advised that his claim is unsound. We do not think it appropriate that such a person should have 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 years later that the original advice

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<sup>36</sup> And also other road traffic accidents; see for example *Elliot v J & C Finney* 1989 SLT 208.

<sup>37</sup> *Comer v James Scott & Co (Electrical Engineers) Ltd* 1978 SLT 235; cf *McClelland v Stuart Building Services* 2004 SLT 1011.

<sup>38</sup> Limitation Act 1963.

<sup>39</sup> Prescription and Limitation (Scotland) Act 1984.

<sup>40</sup> The provision is currently to be found in s 14 of the Limitation Act 1980.

<sup>41</sup> 1980 SC (HL) 46.

<sup>42</sup> Scot Law Com No 74 (1983), para 3.14.

was unsound, he should then be able to raise proceedings as of right. Our consultees agreed unanimously with this view. We therefore recommend 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.**

**Actual awareness**

2.31 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. These provisions differ from the corresponding English legislation, which refers to the plaintiff's having "knowledge". In other jurisdictions<sup>43</sup> whose legislation we have examined the word "knowledge" or its equivalent is also used. In its original form the 1973 Act also referred to material facts which were "outside the knowledge" of the pursuer. The change from "knowledge" to "awareness" occurred when the 1973 Act was amended in 1984. This change of terminology was adopted by our predecessors in this Commission in their Report on *Prescription and the Limitation of Actions*.<sup>44</sup> The adoption of the different terminology is not discussed in the Report, and it seems to have been assumed that the terms were synonymous.

2.32 We have not discovered any judicial discussion of the meaning of "awareness" in this context. The meaning of the word "knowledge" was considered in *Comer v James Scott & Co (Electrical Engineers) Ltd*<sup>45</sup> by the Lord Ordinary (Maxwell). He said:<sup>46</sup>

"... 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."

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."

We consider it clear that in this particular context one is not considering knowledge which is definite or certain. It is possible that in a particular case one or more of the statutory facts will be in dispute; for example, a back injury which the pursuer attributes to lifting a heavy weight at work may in truth be attributable to weekend gardening. In our opinion what one is

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<sup>43</sup> All Australian states and the Canadian provinces of Alberta, British Columbia and Saskatchewan.

<sup>44</sup> Scot Law Com No 74 (1983), Recommendation 4 and Draft Bill.

<sup>45</sup> 1978 SLT 235.

<sup>46</sup> *Ibid* at 240. See also *Halford v Brookes and Another* [1991] 1 WLR 428, per Lord Donaldson of Lynton MR at 443 E-F.

concerned with is a belief or understanding held with a certain degree of confidence or conviction, sufficient to prompt the initiation of proceedings to claim damages. In so far 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. "Knowledge" by itself is apt to suggest a degree of certainty, which we think should not be necessary. Rather what is involved is a belief held with a degree of conviction, and that seems to us to be broadly speaking what is inherent in the notion of "awareness".

2.33 In our Discussion Paper<sup>47</sup> we suggested that, in formulating any amended provisions relating to a pursuer's state of knowledge, the terminology of "awareness", rather than "knowledge", should continue to be used. We expressed the view that the concept of a person's being actually "aware" of a fact is relatively straightforward. We referred to the absence of judicial discussion of the concept, which tended to support the view that in the practical application of section 17(2) (and section 18(2) in fatal cases) of the 1973 Act no particular difficulty arose in respect of the concept of the pursuer's actual awareness of the specified relevant fact. Among our consultees there was unanimous agreement that it was appropriate to use the terminology of "awareness" in these provisions.

2.34 We accordingly recommend:

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".**

(Draft Bill, sections 1(2) and 2(2))

### **Constructive awareness**

2.35 A major criticism 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. The same formulation for constructive awareness is used in section 18(2) in relation to claims arising on death; consequently the criticisms apply to that provision as well. Before we deal with those criticisms, however, we must deal with the logically prior issue of whether in principle there should be a test of constructive awareness, or whether the law should be based solely on what a pursuer actually knew, ignoring what he ought to have known or could reasonably have discovered.

2.36 In our Discussion Paper we stated<sup>48</sup> that the policy reasons for having a constructive awareness test were not difficult to see. The public interest demands that claims should be prosecuted promptly: it is accordingly appropriate to expect a person who has some ground for believing that he may have a claim to proceed with reasonable diligence. If actual awareness were relied on by itself, a claimant would be permitted to postpone the start of the limitation period by delaying, whether deliberately or through indifference or sloth, the making of reasonable enquiries and investigations. It would likewise be irrelevant that he overlooked facts that should have been apparent to him. By thus delaying the start of the limitation period a pursuer would acquire a right to bring an action even though the claim

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<sup>47</sup> Discussion Paper No 132 (2006), para 2.30 and proposal 5.

<sup>48</sup> *Ibid*, para 2.32.

might be very stale. We further noted that all of the other jurisdictions which made use of a knowledge date whose legislation we had examined included in their rules a constructive awareness test. Finally, the absence of a "long-stop" provision such as that formerly found in the 20-year negative prescription (disapplied to personal injury claims as a result of provisions in the 1984 Act) is a further factor in support of the inclusion of a constructive awareness test of some sort. We accordingly proposed that the legislation should continue to contain a constructive awareness test.

2.37 All but one of the consultees agreed with this proposal. The one exception contended that the date of awareness should always be the date of actual awareness. They suggested that the test is unfairly objective and fails to take account of individual circumstances. This was particularly significant in industrial disease cases where, although a pursuer might be aware of symptoms, he usually has no knowledge of their cause. Despite this argument we are satisfied that there should continue to be a constructive awareness test. We consider that the individual circumstances of a pursuer will be adequately taken into account by our recommendations<sup>49</sup> that the current statutory test, whether it was "reasonably practicable" for the pursuer to become aware of a relevant fact, should be amended so that it contains an element of subjectivity. We accordingly recommend that:

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

(Draft Bill, sections 1(2) and 2(2))

*Reasonably practicable test*

2.38 Under the current provisions of sections 17(2) (and 18(2) in fatal cases) 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. These provisions reflect the draft Bill annexed to this Commission's 1983 Report, which in turn reflected recommendations 4 and 7 of that Report.<sup>50</sup> That Report 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 then recorded that, in the consultation exercise, there had been general approval for the view that the legislation should not refer specifically to the seeking of advice. The Court of Session judges had suggested that the legislation should refer to the date on which in the opinion of the court it was reasonable *for the injured person* in all the circumstances to have become aware of the relevant facts. The Commission thought that a formula along these lines would confer a degree of flexibility on the courts, and would have the further merit of not attempting to regulate the test of knowledge in too much detail. In this way the court could take account of the differing circumstances of individuals and the differing nature of their injuries. It would also enable the court, where appropriate, to attribute to an injured

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<sup>49</sup> Recommendations 7 and 8. See paras 2.42 and 2.53 below.

<sup>50</sup> Report on *Prescription and the Limitation of Actions* (Scot Law Com No 74) (1983), recommendations 4 and 7, pp 40 and 41.

person facts in the possession of an adviser, such as a solicitor or a trade union official. The judges' recommendation was accordingly adopted.

2.39 In applying the current statutory provision the courts have tended to emphasise the steps that it might have been practicable for the pursuer to take. In *Elliot v J & C Finney*<sup>51</sup> the pursuer was the driver of a car involved in a road traffic accident with a lorry. He was injured and admitted to hospital. His action was raised six days after the third anniversary of the accident. It was argued for the pursuer that it was not time-barred because he was not aware and it had not been reasonably practicable for him to have become aware of the identity of the driver of the lorry until after his discharge from hospital, 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. If the pursuer had asked the police officer about the identity of the other driver, the 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. For the pursuer it was submitted that, although it was in the ordinary sense of the word practicable 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. This argument was rejected. The Lord Ordinary (Sutherland) said:<sup>52</sup>

"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."

The Lord Ordinary allowed the action to proceed in the exercise of his discretion under section 19A of the 1973 Act. The defenders reclaimed against the decision, but in the event the Lord Ordinary's decision on section 17(2) was not the subject of the reclaiming motion.<sup>53</sup>

2.40 A similar approach was adopted in *McArthur v Strathclyde Regional Council*,<sup>54</sup> a case where a motorist sought damages for injuries suffered when his car collided with an obstruction associated with roadworks. In correspondence with the roads authority it had been disclosed that the roadworks had been carried out by independent contractors. Proceedings were started against the contractors more than three years after the accident but less than three years after the date when the authority had disclosed that contractors had been involved. The pursuer contended that until the disclosure it had not been reasonably practicable for him to become aware of the identity of the contractors. That argument was rejected. The Lord Ordinary (Abernethy) agreed with what had been said in *Elliot*. He stated that the pursuer's averments 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 attributable".<sup>55</sup> In *Little v East Ayrshire Council*,<sup>56</sup> even though it

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<sup>51</sup> 1989 SLT 208.

<sup>52</sup> 1989 SLT 208 at 210 L-211 A.

<sup>53</sup> 1989 SLT 605.

<sup>54</sup> 1995 SLT 1129.

<sup>55</sup> *Ibid* at 1134.

<sup>56</sup> 1998 SCLR 520.

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. A similar approach, applying the test of reasonable practicability with some strictness and ignoring whether the failure to obtain information was excusable, is found in other cases, including *Cowan v Toffolo Jackson & Co Ltd*<sup>57</sup> and *Nimmo v British Railways Board*.<sup>58</sup> Finally, the approach adopted at first instance in *Elliot* was approved at appellate level in the decision of the Extra Division in *Agnew v Scott Lithgow Ltd (No 2)*.<sup>59</sup> The opinion of the court was delivered by Lady Cosgrove, who stated:<sup>60</sup>

"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)."

2.41 In our Discussion Paper we commented on these cases as follows:<sup>61</sup>

"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 reasonably and excusably unaware of one or more of the statutory facts."

We accordingly asked consultees whether they agreed with our provisional conclusion that the current statutory test of whether it was "reasonably practicable" for the pursuer to become aware of a relevant fact was not satisfactory.<sup>62</sup> The reaction to this proposal was

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<sup>57</sup> 1998 SLT 1000 at 1002.

<sup>58</sup> 1999 SLT 778 at 781.

<sup>59</sup> 2003 SC 448.

<sup>60</sup> *Ibid* at 454 A-B.

<sup>61</sup> Discussion Paper No 132 (2006), para 2.37.

<sup>62</sup> *Ibid*, para 2.37 and proposal 7.

mixed. A number of consultees disagreed with it; these included the Faculty of Advocates and representatives of the insurance industry.

2.42 Despite the views expressed by those bodies, we are not persuaded that our provisional conclusion was wrong. The critical point seems to us to be that, while a particular step might have been reasonably practicable in the sense that it could have been executed without great expenditure of time, money or effort, there might at the time have been no good reason for undertaking that step or a good reason for not undertaking such a step. In other words, the current test does not address the reasonable man who reasonably does not take a step. In such a case, if the step is held to be reasonably practicable, the test will not avail the pursuer. It seems to us that, consistent with the underlying rationale of a knowledge or awareness test, sections 17(2) and 18(2) should address the question of whether the pursuer's ignorance of a particular fact was excusable. We accordingly recommend that:

**7. The current statutory test of whether it was "reasonably practicable" for the pursuer to become aware of a relevant fact should not be retained.**

(Draft Bill, sections 1(2) and 2(2))

2.43 We think it is appropriate in this connection to draw attention to sections 22B and 22C of the Prescription and Limitation (Scotland) Act 1973, which deal with limitation of actions arising in relation to product liability under the Consumer Protection Act 1987. While those provisions are not within the terms of our reference, we note that section 22B(2) and 22C(2)(b) also contain a statutory test of whether it was "reasonably practicable" for the person seeking to bring an action of damages to become aware of certain specified facts.

2.44 Sections 22B and 22C were inserted into the 1973 Act by Schedule 1, Part II to the Consumer Protection Act 1987, in order to implement European Directive 85/374/EEC on limitation in consumer protection.<sup>63</sup> It is at least questionable whether the Scottish test of "reasonably practicable" correctly implements the product liability Directive as it would seem to be a stricter test.<sup>64</sup> In terms of the Directive, the limitation period shall begin to run from the day on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.<sup>65</sup> We consider that there may be merit in reviewing sections 22B and 22C of the 1973 Act in this respect.

*Subjective or objective test*

2.45 If the current provisions on constructive awareness (sections 17(2) and 18(2) of the 1973 Act) are not satisfactory, the next question is what should replace them. An issue in the formulation of any legislative text on constructive knowledge or awareness is whether the test should be objective or subjective. An objective test applies the standard of a reasonable person who has suffered the particular injury in question; a more subjective test would take account of such factors as the pursuer's mental capacity, state of education, financial

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<sup>63</sup> Schedule 1, Part I to the 1987 Act implemented the Directive in England and Wales. The product liability limitation period is enacted in sections 11A and 14 of the Limitation Act 1980. Section 14 contains the same test for product liability cases as for personal injury cases, namely that of the "reasonable person".

<sup>64</sup> The Scottish test can also be compared to that in section 14 of the Limitation Act 1980 which is closer to the wording of the Directive.

<sup>65</sup> [1985] OJ L210/29.

resources or special personal features. The test does not require to be either fully objective or fully subjective; it is quite possible to formulate a test containing both objective and subjective elements. In many cases the difference may not matter, since the pursuer will usually be of normal intelligence, education and personality. In the case of a pursuer of limited intelligence, however, a purely objective test may be unfair. On the other hand, a wholly subjective approach may be unfair to a defender by greatly extending the time in which he remains unprotected from having to answer a stale claim.

2.46 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, in that they referred to a 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.<sup>66</sup> The Report recommended the retention of a "reasonable for him" formula in the legislative text.

2.47 The equivalent similarly worded provisions in England and Wales<sup>67</sup> had earlier been interpreted as being subjective.<sup>68</sup> Legislative recasting took place in England and Wales with the Limitation Act 1975 (subsequently consolidated in the Limitation Act 1980). Thereafter a judicial difference of view arose as to whether the test included subjective elements. In some cases it was thought necessary to take into account the personal characteristics and circumstances of the plaintiff.<sup>69</sup> This approach was explained by Purchas LJ in *Nash and Others v Eli Lilly & Co Ltd and Others*:<sup>70</sup>

"... 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."

In other cases, however, a strictly objective view was followed. In one of these cases, *Forbes v Wandsworth Health Authority*,<sup>71</sup> Evans LJ stated:<sup>72</sup>

"[I]t 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."

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<sup>66</sup> Scot Law Com No 74 (1983), para 3.6.

<sup>67</sup> Limitation Act 1963, ss 1 and 7.

<sup>68</sup> *Newton v Cammell Laird & Co (Shipbuilders and Engineers) Ltd* [1969] 1 WLR 415, per Lord Denning MR at 419 C-D; *Smith and Others v Central Asbestos Co Ltd and Another* [1972] 1 QB 244; affirmed subnom *Central Asbestos Co Ltd v Dodd* [1973] AC 518, per Lord Reid at 530.

<sup>69</sup> *Nash and Others v Eli Lilly & Co and Others* [1993] 1 WLR 782 and *Ali v Courtaulds Textiles Ltd* (1999) Lloyds Rep Med 301.

<sup>70</sup> [1993] 1 WLR 782 at 799 F-G

<sup>71</sup> [1997] QB 402.

<sup>72</sup> *Ibid* at 422 F-G.



In 1998 in its Consultation Paper on *Limitation of Actions*,<sup>73</sup> 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."<sup>74</sup> It was explained that the personal characteristics of the plaintiff, such as his or her level of education and intelligence, and the plaintiff's resources would be relevant to the question whether the plaintiff acted reasonably. That contrasted with the position that appeared to have developed under the existing law.<sup>75</sup> The Law Commission also noted that law reform agencies in New Zealand, Western Australia and Ontario had favoured a subjective standard.<sup>76</sup> In its subsequent Report on *Limitation of Actions*,<sup>77</sup> 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 claimant with knowledge which he or she could not possibly have."<sup>78</sup> The Law Commission then went on to explain that the circumstances of the claimant would be relevant to his or her constructive knowledge. Those circumstances would include financial resources, if information could not reasonably be available to the claimant unless expensive expert or other investigations had been carried out. The abilities of the claimant, including his or her intellectual abilities, would also be relevant. The Law Commission then concluded:<sup>79</sup>

"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."

2.48 Since the publication of the Law Commission's Report in 2001, the divergence of views in the Court of Appeal has been settled in favour of a strictly objective approach by the House of Lords in *Adams v Bracknell Forest Borough Council*.<sup>80</sup> In that case Lord Hoffmann agreed with the reasoning in *Forbes v Wandsworth Health Authority*.<sup>81</sup> He stated:<sup>82</sup>

"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."

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<sup>73</sup> Law Com No 151 (1998).

<sup>74</sup> *Ibid* at para 12.57.

<sup>75</sup> *Ibid* at para 12.54.

<sup>76</sup> *Ibid* at para 12.53.

<sup>77</sup> Law Com No 270 (2001).

<sup>78</sup> *Ibid* at para 3.48.

<sup>79</sup> *Ibid* at para 3.49.

<sup>80</sup> [2005] 1 AC 76.

<sup>81</sup> [1997] QB 402.

<sup>82</sup> [2005] 1 AC 76 at 89, para 45.

He continued:<sup>83</sup>

"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 ... 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 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."

Lords Philips of Worth Maltravers, Scott of Foscote and Walker of Gestingthorpe were either wholly or in substantial agreement with Lord Hoffmann. Baroness Hale of Richmond tended to favour some element of subjectivity. Thus judicial opinion in England and Wales has clearly shifted towards a more objective approach to the judging of a party's conduct. Such conduct is judged by the standard of the 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. Presumably, in assessing the significance or seriousness of injury, a hypothetical reasonable person would be assumed to be in the same situation as the claimant in respect of factors directly relevant to that assessment; these might include his occupation or any pre-existing disability. Other features of the particular claimant, however, 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. Such factors might be pertinent to an application made to the judicial discretion to disapply the time limit. In Lord Hoffmann's speech in *Adams*, it is clear that the existence of that discretion formed an important part of his reasoning in favour of an objective standard.

2.49 In our Discussion Paper<sup>84</sup> we drew attention to the relevance of the existence and extent of any judicial discretion to disapply the limitation period and allow a time-barred action to proceed. We also referred to the length of the limitation period itself as a relevant factor; in general terms, it might be said that the need for a generous knowledge test diminishes with a longer limitation period. We also remarked that in some respects the awareness test may be more fundamental than the existence of a general judicial discretion to allow time-barred claims to proceed or the length of the primary limitation period. We asked for views on the two approaches, the objective and the subjective, and asked in particular whether, as a matter of general approach, an awareness test should incline towards subjectivity rather than objectivity.

2.50 Eleven consultees responded on this issue. Of these, five inclined towards subjectivity, while six preferred a more objective approach. Arguments in favour of subjectivity included the fact that people may, reasonably, behave in a number of different ways in a given situation; a subjective element would enable the court to reflect this. Another argument was that the "reasonably practicable" test results in unnecessary and unproductive court procedure as the issues of reasonable practicability have to be argued even if there is no suggestion that the pursuer should reasonably have done more to discover the necessary information about his claim. It was also argued that it may be difficult for a person affected by certain medical conditions to identify them, and it would not be fair to expect every claimant to have the requisite medical knowledge.

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<sup>83</sup> [2005] 1 AC 76 at 89-90, para 47.

<sup>84</sup> Discussion Paper No 132 (2006), paras 2.46 and 2.47.

2.51 Certain consultees, mostly those who represented defenders or insurers, argued that the test should incline towards objectivity. The Faculty of Advocates favoured a similar approach, on the basis that it would result in consistency with England and Wales following the decision of the House of Lords in *Adams v Bracknell Forest Borough Council*.<sup>85</sup> A further argument was that a subjective test would make it more difficult for defenders to dispute a pursuer's contentions, and would also make the outcome of cases much more difficult to predict. There should, it was argued, be some sort of independent assessment of the pursuer's conduct. Certain consultees further pointed out that a case might still be allowed to proceed through the exercise of the judicial discretion.

2.52 Despite the position adopted by the courts in England and Wales and the submissions made in favour of an objective test, we have concluded that the test ought to include an element of subjectivity. The subjective element should include matters relating to the pursuer's assessment of his injury, such as his occupation or any pre-existing disability. It should also include his general education and intelligence. The critical question, it seems to us, is whether the pursuer's lack of awareness of the statutory facts can be considered excusable. The notion of excusability takes the subjective circumstances of the pursuer into account, but at the same time preserves an underlying objective element. It seems to us that it is undesirable to rely too heavily on the judicial discretion to disapply the time-bar; it is the provisions of sections 17(2) and 18(2), relating to lack of knowledge, that are primary, and the judicial discretion is essentially designed to cater for exceptional or anomalous cases. This seems to us to accord with the fundamental principle of the rule of law. If the pursuer's ignorance of a statutory fact is excusable for someone in his position, that should in our view prevent time from running. There is some force in the argument that anything other than a strictly objective test would make it difficult for defenders to dispute a pursuer's contentions. In this connection, however, it is important to bear in mind that it is for the pursuer to establish that he was unaware of one or more of the statutory facts, and that his lack of awareness was excusable. That should in our view go some way to countering the objection that was raised by representatives of defenders and insurers.

2.53 We accordingly recommend that:

8. **The awareness test should contain an element of subjectivity; consequently the limitation period should not run while the pursuer was, in the opinion of the court, excusably unaware of one or more of the statutory facts.**

(Draft Bill, sections 1(2) and 2(2))

### **Length of the limitation period**

2.54 The current limitation period of three years was introduced by the Law Reform (Limitation of Actions etc) Act 1954 following the reports of the Monckton Committee<sup>86</sup> and Tucker Committee<sup>87</sup> 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. In England and Wales they were subject to the general limitation period for tortious claims of

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<sup>85</sup> [2005] 1 AC 76.

<sup>86</sup> Final Report of the Departmental Committee on *Alternative Remedies*, Cmd 6860 (1946).

<sup>87</sup> Report of the Committee on *The Limitation of Actions*, Cmd 7740 (1949).

six years unless they were directed against a public body covered by the Public Authorities Protection Act 1893, when a one-year<sup>88</sup> limitation period applied, or against certain nationalised industries such as 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 years 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% of accident claims against it were raised within three years; at that time delictual claims against individuals and companies in Scotland were subject to the 20-year long negative prescription.

2.55 In our Discussion Paper<sup>89</sup> we thought it appropriate to discuss the proposition that, while three years might have been a reasonable period in 1954, in changed conditions more than 50 years later there may be arguments for having a slightly longer period. We referred<sup>90</sup> to the fact that since 1954 there had been a marked decline in the number of people employed in heavy industry. This had led to changes in the nature of personal injury litigation practice, with perhaps a greater proportion of pursuers requiring expert reports to establish liability. Experts may not always be able to produce reports for forensic purposes within tight timescales. In claims for damages for delict or breach of contract that do not involve personal injury, a five-year prescriptive period (along with a discoverability provision) applies under section 6 of the 1973 Act.

2.56 In its 1970 Report, which was implemented by the 1973 Act, this Commission said:<sup>91</sup>

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

In our 2006 Discussion Paper we further pointed out that having a five-year limitation period 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.<sup>92</sup> 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 noted that the risk of "forum shopping", were Scotland to have a different personal injury limitation period, is now

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<sup>88</sup> In Scotland the period was six months.

<sup>89</sup> Discussion Paper No 132 (2006).

<sup>90</sup> *Ibid* at para 2.49.

<sup>91</sup> Report on *Reform of the Law Relating to Prescription and Limitation of Actions* (Scot Law Com No 15) (1970), para 114.

<sup>92</sup> For a recent example of the difficulties which the existence of dual time limits may present see *Thomson v Newey & Eyre Ltd* 2005 1 SC 373.

diminished by section 23A of the 1973 Act, inserted in 1984,<sup>93</sup> which would oblige a Scottish court to apply English limitation rules to a claim governed by English law. On the other hand, we recognised 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 might be inexpedient, since it might result in increased delay in the prosecution of many of the claims falling within that large majority.

2.57 In our Discussion Paper<sup>94</sup> we noted that we had not been requested in terms to consider whether the length of the three-year limitation period should be altered. We nevertheless thought that we should afford consultees the opportunity of expressing their views on the question. In this connection, we thought it significant that the length of the basic limitation period is bound up with the existence and nature of any discretionary power of the court to disapply the time-bar, and also with the test for constructive knowledge. All of these elements should be combined together to produce a limitation scheme which endeavours to strike an appropriate balance between the interests of pursuers and the interests of defenders. We accordingly asked consultees the following question:<sup>95</sup>

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

2.58 The majority of the consultees who responded to this question (eight out of eleven) did not think that there were significant problems with the current three-year period. The others, however, expressed the view that, while three years was appropriate for "single event" cases, claims in respect of occupational disease were in a different category in that greater investigatory work was required. One response, from a firm of solicitors who commonly act for pursuers in such cases, described in detail those steps and the potential difficulties involved by reference to a typical asbestos-related claim. First, employment history has to be investigated. This can be difficult with an elderly client; documentation can be difficult to obtain or non-existent, and the Inland Revenue records relating to National Insurance Contributions only start in 1961; periods before that are often relevant in asbestos-related cases. Secondly, it is likely that the pursuer will have lost contact with former colleagues, but they must be traced and statements taken. Thirdly, it is very common to find that a pursuer worked for a number of different employers; that is especially so in the construction industry, which is the source of an increasing number of asbestos-related claims. All employers must be discovered before an action is raised. That is a matter of concern to defenders, who obviously wish to ensure their liability is shared by all employers. Fourthly, in a significant number of cases it will be difficult to identify the precise defenders. If an employer was a partnership it will be necessary to identify partners, who will often have died, with the result that executors must be traced. If an employer was a company, it may have been struck off, with the result that it must be restored to the register; in other cases the transfer of assets and liabilities must be investigated, which is an area fraught with difficulty. Fifthly, the relevant insurers must be discovered. There is no central register, with the result that each case must be investigated individually. Usually directors, liquidators or brokers must be contacted. Sixthly, the quantity and quality of exposure to asbestos must be ascertained. That means that the pursuer must remember the jobs that he was doing

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<sup>93</sup> Prescription and Limitation (Scotland) Act 1984, s 4.

<sup>94</sup> Discussion Paper No 132 (2006), para 2.50.

<sup>95</sup> Discussion Paper No 132 (2006), para 2.59 and question 9.

with each employer, and when, where and how he was exposed to asbestos. That information is not normally available from documents. Seventhly, expert medical evidence will be required dealing with the pursuer's condition and its causation. This is often difficult; for example it may be very hard to distinguish asbestosis from cryptogenic fibrosing alveolitis. The diagnosis may in some cases depend on the development of the pursuer's symptoms over time. In addition, it can take a significant time to analyse a pursuer's medical records. Eighthly, in some cases, especially in the construction industry, expert evidence is required in order to establish negligence. The firm that described these problems advocated an extension to five years for claims involving asbestos. In addition, the Scottish Law Agents Society expressed the view that the time limit should be the same for personal injury claims as for other claims.

2.59 In the light of these responses, we considered three options:

- (i) to leave the time limit as it is;
- (ii) to make all personal injury claims subject to a five-year time limit; or
- (iii) to introduce a hybrid provision whereby occupational disease claims were subject to a longer time limit than other personal injury claims.

It was thought that it would not be advisable to treat certain categories of personal injury claim differently from others. To do so would involve introducing a further distinction, or further distinctions, into the law, and these could give rise to doubt and uncertainty in individual cases; this would frequently have to be resolved by the courts. Although the argument for extending the limitation period is largely confined to cases involving industrial diseases, it seemed to us that the argument in such cases was powerful; we are particularly impressed by the description of the difficulties summarised in the last paragraph. Moreover, as this Commission pointed out in its 1970 Report<sup>96</sup> it is not easy to justify the distinction that is made between cases of personal injury and cases of loss or damage to property. This can result in anomalies. No doubt it is desirable that the recollections of witnesses in personal injury cases should be as fresh as possible, but that is true of other cases as well. The three-year period seems originally to have represented a legislative compromise and cannot be regarded as sacrosanct. For all these reasons we recommend that:

**9. Personal injury actions should be subject to a five-year limitation period.**

(Draft Bill, sections 1(2) and 2(2))

2.60 We should draw attention to one matter at this point. If our recommendation is accepted, two different five-year periods will operate, one for limitation in relation to obligations to make reparation for personal injuries and one for prescription in relation to any obligation to make reparation or any obligation arising from a breach of contract. Different rules apply to the calculation of these two periods, and it is important that practitioners and others should keep in mind that the two periods are conceptually quite distinct, even though they are of the same length.

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<sup>96</sup> Report on *Reform of the Law Relating to Prescription and Limitation of Actions* (Scot Law Com No 15) (1970), para 114.

## Unsoundness of mind

2.61 In our Discussion Paper<sup>97</sup> we discussed the terms of section 17(3) of the 1973 Act which provides that:

"(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."

Section 18(3) contains a similar provision in relation to fatal cases. 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; we do not consider any issue to arise under this branch of section 17(3) (and section 18(3) in respect of fatal cases). In relation to the second branch, that relating to "unsoundness of mind", it had been suggested to us by our advisory group that the term was now outdated; indeed it might be potentially offensive to those to whom it might be applied; and it might present possible difficulties to mental health practitioners who operate in the context of different, more modern statutory provisions.

2.62 In our Discussion Paper we agreed with the suggestion that the reference in section 17(3) of the 1973 Act to "unsoundness of mind" required review. The term was used in section 17(3) (and section 18(3) in fatal cases) of the 1973 Act as originally enacted.<sup>98</sup> It was not defined. The Report of this Commission which preceded the 1973 Act did not discuss the phrase but treated it as synonymous with insanity. The term was not used in the principal statute in force in 1973 in the field of mental health, namely the Mental Health (Scotland) Act 1960. The central concept of that Act was "mental disorder".<sup>99</sup> The term "unsoundness of mind" was 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 clearly 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.<sup>100</sup> The requisite "unsoundness of mind" is thus broadly similar to the test for the appointment of a *curator bonis*.

2.63 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*.<sup>101</sup> Section 1 of that Act sets out, in terms of the headnote, "general principles and fundamental definitions". The important provision for present purposes is section 1(6), which provides:

"'incapable' means incapable of –

- (a) acting; or
- (b) making decisions; or

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<sup>97</sup> Discussion Paper No 132 (2006), para 2.52.

<sup>98</sup> The term "unsoundness of mind" is also used in sections 18A(2) (defamation cases), 18B(3) (actions of harassment), 22B(4) and 22C(3) (product liability cases) of the 1973 Act.

<sup>99</sup> Defined by section 6 of the 1960 Act as meaning "mental illness or mental deficiency however caused or manifested". The 1960 Act was repealed by the Mental Health (Scotland) Act 1984.

<sup>100</sup> *Bogan's Curator Bonis v Graham* 1992 SCLR 920, at 924-925.

<sup>101</sup> 2000 Act, s 80.

- (c) communicating decisions; or
- (d) understanding decisions; or
- (e) retaining the memory of decisions,

as mentioned in any provision of this Act, by reason of mental disorder<sup>102</sup> 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."

In our view the justification for the suspension of the running of time for limitation purposes by reason of mental capacity must be a mental disorder rendering the pursuer incapable of taking a decision to proceed with a claim. For that reason there is an obvious attraction in 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. That definition of incapacity, however, refers to the making, communicating, understanding or retaining memory of decisions as a generality. In the Discussion Paper we therefore raised 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 did not favour such a restriction; we thought that the general test of incapacity by reason of mental disorder should suffice for limitation purposes.<sup>103</sup> We further noted that there was Outer House authority for the view that no causal relationship between the mental incapacity and the delay in raising the action need be established.<sup>104</sup>

2.64 In the Discussion Paper<sup>105</sup> we did not favour any requirement for a direct causal link between the incapacity and the delay in bringing proceedings, but we raised the question whether the suspension of the running of time should cease on the making of a guardianship order under the 2000 Act. A guardian is subject to a measure of supervision by the Public Guardian; consequently it might be thought that a guardian would act promptly in bringing the claim for damages and that a specific provision starting the running of time is not necessary in practical terms. Our advisory group reported that past experience indicated that, if a *curator bonis* was appointed to an *incapax*, proceedings were normally instituted promptly.<sup>106</sup>

2.65 Against the foregoing background, in our Discussion Paper we proposed as follows:

- "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."<sup>107</sup>

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<sup>102</sup> "Mental disorder" is defined in s 87(1) of the 2000 Act.

<sup>103</sup> Discussion Paper No 132 (2006), para 2.54.

<sup>104</sup> *Sellwood's Curator Bonis v Lord Advocate* 1998 SLT 1438, following *Paton v Lofflend Brothers North Sea Inc* 1994 SLT 784, in preference to *Brogan's Curator Bonis v Graham* 1992 SCLR 920.

<sup>105</sup> Discussion Paper No 132 (2006), para 2.55.

<sup>106</sup> *Sellwood's Curator Bonis v Lord Advocate* 1998 SLC 1438 may be an exception.

<sup>107</sup> Discussion Paper No 132 (2006), para 2.57.



We further asked the following questions:<sup>108</sup>

"(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?"

2.66 All of the consultees who commented on the proposal 10(a) expressed agreement with it. Eight consultees responded to question 10(b). These divided evenly between those who answered affirmatively and those who answered negatively. Those who were against such a qualification considered that it was unnecessary, which was the general view expressed in the Discussion Paper. Only one consultee in favour of the qualification offered a more detailed argument; this was that the approach in the statute should be to make definitions specific to the decision to which they related.

2.67 Despite the last argument, we remain of opinion that the reference to incapacity need not be qualified by reference to inability to make, communicate or understand decisions respecting the making of a claim for damages for the personal injury in question. We consider that the general test of incapacity by reason of mental disorder should be sufficient for limitation purposes. Adding further qualifications would add little or nothing, and would unduly complicate the legislation.

2.68 In relation to question 10(c), opinion among consultees was also divided. Five consultees did not think that the appointment of a guardian to an adult with incapacity should lift the suspension of the limitation period. These consultees expressed concern about the risk that a guardian might miss the limitation period. A guardian may be appointed in a wide range of situations; in some cases he might be appointed because of some infirmity arising after the delict in question; in others he might have been appointed prior to the time of the accident. It follows that the guardian might have no knowledge of the claim and might be dependent on the *incapax's* ability to communicate. To allow time to run during his appointment might accordingly place too much responsibility on him.

2.69 Four consultees answered the question in the affirmative. One expressed the view that the guardian's accountability to the Public Guardian should provide a sufficient safeguard for the adult with incapacity. One consultee, the Faculty of Advocates, responded affirmatively but expressed concern that injustice could arise if a guardian were reliant solely on the evidence of the adult with incapacity.

2.70 There are clearly significant arguments on both sides of this question. On balance we have reached the conclusion that the current position should be maintained. Consequently, when a guardian is appointed, time should continue to be suspended for the running of the limitation period. We reach that view for two principal reasons. First, it was not suggested to us that the present law in this area operates in an unsatisfactory manner; that of itself tends to suggest that change is unnecessary. Secondly, we are satisfied that if time did not continue to be suspended during the appointment of a guardian there would be

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<sup>108</sup> Discussion Paper No 132 (2006), para 2.57.

a significant risk of injustice in a number of cases. As consultees pointed out, the guardian will normally be dependent upon the *incapax* for his primary information about the accident. Moreover, guardians are appointed in a wide range of different situations and, especially if he is appointed some time after an accident, the guardian may not be told about it. On balance, therefore, we think that the present rule should continue in force.

2.71 We accordingly make the following recommendations:

10. **The references in sections 17(3) and 18(3) of the 1973 Act to "legal disability by reason of unsoundness of mind" should be replaced by a reference to the pursuer's being incapable for the purposes of the Adults with Incapacity (Scotland) Act 2000 by virtue of section 1(6) of that Act.**

(Draft Bill, sections 1(3) and 2(3))

11. **The reference to incapacity should not be qualified so as to be confined to the adult concerned being incapable by reason of mental or physical disability of making, communicating, or understanding decisions respecting the making of a claim for damages for the personal injury in question.**

(Draft Bill, sections 1(3) and 2(3))

12. **The appointment of a guardian should not lift the suspension of the running of time by reason of the incapacity of the adult in question.**

## Part 3            Judicial discretion

### Introduction

3.1     Section 19A of the Prescription and Limitation (Scotland) Act 1973 gives the court a discretionary power to override the three-year limitation period if it seems to it equitable to do so. In this Part we recommend that such a discretionary power should be retained and that its exercise should not be subject to a time limit. We also recommend the introduction of a list of factors to which the court may have regard in the exercise of its discretion.

### Background

3.2     The Edmund Davies Committee considered the possible introduction of judicial discretion in its review of the Law Reform (Limitation of Actions etc) Act 1954, which, until 1973, applied to both Scotland and England and Wales. Although the Committee acknowledged the simplicity of such a provision in allowing hard cases to proceed if it was equitable for them to do so, it took the view in its 1962 Report that an unfettered discretion was undesirable.<sup>1</sup> In its view, any judicial discretion should be as narrow as possible in order to preserve certainty in the law. It thus recommended that judicial discretion should be subject to "certain reasonable objective conditions."<sup>2</sup>

3.3     In its 1970 Report on *Reform of the Law Relating to Prescription and Limitation of Actions*, our predecessor Commissioners recommended that the statutory and common law of prescription and limitation in Scotland should be stated in a comprehensive statute.<sup>3</sup> No recommendations relating to judicial discretion were made.

3.4     In 1974 the Lord Chancellor's Law Reform Committee considered the issue of judicial discretion and recommended that it should be introduced on the ground that that would secure fairness to both parties.<sup>4</sup> It also recommended that, in order to achieve consistency in the application of the court's discretion, the legislation should contain "guidelines" for the courts. These recommendations were implemented in England and Wales by the Limitation Act 1975 and were later re-enacted in section 33 of the Limitation Act 1980.

3.5     In Scotland a judicial discretion was introduced by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, which inserted a new section 19A into the 1973 Act. This amendment came after publication of this Commission's 1980 Consultative Memorandum on *Time-Limits in Actions for Personal Injuries*.<sup>5</sup> At that time, our predecessors were not in favour of allowing judicial discretion to override a fixed limitation period on the basis that

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<sup>1</sup> Report of the Committee on *Limitation of Actions in Cases of Personal Injury*, Cmnd 1829 (1962).

<sup>2</sup> *Ibid* at para 32.

<sup>3</sup> Scot Law Com No 15 (1970), para 8, p 2.

<sup>4</sup> Law Reform Committee Twentieth Report – Interim Report on *Limitation of Actions in Personal Injury Claims*, Cmnd 5630 (1974).

<sup>5</sup> Consultative Memorandum No 45 (1980).

such a power would introduce uncertainty and divergence of approach on the part of judges.<sup>6</sup>

3.6 In its subsequent Report on *Prescription and the Limitation of Actions*<sup>7</sup> this Commission acknowledged that consultees had not been in favour of a judicial discretion, but stated that their comments were made against the background of the pre-1980 law. The view was taken that it would be inappropriate to recommend the repeal of section 19A of the 1973 Act before experience of its working had been gained over a much longer period of time. The Report also concluded that guidelines should not be introduced to section 19A, partly on the basis of the experience in England and partly because guidelines would refer to matters which would be taken into account by the court in any event if they were relevant.

### The current provision

3.7 Section 19A of the 1973 Act provides that:

"Where a person would be entitled, but for any of the provisions of section 17 [actions in respect of personal injuries not resulting in death], [and] 18 [actions where death has resulted from personal injuries] ... to bring an action, the court may, if it seems equitable to do so, allow him to bring the action notwithstanding that provision."

3.8 The discretion is unfettered. Unlike the equivalent legislation in England and Wales,<sup>8</sup> there is no list of factors to which the court must have regard in exercising its discretion. By virtue of section 19A(4), actions which proceed under section 19A cannot be heard by a jury.

3.9 A number of court decisions have indicated factors which may be relevant in the exercise of the judicial discretion. Several Inner House appellate decisions have now given rise to a number of settled propositions. These are summarised in *B v Murray (No 2)*:<sup>9</sup>

"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 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*, 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

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<sup>6</sup> Consultative Memorandum No 45 (1980), para 2.24. The Commission was also not attracted to the approach adopted in England.

<sup>7</sup> Scot Law Com No 74 (1983).

<sup>8</sup> Limitation Act 1980, section 33(3).

<sup>9</sup> [2005] CSOH 70; 2005 SLT 982 per Lord Drummond Young at para [29], affirmed at [2007] CSIH 39; 2007 SLT 605.

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."

3.10 In addition, a number of other factors relevant to the application of the discretion were identified in *B v Murray (No 2)*. Among these were the prejudice caused by the lapse of time and in particular the effect that the passing of time is likely to have had on the quality of justice; prejudice caused by changes in the law since the injury occurred; and prejudice caused to the defenders by loss of evidence.<sup>10</sup>

3.11 Although the very nature of an unfettered discretionary power means that the outcome of each case turns on its facts, judges have tended to develop similar approaches to some of the settled propositions mentioned above.

3.12 It is common for judges to undertake the exercise of balancing the prejudices which are likely to be suffered by the parties. In this respect there are two obvious prejudices: if an action is allowed to proceed, the defender loses an unanswerable defence of the case being time-barred; if the court refuses to allow the action to proceed, the pursuer is unable to pursue a potentially good claim. A pursuer's prejudice may be diminished if he has an alternative remedy against a third party; in the normal case this will be his solicitor, on the ground that the solicitor has failed to raise the action in time. The existence of a clear case of negligence against the pursuer's solicitor has been recognised as a strong factor pointing towards refusal of the discretion in favour of the pursuer in a number of cases;<sup>11</sup> nevertheless, less weight may be given to the existence of an alternative remedy if that remedy is likely to be complicated or difficult to pursue or likely to lead to a lengthy delay in the pursuer's obtaining damages.<sup>12</sup> In addition the degree of culpability in the error made by the solicitor may be relevant: a minor oversight may not result in a refusal to exercise the discretion to allow a case to proceed, but where the delay is due to clear professional negligence it is generally thought acceptable for the solicitor to be responsible for the consequences of that negligence. Where there is no right of action against a third party, the prejudice to the pursuer and the defender is, in a sense, equal and opposite. In that event, however, the fundamental nature of a limitation statute is relevant.<sup>13</sup> The result is stated in *Fleming v Keiller* as follows:

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<sup>10</sup> [2005] CSOH 70; 2005 SLT 982 at paras [111]–[122], affirmed [2007] CSIH 39; 2007 SLT 605.

<sup>11</sup> See for example *Donald v Rutherford* 1984 SLT 70; *Forsyth v AF Stoddard & Co Ltd* 1985 SLT 51; *Morrice v Martin Retail Group Limited* 2003 SCLR 289; *Fleming v Keiller* [2006] CSOH 163; and *Tamburrini v Advocate General for Scotland* [2006] CSOH 169 (although in this case, the action was allowed to proceed on other grounds). Note also that although not included in the list of relevant factors in section 33(3) of the Limitation Act 1980, the existence of a claim against a solicitor or professional adviser is also relevant in England and Wales.

<sup>12</sup> But see *Fleming v Keiller* [2006] CSOH 163 at para [14] where, although Lord Drummond Young acknowledged that an action against professional advisers would in some respects be more complex than the present action, he did not think that this outweighed the existence of a reasonable claim for professional negligence; it did not, taken either alone or with the other features of the case, tip the balance in favour of exercising the judicial discretion in favour of the pursuer.

<sup>13</sup> See *Brisbane South Regional Health Authority v Taylor*, [1996] 186 CLR 541, where McHugh J, following the passage quoted at para 1.8 above, continued (at 553): "In enacting limitation periods, legislatures have regard to all these rationales. A limitation period should not be seen therefore as an arbitrary cut-off point unrelated to the demands of justice or the general welfare of society. It represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated. Against this background, I do not see any warrant for treating provisions that provide for an extension of time for commencing an action as

"First, the onus is on the pursuer of establishing that the limitation period should be extended. Secondly, following on from that first point, if the prejudice to the parties is equal and opposite, and the pursuer does not have a good excuse for his failure to raise proceedings timeously, the defender's rights under the limitation statute must normally prevail."<sup>14</sup>

3.13 The prejudice a defender suffers through the loss of the time-bar defence may be aggravated if, by reason of the passage of time, the defender's ability to investigate and defend the claim is demonstrably impaired because, for example, records have been lost or destroyed or witnesses have died or become untraceable. Conversely, it is clear from *Tamburrini v Advocate General for Scotland*<sup>15</sup> that if a claim has been intimated promptly to the defender affording the opportunity to investigate the claim properly within the limitation period, and the delay after the action became time-barred was relatively short, the loss to the defender of the time-bar defence may be seen as less prejudicial to him than the prejudice to the pursuer if the latter is not allowed to proceed with the action.<sup>16</sup>

3.14 The conduct of the parties is also a relevant consideration. The pursuer is required to provide a reasonable explanation for his failure to raise his action within the limitation period.<sup>17</sup> A pursuer will usually be expected to take responsibility for his solicitor's actings;<sup>18</sup> this is connected with the question of the existence of alternative remedies explored above. The conduct of the defender may also be relevant, and the actings of his solicitor will similarly be attributable to the defender as, for example, where the reason for the action's being time-barred was the failure of the defender's solicitors to honour an agreement reached with the pursuer's solicitor.<sup>19</sup> Fraud by the defender or errors induced by him to prevent the pursuer from claiming may be relevant to the exercise of the court's discretion if they are not such as to prevent the running of the limitation period.<sup>20</sup> In some cases it may be relevant that the wrong that a pursuer suffered from the defender was the cause of his failure to make his claim timeously.<sup>21</sup>

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having a standing equal to or greater than those provisions that enact limitation periods. A limitation provision is the general rule: an extension provision is the exception to it. The extension provision is a legislative recognition that general conceptions of what justice requires in particular categories of cases may sometimes be overridden by the facts of an individual case... But whether injustice has occurred must be evaluated by reference to the rationales of the limitation period that has barred the action. The discretion to extend should therefore be seen as requiring the applicant to show that his or her case is a justifiable exception to the rule that the welfare of the State is best served by the limitation period in question. Accordingly, when an applicant seeks an extension of time to commence an action after a limitation period has expired, he or she has the positive burden of demonstrating that the justice of the case requires that extension".

<sup>14</sup> [2006] CSOH 163 at para [7], per Lord Drummond Young, agreeing with the comments of Lord Nimmo Smith in *Cowan v Toffolo Jackson & Co Ltd* 1998 SLT 1000 at 1003.

<sup>15</sup> [2006] CSOH 169.

<sup>16</sup> *Ibid.* In this case, the summons was timeously served on the defender, but the pursuer's solicitors failed to lodge it for calling with the result that the instance fell after the expiry of the limitation period. The defenders were therefore aware of the claim in time, they had already prepared defences and their investigations were not hampered. In addition, the pursuer had raised another action against the defenders in relation to a separate injury which had been conjoined with the action in question, and defence of the former action would involve some investigation of the time-barred claim.

<sup>17</sup> *Whyte v Walker* 1983 SLT 441.

<sup>18</sup> *Forsyth v AF Stoddard & Co Ltd* 1985 SLT 51; *Fleming v Keiller* [2006] CSOH 163. Although some Outer House cases have indicated that whether the delay which led to the time-bar was due to the actings of the pursuer's solicitors rather than his own could be relevant: *Oliver v KCA Drilling Ltd*, Lord Marnoch, 16 December 1994, unreported and *Caygill v Stena Offshore AS*, Lord Macfadyen, 20 March 1996, unreported.

<sup>19</sup> *McCluskey v Sir Robert McAlpine & Sons Ltd* 1994 SCLR 650.

<sup>20</sup> *B v Murray* [2007] CSIH 39; 2007 SLT 605; *Brisbane South Regional Health Authority v Taylor* [1996] 186 CLR 541, at 555 per McHugh J.

<sup>21</sup> *B v Murray, supra* at para [83].

## Issues arising

3.15 In our Discussion Paper<sup>22</sup> we identified three issues which arose in considering the discretionary power presently contained in section 19A of the 1973 Act. The first issue was whether the courts should continue to have such a discretionary power. Secondly, if the discretion was to be retained, should it be available indefinitely or be temporally restricted? The third issue for consideration was related to whether the discretionary power should continue to be couched in its present form or whether the legislation should stipulate the matters to which a court should have regard in exercising the discretion.

### *Should the discretionary power be retained?*

3.16 The introduction of judicial discretion in section 19A of the 1973 Act was presented to Parliament in 1980 as a temporary measure pending a reform of the provisions of the Act relating to knowledge and awareness. However, in England and Wales judicial discretion to disapply the time-bar in personal injury actions was recommended by the Law Reform Committee and intended to be a permanent feature. The desirability of retaining a judicial discretion to override a time-bar must therefore be considered.

3.17 The disadvantage of retaining a discretionary power is that it produces uncertainty. A potential defender cannot be certain that he will not be pursued for damages after the lapse of a particular period of time. He will remain unsure as to when he is able safely to dispose of records and may require to incur the expense of maintaining indemnity insurance for a prolonged, indeterminable period of time. It also follows that insurers are also affected as they cannot be assured that no liability, or further liability, will emerge from an incident for which they were at risk. The very nature of a discretionary power creates uncertainty as to how it will be exercised in individual cases: it will be exercised in each case in accordance with a judge's perception of equity, which may differ from the views of other judges. A further disadvantage of the discretionary power is that a time-barred pursuer may sometimes feel that, prior to raising a seemingly unanswerable action against the solicitor who neglected to raise proceedings timeously, it is necessary first to sue the original wrongdoer and apply for a favourable exercise of the discretionary power even though the prospects of success in that application are poor. Thus the pursuer incurs further delay in the payment of compensation, and further demands are placed on the court system.

3.18 Nevertheless, the discretionary power has the advantage of flexibility, allowing justice to be done to a pursuer whose reasons for not suing timeously are explained by factors not taken into account by the knowledge or discoverability test but which excuse or mitigate the delay. In addition, judicial discretion has the important advantage of tempering the arbitrariness inherent in a time limit, enabling actions to proceed where the limitation period is overshot by only a short period without any material impairment to the defender's ability to resist the claim.

3.19 The need for judicial discretion is clearly greater if there is no knowledge test and the limitation period runs from the date of accrual of the cause of action, or if the knowledge test is narrowly or objectively conceived. Conversely it has been suggested that a discretionary power is, or ought to be, unnecessary if the knowledge or discoverability test is adequately

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<sup>22</sup> Discussion Paper No 132 (2006), paras 3.15-3.34.

formulated,<sup>23</sup> that is to say, framed sufficiently subjectively as to be favourable to a pursuer: If a pursuer has three (or as we recommend, five) years since the date when he knew all the necessary facts or since the date when he could reasonably have acquired that knowledge, it is arguable he should not be able to acquire further time through the exercise of the judicial discretion, given the uncertainty this entails for a defender.

3.20 In Part 2, we recommend that the knowledge test should incline towards subjectivity.<sup>24</sup> In our Discussion Paper we stated that even if the knowledge test were formulated in subjective terms, we would still incline to the retention of judicial discretion. We gave the following reasons:<sup>25</sup>

"It 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 (*Ferguson v McFadyen* 1992 SLT 44). Similarly, where the pursuer was employed by a company within a group of companies, (*Comer v James Scott & Co (Electrical Engineers) Ltd* 1978 SLT 235) or by a business entity which operates under a trading name similar to that of an associated company (*McClelland v Stuart Building Services* 2004 SLT 1011), 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 (*Erskine III VI 3; Smith v Stewart & Co Limited* 1960 SC 329 at 334; *Barclay v Chief Constable, Northern Constabulary* 1986 SLT 562). 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.

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."

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<sup>23</sup> See paras 2.31-2.34.

<sup>24</sup> See para 2.53 above.

<sup>25</sup> Discussion Paper No 132 (2006), paras 3.21 and 3.22.



3.21 In its Report on *Limitation of Actions* the Law Commission recommended that the discretion existing in England and Wales at the time should be retained.<sup>26</sup> Judicial discretion had been available to the courts since 1975 and the Law Commission considered that it was "difficult to turn the clock back."<sup>27</sup> In addition, it took the view that personal injuries were more extreme forms of injury than damage to property or economic loss<sup>28</sup> and it was also concerned that the proposals might not operate fairly in all cases, for example in some sexual abuse cases, if there were no discretionary power.<sup>29</sup>

3.22 Indeed child sexual abuse cases would benefit from the retention of judicial discretion. The awareness test may enable some victims of child sexual abuse to bring an action of damages as of right; that might occur for example, where the victim was aware of having been the subject of sexual activity with an adult during his childhood but reasonably regarded the experience as not inflicting personal injury sufficiently serious to sue until the later emergence of psychiatric illness and advice of its attributability to the childhood sexual activity. These cases nevertheless present a number of difficulties. Obviously the wrongful act will have taken place during childhood, but claims for damages may not be made until many years after the accrual of the cause of action and after the expiry of the limitation period at the age of the attaining legal capacity. Reasons for the delay vary from case to case but include changes in public awareness and attitudes. There are also disputed views among psychologists and psychiatrists of the possible consequences of child sexual abuse for a victim's subsequent ability to recall or recount the abuse.<sup>30</sup> A further difficulty is that, particularly in the case of children who have been in institutional care, complaints of sexual abuse may be allied with complaints of non-sexual abuse. The existence of judicial discretion may be a useful and pragmatic way of coping with these difficulties.

3.23 In response to our Discussion Paper nearly all consultees agreed that a judicial discretion to override the time-bar should be retained. Thus Charles Hennessey, Solicitor Advocate, agreed on the basis that the concerns expressed when section 19A was introduced have not materialised; that the provisions afford a reasonable degree of flexibility; and that the removal of the discretion would be unduly harsh. By contrast the Forum of Insurance Lawyers and the Scottish Claims Managers Forum disagreed with our proposal to retain the discretion on the basis that, if the knowledge test is framed subjectively, the discretion will no longer be required.

3.24 Taking account of the responses of consultees, we consider that judicial discretion to override the time-bar is desirable. It provides the flexibility crucial to enabling the courts to deal with hard cases equitably, which we think will inevitably arise even if the knowledge test is framed subjectively. These hard cases may stem from minor mishaps or misunderstandings which cause the time-bar to be missed by only a relatively short period, or they may arise for more substantial reasons, especially in the case of child sexual abuse. In this way the essentially arbitrary nature of a time-bar can be mitigated in deserving cases. This is not possible with even the most subjectively framed knowledge test. Accordingly we recommend that:

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<sup>26</sup> Law Com No 270 (2001).

<sup>27</sup> *Ibid*, para 3.161.

<sup>28</sup> *Ibid*, para 3.160.

<sup>29</sup> *Ibid*, para 3.162.

<sup>30</sup> *B v Murray* (No 2) [2005] CSOH 70; 2005 SLT 982 at paras [59]-[92]; affirmed [2007] CSIH 39; 2007 SLT 605.

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

*Restriction of judicial discretion*

3.25 As we mentioned earlier, the disadvantage of the judicial discretion to disapply the time-bar is its uncertainty. A potential defender can never be sure that no action can be raised in respect of a past incident after the expiry of a certain period of time. Even in the case of industrial diseases such as asbestosis and some sexual abuse cases, there will come a point in time when the injured party will have, or ought reasonably to have, all the necessary knowledge. Therefore, even where judicial discretion exists, there should come a time after which no proceedings can be instituted.

3.26 As mentioned above,<sup>31</sup> judicial discretion may in practice be exercised to give relief where, through misunderstanding or mishap, the limitation period has been missed but the proceedings are commenced relatively shortly thereafter. If that is the case, then it is arguable that, once the limitation period has passed by a significant amount of time, there is little scope for the proper exercise of judicial discretion and that the power may therefore be made subject to a temporal limit. For example, statute could provide that an application for the exercise of judicial discretion can only be made within five years of the expiry of the limitation period. On the lapse of the quinquennium, a defender could be certain that no proceedings could thereafter be brought.

3.27 On consultation, there was very little support for temporally limiting the exercise of judicial discretion in this way. Only the Law Society of Scotland voiced support for this suggestion on the basis that it would provide greater certainty, although it indicated that the relevant committee was not unanimous in this view. Those who did not support subjecting the exercise of judicial discretion to a time limit gave a number of reasons for their views, including that it is questionable whether doing so would provide increased certainty for the defender; that it would introduce an additional arbitrary control which could lead to injustice or unfairness and the discretion ought to be such as to enable it to do substantial justice between the parties in all cases; setting a further limit might in practice amount to a rebuttable presumption that an action brought within this time should be allowed to proceed; and the length of the delay in raising an action is already a factor in the exercise of the discretion and thus itself imposes a limit in a practical sense. The Faculty of Advocates pointed out that they were not aware of any cases in which the operation of section 19A had been grossly unfair.

3.28 In view of the lack of support for such a temporal limit on the exercise of judicial discretion and the soundness of the reasons advanced for such lack of support, we do not consider that it is appropriate to investigate the matter further. We therefore recommend that:

**14. The exercise of judicial discretion should not be subject to a time limit.**

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<sup>31</sup> Para 3.18.

## *Guidelines on the exercise of judicial discretion*

3.29 The legislative provisions of a number of jurisdictions which confer a discretion on the court to override the time-bar also contain a list of factors to which the court should have regard in exercising the discretion.<sup>32</sup> In Scotland, section 19A of the 1973 Act contains no such list. In our Discussion Paper we did not see an advantage in having a non-exhaustive list of matters to which the court should have regard as the general approach of the courts to section 19A has been settled through judicial discretion and decision. Indeed most of our consultees did not think that such guidelines should be stated in legislation. Some expressed the view that a non-exhaustive list was of little or no value and that existing case law provided a sufficient framework for the exercise of the discretion. Others thought that a list would distort the exercise of the discretion and risk greater weight being attached to the listed factors or that trying to limit a wide discretion would prove problematic.

3.30 A significant minority of consultees, however, considered that a statutory non-exhaustive list of factors would be of benefit. Some of the reasons given were that the exercise of the discretion was not well settled and guidelines would result in a greater consistency of approach among judges and provide a clear indication to pleaders of the factors that a court would consider relevant. One of the consultees pointed out that the difficulties with the exercise of the discretion in section 19A were more marked in the sheriff courts.

3.31 Although we are of the view that case law generally provides sufficient indications of the factors which are considered relevant by the courts, we acknowledge that difficulties in the exercise of the discretion have occurred. We therefore believe that a statutory list of factors which may be taken into account by the courts may be helpful in focusing and structuring pleadings; they would also assist courts in exercising their discretion under section 19A. Accordingly, we are minded to recommend that section 19A be amended to contain a list of factors to which the court may have regard in the exercise of the discretion.

3.32 The content of the non-exhaustive list must therefore be considered. A comparative approach is helpful in devising a list of factors. Section 33(3) of Limitation Act 1980, which confers a discretion on the court in England and Wales to override the time-bar, contains such a list. It provides that the court must have regard to all the circumstances of the case and in particular to:<sup>33</sup>

"(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;

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<sup>32</sup> See for example the Limitation Act 1980 s 33(3) in England, the Limitation Act 1969 s 62B in New South Wales and the Limitation of Actions Act 1958 s 27L in Victoria.

<sup>33</sup> See Limitation Act 1969 s 62B in New South Wales and the Limitation of Actions Act 1958 s 27L in Victoria. These factors, although differently drafted, are based on and are similar to the provisions in force in England. Note that some of the factors listed in these provisions, such as "the time when the cause of action was discoverable" (New South Wales Limitation Act 1969 s 62B), are not appropriate for inclusion in s 19A of the 1973 Act due to the differences in the structure of the relevant statutes.

(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."

3.33 In addition to these factors, the court must have regard to the respective prejudices to the parties were the application to be granted or refused.<sup>34</sup> There is no hierarchy between the listed factors. In addition, it has now been established that the discretion in England is unfettered<sup>35</sup> and that the court may look at any other relevant factors; section 33(3) of the Limitation Act 1980 states that the court "shall have regard to all the circumstances of the case". Indeed the courts in England have consistently taken into account whether the claimant has an alternative remedy. In 2001, the Law Commission recommended the addition to the statutory list of the factors of "any alternative remedy or compensation available to the claimant" and "the strength of the claimant's case" with the further recommendation that the court should also be empowered to consider any other relevant circumstances.<sup>36</sup>

3.34 The limitation statutes of New South Wales and Victoria contain lists similar to that of the Limitation Act 1980 in England, although some of the factors listed differ from those in the 1980 Act.<sup>37</sup>

3.35 The purpose of a list of factors in a provision such as section 19A is to provide clear and simple guidelines to aid practitioners in focusing their pleadings, evidence and arguments; that should assist the courts in performing their task of assessing whether the case before them warrants the exercise of the discretion. Our strong preference is for the listed guidelines to be as straightforward as possible. Consequently an attempt has been made to express the guidelines in clear and simple terms.

3.36 We consider that the following factors are potentially relevant to the exercise of the judicial discretion and should be included in the statutory list of factors that may be taken into account by a court:

(a) *The period which has elapsed since the right of action accrued.* We have deliberately specified that what is relevant for the exercise of the discretion is the length of time which has elapsed since the cause of action arose, rather than the period which has elapsed since the limitation period ended. It is appropriate to consider the whole period of time

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<sup>34</sup> Limitation Act 1980, s 33(1).

<sup>35</sup> *Thompson v Brown and Another* [1981] 1 WLR 744; *Conry v Simpson and Others* [1983] 1 All ER 369; *Donovan v Gwent Toys Limited* [1990] 1 WLR 472 and *Halford v Brookes and Another* [1991] 1 WLR 428.

<sup>36</sup> Law Com No 270 (2001), para 3.169.

<sup>37</sup> Limitation Act 1969, s 62B (New South Wales) and Limitation of Actions Act 1958, 27L (Victoria).

since the cause of action arose, since the events that must be considered by the court took place on or before that date.<sup>38</sup>

(b) *Why it is that the action has not been brought timeously.* This may be important to the exercise of the discretion. If there is a good reason for delay the court may be minded to exercise its discretion in favour of the pursuer. Erroneous legal and expert advice is dealt with separately<sup>39</sup> but other good reasons may exist for a decision not to proceed with a claim. For example, a pursuer who has just turned 16 may have been advised by his or her parents not to proceed with the action. The converse would also apply: if there are no good reasons to excuse a delay the court may, in the absence of other relevant factors in favour of the pursuer, decline to exercise its jurisdiction.

(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.*<sup>40</sup> Again, the whole period of delay from the time the cause of action arose should be looked at. Although the equivalent provision in England in the form of section 33(3)(b) of the 1980 Act provides that only the delay since the expiry of the limitation period should be considered in assessing whether the defendant's evidence is or is likely to be less cogent, we think the whole period should be taken into account. In judging the effect of delay on evidence the pertinent question is whether evidence has been lost and it is of no moment when the evidence was lost. Indeed it is often impossible to determine the timing of the disappearance of evidence. It should also be noted that the Law Commission for England and Wales has recommended that section 33(3)(b) should be changed so that the delay to be taken into account is not confined to the period subsequent to the expiry of the limitation period. It recognised that it would be unreasonable for a plaintiff to argue that since much time had already elapsed by the end of the limitation period, the defendant has suffered no further disadvantage because of an additional delay.<sup>41</sup>

(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 intimating a claim for damages to the defender.* The court must have regard to "...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 explanations for his not having brought the action timeously."<sup>42</sup> The pursuer must therefore provide a reasonable explanation for his failure to raise an action within the limitation period<sup>43</sup> and the explanation must cover the whole period of the delay.<sup>44</sup> In this respect, although the pursuer may be personally blameless, he is normally answerable for the acts of his agents.<sup>45</sup>

(e) *The quality and nature of any legal advice and (where appropriate) medical or other advice obtained by the pursuer.* If the pursuer has been given unsound advice by his

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<sup>38</sup> See the comments below in relation to the effect of the delay on the defender's ability to defend the case.

<sup>39</sup> See below, sub-para (e).

<sup>40</sup> See above, para 3.10.

<sup>41</sup> Law Com No 270 (2001), para 3.167.

<sup>42</sup> *Carson v Howard Dorris Ltd* 1981 SC 278, Lord Ross at p 282.

<sup>43</sup> *Carson v Howard Doris Ltd* 1981 SC 278; *Whyte v Walker* 1983 SLT 441.

<sup>44</sup> *Munro v Anderson-Grice Engineering Co Ltd* 1983 SLT 295.

<sup>45</sup> *Forsyth v A F Stoddart & Co* 1985 SLT 51; *Morrice v Martin Retail Group Ltd* 2003 SCLR 289; *Tamburrini v Advocate General for Scotland* [2006] CSOH 169. This is related to the relevance of the existence of an alternative remedy. See below, sub-para (g).

legal advisers or other persons (such as trade union officials) which has induced him to delay raising his action, the court may take this into account. In such a case, however, the fact that an action for professional negligence could be raised against a legal adviser would also be relevant. The converse would also apply: if the pursuer was given good advice but failed to follow it, resulting in the action's being raised after the expiry of the time-bar, that would be a factor tending against the exercise of the court's discretion.

(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.* Conduct of the defender has been held to be relevant in exercising the discretion in Scotland. In *McCluskey v Sir Robert McAlpine & Sons Ltd*<sup>46</sup> the defender's solicitors were responsible for the case being dismissed as they failed to arrange for the action to table as had been agreed between them and the pursuer's solicitors. On appeal, one of the factors taken into account by the Second Division in deciding to allow the case to proceed in terms of section 19A was the conduct of the defenders in failing to arrange for the case to table. Fraud by the defender or error induced by the defender causing the pursuer to miss the time-bar may also be regarded as being relevant by the court.<sup>47</sup>

(g) *What other remedy (if any) the pursuer has if he is not allowed to bring the action.* In the normal case, the alternative remedy will be against legal advisers. The existence of an alternative ground of action against the pursuer's legal advisers will usually be regarded as a factor weighing against the exercise of the discretion in the pursuer's favour.<sup>48</sup> However, the existence of an alternative remedy against a solicitor should not automatically bar a case from proceeding. If the solicitor is at fault only because of a minor mishap or oversight it may be considered unreasonable to require the client to sever his relationship with his solicitor, find new legal advisers and pursue a claim against his former solicitor, who is likely to possess knowledge of the weaknesses of his former client's case by virtue of the solicitor-client relationship. In addition, the fact that there is an alternative remedy against legal advisers should not preclude the exercise of the discretion if there are other good reasons for allowing a case to proceed.<sup>49</sup> In some cases, the pursuer may be insured against the loss that he has sustained. In a sense this can be regarded as an "alternative remedy". We are of opinion, however, that any claim that the pursuer may have against insurers should be disregarded for present purposes, as for example, where he has taken out insurance against loss of earnings. In such a case the insurer would normally be subrogated to the pursuer's rights. It is a fundamental principle underlying the law and practice of insurance that an insurer is entitled to assert all rights and duties that are open to the insured. Consequently, an insurer must be regarded as in the same position as the insured, and the existence of insurance cannot affect the insured's rights against any other person. It is thought that this principle is clear and does not have to be reflected in the Bill.

(h) *Any other matter which appears to the court to be relevant.* It is important to note that the list should be non-exhaustive and that the court may take any other matters into consideration.

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<sup>46</sup> 1994 SCLR 650.

<sup>47</sup> *B v Murray* [2007] CSIH 39, at paragraph [83]; *Brisbane South Regional Health Authority v Taylor* [1996] 186 CLR 541, at 555 per McHugh J.

<sup>48</sup> *Fleming v Keiller* [2006] CSOH 163.

<sup>49</sup> See for example, *Tamburrini v Advocate General for Scotland*, [2006] CSOH 169.

In addition, there should be no hierarchy among the factors and the factors contained in the list should not be given more weight than factors which have been omitted but which are relevant to a case before the court.

3.37 Accordingly we recommend:

**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.**

(Draft Bill, section 3)

## Part 4 Practice and procedure

### Introduction

4.1 In this Part of the Report we consider the practice and procedure in relation of limitation in personal injury actions.

### Initial onus

4.2 As we mentioned in our Discussion Paper,<sup>1</sup> it is for the defender to plead that an action should not proceed after the expiry of the limitation period. The expiry of the limitation period does not extinguish the claim (as it would under the law of prescription), but it gives the defender the opportunity to raise limitation or time-bar as a defence to the action. We took the view that invoking the time-bar should continue to be a plea for the defender to take.

### Onus subsequently: actual and constructive knowledge

4.3 Before the amendments introduced by the 1984 Act, section 18(3) of the Prescription and Limitation (Scotland) Act 1973 (which for certain actions provided for the extension of the three-year limitation period imposed by section 17) made it clear that, where a defender pled the limitation defence and the action was prima facie time-barred, the onus of proof passed to the pursuer, who had to establish that he lacked actual and constructive knowledge of the "material facts". The position was less clear under the new provision introduced by the 1984 Act. In a number of first instance decisions of the Court of Session, however, it has been held that it is for the pursuer to prove that he lacked the actual or constructive knowledge until a date within the three years preceding the raising of the action.<sup>2</sup> We are of opinion that this is the correct result.

### Onus subsequently: section 19A

4.4 As regards the judicial discretion under section 19A of the 1973 Act, it is accepted that the onus is on the pursuer to persuade the court that it is equitable to allow the otherwise time-barred action to proceed.

4.5 We therefore took the view in our Discussion Paper that there was no need to amend the law as regards onus of averment and proof in relation to limitation.<sup>3</sup> The majority of those who responded agreed with our preliminary conclusion and we adhere to that view. Accordingly we recommend that:

- 16. There should be no amendment of the present law on onus of averment and proof in relation to limitation issues.**

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<sup>1</sup> Discussion Paper No 132 (2006), para 4.2.

<sup>2</sup> *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.

<sup>3</sup> Discussion Paper No 132 (2006), para 4.5 and proposal 15.



## Pleading

4.6 The traditional form of pleading in Scotland requires the parties to an action to set out in their respective pleadings the averments of facts upon which they rely; this enables the court to determine issues of relevancy. As each party is required to answer the other party's averments by stating which are admitted and which are not conceded, it is sometimes possible for issues of time-bar to be decided during this process on the basis of admitted facts. In *Clark v McLean*<sup>4</sup> the court described the procedure which should be adopted in cases involving the judicial discretion under section 19A of the 1973 Act:<sup>5</sup>

"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."

Although that case concerned section 19A of the 1973 Act, it would also apply to cases under sections 17(2)(b) and 18(2)(b) of the Act. In our Discussion Paper we took the view that the approach described in *Clark* was sound and that it should be for the court to decide whether it is necessary to hear evidence in order to determine the question of limitation.

4.7 We mentioned in our Discussion Paper that members of our advisory group had drawn our attention to the fact that there has been some discussion among Court of Session practitioners about how limitation issues are best dealt with in actions which proceed under the "Coultsfield" procedure introduced in April 2003.<sup>6</sup> Under the new procedure the defences are not permitted to contain pleas-in-law in the traditional way,<sup>7</sup> and the pleadings are intended to be brief. The aim is to proceed directly to inquiry on the merits without any preliminary debate. However, as we mentioned in our Discussion Paper,<sup>8</sup> it is normally appropriate to determine as a preliminary matter whether the action is time-barred and whether the judicial discretion under section 19A of the 1973 Act should be exercised; it may be necessary therefore to plead the facts and circumstances relating to these issues more fully than was perhaps envisaged. Although we recognised that this matter was essentially one for the rules of procedure and practice in the Court of Session, we invited consultees to express views on whether there should be any changes to procedure to enable the resolution of limitation issues as a preliminary matter.<sup>9</sup>

4.8 There was little support among consultees for any amendment to the procedures for personal injury actions. Opinion differed about the appropriateness of dealing with limitation as a preliminary matter. Two consultees considered that there should be proof at large in order to avoid duplication of evidence. It was noted by some consultees that personal injury cases in which limitation is in issue are regularly remitted to the Ordinary Roll, usually with agreement of both parties. One consultee argued that this procedure should happen

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<sup>4</sup> 1994 SC 410.

<sup>5</sup> *Ibid*, at 413.

<sup>6</sup> The new procedures were introduced by Act of Sederunt (Rules of the Court of Session Amendment No 2) (Personal Injury Actions) 2002 (SSI 2002/570), which substituted an amended Chapter 43, dealing with actions of damages for, or arising from personal injuries, into the Rules of the Court of Session (SI 1994/1443).

<sup>7</sup> See *Alexander v Metbro* 2004 SLT 963.

<sup>8</sup> Discussion Paper No 132 (2006), para 4.7.

<sup>9</sup> *Ibid*, para 4.8 and proposal 16.

automatically although other consultees were content with the way in which cases were currently remitted to the Ordinary Roll.

4.9 In view of the comments made by consultees we are not persuaded that there is any need for a change in procedure and accordingly we recommend that:

17. **There is no need for change to the procedure in personal injury actions in the Court of Session to facilitate resolution of limitation issues as a preliminary issue.**

# Part 5 Prescribed claims

## Introduction

5.1 In this Part we deal with the second reference, the terms of which were:

"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 When the Prescription and Limitation (Scotland) Act 1973 came into force in July 1976, section 7 provided for the long negative prescription of obligations, including obligations to make reparation in respect of personal injuries.<sup>1</sup> The effect of section 7 was that obligations which had subsisted for a continuous period of 20 years were extinguished at the end of that period unless a relevant claim had been made or acknowledged. Section 7(2) was amended by the Prescription and Limitation (Scotland) Act 1984 in order to exclude from its scope obligations to make reparation in respect of personal injuries, or in respect of the deaths resulting from such injuries. 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. The amendment was therefore not retrospective.

5.3 The 20 year prescriptive period ran from the date of accrual of the cause of action and was not postponed by the pursuer's nonage, unsoundness of mind or lack of knowledge, even if excusable.<sup>2</sup> The amendment to section 7(2) of the 1973 Act to remove personal injury actions from the ambit of the long negative prescription resulted from this Commission's recognition in its 1983 Report<sup>3</sup> that there was thus a possibility in cases of industrial disease where the initial damage was latent and took more than 20 years to become patent that any claim arising out of that damage would be extinguished by prescription before the three-year limitation period had expired.

5.4 Nevertheless the Commission recognised "the value of the prescription as a general principle of law, in that it acts as a 'longstop' to extinguish stale claims..."<sup>4</sup> Many jurisdictions have an equivalent provision for personal injury claims.<sup>5</sup>

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<sup>1</sup> The 1973 Act repealed the previous legislation governing prescription, namely the Prescription Act 1469; the Prescription Act 1474 and the Prescription Act 1617, as amended by the Conveyancing (Scotland) Act 1924, which reduced the prescriptive period from 40 to 20 years.

<sup>2</sup> The plea of *non valens agere cum effectu* ("unable to sue effectively") would require very exceptional circumstances in order to succeed in interrupting the running of the 20 year period: *A v Murray* 2004 SLT 1273.

<sup>3</sup> Report on *Prescription and the Limitation of Actions* (Scot Law Com No 74) (1983).

<sup>4</sup> *Ibid*, para 2.6.

<sup>5</sup> See for example s 50C(1)(b) of the New South Wales Limitation Act 1969 (12 year long-stop provision); paras 199(2) and 208 of the German BGB (30 year prescriptive period, delayed in sexual abuse cases until the pursuer reaches 21 years of age).

5.5 For the purposes of this reference it is important to note that negative prescription and limitation are conceptually different. Prescription wholly extinguishes the obligation after the requisite lapse in time, unless a relevant claim has been made or acknowledged.<sup>6</sup> The obligation ceases to exist. Limitation does not extinguish an obligation but allows a defender to plead limitation as a defence to court proceedings.<sup>7</sup>

### Cases with which the reference is concerned

5.6 We are asked to consider cases in which the obligation to pay damages for personal injury (and death by reason of such injuries), and therefore the right to compensation, has been extinguished by the long negative prescription prior to 26 September 1984, when prescription was abolished for personal injury actions. Since the relevant claims are those in which the 20-year period expired at some date prior to 26 September 1984, the right of action must have arisen at some date prior to 26 September 1964.

5.7 Although the second reference arose from concerns for those who claimed to have suffered abuse while in institutional care as children, its terms ask us to consider extinguished personal injury claims in general. This is the correct approach. Since the obligation to pay damages has been extinguished in such cases, if the obligation were to be revived retroactive primary legislation creating a new liability would be required. Such legislation presents substantial difficulties. We now turn to consider those difficulties.

### Retrospectivity

#### *General*

5.8 Any legislation to revive claims which prescribed prior to 26 September 1984 would be retrospective, or more accurately retroactive.<sup>8</sup> A retrospective statute:<sup>9</sup>

"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".

5.9 Legislation to reverse the extinguishing effect of prescription and thereby impose a new liability clearly comes under that definition. While there are examples of retrospective

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<sup>6</sup> 1973 Act, s 7(1).

<sup>7</sup> Moreover, prescription runs from the first concurrence of *injuria and damnum* and is not postponed by the later emergence of a separate illness. See above, para 2.21; *K v Gilmartin's Executrix* 2004 SC 784.

<sup>8</sup> The terms "retroactive" and "retrospective" are often used interchangeably in this context, but a distinction has been drawn between true retroactivity and retrospective interference with vested rights: See J P Salembier "Understanding retroactivity: When the past just ain't what it used to be" (2003) HKJL 99. A retrospective statute is one that makes new law from the time of its enactment onwards and applies that law to facts that arose before that time; a retroactive statute is one that makes new law that will be considered to have been applicable at a time before it was enacted to facts that arose before it was enacted. See also Alan Rodger, "A Time for Everything under the Law: Some Reflections on Retrospectivity" (2005) 121 LRQ 57. The reversal of the extinguishing effect of prescription for claims arising prior to 26 September 1964 would be retroactive and also an interference with vested rights in the sense used by Salembier.

<sup>9</sup> D Greenberg, *Craies on Legislation* (8<sup>th</sup> edn, 2004), para 10.3.1 n 28. Judicially approved 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.

legislation,<sup>10</sup> such legislation has long been regarded as highly undesirable in principle<sup>11</sup> and has been recognised as such by successive governments:<sup>12</sup>

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

Bennion clearly states that:<sup>13</sup>

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

5.10 Retrospective legislation is undesirable because it tends to disturb previously existing legal relationships; people have, naturally, conducted their affairs on the basis of the law in form at the time, and altering this retrospectively is unfair and destructive of legal certainty. Thus retrospective legislation is:<sup>14</sup>

"...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."

5.11 Retrospective legislation is also undesirable because it may lead to past events being judged by present standards; this is at odds with the general rule that events should be judged according to the standards prevailing at the date of the event, and not by contemporary standards. Any reversal of the extinguishing effect of negative prescription for injuries sustained before 1964 would present very grave difficulties for courts and practitioners attempting to set aside current standards and attitudes and to apply the standards and attitudes of the past. Normal and proper practice in factories, schools and hospitals in the 1950s was in many respects different from practice prevailing today. Ascertaining and proving the practices and standards prior to 1964 might present insurmountable difficulties and the costs of litigation would certainly increase. Potential witnesses might have died or might be untraceable, or at the very least, if they are still alive and traceable, their ability to recall information accurately and reliably would in all probability be adversely affected. Documentary records would probably have been lost, or, if a defender had treated a potential claim as having prescribed, (understandably) disposed of. Furthermore it might be impossible to establish whether any form of liability insurance was in place at the time.

### *Human rights issues*

5.12 Retrospective legislation imposing criminal liability is contrary to the European Convention on Human Rights.<sup>15</sup> Although there is no express prohibition on retroactive legislation in the Convention in relation to civil law, retroactive legislation affecting rights under the civil law may be contrary to other provisions of the Convention. For example in

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<sup>10</sup> For example the War Damages Act 1965, removing the Crown's common law liability to pay compensation for war damage, was passed to reverse retrospectively the decision in *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* 1964 SC (HL) 117.

<sup>11</sup> See D Greenberg, *Craies on Legislation*, (8<sup>th</sup> edn, 2004) para 10.3.3.

<sup>12</sup> Baroness Hollis of Heigham, *Hansard*, HL, Vol 605, col 502 (13 October 1999).

<sup>13</sup> Bennion, *Statutory Interpretation* (4<sup>th</sup> edn, 2002) at p 689.

<sup>14</sup> *Phillips v Eyre* (1870) LR 6 QB 1 at p 23.

<sup>15</sup> Art 7.

*Achache v France*<sup>16</sup> the pursuers raised an action in the French courts in 1996 against a French Bank which had provided them with a secured loan in 1989. They sought a declaration that the bank was not entitled to the interest on the loan and applied for the recovery of the sums that they had paid. This was on the ground that a repayments table had not been enclosed with the loan proposal as required at that time by the French law on loan proposals. The same day the French parliament passed a law amending the law governing loan proposals with retrospective effect. The local Tribunal de Grande Instance found in favour of the pursuers and made an interim award. However, applying the newly enacted legislation, the appeal court reversed the judgment, rejecting the pursuers' request for the repayment of interest. The pursuers raised an action in the European Court of Human Rights maintaining that the retrospective legislation infringed their right to *inter alia* the peaceful enjoyment of their possessions contrary to Article 1 of the First Protocol. The court reasoned that the pursuers had, if not a right to recover the sums due, at least a "legitimate expectation" of being able to obtain a reimbursement of the sums due, which was a "possession" in the sense of the Article 1 of the First Protocol. The court concluded that there had been a violation of the latter article and awarded damages. In *Lecarpentier v France*,<sup>17</sup> the same French legislation was found by the European Court of Human Rights to breach Article 1 of the First Protocol in similar circumstances to *Achache*.

5.13 In light of the case law on the Convention, there is a real possibility that the retrospective imposition of liability on a person upon whom no liability currently existed for events which occurred in the past would contravene Article 1 of the First Protocol to the Convention, in that it involves an interference with the peaceful enjoyment of his "possessions" (or property); the imposition of such liability could require the payment of compensation out of his assets and thus the depletion of his "possessions". This result is not certain; not every case of retrospective or retroactive legislation affecting property rights will necessarily contravene Article 1 of the First Protocol. In some cases, interference with property rights might be justified on the basis that it was intended to pursue a general community interest or social policy, with a fair balance being struck between that interest and the fundamental rights of persons who are adversely affected.<sup>18</sup> Nevertheless, we consider that any retrospective or retroactive legislation in this area would undoubtedly raise serious human rights issues and might well be held to be incompatible with the European Convention on Human Rights.

#### *The Scottish Parliament's power to legislate retrospectively*

5.14 In an academic work doubt has been cast on whether the Scottish Parliament, assuming it has power to legislate retrospectively, has power to enact legislation which has retroactive effect prior to 1999.<sup>19</sup>

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<sup>16</sup> Application 16043/03 (Judgment of 3 October 2006) (available online at <http://www.echr.coe.int/echr/>).

<sup>17</sup> Application 67847/01 (Judgment of 14 February 2006) (available online at <http://www.echr.coe.int/echr/>); see also the earlier cases of *Stran Greek Refineries and Another v Greece* (1995) 19 EHRR 293 and *Pressos Compania Naviera SA and others v Belgium* (1995) 19 EHRR 301 in which the court also found that retrospective legislation breached Article 1 of the First Protocol.

<sup>18</sup> For an example of the 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* (1968) 8 EHRR 123 which concerned legislation giving certain private sector tenants a "right to buy" at a price determined according to certain statutory criteria.

<sup>19</sup> C M G Himsworth and C M O'Neill, *Scotland's Constitution: Law & Practice* (2003), p 168.

## Application of limitation rules

5.15 It is important to note that, even if the effect of negative prescription on personal injury claims (including death cases) which have been extinguished by its application is reversed, the limitation rules would still operate. On the assumption that the limitation rules did apply to the revived liabilities, virtually every case would already be time-barred by virtue of limitation (even if, as we recommend, the awareness test had an element of subjectivity). A pursuer would require to persuade the court to exercise its equitable discretion to allow the action to proceed. However, the antiquity of the claim would normally result in the discretion being exercised in favour of the defender, who would be able to demonstrate actual prejudice given the difficulty of investigating and defending claims relating to events alleged to have taken place prior to 26 September 1964. Therefore, in real terms, reviving prescribed claims would rarely benefit claimants who have lost their right. It would, however, place a new burden on defenders, who would require to investigate the revived claims, if only to counter the pursuer's application for a favourable exercise of judicial discretion. Exempting the revived claims from the normal limitation rules (even if a fresh limitation period was introduced for these claims) would not be consistent with the legislative policy underlying those rules. It would also produce the anomaly that a claim that was 43 years old could be litigated as of right, whereas one which was 6 years old could not.

### A special regime?

5.16 Although the reference was framed in general terms, it was prompted by concerns for people who claimed to have been abused by employees in residential institutions.<sup>20</sup> A number of actions have also been raised against several religious orders and charitable bodies.<sup>21</sup> We understand that many of these actions were raised following articles in the press and television programmes about conditions in children's homes run by one of those orders.<sup>22</sup> The terms of the petitions to the Scottish Parliament giving rise to the reference imply that it may be appropriate for cases of abuse in residential homes to be given special consideration and special rules.

5.17 There are a number of difficulties in creating a special regime for cases of abuse in residential homes. The most significant hurdle in creating a special regime is that such a regime would treat the victims of abuse falling within that regime more favourably than others.<sup>23</sup> This raises the question of whether it is appropriate as a matter of policy to create a special class of injured person whom the law of delict would treat more favourably. There is recognition that in some cases sexual abuse during childhood may contribute to serious psychiatric injury in later life, but it is difficult to distinguish such illness clearly from other serious mental injury as a consequence of, say, being raped during adulthood or suffering mental harm as a result of injury through negligence at work rather than sexual abuse. In any case the degree of injury (mental or otherwise) will vary from case to case.<sup>24</sup> Special treatment on the basis of the magnitude of the injury (in the sense of its being worth more than a particular sum) is unsatisfactory: It is difficult to justify in principle and magnitude can only be established after a full hearing.

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<sup>20</sup> Scottish Parliament Public Petitions PE 535, PE 888 and PE 976.

<sup>21</sup> See for example *B v Murray (No 2)* [2005] CSOH 70; 2005 SLT 982; affirmed [2007] CSIH 39; 2007 SLT 605.

<sup>22</sup> *Ibid*, paras [43]–[48].

<sup>23</sup> The corollary is that the defenders in these cases would be treated more unfavourably than defenders in other contexts.

<sup>24</sup> For example, the awards in *Bryn Alyn* [2003] QB 1441 as were successful ranged from £12,000 and £68,000.

5.18 One argument which could be made in favour of treating childhood victims of sexual abuse more favourably is that many claim that they were inhibited from raising an action timeously because in the social climate of the time people in their situation would not have thought of making a claim. While we have every sympathy for these victims and accept that they may have been inhibited in such a way, there are other categories of claimant who would have felt similarly inhibited. In past times, for example, it would not have occurred to a victim to raise an action against a spouse, parent, or other close family member. Similarly, there may have been persons suffering from asbestosis prior to 1964 who, in a less litigious culture, simply accepted the injury as part of the normal ups and downs of life. Therefore, despite its initial attraction, we are not persuaded that this is a valid reason for reviving claims under a special regime for the benefit of child victims of sexual abuse in residential homes. It does not remove the unfairness to those who suffered injury in a different context.

5.19 It should also be noted that, if a special regime were to be created, additional unfairness would result from the fact that the law has developed since 1984 to allow claims to succeed which would not have been successful prior to that year. For example, *Carnegie v Lord Advocate*<sup>25</sup> upheld a claim for damages for psychiatric injury stemming from abuse suffered in adulthood during military service. Prior to 1987, such a claim could have been met by the defence of Crown immunity. The defence was removed in 1987,<sup>26</sup> but its removal was not retrospective. If a special regime were to be created for child victims of institutional abuse, it would be very difficult, if not impossible, to justify to adult victims of abuse at the hands of the military why a special regime should not also be created to allow them to bring their actions relating to abuse pre-1987 against the Crown now that Crown immunity has been abolished.<sup>27</sup>

5.20 In 2000 the Irish Law Reform Commission produced a Consultation Paper on *The Law of Limitation of Actions Arising from Non-Sexual Abuse of Children*.<sup>28</sup> Their provisional recommendation was that a special limitation regime was required to deal with cases arising from the non-sexual abuse of children. Special limitation rules have been adopted in other jurisdictions. For the reasons set out in this Part of our Report we are of the clear opinion that a special regime would not be justified in Scotland, because of the unfairness that would inevitably result and because of the difficulties of enacting retroactive legislation. The Irish Law Reform Commission considered the problem of retrospectivity,<sup>29</sup> and concluded that it would not be objectionable to make a limitation provision retrospective. An important part of the reasoning, however, is that the law of limitation is only procedural in effect and does not affect substantive rights.<sup>30</sup> Prescription, by contrast, does affect substantive rights.<sup>31</sup> For that reason the reasoning supporting the Irish Commission's provisional conclusion does not apply to claims in Scotland that have prescribed. A further argument deployed by the Irish Commission is that a limitation period is not a right of a defendant.<sup>32</sup> On this point, we would

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<sup>25</sup> 2001 SC 802.

<sup>26</sup> By the Crown Proceedings (Armed Forces) Act 1987.

<sup>27</sup> There are other examples where the law has developed to allow claims which would not have been recognised in the past to succeed: *Lister and Others v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215, recognised for the first time vicarious responsibility for criminal acts closely connected with employment; *Adams v Bracknell Forest Borough Council* [2004] UKHL 29, [2005] 1 AC 76 upheld a claim for damages for failure by a school to identify and respond appropriately to dyslexia.

<sup>28</sup> LRC-CP16-2000. The Consultation Paper has not been followed by a report.

<sup>29</sup> *Ibid*, at paras 4.46-4.86.

<sup>30</sup> *Ibid*, at para 4.49 et seq.

<sup>31</sup> A point made by the Irish Commission at para 2.023.

<sup>32</sup> LRC-CP16-2000, para 4.56.



comment that the concept of a "right" is ambiguous.<sup>33</sup> In an appropriate context the word "right" can apply to what is more strictly called an immunity. The right of a defender to invoke a period of prescription or limitation seems to us to be a form of immunity. As such it can be regarded as falling within the defender's "possessions", in the sense discussed above.<sup>34</sup> Finally, it should be noted that the Irish proposals which have not been converted into firm recommendations would involve an extension of the limitation period from three years to within 12 or 15 from majority, the former with the possibility of an extension to 15 years as a matter of judicial discretion.<sup>35</sup> This is very different from permitting claims that are more than 40 years old to proceed.

5.21 Our Discussion Paper explored at some length the challenging but probably not insurmountable difficulty of defining the precise category of people who would benefit if a special regime were to be created.<sup>36</sup> We do not propose to consider this issue here because, even assuming that an appropriate and workable definition can be formulated, we are of the view that the difficulties set out above, both in relation to prescribed personal injury claims in general and the creation of a special regime, make it inappropriate to revive claims which prescribed prior to 26 September 1984.

5.22 The vast majority of consultees agreed with the proposal in our Discussion Paper that the prescribed claims should not be revived. In particular, Quarriers, a charity providing care to disabled children, highlighted the difficulties they would experience in defending claims relating to events which happened before 1964. They commented that "There is no one currently working in the organisation with accurate knowledge of the defendant or the pursuer, and their conduct or behaviour at the time of the alleged event. There is no detailed information on how day-to-day issues were dealt with, as no written records exist of policies and procedures at that time. We have consistently found that the children's records that do survive fail to mention any of the incidents which have been alleged, which may not necessarily mean that they did not happen, but merely that they were not recorded".

5.23 Those who disagreed with our proposal did not address the problems associated with retrospective legislation, the human rights questions or the unfairness which would result from the creation of a special regime. The Association of Personal Injury Lawyers was in favour of reviving the prescribed claims on the basis that *inter alia* this would harmonise the Scots position with that of England and Wales; the category of case could be easily defined; there were no precedents for bringing claims for child abuse during institutional care prior to 1984; the nature of the injury in these cases prevents claimants coming forward promptly; the distinguishing factor in these claims is that the injury was deliberately caused; and Scots law has sufficient safeguards to consider any prejudice suffered by the defender as a result of delay. Despite these representations, we are of opinion that the difficulties of retrospective legislation, and indeed the fundamental unfairness of altering legal rights many years after they accrued, are sufficient reason to reject any proposal to revive claims that have already prescribed. We are also influenced by the formidable factual difficulties that

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<sup>33</sup> The classic discussion is W N Hohfeld, "*Fundamental Legal Conceptions as applied in Judicial Reasoning*" (ed W W Cook), in particular pp 35-64 (original work 1919, 3<sup>rd</sup> printing 1964).

<sup>34</sup> At para 5.13.

<sup>35</sup> The three-year limitation period for personal injury actions in the Republic of Ireland was reduced from three years to two years by the Civil Liability and Courts Act 2004 (2004, No 31).

<sup>36</sup> At paras 5.15-5.18.

would arise in any attempt to reconstruct events of 40 or 50 years ago in the greatly changed social conditions of today.<sup>37</sup>

5.24 In conclusion, we sympathise deeply with the victims of childhood institutional abuse, but we are obliged to consider the issue from a principled perspective and to take account of the general legal policy underpinning the rules of limitation and prescription. It must be recognised that the events in question occurred at least 43 years ago. To ensure the proper functioning of society, its members must have confidence in the law as it applies at a particular time. They would not do so if the rules governing the relationships between them could be changed retrospectively many years after an event. Moreover, legal certainty underpins the rule of law. It is for these reasons that the objection against retrospective legislation is so powerful. In our view, there is no coherent basis which would allow us to avoid that fundamental objection when creating a special category of claims for damages for childhood abuse. Finally, we note that it was not considered appropriate to revive pre-1964 claims in 1984, when the 1984 Act abolished the prescription of obligations to make reparation for personal injuries. We consider that it would be even less appropriate to revive such claims now. We accordingly recommend that:

- 18. Claims in respect of personal injury which were extinguished by negative prescription before 1984 should not be revived.**
- 19. A special category of claims in respect of personal injury resulting from institutional childhood abuse which were extinguished by negative prescription before 1984, and which would allow this category only to be revived, should not be created.**

5.25 We have recommended that prescribed claims should not be revived, but we think it right to refer to the existence in the Republic of Ireland of the Residential Institutions Redress Board. The Board was set up under the Residential Institutions Redress Act 2002 and associated regulations;<sup>38</sup> its function is to make fair and reasonable awards to persons who as children were abused while resident in industrial schools, reformatories and other institutions subject to state regulation or inspection. Awards are financed out of funds provided by government. We make no recommendation on this matter, but it may be possible to set up a similar scheme in Scotland for persons who suffered abuse as children while in institutional care. Such institutions were generally under the supervision of national government or local authorities and many of the children in care were placed there by local authorities. The bodies that ran the homes in which the children suffered abuse moved on to other areas of activity, and the individuals responsible for the abuse are now usually dead or very old. Fostering has generally replaced residential care and the attitude of society to the discipline of children has changed dramatically in the last 40 years; consequently instances of physical abuse at least, are likely to be much less common in future. In this connection it should be noted that the Criminal Injuries Compensation Scheme in force in Great Britain is

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<sup>37</sup> See *B v Murray (No 2)* [2005] CSOH 70; 2005 SLT 982 at paragraphs [22], [24], [98], [111]-[114] and [120]-[125]; affirmed [2007] CSIH 39; 2007 SLT 605.

<sup>38</sup> See also the Residential Institutions Redress Act 2002 (Section 33) Regulations 2002 (SI 644/2002); Residential Institutions Redress Act 2002 (Miscellaneous Provisions) Regulations 2002 (SI 645/2002); and Residential Institutions Redress Act 2002 (Section 17) Regulations 2002 (SI 646/2002).

generally of no assistance to victims of child abuse whose claims have prescribed; the Scheme only applies to injuries sustained after 1 August 1964.<sup>39</sup>

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<sup>39</sup> Criminal Injuries Compensation Scheme 2001, para 6. Although of course injuries suffered from 1 August 1964 to 25 September 1964 *prima facie* fall within the 2001 Scheme, applications are very unlikely to be considered since applications should normally be made within two years of the incident. Although the Board will treat 'sympathetically' applications made by persons under 18 at the time of the incident, the application should be made 'soon after reaching the age of 18': See 2001 Scheme, para 18 and *Guide to the Criminal Injuries Compensation Scheme*, Part 5, para 1.

## Part 6 List of recommendations

1. The Prescription and Limitation (Scotland) Act 1973 should continue to include a "date of knowledge" as the starting date for the running of the limitation period.

(Paragraph 2.5)
2. The test in section 17(2)(b)(i) of the 1973 Act should be replaced by the following test:

"that the pursuer's injuries were sufficiently serious to justify his bringing an action of damages (no account being taken, for the purposes of this subparagraph, of the prospects of success in that action or of whether any person against whom it was brought would be able to satisfy a decree)".

(Paragraph 2.14)
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 2.24)
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 2.30)
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 2.34)
6. The legislation on date of knowledge should continue to contain a constructive awareness test.

(Paragraph 2.37)
7. The current statutory test of whether it was "reasonably practicable" for the pursuer to become aware of a relevant fact should not be retained.

(Paragraph 2.42)

8. The awareness test should contain an element of subjectivity; consequently the limitation period should not run while the pursuer was, in the opinion of the court, excusably unaware of one or more of the statutory facts.

(Paragraph 2.53)
9. Personal injury actions should be subject to a five-year limitation period.

(Paragraph 2.59)
10. The references in sections 17(3) and 18(3) of the 1973 Act to "legal disability by reason of unsoundness of mind" should be replaced by a reference to the pursuer's being incapable for the purposes of the Adults with Incapacity (Scotland) Act 2000 by virtue of section 1(6) of that Act.

(Paragraph 2.71)
11. The reference to incapacity should not be qualified so as to be confined to the adult concerned being incapable by reason of mental or physical disability of making, communicating, or understanding decisions respecting the making of a claim for damages for the personal injury in question.

(Paragraph 2.71)
12. The appointment of a guardian should not lift the suspension of the running of time by reason of the incapacity of the adult in question.

(Paragraph 2.71)
13. Judicial discretion to allow a time-barred action to proceed should be retained.

(Paragraph 3.24)
14. The exercise of judicial discretion should not be subject to a time limit.

(Paragraph 3.28)
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.

(Paragraph 3.37)

- 16. There should be no amendment of the present law on onus of averment and proof in relation to limitation issues.

(Paragraph 4.5)

- 17. There is no need for change to the procedure in personal injury actions in the Court of Session to facilitate resolution of limitation issues as a preliminary issue.

(Paragraph 4.9)

- 18. Claims in respect of personal injury which were extinguished by negative prescription before 1984 should not be revived.

(Paragraph 5.24)

- 19. A special category of claims in respect of personal injury resulting from institutional childhood abuse which were extinguished by negative prescription before 1984, and which would allow this category only to be revived, should not be created.

(Paragraph 5.24)

# Appendix A

## **Limitation (Scotland) Bill** [DRAFT]

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### CONTENTS

Section

- 1 Limitation of actions: personal injuries not resulting in death
- 2 Limitation of actions where death has resulted from personal injuries
- 3 Power of court to override time-limits etc.
- 4 Saving
- 5 Short title, interpretation and commencement

# Limitation (Scotland) Bill

[DRAFT]

An Act of the Scottish Parliament to amend Part 2 of the Prescription and Limitation (Scotland) Act 1973; and for connected purposes.

## **1 Limitation of actions: personal injuries not resulting in death**

(1) Section 17 of the 1973 Act (which makes provision as regards actions in respect of personal injuries not resulting in death) is amended as follows.

(2) For subsection (2) there is substituted—

“(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 5 years after the appropriate date, that is to say 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;

(b) the date (if later than any date mentioned in paragraph (a) above) on which the pursuer in the action became aware of all the following facts—

(i) that the injuries were sufficiently serious to justify his bringing an action of damages (no account being taken, for the purposes of this sub-paragraph, of the prospects of success in that action or of whether any person against whom it was brought would be 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; or

(c) where, commencing with the date (or as the case may be the later date) mentioned in paragraph (a) above, there was a continuous period during which the pursuer was, in the opinion of the court, excusably unaware of any of the facts mentioned in sub-paragraphs (i) to (iii) of paragraph (b) above, the date (if earlier than the date mentioned in paragraph (b) above) on which that period came to an end.

(2A) Any date obtained by virtue of paragraph (c) of subsection (2) above is to be taken to be the appropriate date in preference to any date obtained by virtue of paragraph (a) or (b) of that subsection and any date obtained by virtue of paragraph (b) of that subsection is to be taken to be the appropriate date in preference to any date obtained by virtue of paragraph (a) of that subsection.”.



- (3) In subsection (3), for the words “unsoundness of mind” there is substituted “was, by virtue of section 1(6) of the Adults with Incapacity (Scotland) Act 2000 (asp4), incapable for the purposes of that Act”.
- (4) At the end there is added—
  - “(4) If by virtue of subsections (2) and (2A) above no action can be brought as respects a particular personal injury sustained by a person in consequence of a delictual act, then no action can be brought as respects any other personal injury sustained by him in consequence of that act.”.

#### GENERAL NOTE

The draft Bill amends Part 2 of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). It seeks to make improvements, while retaining the basic structure of the limitation scheme in relation to personal injury claims.

As recommended in the Report, the Bill retains a date of knowledge test to determine the starting date for the running of the limitation period and provision for judicial discretion to allow time-barred actions to proceed where it is considered equitable to do so. It also introduces an element of subjectivity into the knowledge test and amends the limitation period from three years to five years for all personal injury actions. As regards the judicial discretion, the Bill amends section 19A of the 1973 Act to include a list of factors which the court may take into account in exercising its discretion.

#### NOTE

Section 1 of the Bill amends section 17 of the 1973 Act which deals with limitation as regards personal injury actions not resulting in death.

Section 1(2) of the Bill implements recommendations 1, 2, 5, 7, 8 and 9 of the Report. It amends section 17 of the 1973 Act by substituting a new subsection (2) and adding a new subsection (2A). The new subsection (2) extends the current three-year limitation period for personal injury actions to five years (recommendation 9) from the appropriate date set out in paragraphs (a) to (c), as follows:

Paragraph (a) re-states the current provisions of section 17(2)(a) of the 1973 Act as regards the starting date for the running of the limitation period. The limitation period starts to run after the "appropriate date". Under this paragraph the appropriate date is when the pursuer sustains a personal injury or, where the injury is caused by a continuing act or omission, the date when that act or omission ceased. The effect is that no action of damages can be brought unless it is commenced within five years of the later of those dates.

Paragraph (b) implements recommendations 2, 5 and 7. It provides an alternative date to that mentioned in paragraph (a) for the start of the five-year limitation period. It restates the current law that time does not begin to run until the injured person is aware of certain facts. It is to be noted that it continues to use the term "aware" (recommendation 5). Paragraph (b) amends section 17 (2)(b) of the 1973 Act to omit the reference to the date on which, in the opinion of the court it would have been "reasonably practicable" for the pursuer to become aware of certain facts (recommendation 7). The provision refers to the "pursuer in the action", who in most cases will be the injured person. This reference needs to be read with the current provisions of section 22(2) of the 1973 Act. Under that provision if the claim is assigned it is the assignor's knowledge not the assignee's which is relevant. The relevant facts are set out in sub-paragraphs (i), (ii) and (iii).

Sub-paragraph (i) sets out the first of the facts, namely 'that the injuries were sufficiently serious to justify the pursuer bringing an action'. Unlike the current section 17(2)(b)(i) the new provision makes no reference to assumptions of admitted liability and ability to satisfy a decree, but makes clear that such matters are to be disregarded.

Sub-paragraph (ii) sets out the second fact - knowledge of the cause of the injuries. It makes no change to the current provisions of section 17(2)(b)(ii). The injuries must be attributable in whole or in part to an act or omission.

Sub-paragraph (iii) sets out the third fact - knowledge of the appropriate person to sue. It re-states the current provisions of section 17(2)(b)(iii). The injuries must be attributable in whole or in part to an act or omission of the defender or the employer or principal of the defender.

These are the only factors which must be considered. There is no change to section 22(3) of the 1973 Act which provides that for the purposes of section 17(2)(b), knowledge that an act or omission was or was not actionable is irrelevant.

Paragraph (c) implements recommendation 8 and is a new provision. It introduces an element of subjectivity to the constructive awareness test set out in paragraph (b), by providing that the limitation period will not run during any period when in the opinion of the court the pursuer is excusably unaware of one or more of the facts listed in paragraph (b). Again this provision uses the language of "awareness" (recommendation 5).

Subsection (2A) is a new provision which sets out the order of preference for the appropriate starting date for the running of the five-year limitation period under the new section 17(2) of the 1973 Act. The dates rank in order as follows:

The first date for the start of the five-year limitation period is that arrived at where the new section 17(2)(c) applies. As mentioned above, time does not run for limitation purposes during any period when the pursuer was excusably unaware of any of the facts listed in paragraph (b) of the new subsection (2). The date arrived at after taking any such period into account is treated as the appropriate date for the purposes of calculating the start of the five-year limitation and has precedence over any date arrived at under the new section 17(2)(a) or (b).

The second date for the start of the limitation period is that arrived at where under the new section 17(2)(b), namely the date on which the pursuer became aware of the facts listed in sub-paragraphs (i) (ii) and (iii) of that provision. However, The date arrived at under subsection (2)(b) will only apply for the purposes of calculating the starting date for the limitation period in cases where that date is later than the date which is arrived at under the new section 17(2)(a). For example, a pursuer may have sustained injuries on 1 June 2006 or sustained injuries as a result of a continuous act or omission and the act or omission ceased on 1 June 2006. However he may not become aware of the facts listed in the new section 17(2)(b) until say 1 September 2007. In that event 1 September 2007 takes precedence as the starting date for the running of the five-year limitation period. But that date will itself depend on whether there was any period during which the pursuer was excusably unaware of any of the facts (ie cases where the new section 17(2)(c) applies). For example, if it was excusable in the eyes of the court for the pursuer mentioned above to be unaware of one of the facts throughout (and only throughout) June and July 2006, that two month period would be disregarded and so the appropriate date for the start of the limitation period would be 1 August 2006. That date would have precedence over any date arrived at under the new section 17(2)(a) or (b).

The starting date for the running of the limitation period is therefore:

- (1) Any date obtained from paragraph (c);
- (2) If no date is obtained from that paragraph, any date obtained from paragraph (b);
- (3) If no date is obtained from paragraphs (b) and (c), the date obtained from paragraph (a).

Section 1(3) of the Bill implements recommendations 10 and 11. It replaces the reference in section 17(3) of the 1973 Act to 'unsoundness of mind' with a reference to the injured person being incapable, for the purposes of the Adults with Incapacity (Scotland) Act 2000, by virtue of section 1(6) of that Act. As a

result of the amendment, any period during which an injured person is incapable for the purposes of that Act is disregarded in calculating the running of the limitation period.

Section 1(4) of the Bill implements recommendation 3. It reverses the decision in *Carnegie v Lord Advocate* 2001 SC 802. It inserts a new subsection (4) into section 17 of the 1973 Act. Where an action of damages for personal injury cannot be brought as a result of the operation of the limitation rules in the new subsections (2) and (2A), this provision prevents a fresh limitation period in respect of additional injuries which subsequently emerge but which arise from the same delictual act. In effect this means that no action can be brought in respect of those subsequent injuries.

## **2 Limitation of actions where death has resulted from personal injuries**

- (1) Section 18 of the 1973 Act (which makes provision as regards actions in which, following the death of any person from personal injuries, damages are claimed in respect of the injuries or death) is amended as follows.
- (2) For subsection (2) there is substituted—
  - “(2) Subject to subsections (3) and (4) 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 5 years after the appropriate date, that is to say after—
    - (a) the date of death of the deceased;
    - (b) the date (if later than the date mentioned in paragraph (a) above) on which the pursuer in the action became aware of both 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; or
    - (c) where, commencing with the date mentioned in paragraph (a) above, there was a continuous period during which the pursuer was, in the opinion of the court, excusably unaware of either of the facts mentioned in sub-paragraphs (i) and (ii) of paragraph (b) above, the date (if earlier than the date mentioned in paragraph (b) above) on which that period came to an end.
  - (2A) Any date obtained by virtue of paragraph (c) of subsection (2) above is to be taken to be the appropriate date in preference to any date obtained by virtue of paragraph (a) or (b) of that subsection and any date obtained by virtue of paragraph (b) of that subsection is to be taken to be the appropriate date in preference to any date obtained by virtue of paragraph (a) of that subsection.”.
- (3) In subsection (3), for the words “unsoundness of mind” there is substituted “was, by virtue of section 1(6) of the Adults with Incapacity (Scotland) Act 2000 (asp4), incapable for the purposes of that Act”.

### **NOTE**

Section 2 of the Bill amends section 18 of the 1973 Act which deals with limitation as regards actions where a person has died as a result of personal injuries.

Section 2(2) of the Bill implements recommendations, 1, 2, 5, 7, 8 and 9, as regards fatal cases. It amends section 18 of the 1973 Act by substituting a new subsection (2) and adding a new subsection (2A). The new subsection (2) extends the current three-year limitation period for personal injury actions resulting in death to five years (recommendation 9) in line with the equivalent amendment to section 17(2) of the 1973 Act made by section 1(2) of the Bill in respect of actions not resulting in death. As a result of the two provisions, the limitation period for personal injury actions will be the same as that for actions of damages for loss or damage to property.

The new five-year limitation period runs from the appropriate date obtained from paragraphs (a) to (c), as follows:

Paragraph (a) re-states the current provision of section 18(2)(a) of the 1973 Act as regards the starting date for the running of the limitation period in fatal cases. Under the paragraph the five-year limitation period starts to run after the date of death of the deceased.

Paragraph (b) implements recommendations 2, 5 and 7. It provides an alternative date to that mentioned in paragraph (a) for the start of the five-year limitation period in fatal cases. It restates the current law that time does not begin to run until the pursuer is aware of certain facts. It is to be noted that it continues to use the term "aware" (recommendation 5). Paragraph (b) amends section 18(2)(b) of the 1973 Act to omit the reference to the date on which, in the opinion of the court it would have been "reasonably practicable" for the pursuer to become aware of certain facts (recommendation 7). The provision refers to the "pursuer in the action" (who may be a relative) and needs to be read with the current provisions of section 22(2) of the 1973 Act. Under that provision if the claim is assigned it is the assignor's knowledge not the assignee's which is relevant. The relevant facts are set out in sub-paragraphs (i) and (ii).

Sub-paragraph (i) sets out the first fact in fatal cases - knowledge of the cause of the injuries. It restates the current provisions of section 18(2)(b)(i). The injuries must be attributable in whole or in part to an act or omission.

Sub-paragraph (ii) sets out the second fact in fatal cases - knowledge of the appropriate person to sue. It re-states the current provisions of section 18(2)(b)(ii). The injuries must be attributable in whole or in part to an act or omission of the defender or the employer or principal of the defender.

These are the only factors which must be considered in fatal cases. There is no change to section 22(3) of the 1973 Act which provides that for the purposes of section 18(2)(b), knowledge that an act or omission was or was not actionable is irrelevant.

Paragraph (c) implements recommendation 8 in relation to fatal cases and is a new provision. It introduces an element of subjectivity to the constructive awareness test set out in paragraph (b), by providing that the limitation period will not run when in the opinion of the court the pursuer is excusably unaware of either of the facts listed in paragraph (b). Again this provision uses the language of "awareness" (recommendation 5).

Subsection (2A) is a new provision which sets out the order of preference for the appropriate starting date for the running of the five-year limitation period in fatal cases under the new section 18(2) of the 1973 Act. The dates rank in order as follows:

The first date for the start of the five-year limitation period is that arrived at where the new section 18(2)(c) applies. As mentioned above, time does not run for limitation purposes during any period when the pursuer was excusably unaware of any of the facts listed in paragraph (b) of the new subsection (2). The date arrived at after taking any such period into account is treated as the appropriate date for the purposes of calculating the start of the five-year limitation and has precedence over any date arrived at under the new section 18(2)(a) or (b).

The second date for the start of the limitation period is that arrived at under the new section 18(2)(b), namely the date on which the pursuer became aware of the facts listed in sub-paragraphs (i) and (ii) of that provision. However, the date arrived at under subsection (2)(b) will only apply for the purposes of

calculating the starting date for the limitation period in cases where that date is later than the date which is arrived at under the new section 18(2)(a).

What is said above in the context of the new section 17(2)(c) of the 1973 Act, about excusable unawareness applies also here.

The starting date for the running of the limitation period is therefore:

- (1) Any date obtained from paragraph (c);
- (2) If no date is obtained from that paragraph, any date obtained from paragraph (b);
- (3) If no date is obtained from paragraphs (b) and (c), the date obtained from paragraph (a), namely the date of the deceased's death.

Section 2(3) of the Bill implements recommendations 10 and 11 in relation to fatal cases. It replaces the reference in section 18(3) of the 1973 Act to 'unsoundness of mind' with a reference to a relative of the deceased being incapable, for the purposes of the Adults with Incapacity (Scotland) Act 2000, by virtue of section 1(6) of that Act. As a result of the amendment, any period during which a relative of the deceased is incapable for the purposes of that Act is disregarded in calculating the running of the limitation period.

### **3 Power of court to override time-limits etc.**

In section 19A of the 1973 Act (which empowers a court, if it seems to it equitable to do so, to override limitations imposed by certain other provisions of Part 2 of that Act), at the end there is added—

- “(5) The court may, in determining under subsection (1) whether to allow an action to be brought, have regard to the following matters—
- (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—
    - (i) in seeking legal advice and (in so far as appropriate) medical or other expert advice; and
    - (ii) in intimating a claim for damages to the defender;
  - (e) the quality and nature of any legal advice, and (in so far as appropriate) medical or other expert 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; and
  - (h) any other matter which appears to the court to be relevant.

- (6) The order in which matters are set out in subsection (5), or the fact that a matter is not included among those set out in paragraphs (a) to (g) of that subsection, is not to be taken to indicate that any matter to which the court may have regard by virtue of that subsection ought to be given greater weight than any other such matter.”.

#### NOTE

Section 3 of the Bill implements recommendation 15. It adds two new provisions (subsections (5) and (6)) to the judicial discretion provisions in section 19A of the 1973 Act. The new subsection (5) sets out a non-exhaustive list of matters which the court may take into account in exercising its discretion:

Paragraph (a): A relevant consideration for the exercise of the discretion is the length of time since the cause of action arose, not that which has elapsed since the time limit ended.

Paragraph (b): The reasons for the delay may be an important consideration in appropriate cases.

Paragraph (c): The effect of the passage of time since the cause of action accrued may be taken into account. The words "if any" in brackets recognise that delay may not have had any effect.

Paragraph (d): Another consideration which the court may take into account is the conduct of the pursuer and how expeditious he was in obtaining expert advice and notifying the defender of the claim. The pursuer will usually be responsible for the acts of his agents.

Paragraph (e): The quality and nature of any legal, medical or other advice obtained by the pursuer may be taken into account by the court in appropriate cases.

Paragraph (f): The court may take into account the conduct of the defender and in particular how he responded to any requests for information made by the pursuer.

Paragraph (g): Another factor which the court may consider is whether the pursuer has another remedy. He may have an alternative remedy against his legal advisers. This will usually be regarded as a factor weighing against the exercise of the judicial discretion, but should not automatically bar the case from proceeding.

Paragraph (h): The list of matter which the court may take into account is not exhaustive: the court may take any other factors into account in exercising its discretion.

The new subsection (6) makes clear that the court's discretion remains unfettered and that there is no hierarchy between the matters listed in subsection (5).

#### **4 Saving**

Nothing in this Act affects a right of action which accrues before the day mentioned in section 5(4) of this Act.

#### NOTE

Section 4 makes clear that the Bill only affects actions where the cause of the action has accrued on or after the coming into force of the substantive provisions of the Bill.

## **5 Short title, interpretation and commencement**

- (1) This Act may be cited as the Limitation (Scotland) Act 2007.
- (2) In this Act, “the 1973 Act” means the Prescription and Limitation (Scotland) Act 1973 (c.52).
- (3) This section comes into force on Royal Assent.
- (4) The remaining provisions of this Act come into force on such day as the Scottish Ministers may, by order made by statutory instrument, appoint.

### NOTE

Section 5 sets out the short title of the Bill, defines references to "the 1973 Act" and provides a power for the Scottish Ministers to commence the Bill by means of commencement order.

# Appendix B History of the legislation

## History of the legislation

1. 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.<sup>1</sup> 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<sup>2</sup> and Tucker Committee<sup>3</sup> the statutory provisions on limitation of actions in England and Wales<sup>4</sup> 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.

2. 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"<sup>5</sup> which was interpreted as meaning the date when an act or omission by the defender resulted in injury to the pursuer.<sup>6</sup> 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*,<sup>7</sup> 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.

3. Following the Report of the Edmund Davies Committee,<sup>8</sup> 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"<sup>9</sup> which were outside his

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<sup>1</sup> 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.

<sup>2</sup> Final Report of the Departmental Committee on *Alternative Remedies*, Cmd 6860 (1946).

<sup>3</sup> Report of the Committee on *The Limitation of Actions*, Cmd 7740 (1949).

<sup>4</sup> Limitation Act 1939.

<sup>5</sup> 1954 Act, s 6(1)(a).

<sup>6</sup> *Watson v Fram Reinforced Concrete Co (Scotland) Ltd and Another* 1960 SC (HL) 92.

<sup>7</sup> [1963] AC 758.

<sup>8</sup> Report of the Committee on *Limitation of Actions in Cases of Personal Injury*, Cmnd 1829 (1962).

<sup>9</sup> 1963 Act, s 8(3).



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.

4. In 1970 the Scottish Law Commission published its Report on *Reform of the Law Relating to Prescription and Limitation of Actions*.<sup>10</sup> 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.<sup>11</sup> 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.

5. 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.<sup>12</sup> One of the particular difficulties with the drafting was its lack of 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.

6. In England and Wales, the problem was examined by the Lord Chancellor's Law Reform Committee in its Twentieth Report.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

7. 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*.<sup>17</sup> Shortly thereafter an

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<sup>10</sup> Scot Law Com No 15 (1970).

<sup>11</sup> *Ibid* at para 113.

<sup>12</sup> *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).

<sup>13</sup> Law Reform Committee Twentieth Report – Interim Report on *Limitation of Actions in Personal Injury Claims*, Cmnd 5630 (1974).

<sup>14</sup> *Ibid* at recommendation (5) and para 53.

<sup>15</sup> *Ibid* at recommendation (6) and paras 56 to 58 and 69(2)(b) and (5).

<sup>16</sup> See Appendix B.

<sup>17</sup> Memorandum No 45 (1980).

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"<sup>18</sup> pending the reform of the underlying structure of the 1973 Act.

8. Following the Commission's subsequent Report on *Prescription and the Limitation of Actions*<sup>19</sup> 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.<sup>20</sup> The 1984 Act also removed personal injury actions from the ambit of the long negative prescription<sup>21</sup> 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 26 September 1964 had already prescribed (by operation of the 20 year negative prescription) when the 1984 Act came into force.

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<sup>18</sup> *Hansard*, HL, Vol 413, col 1898 (21 October 1980).

<sup>19</sup> Scot Law Com No 74 (1983).

<sup>20</sup> 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.

<sup>21</sup> Schedule 1, para 2 amended s 7 of the 1973 Act.

# Appendix C

## List of consultees who submitted written comments on Discussion Paper No 132

Association of Personal Injury Lawyers (APIL)

Cameron Fyfe, Solicitor

Charles Hennessy, Solicitor Advocate

Colin McEachran, QC

Faculty of Advocates

Forum of Insurance Lawyers (FOIL) and the Scottish Claims Managers Forum

Law Society of Scotland

Lawford Kidd, Solicitors

Medical Defence Union (MDU)

Personal Injuries User Group

Quarriers

R Craig Connal, QC, Solicitor Advocate

Scottish Law Agents Society

Thompsons (Scotland), Solicitors

W J Stewart, University of Stirling

David Whelan, on behalf of the Former Boys and Girls Abused in Quarriers

