SCOTTISH LAW COMMISSION

MEMORANDUM NO : 45
TIME-LIMITS IN ACTIONS FOR PERSONAL INJURIES
17 APRIL 1980

This Memorandum is published for comment and criticism, and does not represent the final views of the Scottish Law Commission.

The Commission would be grateful if comments were submitted by 31 October 1980. All correspondence should be addressed to:

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PART I: INTRODUCTION

1-1 Paragraph 15 of our First Programme of reform, which was approved on 21 October 1965, referred to prescription and limitation of actions. The main part of our examination of that branch of the law has already been carried out: in 1970 we submitted a report which proposed far-reaching changes in the Scots law relating to prescription and limitation in civil actions.[1] It rationalised and restated the law in relation to the positive prescription of rights to immoveable property, the long negative prescription, and the shorter negative prescription. The positive prescription of moveables was left for later study.

1-2 While the general scheme of the report embodied proposals for a short prescription of five years extinguishing rights and obligations based on delict and quasi-delict, it did not embody within the same scheme rights and obligations arising out of personal injuries. The Commission explained:

> "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".[2]

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[1] Reform of the law relating to prescription and limitation of actions: Scot. Law Com. No. 15 (1970).

[2] Para. 114.

1-3 The Commission's report, with minor amendments, was implemented by the Prescription and Limitation (Scotland) Act 1973.[1] That Act was divided into two Parts: Part I covered prescription, both positive and negative, but excluded all actions for personal injuries. Part II covered limitation of actions, and consisted of a consolidation,[2] with minor amendments, of the Limitation Acts (which dealt almost exclusively with personal injuries).

1-4 The Commission, as now constituted, appreciate the reasons which led to the exclusion from the general scheme of the 1973 Act of rights and obligations arising out of personal injury and death. Since 1973, however, there has been a re-examination of the law of England by the Lord Chancellor's Law Reform Committee, and, following its report,[3] legislation for England[4] departing in certain respects from the previous common scheme of law throughout the United Kingdom.[5] There have also been continuing expressions of dissatisfaction with the existing law in Scotland.[6] These factors, in our view, justify a further review of the Scottish position.

History of the law

1-5 Under the common law, actions of damages for personal injuries were subject to the long negative prescription which

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[1] Referred to subsequently as the 1973 Act.

[2] The Commission's proposals on personal injury claims had already been implemented by the Law Reform (Miscellaneous Provisions) Act 1971 (referred to subsequently as the 1971 Act). See para. 1-9.

[3] Twentieth Report (interim report on limitation of actions in personal injury claims); Cmnd. 5630 (May 1974).

[4] Limitation Act 1975, referred to subsequently as the 1975 Act.

[5] Notwithstanding this common scheme, there was, even before the 1975 Act, a significant difference between English and Scots law: English law has no equivalent to the long negative prescription.

[6] See para. 1-12.

is now 20 years.[1] This period was, however, subject to a number of specific statutory limitation periods, notably six months for bringing claims against certain public authorities, including local authorities.[2] This period was extended in 1939 to twelve months in England but remained at six months in Scotland.[3] There were also statutory limitation periods of three years for bringing claims against the National Coal Board, the British Transport Commission, and Electricity Boards.[4] The law at that time was criticised on two grounds: on the one hand, that the period was too long in most road accident and employment cases, because the evidence of eye-witnesses (rather than evidence contained in documents) was crucial: if a proof or trial was held, say, five years after an accident, witnesses could not be expected to remember the events accurately. On the other hand, it was said that the six-month period was too short.

1-6 After the war the law was examined by two committees which, for the most part, concentrated on the law of England. The Monckton Committee on Alternative Remedies, which considered periods of limitation in the context of actions by employees against employers, recommended quoad England and Wales that the period should be three years, whether or not an action was brought against public authorities.[5] The Tucker Committee on the Limitation of Actions supported the proposal to remove the special protection conferred on public authorities, but preferred a two-year limitation period, with a discretionary

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[1] S.7 of the 1973 Act.

[2] Public Authorities Protection Act 1893.

[3] S.21 of the Limitation Act 1939 (referred to subsequently as the 1939 Act).

[4] Coal Industry Nationalisation Act 1946, s.49; Transport Act 1947, s.11; Electricity Act 1947, s.12. It is not certain, however, that the limitation periods contained in these Acts were intended to apply to Scotland.

[5] Final Report of the Departmental Committee on Alternative Remedies, Cmd. 6860 (July 1946).

power vested in the courts to extend the time up to a maximum of six years.[1] In the event it was the Monckton Committee's recommendation which was preferred. The Law Reform (Limitation of Actions, etc) Act 1954,[2] which was applied to Scotland as well as to England and Wales, repealed the Public Authorities Protection Act 1893; introduced, as a general rule, a limitation period of three years; and denied the courts any power to extend the three-year period. Executors and dependants were required to bring proceedings within three years of the date of death, and were prevented from suing if, at the date of his death, the injured person was himself time-barred.[3] "Legal disability" - that is, in the context, pupillarity, minority, or unsoundness of mind - was not in itself to prevent time from running if the injured person was in the custody of a parent.[4]

1-7 After the 1954 Act a number of problems arose. One, highlighted by the case of Watson v. Fram Reinforced Concrete Co (Scotland) Ltd and Winget Ltd[5] was the meaning of the words "the date of the act, neglect or default giving rise to the action" in section 6(1)(a) which were used to describe the terminus a quo. A majority of the House of Lords, though for different reasons, held that the words meant the date when the right of action arose, i.e. when there was a conjunction between the defenders' fault and injury to the pursuer.[6] The other problem concerned certain diseases, notably pneumoconiosis, asbestosis, certain radiation diseases and brain tumours. The essential feature of these diseases is

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[1] Report of the Committee on the Limitation of Actions, Cmd. 7740 (July 1949).

[2] Referred to subsequently as the 1954 Act.

[3] S.6(1).

[4] S.6(2). The expression "parent" included a step-parent and grandparent and covered both illegitimate and adoptive relationships.

[5] 1960 S.C. 100; 1960 S.C. (H.L.) 92.

[6] Or, in the words of Lord Wheatley in the Outer House, "no right of action emerges until damnum results from injuria" (1960 S.C. 100 at p. 103).

that they are slow to reveal their symptoms, and an affected person is often not aware of his condition, sometimes for many years. It was held in a series of cases on both sides of the Border that the conjunction of fault on the part of the defender and injury sustained by the pursuer could take place irrespective of whether the illness had manifested itself: the fact that the pursuer did not discover, and had no reasonable opportunity to discover, that injury had been sustained until several years had elapsed, made no difference.[1] In Cartledge v. Jopling[2] the previous English limitation period of six years applied, and it was evident that similar cases were even more likely to occur under the 1954 Act.

1-8 As a result of the circumstances disclosed in Cartledge a committee was set up under the chairmanship of Mr Justice Edmund Davies. In its report[3] the committee recommended that a pursuer should not be time-barred if he commenced proceedings within twelve months of his date of knowledge - i.e., the earliest date on which he could reasonably have been expected to discover the existence and cause of his injury.[4] A further proposal that a pursuer, in order to benefit from this provision, should be required to satisfy a court both that he had a good prima facie case on the merits, and that the existence and cause of his injury were not reasonably discoverable within the normal three-year period, was not extended to Scotland. Section 8 of the Limitation Act 1963,[5] in implementing the principal proposal of the committee, treated the pursuer as being in a state of justifiable ignorance if there were outside his knowledge (actual or constructive)

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[1] Clark v. Tennent 1962 S.C. 578; Davie v. Scottish Enamelling Co. 1962 S.C. 582; Gardner v. Findlay 1963 S.L.T. (Notes) 55.

[2] [1963] A.C. 758.

[3] Report of the Committee on Limitation of Actions in Cases of Personal Injury, Cmnd. 1829 (September 1962).

[4] For convenience, we refer to the pursuer as being in a state of "justifiable ignorance" until his date of knowledge.

[5] Referred to subsequently as the 1963 Act.

"material facts of a decisive character". Section 9 made similar amendments both in cases where the injured person had died in a state of justifiable ignorance (his executors and dependants were to have a further twelve months from the date of death in which to commence proceedings); and where the injured person's date of knowledge was less than a year before his death (his executors and dependants were to have a further twelve months from that date.)

1-9 The 1963 Act was criticised on two counts: the extension of twelve months was too short; and the Act did not cater for circumstances where the claimants in a fatal accident case themselves remained in a state of justifiable ignorance. At this time the law of Scotland was under consideration by this Commission,[1] and we recommended, first, that an injured person should have three years from his date of knowledge in which to raise an action, rather than twelve months;[2] and second, that in claims arising out of death an executor or dependant should have three years from the date of death, or from his date of knowledge, whichever was the later, in which to raise an action[3]. In England, these questions were referred to the Law Commission for England and Wales, which recommended in substantially the same terms. The recommendations were given effect by the 1971 Act.

1-10 The 1971 Act, however, left untouched one of the major problems, namely what are the "material facts of a decisive character," ignorance of which will justify a postponement of the running of time. This problem was particularly acute in England, where there was a line of authority in the Court of Appeal to the effect that knowledge that the defendant's

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[1] In terms of paragraph 15 of our First Programme: see paragraph 1-1 above.

[2] Paragraph 119.

[3] Paragraphs 123-4.

conduct gave rise to a legal obligation to make reparation was a relevant factor.[1] The Lord Chancellor's Law Reform Committee in its Twentieth Report examined this problem for England and Wales, and recommended that an injured person's date of knowledge should be the date on which he 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.[2] The Committee concluded that ignorance of matters of law should not postpone the running of time, but left undecided the question what should constitute "constructive" (as opposed to actual) knowledge. However, it also recommended that, in extremis, the courts should have a discretion to override a defence of limitation even though a plaintiff had not sued within three years of his date of knowledge. It also recommended the abolition of the rule whereby time ran against a person under disability if he was in the custody of a parent.

1-11 The Committee's recommendations were given effect by the 1975 Act, but on this occasion the legislation was not extended to Scotland. The provisions of the 1954, 1963 and 1971 Acts, insofar as they applied to Scotland, are now consolidated, with minor amendments, in Part II of the 1973 Act.

The need for re-examination

1-12 The present law is generally recognised to be in an unsatisfactory state. Several specific criticisms and suggestions have been made, among which we would mention the following (without at this stage indicating whether or not we agree with them).

(i) The Scottish courts have not adopted the "worthwhile cause of action" test. A pursuer should not be fixed with knowledge of facts which were ascertainable only with the help of expert advice, if the steps which he has taken to obtain that advice were reasonable.[3]

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[1] See para. 2-40. This became known as the "worthwhile cause of action" test.

[2] Paras. 53-55 and 69(3).

[3] See paras. 2-46 to 2-49.

(ii) Recent cases have made it clear that ignorance of the defender's identity does not prevent time from running, and this has on several occasions caused hardship to injured employees.[1]

(iii) The ordinary period for raising an action for personal injuries may be too short, and in particular is shorter than for other contractual or delictual obligations (three years instead of five). It is not immediately obvious why, for example, where a person is injured in a car accident, his action for damages for personal injuries should be subject to a three-year limitation, but if his car is damaged and he himself sustains no personal injury the period is five years.[2]

(iv) It would be desirable to confer on the courts a power, similar to that now possessed by the English courts, to override in certain circumstances a defence of limitation.[3]

(v) The rule that time runs against a person under disability if he is in the custody of a parent may discriminate against the interests of that person, is anomalous and is inconsistent with the other principles of the law relating to legal disability.[4]

(vi) The language of Part II of the 1973 Act is unduly technical and obscure: it is arguable that, even if no changes, or only very minor changes, in the substance of the law were contemplated, it would be desirable to restate the existing statutory provisions in a simplified form.

(vii) There are technical drafting problems in Part II of the 1973 Act which should be resolved. It has been suggested, for example, that an action at the instance of an executor may be subject only to the long negative prescription if the death has not resulted from the delict.[5]

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[1] See paras. 2-36 to 2-39.

[2] See Part V.

[3] See paras. 2-21 to 2-29.

[4] See paras. 4-1 to 4-8.

[5] W.A. Wilson, 1977 S.L.T. (News) 143 at p.144.

PART II: THE MAIN OPTIONS FOR REFORM

(a) No time-limits

2-1 It is a general principle of the civil law of Scotland, deriving originally from ancient statutes and now embodied in the Prescription and Limitation (Scotland) Act 1973, that after the lapse of specified periods of time rights and obligations should be extinguished. The whole law was restated in the 1973 Act.

2-2 It may be argued that the burden of justifying any restriction on the right of a person to seek redress for personal injuries lies clearly on the person seeking to impose the restriction; that it is as much to the pursuer's as to the defender's advantage to introduce proceedings quickly while the evidence is still fresh; and that the present law operates merely in the interest of defenders, particularly insurance companies and public bodies. Indeed, these arguments were advanced by the Trades Union Congress in their evidence submitted to the Lord Chancellor's Law Reform Committee.[1]

2-3 While we have much sympathy with these arguments, we are impelled to reject them. There are four main justifications for applying the principle of the existing law to actions for personal injuries. The first is of an evidential character. Most personal injuries claims depend on the evidence of eye-witnesses. The longer the delay, the less reliable the evidence on both sides tends to be. Memories tend to be short, and the recall of facts becomes progressively more difficult after the lapse of time. In relation to businesses, moreover, records may have been lost or destroyed and employees who have personal knowledge of the facts may have left the company's employment and be difficult to trace. These considerations suggest that persons who have a claim should be encouraged, in the interests of the efficient administration of justice, to present it expeditiously.

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[1] Twentieth Report, para. 26.

2-4 The second justification for the principle rests more squarely upon fairness to defenders. While it seems right that no artificial barriers should be placed in the way of presentation of claims, there comes a time when it becomes reasonable to have regard to the interests of defenders. They may be surprised by the presentation of a stale claim relating to events in the distant past which, if successfully pursued, might cause disruption to their businesss and personal affairs. There comes a time, that is, when books should be closed. This argument applies both to companies (and other organisations) and to individuals, who are less likely to be insured or adequately insured against the particular risk involved, but who are reasonably entitled to a degree of certainty in the conduct of their affairs.

2-5 The third justification is that, whatever advantages there may be in raising proceedings promptly, it is common experience that many pursuers (or their advisers) do not initiate proceedings until very close to the last possible date for doing so. If the only practical sanction presently provided by the law were to be removed, it is difficult to accept that there would not be further delays. This would not be in the interests of justice.

2-6 The fourth justification is that, with few exceptions, the general principle applies throughout the law.[1] It would introduce an element of incoherence into the law to treat claims for damages for personal injuries in a different way from other rights and obligations.

2-7 We propose, therefore, that whatever their precise form, there should be some rules of prescription or limitation in the field of personal injury claims.

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[1] There are a number of imprescriptible rights and obligations with which we are not concerned in this memorandum: e.g. real rights of ownership in land and the right to recover stolen property. See Schedule 3 to the 1973 Act.

(b) The retention of the long negative prescription

2-8 At present two different rules of prescription and limitation apply simultaneously to personal injury claims:

(a) a long negative prescription of twenty years, which under the 1973 Act runs in personal injury cases from the date when the obligation to make reparation has become enforceable, and is not affected by absence of knowledge of the existence of his injury on the part of the injured person;[1] and

(b) a shorter limitation of three years running from the date when the cause of action accrued or when the injured person's justifiable ignorance ceased (if later).[2]

The combined effect of the two provisions is that an obligation to make reparation may be cut off by the long negative prescription before it is cut off by the shorter limitation.[3]

2-9 The terminus a quo will, of course, depend on the facts of each case. As a general rule, the dictum of Lord Evershed in Cartledge v. Jopling, although made in the context of English law, may be taken as applying equally to the present Scottish provisions: a cause of action accrues when "damage - that is, real damage as distinct from purely minimal damage - is suffered."[4] In the same case, Lord Pearce observed that a cause of action accrues when a disease has "reached a stage, whether then known or unknown, at which a judge could properly give damages for the harm that had been done".[5] To put it another way, the damages awarded by a judge would be more than merely nominal.[6]

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[1] 1973 Act, ss 7 and 11.

[2] See paras 1-8 and 1-9.

[3] Conversely the long negative prescription might, in certain circumstances, run from a date later than the date of knowledge, but in practice this would only happen if the defender admitted liability: s. 7(1)(a) and (b).

[4] [1963] A.C. 758, 774. Cf. Avinou v. Scottish Insulation Co. Ltd. 1970 SLT 146 at p. 148 and Wilson v. Morrinton Quarries Ltd 1979 SLT 82 at p.86.

[5] p. 781; quoted with approval in Wilson v. Morrinton Quarries Ltd 1979 SLT 82 at p. 86.

[6] See e.g. Comrie v. National Coal Board 1974 SLT 12.

2-10 It can be argued that the long negative prescription should not apply to personal injury claims. It may seem particularly harsh where the injury is initially of a latent character, such as a respiratory disease caused by the inhalation of noxious substances. At the time of the injury the person concerned may have been quite unaware of his condition, and the nature and causation of the injury may become apparent only after the lapse of the period of the long negative prescription. We know of no case in Scotland where the defender has pleaded the long negative prescription, but such a case could arise. If and when it does it may well seem harsh to exclude the claim. If a short period applies to the claim, therefore, it may seem unnecessary, and perhaps undesirable, that the long negative prescription may extinguish it at an earlier stage.

2-11 We consider, however, that there are strong arguments for the continued retention of the long negative prescription:

(a) The evidential justification[1] increases in force with passing years and, after a certain time, it becomes wrong for the law to countenance claims in which the evidence is likely to be one-sided.

(b) The question of fairness to defenders[2] is also material. This was widely accepted in the course of consultation on our Memorandum No. 9,[3] and in our report we expressed ourselves as follows:

> "The law should not give countenance to latent and antiquated claims which may affect even the successors of the person responsible and, if revived after many years, may disturb the basis upon which they have arranged their lives."[4]

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[1] See para. 2-3.

[2] See para. 2-4.

[3] The consultative document which preceded the preparation of our report, published in November 1968.

[4] Para. 34(2).

(c) The long negative prescription applies consistently throughout the law.[1]

2-12 We invite views, accordingly, on whether the long negative prescription should continue to apply to obligations to make reparation for personal injuries.

(c) The long negative prescription alone

2-13 The next question would appear to be whether the long negative prescription should be the sole method of control. This would mean, in effect, reverting to the pre-1954 law, but without the specific short periods designed to protect public authorities.

2-14 We consider, however, that most of the arguments already advanced in favour of some period apply with equal force against this solution[2]. There is a further consideration that the existing law of mora does not provide adequate control:

> "Mora, or delay, is not of itself a defence, unless the delay has been for such a period, and the circumstances are such, that prescription applies."[3]

In Bethune v. A. Stevenson & Co. Ltd,[4] an action for personal injuries was raised some fifteen years after the accident. Although the pursuer had been silent for twelve years, he was held not to be barred by mora, taciturnity and acquiescence from initiating the action. Mora leads rather to less favourable inferences being drawn from the evidence than would have been drawn had the action been expeditiously brought.

2-15 We conclude, therefore, that the long negative prescription should not be the sole method of controlling stale claims.

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[1] See para. 2-6.

[2] The evidentiary requirements (para. 2-3); the interest of defenders (para. 2-4); and the need for some practical sanction against delay (para. 2-5).

[3] Maclaren, Court of Session Practice p. 403; approved by L.P. Clyde in Halley v. Watt 1956 S.C. 370.

[4] 1969 S.L.T. (Notes) 12.

(d) Short periods of prescription or limitation

2-16 The preceding considerations lead us to the conclusion that a short period is generally appropriate for actions of damages for personal injuries, whether or not the long negative prescription also applies. We now proceed to consider the possible solutions.

(i) A short fixed period

2-17 We believe it would be universally agreed that, as a general principle, time should not begin to run before injury has been sustained. This point was at issue in Watson v. Fram Reinforced Concrete Co (Scotland) Ltd and Winget Ltd,[1] where it was submitted for the defenders that the relevant statutory wording[2] indicated that time ran from the supply of a machine by the defenders, injury being caused subsequently through the breaking of a defective part of the machine. The court rejected this argument, holding that time could not begin to run before injury was sustained. Those particular words no longer concern us, because it is now provided that, as a general rule, time runs from the date when injuries were sustained as a result of an act, neglect or default.[3] This approach, we consider, should be maintained.

2-18 Another question arises where the act, neglect or default causing the injuries is of a continuing nature. Section 6(1)(a) of the 1954 Act provided that in such a case the period ran only from the date on which the act, neglect or default ceased. This rule is now contained in section 17(1)(a) of the 1973 Act. Its counterpart as regards prescription in other matters is contained in s.11(2) of the 1973 Act. It is arguable that if time is to run from a date of reasonable awareness of injury it should run from that date even although a continuing delictual act or omission has not

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[1] 1960 S.C. 100; 1960 S.C. (HL) 92.

[2] "The date of the act, neglect or default giving rise to the action." (S.6(1)(a) of the 1954 Act.)

[3] S.17(1)(a) of the 1973 Act.

then ceased. We would reject this proposition. In our view it would unduly complicate the law; it would give rise to an unjustifiable distinction between claims based on personal injuries and other claims; and it would be likely, in many cases, to cut off part only of a claim, as when an individual who knew that an act or omission of his employer caused him some injury continued to work in these conditions, thereby sustaining further injury. It is a sounder principle, in our view, that time should not begin to run in any circumstances until the act or omission complained of has ceased.

2-19 The general rule under the 1954 Act and before the 1963 Act came into operation was that there was a short inflexible period of three years, which ran from the date when the cause of action accrued, irrespective of the injured person's state of knowledge. We have already described the hardship which resulted from this rule, notably where the pursuer was suffering from one of the progressive industrial diseases. It is plain that this rule did cause hardship and we do not recommend a return to it.

2-20 There is no reason, of course, why the fixed period should be as short as three years. It might be five years or some longer period. A longer period would, however, attract the criticism that it was too long in most cases, but might be too short in other cases where injury was difficult to ascertain. We provisionally reject this solution.

(ii) A judicial discretion

2-21 If a short fixed period is inappropriate, the next question is whether there is a case for the introduction of a judicial discretion, whereby the courts might be permitted to allow an action to proceed in certain circumstances even though in theory the action was time-barred. There are two possibilities: the first is a judicial discretion combined with a fixed period; the second is a judicial discretion combined with a flexible period such as is provided by Part II of the 1973 Act.

2-22 At the outset we note that this kind of approach has in the past been resisted, on the grounds that, in Scots practice, any form of judicial discretion would

> "lead to a multiplicity of procedural debates ... and would make the operation of the limitation provision so uncertain as to protract litigation rather than limit it."[1]

A fixed period with discretion to extend

2-23 One disadvantage of the present law is, arguably, its excessive technicality, and it might be argued that the courts, against the background of a short fixed period and the retention of the long negative prescription, should have a discretion - subject to the provisions of any international conventions binding upon the United Kingdom - to waive the short period wherever the circumstances of the case so warranted.

2-24 This possibility was considered by the Edmund Davies Committee, who, while appreciating its merits of simplicity, rejected it on the grounds that it would lead to uncertainty and divergencies of approach on the part of the judges.[2] It would encourage the bringing of hopeless actions into court and would make the writing-off of claims more difficult. We share this view. If, however, this solution finds favour on consultation we would welcome advice on whether the discretion should extend to a power to override the long negative prescription.[3]

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[1] Evidence of the Faculty of Advocates to the Edmund Davies Committee.

[2] Cmnd. 1829, para. 31.

[3] Assuming that it is to be retained for personal injury claims: see para. 2-12.

A flexible period with discretion to extend

2-25 This is the solution introduced into English law by the 1975 Act. It was the intention of the Law Reform Committee, which recommended its introduction, that the discretion should only be exercised in exceptional circumstances,[1] and the Committee stated that

> "in order to achieve consistency in the application of the court's discretion, we think it would be advisable for any legislation to prescribe 'guide-lines' for the courts on which their practice could be founded."[2]

2-26 The provision implementing the Committee's recommendations states that the court is to

> "have regard to all the circumstances of the case and in particular to -
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> (a) the length of, and the reasons for, the delay on the part of the plaintiff;
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> (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 2A or as the case may be 2B;
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> (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;
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> (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
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> (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;
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> (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]

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[1] Para. 55.

[2] Para. 57.

[3] S.2D(3). The discretion cannot be exercised in certain cases, for example if the Carriage by Air Act 1961 applies, because that would be incompatible with the provisions of the Warsaw Convention to which the 1961 Act gave effect - s.2D(2).

The exercise of such a discretion depends on a fundamentally different philosophy from that normally prevailing in this area of the law. Instead of extinguishing rights and cutting off remedies at a particular point of time, the court is able to enquire into the precise facts of each case, and to assess any actual hardship on either side.

2-27 This philosophical difference is illustrated by the decided cases. In Buck v. English Electric Co Ltd[1], a pneumoconiosis case, almost 16 years had elapsed between the time the disability was certified and the commencement of proceedings. The judge thought that a delay in excess of five years raised a presumption of prejudice to the defendant, and that the plaintiff, the deceased's widow, had "a heavy burden to shoulder"[2]: it was therefore necessary to consider the extent to which the defendant's evidence was likely to be less cogent by reason of the delay[3]. There had, in the event, been a series of claims against the defendants by workers who had sustained the same injury, and there was no evidence that the material acquired by them for those cases had been lost or destroyed. The discretion was accordingly exercised in the plaintiff's favour.

2-28 In Davies v. British Insulated Callender's Cables Ltd.,[4] on the other hand, the plaintiff had sustained back injuries in an accident at work more than five years earlier, and the court, in refusing to exercise the discretion, took the view that it would be extremely difficult for anyone to remember what had happened. The judge contrasted the facts with those in Buck, and with those in a fatal road accident with which he had recently been concerned, where the police had taken statements at the time and reports had been prepared for court proceedings which followed within a short time of the accident. However, in Firman v. Ellis[5] the Court of Appeal

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[1][1977] 1 WLR 806.

[2]p. 810.

[3]See guideline (b).

[4]The Times, 5 February 1977.

[5][1978] 3 WLR 1; [1978] Q.B. 886.

decided that the court's discretion is virtually unfettered. This decision appears to have frustrated the recommendations of the Law Reform Committee.[1]

2-29 We are not attracted to this solution. In the first place there is a greater reluctance on the part of appellate courts in Scotland, compared with their English counterparts, to interfere with the exercise of a discretion by an inferior court. Thus even if the legislation stipulated that the discretion was to be exercised only in limited circumstances, the possibility of divergent judicial interpretations could not be excluded. There would also be a danger that the circumstances in which the discretion was exercised would gradually be extended, leading to an erosion of the safeguards of the defender's position which the law is supposed to provide. Above all, such a course may be unnecessary, not least if the period is increased to five years.[2] If, however, this solution finds favour on consultation we would welcome advice on whether the discretion should extend to a power to override the long negative prescription.[3]

(iii) A short period based on actual or imputed knowledge.

2-30 The preceding discussion suggests to us that a solution should be sought within the framework of the existing principles relating to the short period, with appropriate amendments. We now consider these in detail.

What constitutes injury?

2-31 The problem of determining what constitutes injury is less straightforward in actions for personal injuries than in other actions. The cause and the full effects of the injury may not become apparent for a long time. The incidence of progressive industrial diseases, such as pneumoconiosis and asbestosis, figure prominently in the cases. As Lord Wheatley observed in Clark v. R B Tennent Ltd,[4]

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[1] See para. 2-25.

[2] See Part V.

[3] Assuming that it is to be retained for personal injury claims: see para. 2-12.

[4] 1962 SC 578 at p. 580.

> "when dealing with a disease which is progressive in its nature, it may be difficult to give an exact date from which it can be said that the disease as a certifiable disease existed."[1]

2-32 As we have already described, the 1963 Act introduced a test of reasonable knowledge, but it did not give much guidance towards resolving this question. The present law of England goes somewhat further towards resolving it:[2] one of the prescribed factors is the date on which the injured person first had knowledge that

> "the injury in question was significant .... an injury is significant if the plaintiff would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment".

2-33 It will be noted that, in substance, this approach follows the pattern of the post-war legislation, albeit in simpler language. It bears some similarity to Lord Dunpark's elucidation of the principle contained in the 1963 Act:

> "a pursuer should be allowed to raise an action within... three years, either from the date when he first ascertained that he had a probabilis causa or, if he could with reasonable diligence have ascertained that fact at an earlier date, then from the date when he ought with reasonable diligence to have acquired that knowledge".[3]

The expression "probabilis causa" means not merely that there was a relevant causal connection between a wrongful act and an injury, but also that an action would have a reasonable prospect of success. The test formulated in the 1975 Act does not indicate with precision when injury is sustained: instead, it concentrates on the prospects of success of an action. We concede that this may be a relevant factor,

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[1] See also in this connection Davie v. Scottish Enamelling Co. 1962 SC 582; Gardner v. Alexander Findlay & Co 1963 SLT (Notes) 55; Brown's Executrix v. North British Steel Foundry Ltd 1968 SLT 121. The issue was whether a disease had been contracted before the 1954 Act came into force. Cf. Cartledge v. E Jopling & Sons Ltd [1962] 1QB 189 (Court of Appeal); [1963] AC 758 (House of Lords).

[2] S.2A(6)(a) and s.2A(7) of the 1939 Act, introduced by s.1 of the 1975 Act.

[3] Comrie v. National Coal Board 1974 SLT (Notes) 12 at p.12.

but only in the sense that the degree or development of the injury is such that it is reasonably practicable to put an action into court.

2-34 In Goodchild v. Greatness Timber Co Ltd[1] the plaintiff fractured his shoulder, and his condition deteriorated almost five years later. The Court of Appeal in England held that a reasonable man would have thought he had a reasonable prospect of winning an action within the triennium, and that the damages recoverable would be sufficiently high to justify the bringing of an action.[2] While the reasoning of the Court of Appeal in that case is usually regarded as the genesis of the "worthwhile cause of action" test,[3] it is clear the courts considered that the injured person had all the necessary information to justify raising an action, and that the running of time should not be postponed simply because there was a subsequent change in his medical condition. Lord Denning went on to emphasise that an extension of time would not be allowed simply because the injuries turned out to be more serious than at first thought: it would be otherwise, however, if a trifling knock on the head was the eventual cause of a tumour.[4]

2-35 We agree with the reasoning which has prevailed in the decided cases, and provisionally conclude that, as a general principle, the law should continue to recognise a distinction between knowledge of facts which are relevant to the constitution of a right against the defender, and knowledge of facts which are relevant only to the quantification of a claim: the former should postpone the running of time, but not the latter.

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[1] [1968] 2 All E.R. 255; [1968] 2 Q.B. 372.

[2] See especially per Lord Denning MR at p.257, 379.

[3] See paras. 2-40 et seq.

[4] P.257. Cf. Knipe v. British Railways Board [1972] 1 Q.B. 361, where what was at first thought to be a strained knee proved, 10 years later, to be a ruptured tendon. See also Rieley v. Kingslaw Riding School 1975 SLT 61 (Court of Seven Judges).

Knowledge of the wrongdoer's identity

2.36 The next question is whether knowledge of the wrongdoer's identity is a relevant factor. It has been so held in England,[1] and this has been confirmed by the 1975 Act.[2] The Scottish cases, on the other hand, tend to the conclusion that such knowledge is not per se a relevant factor. At first sight it may seem strange that, in the case of an accident at work, there may be difficulty in ascertaining the employer's identity. Nonetheless there have been no fewer than three reported cases in Scotland since the 1973 Act where this has been in issue.[3] Two of these cases concerned linked companies,[4] and the third pro hac vice employment.[5] On each occasion the problem was exacerbated by delay in raising proceedings.

2.37 Knowledge of the wrongdoer's identity does not appear to be a relevant factor under Part I of the 1973 Act: this is one of the facts, along with the rest of the evidence required to support the pursuer's case, which he will require to ascertain within the five-year period.[6]

2-38 While there have been cases where a party has been barred from objecting to the court's jurisdiction if he has not done so at a relatively early stage in the proceedings, this line of authority may not be helpful to injured persons.[7]

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[1] Clark v. Forbes Stuart (Thames Street) Ltd [1964] 2 All ER 282.

[2] S.2A(6)(c) of the 1939 Act, introduced by s.1 of the 1975 Act.

[3] See Kerr v. J.A. Stewart (Plant) Ltd 1975 SLT 138 (Outer House, Lord Keith) and 1976 SLT 255 (First Division); Comer v. James Scott & Co (Electrical Engineers) Ltd 1978 SLT 235; Love v. Haran Sealant Services Ltd 1979 SLT 89, and especially Lord Maxwell's analysis of s.22(2) of the 1973 Act.

[4] Comer and Love.

[5] Kerr.

[6] Time runs from the date of loss, injury or damage caused by an act, neglect or default (s.11(1)), or (if later) from the date of knowledge - actual or imputed - that such loss, injury or damage had occurred (s.11(3)).

[7] See Dundee Provident Property Investment Co v. Macdonald (1884) 11 R 537 (arbitration); Alexander Ward & Co Ltd v. Samyang Navigation Co Ltd 1975 SLT 126 per Lord Kilbrandon at p.132 (arrestment to found jurisdiction).

The failure of a defender to reveal, for example, the name of a pursuer's actual employer could not be regarded as a ground for denying a valid defence to the actual employer if he was not sued in time; nor would such failure be sufficient to render liable a person who was not himself responsible for the accident. There is a case for departing from such a rule if the defender and a third party were associated companies: but the courts have been reluctant to "pierce the corporate veil"[1], and there would be objections to adopting such a solution in the case of companies with different shareholders. Nevertheless, the courts have shown sympathy to pursuers who were under a genuine misapprehension.[2] Indeed, the pursuer in Comer was allowed a proof before answer on the ground that his belief that one of the companies was the real employer did not constitute knowledge simply because his belief turned out to be true. On one view the purpose of the law is satisfied if any one of a group of associated companies is sued timeously, because the raising of such an action may be regarded as providing adequate notice to the group of companies as a whole that a claim is being pursued.

2-39 In view of these difficulties, we conclude that the absence of actual or imputed knowledge of the wrongdoer's identity should be a relevant factor.

Other factors

2-40 It may be argued that, in addition to knowledge of the wrongdoer's identity, knowledge of his fault is also a relevant factor.[3] There was also a train of authority in the English Court of Appeal, before the 1975 Act, to the effect that

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[1] See, for example, the decision of the House of Lords in Woolfson v. Strathclyde Regional Council 1978 SLT 159.

[2] In Comer, it was revealed that there were at least seven companies whose names began with the words "James Scott" (see p. 238); in Love the pursuer believed he was employed by J & W Haran Ltd, whereas his real employers were Haran Sealant Services Ltd.

[3] It has been so held in England: Pickles v. National Coal Board [1968] 2 All ER 598; [1974] Q.B. 614.

knowledge that the defendant's conduct gave rise to a legal obligation on his part to make reparation was a relevant factor. This approach, in the years following the 1963 Act, became known as the "worthwhile cause of action" test. In Central Asbestos v. Dodd[1] the House of Lords were divided on this question, Lords Reid and Morris concluding that it had been the intention of Parliament that ignorance of a legal right should be treated in the same way as ignorance of any other material fact, Lords Simon and Salmon concluding that Parliament had not so intended. Lord Pearson was, however, prepared to hold that knowledge of the defender's fault was a material fact. The Court of Appeal subsequently declared itself unable to extract any clear ratio from this decision.[2]

2-41 There are also a series of decisions in the Court of Appeal in England which go beyond an objective test of reasonable knowledge: e.g. Skingsley v. Cape Asbestos Co. Ltd[3], an asbestosis case, where the date of the plaintiff's actual knowledge was preferred; and Newton v. Cammell Laird Ltd, where Lord Denning said that the test was not whether a reasonable person would have taken advice, but whether it was reasonable for that particular person to have taken advice.[4]

2-42 The train of authority in Scotland has been somewhat different.[5] In Comrie v. National Coal Board,[6] a pneumoconiosis case, Lord Dunpark identified four facts which a person had to know before he could decide whether he had a justifiable right of action. These were:

(1) that he had contracted pneumoconiosis;

(2) that the disease was caused by dust-laden working conditions;

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[1] [1973] AC 518.

[2] Harper v. National Coal Board [1974] 2 All ER 441.

[3] [1968] 2 Lloyd's Rep. 201.

[4] [1969] 1 All E.R. 708, 718.

[5] See Avinou v. Scottish Insulation Co. Ltd 1970 S.L.T. 146; Comrie v. National Coal Board 1974 S.L.T. (Notes) 12; Provan v. Glynwed Ltd 1975 S.L.T. 192; McIntyre v. Armitage Shanks Ltd 1978 S.L.T. 53 (Outer House); 1979 S.L.T. 110 (First Division): an appeal to the House of Lords has been dismissed (not yet reported).

[6] 1974 S.L.T. (Notes) 12.

(3) that his employers could and should have taken steps, which they did not take, to reduce the amount of dust to which the pursuer was exposed; and

(4) that there was a causal connection, not just between the inhalation of dust at work and the disease, but between what had been called the "guilty" dust, i.e. the dust which the pursuer inhaled due to the fault of the defenders, and his disease.

In McIntyre v. Armitage Shanks, where the "worthwhile cause of action" test was specifically rejected, Lord Allanbridge observed[1]:

> "in my view 'material facts' as defined in s.22(2) of the Scottish Act of 1973 include the following four questions of fact, namely:
>
> (1) were the acts or omissions of the defenders 'wrongful' as a matter of fact;
>
> (2) did injuries actually exist at the relevant time;
>
> (3) were these injuries substantial; and
>
> (4) were these injuries caused by these wrongful acts or omissions ...
>
> These four facts do not include, and are not apt to include, conclusions or points of law".

2-43 It would seem that in Scotland a more objective approach has been adopted, with emphasis on a potential pursuer's need to consult experts, rather than on his awareness of the defender's liability.[2] We note that most of the factors which we have described in the preceding paragraphs do not prevent time from running under the five-year short negative prescription: the obligation to which prescription attaches is

> "to make reparation for loss, injury or damage caused by an act, neglect or default",[3]

and time does not begin to run while the pursuer

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[1] 1978 SLT 53 at p.57.

[2] As, indeed, the legislation seems to imply - see s.22(4) of the 1973 Act.

[3] S.11(1) of the 1973 Act.

"was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred."[1]

Section 11 does not say that the pursuer needs to know the cause of loss, injury or damage, or who was responsible for it.

2-44 In our report we justified this approach as follows:[2]

"In the case of delicts which cause personal injuries, the material facts relating to causation, the ground of action and the person liable may in certain circumstances, as when injuries result from industrial disease, be difficult to ascertain .... In the case of pecuniary loss or damage to property, the problems of ascertaining causation and liability are less difficult, and the longer period of five years from the time when any such loss or damage becomes ascertainable is available for discovery of the cause and the culprit."

2-45 We adhere to the view that, in actions for personal injuries, some knowledge of causation should also be required, and to this extent we consider that the test should be more favourable to the pursuer than in actions for pecuniary loss or for damage to property. We therefore propose that the absence of actual or imputed knowledge that the injury was attributable to an act or omission on the part of the wrongdoer should be a relevant factor.

2-46 We next consider whether knowledge that the defender was at fault, or that his conduct gave rise to a legal obligation to make reparation to the injured person, should be relevant factors. If an injured person does not seek the appropriate professional advice, he should presumably be regarded as not having exercised reasonable diligence. However, he may consult a lawyer or a trade union official and be incorrectly advised. He may obtain advice relatively soon after an accident, or in the early stages of an illness, in which case advice that he had no right of action, or that it would be inadvisable to raise an action, may have

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[1] S.11(3).

[2] Para. 97.

been sound on the evidence available at that time: whereas if he had sought advice later he might have been encouraged to pursue a claim. A subsequent action for professional negligence may not be an adequate substitute: in order to recover the same amount of damages the pursuer would have to establish not merely the adviser's negligence, but the extent to which the earlier right of action would have been likely to succeed.[1]

2-47 Should any concession to the pursuer apply only to cases where there has been negligent professional advice? Should it apply to cases where a solicitor, while correctly assessing the potential of his client's claim at the time when he was consulted, nevertheless advises against judicial proceedings? Should it extend even to the case where the injured person has failed to seek advice at all? We are of the provisional view that to grant a concession in any of these circumstances would introduce an element of uncertainty into the law and would undermine the justification for any law of prescription or limitation in this domain. It is true that there are hard cases, but at least some of them would be ameliorated by an extension of the ordinary three-year period.[2]

2-48 It seems to us that the field of choice can be narrowed to two principal options, viz:-

(i) the pursuer should only be fixed with knowledge of material facts of which he was aware, or a reasonable person ought to have been aware;

(ii) the pursuer should only be fixed with knowledge of material facts of which he was aware, or a reasonable person ought to have been aware; and, where a reasonable person would have sought appropriate advice, that advice would have disclosed the material facts.

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[1] See Yeoman v. Ferries 1967 SC 255.

[2] See Part V.

2-49 Our own preference is for the first option. It is not materially different from the second, except that the second specifically refers to expert advice. We consider, not only that a specific reference to advice may encourage the kind of difficulties which have in the past bedevilled this area of the law, but also that the courts are well able[1] to assess the materiality of facts without detailed statutory guidance. We are fortified in this view by the consideration that section 11(3) of the 1973 Act refers simply to the date when the creditor "was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage ... had occurred", without attempting to spell out what constitutes reasonable diligence.

(e) Prescription or limitation?

2-50 In our report we rehearsed, against a wider background of obligations, the principal arguments for and against the concepts of prescription and limitation. We concluded that, in general, a law of prescription was to be preferred, especially as:

> "To treat prescription as extinguishing obligations would be in consonance with the general philosophy of Scots law, where procedural rules are normally the handmaid of substantive law rather than a mode of expressing it".[2]

However, we did not at that time recommend that obligations to make reparation for personal injuries should be treated in the same way[3]. In fact, the only argument advanced[4] in favour of a period of limitation was that this approach would be consonant with the principles of the law of England. We expressed the hope[5] that, in the light of suggestions made in England that the English six-year period of limitation

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[1] Subject to our specific proposals on knowledge of the wrongdoer's identity and of causation: see paras. 2-39 and 2-45.

[2] Para. 87.

[3] See para. 114 and para. 1-2 of this memorandum.

[4] See para. 86.

[5] See paras. 68 and 86.

was too long, a uniform period of five years might be adopted throughout the United Kingdom. These suggestions have now been specifically rejected by the Law Reform Committee in its Twenty-first Report.[1]

2-51 The present divergence between the laws of England and Scotland which has existed since the 1975 Act permits us to stress, in this Memorandum, the advantages of internal consistency in our own law, and of applying a consistent principle of prescription.[2] One effect - indeed the most important effect - would be to rule out the adoption of a judicial discretionary power such as that introduced into English law by section 1 of the 1975 Act. Such a discretionary power is a concept which focuses on allowing the pursuer to bring an action into court, however belatedly, rather than on posing the fundamental question whether the pursuer still has an enforceable legal right against the defender.

2-52 Another factor which has to be taken into account is the effect in private international law. Most foreign systems regard prescription as relating to substance rather than procedure. The effect of prescription would be that when Scots law was applied as the lex loci delicti by a foreign court, the relevant rules of prescription in Scots law would probably be applied as rules of substance; whereas the effect of limitation would be that the foreign system would ignore the Scots rules as being merely procedural. Thus if limitation were retained in Scotland, the English judicial discretionary power could be exercised in an action relating to injuries

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[1] Cmnd. 6923 (September 1977), paras. 2-49 to 2-53 and Conclusion 7.

[2] This does not necessarily mean that exactly the same principles should determine from when time should run in actions for personal injuries and other actions; nor that the same period of prescription should apply.

sustained in Scotland which was competently brought in England. If, on the other hand, prescription applied, and the action was already time-barred according to the substantive law of Scotland, the English judicial discretionary power could not be exercised. It might be added, in favour of the latter solution, that it would serve to discourage forum-shopping between the two jurisdictions in cases where there had been considerable delay in bringing an action into court.

2-53 Our provisional view, therefore, is that if the introduction of a judicial discretionary power is rejected on consultation, it would be preferable to adopt a law of prescription in relation to actions for personal injuries.

PART III: CLAIMS ARISING ON DEATH

3-1 At present, a claimant in a fatal accident, whether an executor or a dependant, has three years from the date of death, or from the date of actual or imputed knowledge, whichever is the later, in which to commence proceedings.[1]

3-2 It has long been recognised that the dependants' rights are not directly derived from those of the deceased: they are of a different nature, and are designed to compensate losses which they, rather than the deceased, suffer. On the other hand, their rights are not wholly independent of those of the deceased, because both rights arise from the same wrong, and the existence of a right of action on the part of the deceased is the indispensable foundation of the dependants' right[2].

3-3 Thus if the deceased's own rights were time-barred at the date of his death, the rights of his dependants are also time-barred. It is arguable that this rule should apply only to executors, standing the separate rights which dependants acquire on the injured person's death. This suggestion does not attract us, however, nor did it attract those who offered comments on Memorandum No 17[3], because it would open the way to the prosecution of stale claims. We concluded in our subsequent report on damages[4] that an injured person's waiver of his rights, voluntary assumption of risk, contributory negligence or recovery of damages should exclude or restrict, as the case may be, the corresponding rights of the dependants after his death. These proposals were implemented in the Damages (Scotland) Act 1976.

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[1] See para. 1-9.

[2] McKay v. Scottish Airways 1948 S.C. 254, per Lord Mackintosh at p.258.

[3] Damages for injuries causing death, April 1972.

[4] Report on the law relating to damages for injuries causing death (Scot. Law Com. No. 31, 1973) paras. 27-43.

3-4 If, however, the deceased's claim was not time-barred at the time of his death, it seems that separate periods of prescription or limitation should apply to the obligations owed respectively to the injured person and to his dependants. To subject the rights of dependants to the original period would imply that the dependants' rights were wholly subordinate to those of the deceased.

3-5 Even in a straightforward case, where the injured person's date of knowledge is very close to, or contemporaneous with, the date of injury, a dependant might under the present law have six years in which to bring an action into court; if a five-year period were to be substituted[1] he might have ten years. Where the date of knowledge was postponed, the interval between the date when the cause of action accrued and the date when an action was competently brought by the dependants could be considerable. Indeed, even the long negative prescription would permit a dependant, in extreme circumstances, to bring an action into court at any time up to 40 years after the original injury. The reason for this is that the long negative prescription would apply to the obligation owed to the dependant, and not to the obligation owed to the injured person.[2]

3-6 The case for extending the time available to an executor is less compelling. There is no obligation owed to him which is separate from the obligation owed to the deceased - he is, in effect, the same legal persona. His claim is now restricted to patrimonial loss up to the date of death, and this will usually form a small part of the total claim by

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[1] See Part V.

[2] Under English law a claim might not in theory be barred even after 40 years, as (i) there is no equivalent to the long negative prescription and (ii) the court now has a power to override the time-limit altogether in certain circumstances. It seems unlikely, however, that such a power would be exercised in favour of a claimant after so long a time had elapsed: s.2D of the 1939 Act, inserted by s.1 of the 1975 Act. See paras. 2-25 to 2-29.

executors and dependants. If time has already begun to run before the date of death, a fixed period of three or five years might be selected, to run against the executors either from the injured person's date of knowledge or the date of death. If the injured person died in a state of justifiable ignorance, there is a case for imposing a fixed period, irrespective of the executor's actual date of knowledge, to run from the date of death.

3-7 A further complicating factor, and, in our view, a crucial one, is the scheme contained in section 5 of the Damages (Scotland) Act 1976. That scheme has as its object the avoidance of a multiplicity of actions arising out of the death of an injured person. A pursuer is under a duty to serve notice of his action on all other potential claimants[1], whether executors or dependants, of whose existence and connection with the action he is aware, or could with reasonable diligence have become aware. In the vast majority of cases this means that all the claimants will be sisted in the same process, although there is a provision whereby, in an exceptional case, a claimant who did not know about the action, or had some other reasonable cause for failing to sist himself as a pursuer, will be allowed to raise a separate action.[2]

3-8 It seems to us, therefore, that on balance it would be simpler to treat claims by both executors and dependants in the same way. If an executor's date of knowledge is to be regarded for the purposes of prescription as that of the injured person, his claim will be time-barred before that of the dependants. In terms of section 5 of the Damages (Scotland) Act, he would be required to bring the dependants into the process at a date earlier than they would otherwise require to raise their own action, and possibly before they had had time to prepare their own case adequately. The dependants, for example, might have a

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[1] S. 5(6).

[2] S. 5(5).

more complex task in assessing future loss of support; and they might be deprived of the opportunity to make their own investigation into the facts, which might not have been carried out adequately by the injured person during his lifetime. The alternative would be to amend the scheme contained in section 5, but the consequence - that a defender would more often have to defend two actions arising out of the same incident - strikes us as undesirable.

3-9 If, then, all claims arising out of the death of the injured person are to be treated in the same way, what is to be the terminus a quo? If the three-year period is to be retained, it should not, in our view, simply be the date of death, because the claimants - whether the deceased himself, his executors or dependants - would not necessarily be in possession of the material facts at that date. For example, the widow of a man who had died from an industrial disease might not have the means of ascertaining the cause of his death until much later. We are also inclined to discount the knowledge of any claimant before the date of the injured person's death: it would be simpler to make time run either from the date of death (which would, therefore, be deemed to be a claimant's date of knowledge even if he had known the material facts earlier), or from the date of actual or imputed knowledge, if later.

3-10 It may happen that some claimants (especially the closest relatives) have the necessary knowledge at the date of death, and some do not. For the reasons described in the previous paragraph it would be unfair to attribute knowledge, at the date of death, to those claimants who did not then possess it. In practice the section 5 procedure will suffice. Most of those who were justifiably ignorant will be alerted to the grounds of action when they are served with notices by the other claimants; in the exceptional case section 5(5) will protect a late claimant.[1]

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[1] See para. 3-7.

3-11 Further, let us suppose that the first claimant (an executor or a dependant) himself acquired the necessary knowledge some time after the death, whereas some or all of the other potential claimants had previously acquired the necessary knowledge and accordingly were time-barred by the time they received notices. There is a case for allowing all the potential claimants to come into the process in these circumstances, because the defender will already have been alerted to at least one competent claim against him arising out of a single incident. Nevertheless, we take the provisional view that the section 5 procedure should not serve to resuscitate rights which have already been extinguished.

3-12 When an injured person dies from a cause unconnected with the delictual act which caused his injuries, there is no dependants' claim, nor, in terms of section 2(3)(a) of the Damages (Scotland) Act, can the executors maintain a claim by way of solatium. Should, however, the executors themselves, whose claim is restricted to patrimonial loss up to the date of death, be given a fresh period in which to sue, calculated from the date of death? We think not: the special circumstances of a death caused by the delictual act of another do not exist. It would be correct, in this case, to treat the claim by an executor in the same way as a claim by an executor in respect of any other contractual or delictual obligation.[1]

3-13 If, as a general principle, a five-year prescriptive period is favoured on consultation,[2] we consider that the same period should be available to claimants in an action arising out of a fatal accident. We do not think that defenders would suffer undue prejudice. Most deaths giving rise to a dependant's claim follow within a relatively short time after the accident. The factors which lead us to consider how long a person should be given to commence proceedings after he has

[1]Under Part 1 of the 1973 Act.

[2]See Part V.

acquired the necessary knowledge are, in our view, the same in both cases. There is, however, a case for saying that a fixed period of five years from the date of death will in practice be sufficient to enable a claimant to acquire the necessary knowledge, and that there should be no extension. While we do not ourselves, as at present advised, advocate this solution, we invite comment upon it.[1]

[1] As an alternative to the conclusion in para. 3-9.

PART IV: MISCELLANEOUS PROBLEMS

(a) Legal disability

4-1 Under the present law[1] relating to personal injury claims, time does not begin to run if the claimant was under a legal disability, that is either he had not attained the age of majority, or he was of unsound mind. There is one important exception: if the person under disability was in the custody of a parent.[2] Moreover, if the disability is "supervening" - that is, in the case of mental illness, it commences after time begins to run - the disability does not suspend the running of time.

4-2 The justification for the "custody of a parent" rule lies in the need to reduce the number of stale claims. It has, however, been widely criticised. The definition of "parent" is arbitrary, excluding as it does a guardian or other close relative. The rule applies not only to a child, but also to a mental patient, who may not be young: in which case it might be logical to refer to his being in the custody of any other close relative (such as a spouse or child). It places a child whose parents are carrying out their parental responsibilities in a worse position than a child whose parents are not. The rule discriminates against a child whose parent is himself under a disability either at the time of the accident or at some time during the limitation period, or who dies during the limitation period. The Lord Chancellor's Law Reform Committee recommended the abolition of the rule,[3] and their recommendation was given effect in the 1975 Act.[4]

4-3 The Law Reform Committee also considered the present rule that "supervening" disability does not suspend the running of time, but in this instance did not recommend its abolition, for reasons which we discuss below.[5]

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[1] S.17(2) of the 1973 Act.

[2] Which is defined to include a step-parent and a grandparent; an illegitimate person is treated as the legitimate child of his mother, and an adopted person as the child of his adoptor.

[3] Twentieth Report, Cmnd. 5630 (1974), paras. 97-110.

[4] S.2.

[5] Paras. 4-6 and 4-7.

4-4 In terms of section 6 of the 1973 Act (which applies to most obligations but not to obligations to make reparation for personal injuries), any period during which the original creditor was under legal disability is disregarded. Thus if the creditor was in minority, time would not begin to run against him until he attained majority;[1] if the creditor was mentally ill, time would not begin to run against him until he ceased to be incapax;[2] if the creditor became mentally ill during the prescriptive period, the period would[3] be suspended for as long as he was mentally ill, but would not begin to run again in toto after he ceased to be incapax - only the unexpired portion of the prescriptive period would remain.

4-5 If this approach were extended to actions for personal injuries, the "custody of a parent" rule would no longer operate. This would, we think, be a sensible reform. We agree with the criticisms which have been levelled against it and, while we concede that its abolition might cause hardship in some cases to defenders, we are concerned at the discriminating effect which it has on certain classes of pursuer. We consider that it would be difficult to justify its continuation both when it has been abolished in England and when it does not apply to other obligations in Scots law.

4-6 On the other hand, if the approach of Part I of the 1973 Act were adopted, supervening disability would suspend the running of time. On this question we have reached a

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[1] Subject to the long negative prescription, which would run notwithstanding minority.

[2] Subject, again, to the long negative prescription, which in this case would be capable of extinguishing the right before the disability ceased.

[3] Subject again to the long negative prescription.

different conclusion from the Law Reform Committee. As they themselves commented:[1]

> "there is something objectionable in a rule which prevents time running against the person who is knocked down by a motor vehicle and thereby immediately rendered mentally ill, but which lets time run against him if the accident merely causes 24 hours' unconsciousness followed by mental illness. Yet that is, on the authorities, the effect of the current law."

The Law Reform Committee sought to draw a distinction depending on whether the supervening disability was or was not caused by the accident giving rise to the action.

4-7 We ourselves would not draw this distinction, preferring - consonant with the policy of Part I of the 1973 Act - to give the benefit to the incapacitated claimant even in cases where the incapacity had nothing to do with the accident. The Law Reform Committee also stressed the difficulty in establishing when the disability first supervened. This point does not unduly trouble us, because a pursuer will have to satisfy the court in either case that he was under disability. Whether or not the disability existed at the date of the accident, he will have to establish when it ceased. The only remaining difference is that he will have to establish either when the disability commenced, or that it already existed at the time of the accident. This suggests to us that the evidentiary problems in themselves do not require the two cases to be treated in different ways.

4-8 We would accordingly welcome comment on the proposal that the principles relating to legal disability in Part I of the 1973 Act should be extended to obligations to make reparation for personal injury.

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[1]Para. 92.

(b) Interruption

4-9 In our report[1] we identified certain factors which as a general rule should extend or interrupt prescription, except in the case of obligations to make reparation for personal injuries. These were: court action; legal disability; written acknowledgement of the debt or liability; payment to account of principal or interest; fraud or concealment on the part of the debtor or person liable; and error induced by the conduct of the debtor or person liable. The recommendations contained in our report were given effect in Part I of the 1973 Act.[2]

4-10 There is no analogue to these recommendations in Part II of the Act, apart from section 17(2) which relates to legal disability.[3] In all other cases, an action must be raised within the triennium. It may be argued that the rules of prescription are unduly formalistic and inappropriate for actions for personal injuries, and that time should run from, say, the date of knowledge of the injury regardless of certain factors which may interrupt prescription in other actions. This indeed represents the present law, but we are not altogether convinced that the factors which interrupt prescription should not be applied to personal injury claims.

4-11 For the purposes of the present discussion, these factors may be regarded as falling into two broad categories: those which generally precede the raising of an action - such as legal disability, fraud or error; and those which generally mark the termination of the period - notably the raising of legal proceedings. Of the factors in the first category, fraud and error will not feature very prominently,

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[1]Paras. 89-93; recommendations 170 and 171.

[2]Ss. 6, 9 and 10.

[3]Legal disability is separately discussed at paras. 4-1 to 4-8.

but it is possible to imagine cases where there has been fraud or induced error in connection with the identity of the wrongdoer, e.g. the driver responsible for an accident.

4-12 Of the factors in the second category, written acknowledgement of liability, or payment to account of damages, are not at present sufficient by themselves to interrupt the triennium in an action for personal injuries. Even in the case of other obligations, the writing would have to acknowledge in clear terms that the right or claim is renewed as at the date of the document. Section 10(1)(b) of the 1973 Act refers to:

> "an unequivocal written admission clearly acknowledging that the obligation still subsists".[1]

As to payments to account, section 10(1)(a) refers to:

> "such performance ... towards implement of the obligation as clearly indicates that the obligation still subsists".

It is for consideration whether these additional grounds for interruption should apply also to claims for personal injuries. It is our provisional view that they should.

4-13 We have also considered the possibility of relaxing the present rules still further, for example by providing that written intimation should be sufficient to interrupt prescription. It is arguable that, on such intimation, the defender has received adequate notice of a claim against him and can thereafter take appropriate steps to safeguard his position. On this view the defender requires no further protection from the law.

4-14 We consider, however, that this approach should be rejected. It would create a new inconsistency between the rules governing obligations arising out of personal injuries and other obligations. It is one thing to allow time to run from written acknowledgement of liability, but quite another to deprive the defender of the protection of existing procedural rules. Moreover, negotiations between the parties

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[1] See para. 91 of the report.

following on intimation of a claim may be protracted, and the postponement of an inquiry into the facts may affect the quality of the evidence ultimately presented to the court. Many claims which are intimated to a defender are not in practice proceeded with, and a defender is entitled to know, after a reasonable time has elapsed, the pursuer's future intentions.

4-15 In this context we note with interest a proposal by the Kincraig Committee[1] designed to prevent undue delay before an action is raised. Their proposal is in the following terms:

> "Provision could be made for a letter to be sent to the claimant's solicitor calling upon him to raise the action within a stated time (possibly six weeks) failing which the action will be barred. We think that the defender should be entitled to make use of this procedure at any time after one year from the date of the accident, or after six months from the date of intimation of the claim, whichever is the earlier. We also think that it should only be applicable in cases in which the claimant is known to have consulted a solicitor who is still acting for him. If this procedure were followed, and if for any reason the action turns out to have been prematurely raised, we think that the defender should not be entitled to found on that contention in a question of expenses."[2]

The implementation of such a proposal would reinforce our provisional view that further relaxation of the rules, along the lines which we have just described, would be undesirable.

(c) Amendment of pleadings after the expiry of the period.

4-16 In our report we discussed to what extent it should be competent to make amendments to the record after the expiry of the limitation period.[3] In Pompa's Trustees v. Edinburgh Magistrates[4] it was stated that:

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[1] Report of the Committee on Procedure in the Court of Session in Personal Injuries Litigation, April 1979.

[2] P.11.

[3] Para. 116.

[4] 1942 S.C. 119 at p. 125.

> "the Court will not in general allow a pursuer by amendment to substitute the right defender for the wrong defender, or to cure a radical incompetence in his action, or to change the basis of his case if he seeks to make such amendments only after the expiry of a time limit which would have prevented him at that stage from raising proceedings afresh".

Following this dictum, the court in Miller v. National Coal Board[1] refused leave to the pursuer to introduce additional defenders, and in Dryburgh v. National Coal Board[2] refused the pursuers leave to substitute entirely new grounds of fault based on new averments of fact. The court is, however, prepared to allow amendments of the pleadings after the expiry of the statutory period where the alterations do not amount to a new action.[3] It had been suggested to us in consultation on Memorandum No 9 that the courts could have adopted a more liberal approach, but in our report we concluded that the other recommendations which we were making at that time would go some way to meeting the difficulty, and that it was preferable to leave the courts to deal with the multiplicity of circumstances which might arise.

4-17 On re-examination of this question we do not consider that the proposals contained in this Memorandum point to a different concusion. It is possible that an increase in the period to five years might alleviate some of the problems which have arisen.[4] We therefore adhere to the view expressed in the report.

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[1] 1960 S.C. 376.

[2] 1962 S.C. 485. cf. Clark v. India Tyre & Rubber Co. Ltd 1960 SLT (Sh. Ct.) 37; Boyle v. Glasgow Corporation 1973 SLT (Notes) 42.

[3] See, e.g. O'Hare's Executrix v. Western Heritable Investment Co Ltd 1965 S.C. 97 and cases cited therein; Stevens v. Thomson 1971 SLT 136; Anderson v. British Railways Board 1973 SLT (Notes) 20; Mazs v. The Dairy Supply Co. Ltd. 1978 SLT 208.

[4] See Part V.

(d) The two-year time-limit for claiming "contribution" between wrongdoers.

4-18 In terms of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, where two or more persons are jointly and severally liable in delict the court can apportion the damages between them, although this does not prejudice the right of the pursuer to recover the full sum from one of them.[1] If a defender pays the whole of the damages, or at any rate more than his fair share, he can recover the appropriate sum(s) apportioned to the other defender(s). In addition, he can sue any other person who might also have been held liable if sued.[2] Section 20 of the 1973 Act imposes a two-year limitation period (not a prescriptive period) on his right to recover a contribution from another wrongdoer, whether or not the claim was for personal injuries.[3] Where the person seeking relief is under a disability, he has two years in which to claim after the disability ceases.

4-19 There is a strong justification for a relatively short time-limit, at any rate where both wrongdoers were parties to the original action. It is clearly undesirable that proceedings arising out of one incident should be unduly protracted. Even where one of the wrongdoers was not a party to the original action[4] the argument for a short time-limit seems strong. We do not, therefore, recommend any alteration in the period of two years. However, if prescription, rather than limitation, is in future to apply to personal injury claims,[5] there seems to be no reason for retaining a rule of limitation on this isolated point. In that event we suggest that section 20 be replaced by a two-year prescription.

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[1] Ss. (1).

[2] Ss. (2). This occurs less commonly in the Court of Session since the introduction of third party notice procedure.

[3] A provision of this kind was first introduced into the law by section 10 of the 1963 Act.

[4] This is much more likely to occur in the sheriff court, where there is at present no third party notice procedure except under s.75 of the Consumer Credit Act 1974.

[5] See Part V.

PART V: THE LENGTH OF THE SHORT PERIOD

5-1 We have left until last the question of the length of the short period, because it is only when all the other relevant factors have been considered that this problem can be seen in its proper perspective.

5-2 In both England and Scotland, less time is allowed for pursuing claims for personal injuries than for enforcing other obligations. We outlined the historical reasons for this in Part I[1] - three years was selected in England in 1954 as a compromise between twelve months for suing certain public authorities, and six years for suing other defenders. The reason why the usual six-year period was not chosen in England for personal injury claims is that six years was said to be too long for actions in which, typically, the crucial evidence depended on the recollection of eye-witnesses rather than on documents. In Scotland, where actions against public authorities still had to be raised within six months, and actions against other defenders within 20 years, the extension in the former case was generally welcomed, and three years was accepted as an appropriate compromise.

5-3 There are arguments in favour of adopting the same time-limit - five years - which applies to most other obligations. It may be thought strange that in this respect the law should be more generous to someone who has suffered loss of or damage to his property than to someone who has sustained personal injury.[2] A longer period would in some cases enable the pursuer to have available more positive evidence about the likely long-term consequences of his injuries, which would enable the court to assess his loss with greater accuracy.

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[1] See paras. 1-5 and 1-6.

[2] If, however, a person sustains both personal injuries and damage to his property - e.g. as a result of a car accident - the 3-year limitation applies to both elements of his claim (s.17(1) of the 1973 Act).

There would be fewer objections to discounting ignorance of the defender's fault or liability as a relevant factor in determining the terminus a quo.[1] As we have suggested,[2] the longer the period, the more unnecessary it is to introduce a judicial discretion to override the period. We have also canvassed the possibility, while not indicating our support for it, that if the period is to be five years, time should run against all claimants in fatal accident cases from the date of death, without any further extension.[3] We have suggested, too, that a five-year prescription might alleviate some of the problems which have arisen in relation to the amendment of pleadings.[4]

5-4 On the other hand, there is a perfectly respectable argument that where time runs from a date of actual or imputed knowledge - howsoever defined - it is neither necessary nor desirable to allow a pursuer more than three years in which to bring an action for personal injuries into court. This argument would be strengthened if the rules on interruption of prescription were applied to actions for personal injuries.[5]

5-5 We do not, however, express a firm opinion on this question, but rather seek advice from practitioners. In particular, we do not overstress the advantages of a uniform period of prescription governing all obligations arising out of contract or delict. If, however, uniformity were thought to be desirable we think that the period would have to be five years, because we do not consider it would be right to recommend the reduction of the period which affects other obligations. These obligations vary widely in their character, and the statute which introduced the uniform period of five years has been in force for only a few years. Moreover, any reduction would cause considerable transitional problems. Accordingly, for the purposes of consultation, we tentatively suggest that the length of the short period of prescription should be five years.

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[1] See para. 2-47.

[2] Para. 2-29.

[3] Para. 3-13.

[4] Para. 4-17.

[5] Para. 4-12.

PART VI: SUMMARY OF PROVISIONAL CONCLUSIONS AND OTHER MATTERS ON WHICH COMMENT IS INVITED

Part II: The main options for reform

1. As a general proposition, there should be some rules of prescription or limitation in the field of personal injury claims (para. 2-7).

2. Should the long negative prescription continue to apply to obligations to make reparation for personal injuries? (para. 2-12)

3. The long negative prescription should not be the sole method of controlling stale claims (para. 2-15).

4. Time should not begin to run in any circumstances before injury has been sustained (para. 2-17).

5. Time should not begin to run until a continuing act or omission has ceased, even if the pursuer has become aware of his injuries, or should reasonably have been aware of his injuries, before that date (para. 2-18).

6. There should not be a fixed three-year period running from the date when the cause of action accrued, irrespective of the injured person's state of knowledge (para. 2-19).

7. There should not be a fixed period of five years, or perhaps longer, running from the date when the cause of action accrued, irrespective of the injured person's state of knowledge (para. 2-20).

8. There should not be a fixed period coupled with a judicial discretion to extend it (para. 2-24).

9. There should not be a more flexible period based on the injured person's state of knowledge, coupled with a judicial discretion to extend it (para. 2-29).

10. There should be a short period based on the pursuer's actual or imputed knowledge (para. 2-30).

11. The law should continue to recognise a distinction between knowledge of facts which are relevant to the constitution of a right, and knowledge of facts which are relevant only to the quantification of a claim: the former should postpone the running of time, but not the latter (para. 2-35).

12. The absence of actual or imputed knowledge of the wrongdoer's identity should postpone the running of time (para. 2-39).

13. The absence of actual or imputed knowledge that the injury was attributable to an act or omission on the part of the wrongdoer should postpone the running of time (para. 2-45).

14. Either (i) The pursuer should only be fixed with knowledge of material facts of which he was aware or a reasonable person ought to have been aware;

    Or (ii) the pursuer should only be fixed with knowledge of material facts of which he was aware or a reasonable person ought to have been aware; and, where a reasonable person would have sought appropriate advice, that advice would have disclosed the material facts (paras. 2-48 and 2-49).

15. If a judicial discretion, as described in proposals 8 and 9, is rejected, a law of prescription should replace a law of limitation in relation to actions for personal injuries (para. 2-53).

Part III: Claims arising on death

16. If the deceased's own rights were time-barred at the date of his death, the rights of his executors and dependants should also be time-barred (para. 3-3).

17. If the deceased's own rights were not time-barred at the date of his death, separate time-limits should apply to the obligations owed to his dependants (para. 3-4).

18. For practical reasons, time should not begin to run against the executors before the date of death (para. 3-8).

19. Time should run against a claimant (whether an executor or a dependant) either from the date of death, or from the date of the claimant's actual or imputed knowledge, if later (paras. 3-9 and 3-10).

20. An executor or dependant whose action is time-barred by virtue of proposal 19 should not be permitted by virtue of section 5(2) of the Damages (Scotland) Act 1976 to sist himself as a pursuer in an action competently raised by another claimant (para. 3-11).

21. Where an injured person dies from a cause unconnected with the delictual act which caused his injuries, the date of death is to be disregarded: time should run from the date when the injured person's cause of action accrued, or from the date of the injured person's actual or imputed knowledge (para. 3-12).

22. As an alternative to proposal 19, should there be a fixed period of five years running from the date of death against all claimants? (para. 3-13).

Part IV: (a) Legal disability

23. The principles relating to legal disability contained in Part I of the Prescription and Limitation (Scotland) Act 1973 should be extended to obligations to make reparation for personal injury, thus abolishing the present rules whereby (1) time runs against an incapax who is in the custody of a parent, and (2) time runs notwithstanding supervening disability (para. 4-8).

(b) Interruption

24. The rules on interruption of prescription contained in Part I of the 1973 Act should be extended to actions for personal injuries (para. 4-12).

25. The rules on interruption of prescription should not be further relaxed, e.g. by providing that written intimation should be sufficient (paras. 4-13 to 4-15).

(c) Amendment of pleadings after the expiry of the period

26. No legislation is required to regulate in what circumstances pleadings may be amended after the expiry of the prescriptive period (para. 4-17).

(d) The two-year time-limit for claiming "contribution" between wrongdoers

27. The two-year time-limit for claims by one wrongdoer against another, under section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, should be retained. If proposal 15 is implemented, the two-year time-limit should be categorised as a period of prescription and not as a period of limitation (para. 4-19).

Part V: The length of the short prescription

28. For the purposes of consultation, it is suggested that the length of the short period of prescription should be five years. (para. 5-5).

Prescription and Limitation (Scotland) Act 1973

PART II

LIMITATION OF ACTIONS

General provision as to limitation of actions.

17.—(1) No action of damages where the damages claimed consist of or include damages or solatium in respect of personal injuries to any person shall be brought against any person unless it is commenced—

(*a*) in the case of an action brought by or on behalf of a person in respect of injuries sustained by him as a result of any act, neglect or default, before the expiration of three years from the date when the injuries were sustained or, where such act, neglect or default was a continuing one, from that date or the date on which the act, neglect or default ceased, whichever is the later;

(*b*) in the case of an action brought by or on behalf of a person to whom a right of action has accrued on the death of another person in consequence of injuries sustained by that other person, before the expiration of three years from the date of that death:

Provided that for the purposes of paragraph (*b*) of this subsection a right of action shall be deemed not to have accrued to a person on the death of another person by whom injuries have been sustained if that other person or someone on his behalf was not, immediately before his death, himself entitled to bring or continue an action in respect of the injuries.

(2) If on the date when any right of action accrued for which a period of limitation is prescribed by the foregoing subsection the person to whom it accrued was under legal disability by reason of nonage, or if on that date the said person was or became under legal disability by reason of unsoundness of mind, and in either case that person was not in the custody of a parent, the action may be brought at any time before the expiration of three years from the date when the person ceased to be under disability, notwithstanding that the period of limitation has expired.

For the purposes of this subsection "parent" includes a step-parent and a grand-parent and in deducing any relationship an illegitimate person and a person adopted in pursuance of any enactment shall be treated as the legitimate child of his mother or, as the case may be, of his adoptor.

Extension of time-limit for certain actions.

18.—(1) Section 17(1) of this Act shall not afford any defence to an action to which this section applies, in so far as the action relates to any right of action in respect of which the requirements of subsection (3) of this section are fulfilled.

(2) This section applies to any action of damages where the damages claimed consist of, or include, damages or solatium

in respect of personal injuries sustained by the pursuer or any other person, not being an action to which section 19 of this Act applies.

(3) The requirements of this subsection are fulfilled in relation to a right of action if it is proved that the material facts relating to that right of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the pursuer until a date which was not earlier than three years before the date on which the action was brought.

(4) Nothing in this section shall be construed as excluding or otherwise affecting—

(*a*) any defence which, in any action to which this section applies, may be available by virtue of any enactment other than section 17(1) of this Act (whether it is an enactment imposing a period of limitation or not) or by virtue of any rule of law, or

(*b*) the operation of any enactment or rule of law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the right of action accrued.

Extension of time-limit for certain actions brought after death of injured person.

19.—(1) Section 17(1) of this Act shall not afford any defence to an action to which this section applies, in so far as the action relates to any right of action in respect of which the requirements of subsection (3) of this section are fulfilled.

(2) This section applies to any action of damages where the damages claimed consist of, or include, damages or solatium in respect of personal injuries sustained by the pursuer or any other person, being an action brought by or on behalf of a person to whom a right of action has (apart from subsection (5) of this section) accrued on the death of another person (in this section referred to as "the deceased") in consequence of personal injuries sustained by the deceased.

(3) The requirements of this subsection are fulfilled in relation to a right of action if—

(*a*) it is proved that the material facts relating to the right of action were or included facts of a decisive character which were outside the knowledge (actual or constructive) of the deceased at all times until—

(i) his death; or

(ii) a date less than three years before his death; or

(iii) where the deceased had brought, and immediately before his death was continuing, an action in respect of personal injuries sustained by him, a date not earlier than three years before the date on which that action was brought; and

(*b*) either—

(i) the action was brought not later than three years after the death of the deceased; or

(ii) it is proved that the said facts of a decisive character were at all relevant times outside the knowledge (actual or constructive) of each relevant person until a date which was not earlier than three years before the date on which the action was brought.

(4) In subsection (3) of this section "relevant person" means—

(*a*) in relation to an action in respect of a right of action forming part of the estate of a deceased person, any person who is or has been a personal representative of the deceased, including an executor who has not been confirmed as such; and for the purposes of this paragraph regard shall be had to any knowledge acquired by any such person while a personal representative or previously;

(*b*) in relation to an action brought by or on behalf of a relative in respect of which the right of action was (apart from subsection (5) of this section) the death of the deceased, any person by whom or on whose behalf the action is brought:

Provided that where, in determining whether the requirements of this paragraph are fulfilled in the case of any such action as aforesaid, it appears to the court that these requirements would be fulfilled if any person had not been included among those by whom or on whose behalf the action is brought, the court shall—

(i) determine that question as if he had not been so included; but

(ii) direct that, in so far as the action is brought by or on behalf of that person, subsection (1) of this section shall not operate to displace any defence there mentioned,

and the said subsection (1) shall have effect accordingly.

(5) In relation to an action falling within this section—

(*a*) the death of the deceased shall not, and

(*b*) any circumstances falling within subsection (6) of this section shall,

be regarded for the purposes of this Part of this Act as constituting a right of action.

(6) The circumstances referred to in paragraph (*b*) of subsection (5) of this section include any circumstances which would have constituted a right of action in relation to an action brought by the deceased before his death in respect of the personal injuries which caused his death.

(7) Subsection (4) of section 18 of this Act shall have effect in relation to an action to which this section applies as it has effect in relation to an action to which that section applies.

Time-limit for claiming contribution between wrongdoers. 1940 c. 42.

20.—(1) Where under section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 a person has become or becomes entitled on or after 31st July 1963 to a right to recover from another person a contribution in respect of any damages or expenses, no action to recover a contribution by virtue of that right shall be brought after the end of the period of two years from the date on which that right accrued to the first-mentioned person.

(2) Section 17(2) of this Act shall have effect as if any reference therein to subsection (1) of that section included a reference to subsection (1) of this section:

Provided that in relation to any action to which the said section 17(2) applies by virtue of this subsection it shall have effect as if for the words " three years " therein there were substituted the words " two years ".

(3) The foregoing provisions of this section, and the provisions of section 17(2) of this Act as extended by the last foregoing subsection, shall have effect in relation to an arbitration to recover from a carrier a contribution in respect of damages to which Article 29 in Schedule 1 to the Carriage by Air Act 1961 applies, as they have effect in relation to an action for that purpose. 1961 c. 27.

(4) For the purposes of this section an arbitration shall be deemed to be commenced when one party to the arbitration serves on the other party or parties a notice requiring him or them to appoint an arbiter or to agree to the appointment of an arbiter, or, where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring him or them to submit the dispute to the person so named or designated.

Transitional provisions.

21.—(1) Subject to subsection (2) of this section and to section 25(3) of this Act, the provisions of this Part of this Act shall have effect in relation to rights of action which accrued before, as well as rights of action which accrue after, the commencement of this Part of this Act:

Provided that the said provisions shall not have effect in relation to rights of action which accrued before 4th June 1954.

(2) Nothing in section 20 of this Act shall affect any action for a contribution where, before 31st July 1963, decree has been pronounced against the person seeking to obtain the contribution; and in this subsection " action " includes " arbitration " and " decree " includes " decree-arbitral ".

22.—(1) In this Part of this Act, unless the context otherwise requires, the following expressions shall have the meanings hereby respectively assigned to them, that is to say—

"appropriate advice", in relation to any fact or circumstances, means the advice of competent persons qualified, in their respective spheres, to advise on the medical, legal and other aspects of that fact or those circumstances, as the case may be;

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

"wrongful" includes negligent.

(2) For the purposes of this Part of this Act any reference therein to the material facts relating to a right of action is a reference to any one or more of the following, that is to say—

(*a*) the fact that personal injuries resulted from a wrongful act or omission;

(*b*) the nature or extent of the personal injuries so resulting;

(*c*) the fact that the personal injuries so resulting were attributable to that wrongful act or omission, or the extent to which any of those personal injuries were so attributable.

(3) For the purposes of this Part of this Act any of the material facts relating to a right of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice with respect to them would have regarded at that time as determining, in relation to that right of action, that (apart from any defence under section 17(1) of this Act) an action would have a reasonable prospect of succeeding and of resulting in an award of damages sufficient to justify the bringing of the action.

(4) Subject to the next following subsection, for the purposes of this Part of this Act a fact shall, at any time, be taken to have been outside the knowledge (actual or constructive) of a person if, but only if,—

(*a*) he did not then know that fact; and

(*b*) in so far as that fact was capable of being ascertained by him, he had taken all such action (if any) as it was reasonable for him to have taken before that time for the purpose of ascertaining it; and

(*c*) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such action (if any) as it was reasonable

for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances.

(5) In the application of the last foregoing subsection to a person at a time when he was under a disability and was in the custody of a parent, any reference to that person in paragraph (*a*), (*b*) or (*c*) of that subsection shall be construed as a reference to that parent.

(6) Notwithstanding anything in any enactment relating to the trial by jury of actions, whether in the Court of Session or the sheriff court, no action relating to a right of action in respect of which the operation of section 17(1) of this Act is precluded by virtue of section 18(1) or 19(1) of this Act shall be tried by jury.

Amendments and repeals related to Part II.

23.—(1) The enactments specified in Part II of Schedule 4 to this Act shall have effect subject to the amendments specified in that Schedule, being amendments consequential upon the provisions of this Part of this Act.

(2) The enactments specified in Part II of Schedule 5 to this Act are hereby repealed to the extent specified in column 3 of that Schedule.

Limitation Act 1975, sections 1 and 2

Personal injuries

1. After section 2 of the Limitation Act 1939 there shall be inserted the following sections— New time limits. 1939 c. 21

"Time limit for personal injuries.

2A.—(1) This section applies to any action for damage for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

(2) Section 2 of this Act shall not apply to an action to which this section applies.

(3) Subject to section 2D below, an action to which this section applies shall not be brought after the expiration of the period specified in subsections (4) and (5) below.

(4) Except where subsection (5) applies, the said period is three years from—

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

(*b*) the date (if later) of the plaintiff's knowledge.

(5) If the person injured dies before the expiration of the period in subsection (4) above, the period as respects the cause of action surviving for the benefit of the estate of the deceased by virtue of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 shall be three years from— 1934 c. 41.

(*a*) the date of death, or

(*b*) the date of the personal representative's knowledge,

whichever is the later.

(6) In this section, and in section 2B below, references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts—

(*a*) that the injury in question was significant, and

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

(*c*) the identity of the defendant, and

(*d*) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant,

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

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

(8) For the purposes of the said sections a person's knowledge includes knowledge which he might reasonably have been expected to acquire—

(*a*) from facts observable or ascertainable by him, or

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

but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the

help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

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

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

Time limit for actions under Fatal Accidents Act 1846.

2B.—(1) This section has effect subject to section 2D below.

(2) An action under the Fatal Accidents Act 1846 shall not be brought if the death occurred when the person injured could no longer maintain an action and recover damages in respect of the injury (whether because of a time limit in this Act or in any other Act, or any other reason). 1846 c. 93.

Where any such action by the injured person would have been barred by the time limit in section 2A above, no account shall be taken of the possibility of that time limit being overridden under section 2D of this Act. . .

(3) An action under the Fatal Accidents Act 1846 shall not be brought after the expiration of three years from—

(*a*) the date of death, or

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

whichever is the later.

(4) Subsection (3) above shall not apply to an action for which a period of limitation is prescribed by or under any Act other than this Act, and section 2A above shall not apply to an action under the Fatal Accidents Act 1846.

(5) An action under the Fatal Accidents Act 1846 shall be one to which section 22 of this Act (persons under disability) applies, but otherwise Part II and Part III of this Act shall not apply to the action.

Dependants subject to different time limits.

1846 c. 93.

2C.—(1) This section applies where there is more than one person for whose benefit an action under the Fatal Accidents Act 1846 is brought.

(2) Section 2B(3)(*b*) shall be applied separately to each of them, and if that would debar one or more of them, but not all, the court shall direct that any person who would be so debarred shall be excluded from those for whom the action is brought unless it is shown that if the action were brought exclusively for the benefit of that person it would not be defeated by a defence of limitation (whether in consequence of section 22 of this Act (persons under disability), or an agreement between the parties not to raise the defence, or otherwise).

Court's power to override time limits.

2D.—(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—

(*a*) the provisions of section 2A or 2B of this Act prejudice the plaintiff or any person whom he represents, and

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

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

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

If, for example, the person injured could at his death no longer maintain an action under the Fatal Accidents Act 1846 because of the time limit in Article 29 in Schedule 1 to the Carriage by Air Act 1961, the court has no power to direct that section 2B(2) shall not apply.

1961 c. 27.

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

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

(*b*) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 2A or as the case may be 2B;

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

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

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

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

(4) In a case where the person injured died when, because of section 2A, he could no longer maintain an action and recover damages in respect of the injury, the court shall have regard in particular to the length of, and the reasons for, the delay on the part of the deceased.

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

(6) A direction by the court disapplying the provisions of section 2B(2) shall operate to disapply the provisions to the same effect in section 1 of the Fatal Accidents Act 1846.

1846 c. 93.

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

(8) References in this section to section 2A include references to that section as extended by any provision of Parts II and III of this Act."

Persons under disability.
1939 c. 21.

2.—(1) At the end of section 22 of the Limitation Act 1939 (persons under disability: time limit of 6 years from end of disability) there shall be inserted the following subsections:—

"(2) If the action is one to which section 2A or 2B(3) of this Act applies subsection (1) of this section shall have effect as if for the words '6 years' there were substituted the words '3 years'.

(3) Where this section applies by virtue of section 4(3) of the Limitation Act 1963 (contribution between tortfeasors) subsection (1) of this section shall have effect as if for the words '6 years' there were substituted the words '2 years'".

1954 c. 36.
1963 c. 47.

(2) The provisions of this section are in substitution for the subsection (2) added to section 22 by the Law Reform (Limitation of Actions &c.) Act 1954, and in substitution for the proviso to section 4(3) of the Limitation Act 1963.