Scottish Law Commission

(SCOT. LAW COM. No. 74)

Prescription and the Limitation of Actions

REPORT ON PERSONAL INJURIES ACTIONS AND PRIVATE INTERNATIONAL LAW QUESTIONS

Edinburgh
Her Majesty's Stationery Office

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Laid before Parliament
by the Lord Advocate
under section 3(2) of the Law Commissions Act 1965

Ordered by The House of Commons *to be printed*
9th February, 1983

EDINBURGH
HER MAJESTY'S STATIONERY OFFICE

153

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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ISBN 0 10 215383 3

SCOTTISH LAW COMMISSION

Item 3 of the First Programme

PRESCRIPTION AND THE LIMITATION OF ACTIONS

PERSONAL INJURIES ACTIONS AND PRIVATE INTERNATIONAL LAW QUESTIONS

To: The Right Honourable the Lord Mackay of Clashfern, Q.C.,
Her Majesty's Advocate

We have the honour to submit our Report on

(1) Personal Injuries Actions, and
(2) Private International Law Questions

(*Signed*) PETER MAXWELL, *Chairman*
R. D. D. BERTRAM
E. M. CLIVE
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R. EADIE, *Secretary*
16th November 1982

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PART I INTRODUCTION

1.1 Item 3[1] of our First Programme of reform, which was approved on 21 October 1965, referred to prescription and the 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.[2] 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. While the general scheme of our 1970 report contained proposals for a short prescription of five years extinguishing rights and obligations based on delict and quasi-delict, it excluded rights and obligations arising out of personal injuries. In the latter context there had been since 1954 a more or less uniform set of rules applying throughout the United Kingdom. Our report, with minor amendments, was implemented by the Prescription and Limitation (Scotland) Act 1973.[3] That Act was divided into two main 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,[4] with minor amendments, of the Limitation Acts (which dealt almost exclusively with personal injuries).

1.2 Since 1973 there has been a re-examination of the law of England by the Lord Chancellor's Law Reform Committee, and, following their report,[5] legislation for England[6] which departed in certain respects from the previous common scheme of law throughout the United Kingdom.[7] The principal innovation of the 1975 Act was to confer a discretion on the court to disregard the time-limit. There have also been continuing expressions of dissatisfaction with the existing law in Scotland. These factors, in our view, justified a further review of the Scottish position, and accordingly in April 1980 we published a consultative memorandum.[8] Since its publication there has been one further development. The Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 provided for the introduction of a judicial discretion to dispense with the existing limitation rules where it seemed to the court "equitable to do so".[9]

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[1]Para. 15.

[2]Reform of the law relating to prescription and limitation of actions: Scot. Law Com. No. 15 (1970), referred to subsequently as our 1970 report.

[3]Referred to subsequently as the 1973 Act.

[4]Our 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. 1.10.

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

[6]Limitation Act 1975, referred to subsequently as the 1975 Act. The main provisions of this Act are now consolidated in the Limitation Act 1980, ss. 11 to 14, 28 and 33.

[7]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.

[8]Consultative Memorandum No. 45, Time-limits in actions for personal injuries, referred to subsequently as the "consultative memorandum".

[9]S. 23, which incorporated a new s. 19A into the 1973 Act.

1.3 In July 1980 we also published for limited circulation a consultation paper on prescription and limitation in private international law. This paper was prompted by two current developments. In the first place, the Member States of the European Communities had negotiated a draft Convention[1] designed to establish uniform choice of law rules applicable to contractual obligations. The Convention, largely in accordance with our existing choice of law rules, allows the parties to a contract to choose the law which is to govern it.[2] Where no such choice has been made, rules for determining the governing law are prescribed pointing, in effect, to the law of the country with which the contract is most closely connected.[3] The Convention goes on to provide[4] that the law applicable to a contract shall govern in particular:

> "the various ways of extinguishing obligations, and prescription and limitation of actions."

If the relevant rules of the applicable law are to be applied whether these rules in terms of that law are procedural or substantive in effect, and if those rules are to be applied to the exclusion of the relevant rules of the *lex fori*, then this provision is in marked contrast with the existing common law rules of Scots law on this topic. The Convention does not relate to all contractual obligations[5] and it would no doubt be possible in implementing the Convention to narrow correspondingly the scope of the proposed rules to those contractual obligations within the scope of the Convention. This would entail, however, that different rules relating to the application of prescription and limitation would govern respectively contractual obligations within the scope of the Convention and contractual obligations outside its scope. This would create confusion. In the second place, the Law Commission for England and Wales had published in 1980 Working Paper No. 75 on Classification of Limitation in Private International Law. Their report, which has now been published,[6] contains important recommendations for the reform of the English common law rules in this domain, rules very similar to those of the Scots common law.

1.4 Commentators on the consultative memorandum for the most part expressed satisfaction with the law, though not with its presentation. There is now wide acceptance of a short limitation period, running from the date of injury, but sufficiently flexible to take account of the claimant's lack of knowledge of such matters as the existence and cause of his injury. We have therefore seen our main task as one of simplifying the law and eradicating a number of obvious defects, and this is something which we believe can be readily achieved.[7] We have made no specific recommendations on the judicial discretion, which has been too recently introduced to enable any definite pronouncement to be made on it; but we believe that, if our other recommendations are accepted, there ought in future to be very few cases where a judge will find it necessary to exercise his discretion in a pursuer's favour. Finally, we have recommended that where a foreign law falls to be applied

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[1]Draft EEC Convention on the Law Applicable to Contractual Obligations: H.M.S.O. 1979.
[2]Article 3.
[3]Article 4.
[4]Article 10(1)(*d*).
[5]See Article 1.
[6]Classification of Limitation in Private International Law (Law Com. No. 114, June 1982).
[7]See the draft Bill annexed to this Report, Appendix A.

by our courts, the foreign rules of prescription or limitation should be applied in preference to our own, irrespective of their classification.

Purpose of the law

1.5 At this stage it is appropriate to state what, in our view, is the purpose of the law in relation to personal injury claims. As the Lord Chancellor's Law Reform Committee remarked, the purpose is perhaps more easily stated than applied,[1] and its application to personal injury claims presents peculiar difficulties. This is especially so since the introduction of the judicial discretion. However, we consider that, against the background of present Scots law and practice, the purpose of the law in relation to personal injury claims may be summarised as follows:

(i) To protect a defender, in so far as it is fair to a pursuer to do so, from being vexed by stale claims. The defender's records may have been lost or destroyed and employees who have personal knowledge of the facts may have left the company's employment and may be difficult to trace. There comes a time when books should be closed. This argument applies both to companies 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.

(ii) To ensure the efficient operation of the machinery of justice. Claims should, as far as possible, be expeditiously dealt with. Most personal injury 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. Despite this, it is common experience that many pursuers, or rather their advisers, do not initiate proceedings until very close to the last possible date for doing so. The reasons for this are not to be found in the law of limitation, and the resolution of the problem lies beyond the scope of this report. However, it is fair to say that the law of limitation provides the only practical sanction against excessive delay, and that the machinery of justice requires its retention in relation to personal injury claims.

History of the law

1.6 Under the common law, actions of damages for personal injuries were subject to the long negative prescription, which is now 20 years.[2] 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.[3] This period was extended in 1939 to twelve months in England but remained at six months in Scotland.[4] There were also statutory limitation periods of three years for bringing claims against the National Coal Board, the British Transport Commission, and Electricity Boards.[5] The law

[1]Cmnd. 5630, para. 22.

[2]1973 Act, s. 7.

[3]Public Authorities Protection Act 1893.

[4]Limitation Act 1939, s. 21.

[5]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.

at that time was criticised on two grounds. First, the 20-year period was too long in most road accident and employment cases, because the evidence of eye-witnesses (which is particularly important in personal injury cases) becomes progressively unreliable. Secondly, the six-month period designed to protect public authorities was too short.

1.7 After the war the law was examined by two committees which, for the most part, concentrated on English law. 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.[1] 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 power vested in the courts to extend the time up to a maximum of six years.[2] In the event it was the Monckton Committee's recommendation which was preferred. The Law Reform (Limitation of Actions, etc.) Act 1954,[3] 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.[4] "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.[5]

1.8 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.*,[6] was the meaning of the words "the date of the act, neglect or default giving rise to the action" which were used to describe the date from which the triennium was calculated.[7] 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 an act or omission on the part of the defender caused injury to the pursuer.[8] The other problem concerned certain diseases, notably pneumoconiosis, asbestosis, certain radiation diseases and brain tumours. The essential feature of these diseases is that they are slow to reveal their symptoms, and an affected person is often unaware of his condition, sometimes for many years. It was held in a series of cases on both sides of the Border that injury could be sustained by the pursuer irrespective of whether the illness had manifested itself: the fact that the pursuer did not discover, and

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

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

[3]Referred to subsequently as the 1954 Act.

[4]S. 6(1).

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

[6]1960 S.C. 100; 1960 S.C. (H.L.) 92.

[7]In s. 6(1)(*a*).

[8]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, 103).

had no reasonable opportunity to discover, that injury had been sustained until several years had elapsed, made no difference.[1]

1.9 As a result a committee was set up under the chairmanship of Mr. Justice Edmund Davies. In their report[2] 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.[3] 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,[4] 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) "material facts of a decisive character". Section 9 made similar amendments 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 the injured person's date of knowledge).

1.10 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,[5] 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;[6] 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.[7] In England, these questions were referred to the Law Commission, which recommended in substantially the same terms. The recommendations of both Commissions were given effect by the 1971 Act.

1.11 The 1971 Act, however, left in an uncertain state 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 conduct gave rise to a legal obligation to pay damages was a relevant factor.[8]

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[1] *Clark* v. *R. B. Tennent Ltd.* 1962 S.C. 578; *Davie* v. *Scottish Enamelling Co.* 1962 S.C. 582; *Gardner* v. *Alexander Findlay & Co.* 1963 S.L.T. (Notes) 55; *Cartledge & Others* v. *E. Jopling & Sons Ltd.* [1963] A.C. 758.

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

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

[4] Referred to subsequently as the 1963 Act.

[5] In terms of para. 15 of our First Programme: see para. 1.1 above.

[6] Para. 119.

[7] Paras. 123–4.

[8] This became known as the "worthwhile cause of action" test.

The Lord Chancellor's Law Reform Committee in their 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.[1] 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, they also recommended that, *in extremis*, the court 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. They also recommended the abolition of the rule whereby time ran against a person under disability if he was in the custody of a parent.

1.12 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. As we have already observed, however, judicial discretion to dispense with the limitation rules has now been separately introduced into Scots law.[2]

PART II THE LONG NEGATIVE PRESCRIPTION

2.1 In the consultative memorandum we posed two distinct questions in relation to the long negative prescription. The first is whether it should once again become the sole method of controlling stale claims, as it was before 1954.[3] We concluded provisionally that it should not,[4] and there was no dissent from this view on consultation. In our view the main objectives of the law—to protect the defender from being vexed by stale claims, and to ensure the efficient operation of the machinery of justice[5]—suggest that a shorter period is needed. The second question is whether the long negative prescription should apply at all to personal injury claims, and the remainder of this Part is devoted to a consideration of this problem.

2.2 At present two different rules, one of prescription and the other of limitation, apply simultaneously to personal injury claims: the long negative prescription of twenty years, and the shorter limitation of three years. The prescription runs from the date when the obligation to make reparation has become enforceable, and is not affected by absence of knowledge of injury on the part of the injured person.[6] The three-year limitation runs from the date when the cause of action accrued or when the injured person's justifiable ignorance ceased (if later).[7] The combined effect of the two periods of prescription and limitation is that an obligation to make reparation may be

[1]Paras. 53–55 and 69(3).

[2]Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s. 23, which incorporated a new s. 19A into the 1973 Act.

[3]Except for the specific short periods designed to protect public authorities.

[4]Provisional Proposal 3, paras. 2.13 to 2.15.

[5]See para. 1.5 above.

[6]1973 Act, ss. 7 and 11.

[7]See paras. 1.7 and 1.10 above.

extinguished by the long negative prescription before the triennium has run its course.[1]

2.3 While opinion on consultation was generally in favour of retaining the prescription, some reservations about its operation were expressed to us because of a series of Outer House decisions in the early 1960s.[2] In these cases it was held that the prescription had begun to run well before the commencement of the triennium. It is questionable, however, whether these decisions would be followed today. They were made against the background of different statutory provisions. In each case it is evident that the judge was sympathetic towards the pursuer. The 1954 Act had introduced a fixed limitation period of three years which was not susceptible of extension by virtue of the pursuer's lack of knowledge. His right of action was not extinguished, however, if he could establish that it had accrued before the 1954 Act came into force:[3] in that event he benefited from the transitional provisions of the Act and only the prescription applied to his claim. At that time, unlike today, it was to a pursuer's advantage if the prescription had begun to run at a relatively early date. Moreover, under the 1973 Act, in the event of a continuing wrong the prescription will not begin to run until the wrong ceases.[4] Therefore time would not begin to run against a pursuer under the present law so long as he remained in the same employment and continued to work in the same conditions.

2.4 It may also be that some of the factors identified by the judges in the early 1960s as indicating that time had already begun to run would be regarded in a different light by the courts today. In *Davie* v. *Scottish Enamelling Co.* Lord Johnston was

> "satisfied on the medical evidence, and on the pursuer's own evidence that, if an earlier radiological examination had been made, such an examination would have confirmed the existence of the disease, and that it was open to the pursuer before 4th June 1954 to raise an action against the defenders."[5]

In *Gardner* v. *Alexander Findlay & Co.* Lord Wheatley referred to

> "the building up by a continuous process of lung damage resulting in certifiable pneumoconiosis in 1958 throughout the whole of the pursuer's employment with the defenders from 1946 to 1956"[6]

and held that, provided "not insignificant" damage was done between 1946 and 4 June 1954, the prescription was already running by the latter date. While it would be open to the courts to come to a similar conclusion today, in that more than minimal damage had been sustained, it seems unlikely that the courts would arrive at a decision which was manifestly unjust to the pursuer, and it is probable that the law is sufficiently flexible to prevent such a result. There is no reason to suppose that the courts would be any less sympathetic towards a pursuer than they were twenty years ago.

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[1]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*).

[2]*Clark* v. *R. B. Tennent Ltd.* 1962 S.C. 578; *Davie* v. *Scottish Enamelling Co.* 1962 S.C. 582; *Gardner* v. *Alexander Findlay & Co.* 1963 S.L.T. (Notes) 55.

[3]On 4 June 1954.

[4]1973 Act, s. 11(2).

[5]1962 S.C. 582, 588.

[6]1963 S.L.T. (Notes) 55, 56.

2.5 The possibility cannot altogether be excluded, however, that the continued application of the prescription may cause injustice, especially where an injury is initially of a latent character, such as a respiratory disease. At the time of the onset of the disease a person may be quite unaware of his condition, and its true extent and cause may become apparent only after the prescription has run its course. A person who is contracting an industrial disease may cease to work altogether, may be transferred to a different post where he is no longer exposed to dust,[1] or may commence work for a different employer. In all these circumstances the prescription may begin to run against him long before his condition is diagnosed. We know of no personal injury case in Scotland since the passing of the 1954 Act where a defender has successfully pleaded the prescription in such circumstances, but such a case could conceivably arise. We believe this result would be unacceptable if the triennium (which contains principles favourable to the pursuer) had not itself expired.[2] We note also that in these circumstances an action would not be time-barred under English law, which has no equivalent to the long negative prescription. This might lead to forum-shopping.

2.6 We recognise the value of the prescription as a general principle of law, in that it acts as a "longstop" to extinguish stale claims, and we therefore attempted to devise a solution to this problem which would fall short of disapplying the prescription altogether to personal injury claims. One possibility which we examined was to define the date of injury, for the purposes of the prescription, in a manner more favourable to a pursuer.[3] We examined some authorities which might provide models for this kind of definition. In *Cartledge & Others* v. *E. Jopling & Sons Ltd.* Lord Evershed said that 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] In addition, one of the factors in the present English legislation which is relevant for determining whether an injured person had sufficient knowledge is that the injury was significant, and an injury is significant

> "if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment."[7]

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[1]Cf. *McIntyre* v. *Armitage Shanks Ltd.* 1980 S.C. (H.L.) 46; 1980 S.L.T. 112.

[2]We note, too, that the judicial discretion cannot be exercised when the obligation has been extinguished by the prescription: 1973 Act, s. 19A.

[3]The date of injury is in principle the same for the purposes of the commencement of the prescription and of the limitation (ss. 7, 11 and 17). The same applies to the short and long prescriptions under Part I (ss. 6, 7 and 11). The difference in the commencement dates, if any, is justified by lack of knowledge on the part of the injured person or of the creditor in the obligation.

[4][1963] A.C. 758, 774. Cf. *Avinou* v. *Scottish Insulation Co. Ltd.* 1970 S.L.T. 146, 148 and *Wilson* v. *Morrinton Quarries Ltd.* 1979 S.L.T. 82, 86.

[5]At 781; quoted with approval in *Wilson* v. *Morrinton Quarries Ltd.* at p. 86.

[6]See e.g. *Comrie* v. *National Coal Board* 1974 S.L.T. (Notes) 12.

[7]Limitation Act 1980, s. 14(2).

There are a number of objections, however, to evolving a statutory definition of the date of injury along these lines. Such a definition might not achieve its object, in that an injury might in some cases be sufficiently serious to justify instituting proceedings long before it could be discovered. Conversely, even where a person lacked the necessary knowledge at the commencement of the prescription as it is presently defined, he would in the overwhelming majority of cases acquire that knowledge long before the expiry of the prescription. To postpone the commencement of the prescription in all cases would accordingly be difficult to justify. We have therefore concluded that a solution along these lines would represent no improvement to the present law.

2.7 Alternatively it would be possible to retain the present law, whereby the prescription commences at the date of injury, a date which is undefined. This is not, however, a satisfactory solution for the reasons already advanced. It is open to the further objection that the date of injury can seldom be ascertained in those cases, such as industrial diseases, where problems under the present law are most likely to arise. If the commencement of the prescription is inherently uncertain in personal injury cases, an arbitrary or unfair result may be reached on the occasions when the date of commencement has to be determined. We are also conscious of the possibility that, in future, the courts may be faced more frequently with cases where the full effects of a disease do not become apparent for a very long period after the notional date of injury. For these reasons we have concluded that the only practical solution is to disapply the prescription altogether to personal injury claims. Such a course could only be justified, however, if a shorter period of limitation were retained and if the principles governing that limitation adequately balanced the interests of pursuer and defender. In Part I of this report, in stressing the need to protect the defender from being vexed by stale claims, we drew attention to the position of individual (as opposed to corporate) defenders who might not be insured, or might be inadequately insured, against a particular risk.[1] This does not seem to be an important factor in the present context, because the employers of persons who develop industrial diseases are more likely than not to be large companies or public bodies such as nationalised industries.

2.8 We therefore **recommend:**

1. The long negative prescription should no longer apply to personal injury claims.[2]

PART III THE SHORT LIMITATION PERIOD

The date of commencement

3.1 As we have already mentioned by way of introduction, the consensus on consultation was that the general principles of the law relating to the

[1]Para. 1.5.

[2]See draft Bill, Appendix A, Sched. 1, para. 2.

limitation period are mostly sound, and that relatively few alterations are needed to the substance of the law (as opposed to its presentation).[1] One such alteration relates to an injured person's knowledge of the identity of the person liable to pay damages, a point on which we recommend below a specific amendment to the law.[2] There was, for example, universal approval for the propositions that time should not begin to run in any circumstances before injury has been sustained;[3] and that there should not be a fixed period running from the date of injury, irrespective of the injured person's state of knowledge.[4] These propositions represent the present law, and we do not recommend any change.

3.2 The main principle of the law was not disputed on consultation—that there should be a period of limitation commencing with the date of injury. There was also general support for the retention of the principle that there should be an extension of this period for as long as the injured person remained in a state of justifiable ignorance. These two principles, of course, in essence represent the present law not only in the context of personal injury claims but also of most other obligations arising from contract and delict. We therefore **recommend:**

2. The short limitation period should run from the date of injury, or, if later, the date of the injured person's knowledge.[5]

We consider these points in turn.

The date of injury

3.3 The present Scottish legislation does not attempt to define the date when injury is sustained. Section 17 states simply that time runs from the date when the injuries were sustained as a result of any act, neglect or default.[6] The problem of determining when injury is sustained is less straightforward in actions for personal injuries than in most other actions. The cause and the full effects of the injury may not become apparent for a long time. Progressive industrial diseases, such as pneumoconiosis and asbestosis, figure prominently in the cases. As Lord Wheatley observed in *Clark* v. *R. B. Tennent Ltd.*,[7]

> "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."[8]

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[1]Para. 1.4.

[2]Paras. 3.11–12.

[3]Provisional Proposal 4.

[4]Provisional Proposal 6.

[5]See draft Bill, Appendix A, cl. 2, ss. 17(2) and 18(2).

[6]Cf. s. 11(1), in relation both to the long and the short negative prescriptions: an obligation is regarded as enforceable on the date when loss, injury or damage resulted from an act, neglect or default.

[7]1962 S.C. 578, 580.

[8]See also in this connection *Davie* v. *Scottish Enamelling Co.* 1962 S.C. 582; *Gardner* v. *Alexander Findlay & Co.* 1963 S.L.T. (Notes) 55; *Brown's Exix.* v. *North British Steel Foundry Ltd.* 1968 S.L.T. 121. In all these cases the issue was whether a disease had been contracted before the 1954 Act came into force. Cf. *Cartledge & Others* v. *E. Jopling & Sons Ltd.* [1962] 1 Q.B. 189 (Court of Appeal); [1963] A.C. 758 (House of Lords).

An extension of time would not be allowed simply because the injuries turned out to be more serious than at first suspected: an extension would be permitted, however, if a trifling knock on the head was the eventual cause of a tumour.[1] We do not consider that any useful purpose would be served by attempting to define the date of injury. We have already adverted[2] to a number of judicial dicta which may be thought to provide adequate guidance: for example, the date is when "damage—that is, real damage as distinct from purely minimal damage—is suffered";[3] or 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".[4] It seems to us that any questions as to the degree or development of injury are best treated as aspects of knowledge, and we deal with these questions below.[5]

3.4 Where the act, neglect or default causing the injuries is of a continuing nature, the period runs only from the date on which the act, neglect or default ceased.[6] A provision to this effect has existed since 1954,[7] and there is a similar provision in Part I of the 1973 Act.[8] There was no opposition to this principle on consultation, and we are not aware that it has caused any difficulties in practice. Nevertheless there are two aspects which call for examination. The first is that the principle will prevent time from running even where, by applying the other rules of the triennium, a person is sufficiently aware of his injuries. 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 then ceased. While a rule to this effect has logical attractions, it would in our view unduly complicate the law; it would give rise to a distinction between claims based on personal injuries and other claims which would be difficult to justify;[9] and it might in some cases cut off part only of a claim, as when an individual who knew that an act or omission of his employer had caused him some injury continued to work in these conditions, thereby sustaining further injury. It is a more practical rule, in our view, that time should not begin to run in any circumstances until the act or omission complained of has ceased. This will often be the date when the employee ceased to work in the injurious conditions, a date which is easier to ascertain than the date of injury or the date of knowledge. The second aspect is that, on a strict construction of the present rule, time may not begin to run even where the act, neglect or default has ceased to be a cause of the injuries. This is a possible interpretation of the present statutory language, which refers to the "date on which the act, neglect or default ceased" without further

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[1]See *Goodchild* v. *Greatness Timber Co. Ltd.* [1968] 2 Q.B. 372 per Lord Denning M.R. at 379. Cf. *Knipe* v. *British Railways Board* [1972] 1 Q.B. 361, where what was at first thought to be a strained knee proved, ten years later, to be a ruptured tendon. See also *Rieley* v. *Kingslaw Riding School* 1975 S.L.T. 61 (Court of Seven Judges).

[2]Para. 2.6.

[3]*Cartledge & Others* v. *E. Jopling & Sons Ltd.* [1963] A.C. 758, 774.

[4]*Ibid.*, p. 781.

[5]Paras. 3.6 *et seq.*

[6]1973 Act, s. 17(1)(*a*); cf. s. 11(2).

[7]1954 Act, s. 6(1)(*a*).

[8]S. 11(2).

[9]I.e. s. 11(2).

qualification.[1] Thus if an employer is in continuous breach of a section of the Factories Acts, time may not begin to run against an injured employee even if that employee is no longer affected by the breach (for example, he may have been transferred to another part of the factory). We do not suppose that this was the intention of the legislature, and we think it unlikely that the courts would be disposed to interpret the statute in this way. We have not been able to devise a formula which altogether removes this doubt, but it might be marginally more satisfactory if the reference to an act or omission were qualified by words such as "to which the injuries were attributable".[2]

3.5 We therefore **recommend:**

3. The date of injury should be the date on which an injured person sustained injuries attributable to an act or omission;[3] or, where the act or omission to which the injuries were attributable was a continuing one, that date or the date on which the act or omission ceased, whichever is the later.[4]

The date of knowledge

3.6 An injured person's knowledge may be actual or constructive. The main problem is whether the test of constructive knowledge should be subjective or objective: should the standard be that of the particular pursuer or of the hypothetical reasonable man, or partly one and partly the other?[5] Part I of the 1973 Act adopts the standard of the hypothetical reasonable man: the obligation to which prescription applies is

> "to make reparation for loss, injury or damage caused by an act, neglect or default",[6]

and time does not begin to run while the pursuer

> "was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred."[7]

Section 11 does not say that the pursuer needs to know the cause of loss, injury or damage, or who was responsible for it. In our report we justified this approach as follows:[8]

> "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,

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[1]S. 17(1)(*a*).

[2]We considered, but rejected, an expanded formula which included the words "the date on which the act or omission ceased to be a continuing source of the injuries". This might enable a defender to lead evidence that, say, exposure to dust for five years had been the cause of a particular disease and that subsequent exposure was irrelevant.

[3]We regard "act or omission" as the preferable term, as it excludes any suggestion of fault or culpability which might conceivably be included in the term "act, neglect or default". "Act, neglect or default" appears in the principal section in Part II (s. 17), but "act or omission" is used in s. 22. "Act, neglect or default" appears in the corresponding provision in Part I (s. 11). "Act or omission" is the expression used in the Damages (Scotland) Act 1976 (s. 1).

[4]See draft Bill, Appendix A, cl. 2, s. 17(2)(*a*).

[5]See the Twentieth Report of the Law Reform Committee, para. 59.

[6]1973 Act, s. 11(1).

[7]S. 11(3).

[8]Para. 97.

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."

The present legislation relating to personal injuries adopts a test which appears to be partly subjective and partly objective. This arises because one of the tests is whether a person

". . . had taken all such action (if any) as it was reasonable *for him* to have taken . . ."

for the purposes of ascertaining a relevant fact and of obtaining appropriate advice.[1]

3.7 In the consultative memorandum we invited comment whether the legislation should refer specifically to the seeking of advice.[2] There was general approval for the view that it should not. One judge considered that references to seeking "appropriate advice" were unnecessary and served only to complicate matters, and that the test of constructive knowledge might reasonably be expected to be developed judicially. We agree with this view. Moreover, the Court of Session judges urged us to adopt a test which allowed the court

". . . a modicum of discretion directly related to the pursuer's state of knowledge at a critical time"

and suggested that one way to achieve this result would be to refer in legislation, not to the date on which the injured person could reasonably have become aware of the relevant facts: but to the date on which, in the opinion of the court, it was reasonable *for him* in all the circumstances to have become so aware—in other words, a formula of the kind which already appears in the statute.[3] A formula along these lines would seem to afford the courts the desired degree of flexibility, and would have the further merit of not attempting to regulate the test of knowledge in too much detail. It would enable the court to take account of the differing circumstances of individuals and the differing nature of their injuries. It would enable the court, where appropriate, to attribute to an injured person facts in the possession of an adviser, such as a solicitor or a trade union official. Accordingly we endorse the judges' suggestion, and **recommend:**

4. The date of the injured person's knowledge should be the date on which he became aware, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become aware, of the relevant facts. The legislation should not contain any references to seeking "appropriate advice".[4]

3.8 The present legislation refers to the knowledge of the "pursuer".[5] In the normal case this will be the injured person himself. However, the actual pursuer may be a curator *ad litem* or judicial factor or, after the injured person's death, an executor. The pursuer may also have assigned his claim.[6]

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[1]S. 22(4)(*b*) and (*c*) (emphasis added).
[2]Provisional Proposal 14.
[3]S. 22(4)(*b*) and (*c*).
[4]See draft Bill, Appendix A, cl. 2, s. 17(2)(*b*).
[5]S. 18(3).
[6]Such assignation is competent in respect of both patrimonial loss and solatium: *Cole-Hamilton v. Boyd* 1963 S.C. (H.L.) 1.

In our view, where the pursuer is a curator *ad litem*, judicial factor or executor, it is the knowledge of the pursuer, rather than that of the injured person, which is relevant.[1] It will be for the court to determine whether, and to what extent, facts known to the injured person himself can be attributed to the actual pursuer. We have reached a different conclusion, however, in relation to an assignee. It seems wrong that the limitation period should be extended, to the detriment of the defender, simply because the injured person, of his own volition, has assigned his claim to another person. We have therefore included a specific provision in the draft Bill that a reference to the pursuer is to be construed as a reference to the assignor.[2]

The relevant facts

Injury

3.9 The first relevant fact is that there must be knowledge of injury. The present legislation identifies this factor in a somewhat roundabout manner, by referring to (a) the fact that personal injuries resulted from a wrongful act or omission; and (b) the nature or extent of the personal injuries so resulting.[3] The first relevant fact specified in the current English legislation is that the injury in question was significant; and an injury is significant

> "if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment."[4]

We have already alluded to the problem of the degree or development of injury when discussing whether a definition of injury should be incorporated in the legislation.[5] We consider that a formula such as appears in the English legislation would provide a clear indication to the courts that the injury must have achieved a reasonably advanced stage before time begins to run; and we therefore propose that a similar provision should be included in legislation applying to Scotland.[6]

Causation

3.10 The second relevant fact is that there must be knowledge of a link between the injuries which have been sustained and another person's role in causing those injuries. The present law on prescription and limitation describes this causal link in a number of ways, e.g. by referring to injuries sustained as a result of, or caused by, an act, neglect or default[7] or resulting from a "wrongful act or omission".[8] There is a danger that phrases such as these will be taken to connote elements of fault and liability as well as of causation,

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[1]The present English legislation refers to the date of the personal representative's knowledge, where the action survives for the benefit of the deceased's estate by virtue of s. 1 of the Law Reform (Miscellaneous Provisions) Act 1934—Limitation Act 1980, s. 11(5).

[2]See draft Bill, Appendix A, cl. 3, s. 22(2). Exactly the same consideration applies to the assignation of a claim arising on death.

[3]1973 Act, s. 22(2).

[4]Limitation Act 1980, s. 14(2).

[5]See para. 3.3 above.

[6]This conclusion forms part of a composite recommendation on the relevant facts: see para. 3.15 below.

[7]1973 Act, ss. 11(1) and 17(1)(*a*).

[8]*Ibid.*, s. 22(2).

which we consider would be undesirable.[1] In the present context we are concerned solely with a causal link, and in our view the legislation should be clarified. We suggest that this should be done in two ways: first, by making a simple reference to the link between the injury and an act or omission; secondly, by incorporating a provision, in similar terms to the present English legislation, that knowledge that any act or omission was or was not, as a matter of law, actionable is irrelevant.[2]

The identity of a person liable

3.11 The next question is whether knowledge of the identity of a person liable should be a relevant factor. It is in England,[3] but does not appear to be included among the relevant factors in the Scottish legislation.[4] The cases show that the question of identity of an injured person's employer can in fact create problems for the pursuer or his adviser. The problem is at its most acute where the pursuer is employed by one of a number of linked companies.[5]

3.12 There was no opposition to the proposal in the consultative memorandum that lack of knowledge of the identity of a person liable should be a relevant fact. There can be little doubt where the sympathies of the judges lie on those occasions where defenders or their insurers do not reveal this information. It should not, in our view, be necessary in future for judges to find ingenious ways round this defect in the law, for example by holding that "information, suspicion or belief falling short of knowledge is not transformed into knowledge if it happens to be correct",[6] or to resort to the exercise of discretion in order to ensure that injustice does not result. In our view legislation should specify the person alleged to be the wrongdoer against whom the action has been brought. This will mean the person from whom the injured person will endeavour to recover damages in a particular action, for example his own employer or the employer of a person whose fault led directly to an accident. It will not mean a person actually at fault, such as an employee, if that person has not been called as a defender in the action. If, however, it is proved subsequently, for example, that the person at fault was not acting in the scope of his employment the expression will also include that person if an action is subsequently raised against him.[7]

Fault or liability

3.13 In the consultative memorandum we discussed in some detail the train of authority in both England and Scotland as to whether knowledge of the

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[1]See para. 3.14 below.

[2]See draft Bill, Appendix A, cl. 3, s. 22(3). Cf. Limitation Act 1980, s. 14(1). This provision, both in our draft Bill and the English legislation, is applied also to the next relevant fact. See paras. 3.11–12; and cl. 2, ss. 17(2)(*b*) and 18(2)(*b*).

[3]Limitation Act 1980, s. 14(1)(*c*) and (*d*).

[4]See *Love* v. *Haran Sealant Services Ltd.* 1979 S.C. 279, 1979 S.L.T. 89, and especially Lord Maxwell's analysis of s. 22(2) of the 1973 Act.

[5]See *Kerr* v. *J. A. Stewart (Plant) Ltd.* 1976 S.C. 120; 1975 S.L.T. 138 (Outer House, Lord Keith) and 1976 S.L.T. 255 (First Division); *Comer* v. *James Scott & Co. (Electrical Engineers) Ltd.* 1978 S.L.T. 235; *Love* v. *Haran Sealant Services Ltd., supra.* Cf. *Boslem* v. *Paterson* 1982 S.L.T. 216.

[6]*Comer* at 240.

[7]Contrast the English legislation, which specifies both the defendant *and* a person actually at fault: Limitation Act 1980, s. 14(1)(*c*) and (*d*).

wrongdoer's fault or legal liability should postpone the running of time. Prior to 1975 there was a line of authority in the English Court of Appeal that such knowledge was a relevant factor.[1] The approach of the Court of Appeal was discouraged (with limited success) by the House of Lords in *Central Asbestos* v. *Dodd*.[2] The 1975 Act put the matter beyond doubt in England. Only ignorance 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"

is to prevent the running of time.[3] Moreover, knowledge that the act or omission involved, as a matter of law, negligence, nuisance or breach of duty is specifically stated to be irrelevant.[4] In Scotland there were conflicting decisions on this point in the Outer House,[5] which were resolved by the decision of the House of Lords in *McIntyre* v. *Armitage Shanks Ltd.*:[6] ignorance of legal liability, actual or constructive, is not a relevant factor.

3.14 There was some support on consultation for making ignorance of fault or liability a relevant fact. If an injured person does not seek advice of any kind, he may not satisfy the test required of him by the recommendation set out at paragraph 3.7. 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 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. Nevertheless, to make ignorance of fault or liability a relevant fact in all cases would in our view go too far. It would also create undue uncertainty in the law and would increase the incidence of stale claims. It was the view of most commentators that such a change in the law would be undesirable. We do not, therefore, recommend any change in the present law, though we consider that the legislation should contain a specific provision on this point.[7]

3.15 We therefore **recommend:**

5. For the purposes of establishing the date of the injured person's knowledge, the relevant facts are:
   (i) that the injuries in question were sufficiently serious to justify his bringing an action of damages on the assumption that the person against whom the action was brought did not dispute liability and was able to satisfy a decree;
   (ii) that the injuries were attributable in whole or in part to an act or omission; and

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[1] *Pickles* v. *National Coal Board* [1968] 1 W.L.R. 997.

[2] [1973] A.C. 518.

[3] The words "which . . . constitute negligence", etc., are purely adjectival, that is to say they are intended to describe and do not add to the words "act or omission".

[4] S. 2A(6) of the Limitation Act 1939, introduced by s. 1. See now Limitation Act 1980, s. 14(1).

[5] Contrast, e.g., *Avinou* v. *Scottish Insulation Co.* 1970 S.C. 128, *Hunter* v. *Glasgow Corporation* 1971 S.C. 220 and *Provan* v. *Glynwed Ltd.* 1975 S.L.T. 192, with *Wilson* v. *Morrinton Quarries Ltd.* 1979 S.L.T. 82 and *Armstrong* v. *Armitage Shanks Ltd.* (unreported, 3 March 1979).

[6] 1980 S.C. (H.L.) 46; 1980 S.L.T. 112.

[7] See draft Bill, Appendix A, cl. 3, s. 22(3).

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

However, knowledge that any act or omission was or was not, as a matter of law, actionable should be irrelevant.[1]

Claims arising on death

3.16 At present, a claimant in a fatal accident, whether an executor or a dependent relative, has three years from the date of death, or from the date of his actual or imputed knowledge, whichever is the later, in which to commence proceedings.[2]

3.17 It has long been recognised that the relatives' 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 a relative's right.[3] A relative's right arises only on the injured person's death.[4]

3.18 Thus if the deceased's own rights were time-barred at the date of his death, the rights of his relatives are also time-barred.[5] It is arguable that this rule should apply only to executors, standing the separate rights which relatives acquire on the injured person's death. We first consulted on this question in 1972, when we were reviewing the law on damages for injuries causing death.[6] At that time the suggestion did not attract commentators, because it would open the way to the prosecution of stale claims. We concluded in our subsequent report on damages[7] 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 his relatives after his death. These proposals were implemented in the Damages (Scotland) Act 1976.[8] The tenor of opinion arising out of the more recent consultative memorandum was to the same effect; and we therefore **recommend:**

6. Where a person has not brought an action of damages for personal injuries within the limitation period, and subsequently dies in consequence of those injuries, his executors and relatives should not be entitled to bring an action of damages in respect of the death.[9]

3.19 The next question is whether, assuming that the injured person's own rights were not time-barred at the date of his death, separate time-limits

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[1]See draft Bill, Appendix A, cl. 2, s. 17(2)(*b*), and cl. 3, s. 22(3).

[2]See para. 1.10.

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

[4]*Robertson* v. *Turnbull* 1982 S.L.T. 96 (House of Lords).

[5]Subject to the exercise of judicial discretion under s. 19A of the 1973 Act.

[6]Consultative Memorandum No. 17, April 1972.

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

[8]S. 1(2).

[9]Subject to the exercise of judicial discretion under s. 19A of the 1973 Act. See draft Bill, Appendix A, cl. 2, s. 18(4).

should apply to the rights of his relatives. We noted in Part I one criticism of the 1963 Act, that it did not cater for circumstances where the relatives were ignorant of the relevant facts at the time of the death. The 1971 Act accordingly provided that a relative should have three years from the date of the injured person's death, or from his own date of knowledge, whichever was the later, in which to raise an action. The Act applied the same rule to both Scotland and England.[8]

3.20 There was no support on consultation for a return to the previous rule, which permitted time to run against a relative in certain circumstances from a date earlier than the date of death.[2] Quite apart from considerations of fairness to the relatives, it would not seem practicable to select the date of injury or the date of the injured person's knowledge, either of which (and especially the latter) might be extremely difficult to ascertain. Some commentators expressed concern, however, that under the present law very long periods may potentially apply to claims arising on death. Even in a straightforward case, where the date of the injured person's knowledge is very close to, or contemporaneous with, the date of injury, a relative might have up to six years from that date in which to raise an action. There was accordingly some support on consultation for a fixed period running against relatives from the injured person's date of death. It was said that a fixed period of limitation running from the date of death would conduce to simplicity in the law.

3.21 The majority view was, however, that this solution might occasionally result in hardship to relatives—this was, of course, the reason why the present rule was introduced in 1971. Where, for example, a man has died from an industrial disease without the disease having been properly diagnosed or certified by the appropriate board, his widow and children may lack the means of ascertaining the cause of his death and may remain unaware of certain essential facts for a long period. As we observed in our 1970 report:

> "It is difficult to justify a rule of law which in comparable circumstances allows a potentially longer period for an injured person who has survived to raise an action than it accords to the representatives of an injured person who has died."[3]

Moreover, a rule of this kind would ignore the independent nature of the relatives' claim.[4] It is true that the judicial discretion can be exercised in favour of a relative as well as an injured person; but in our view, if a category of claims can be identified in which the relevant facts may not be known at the date of death, it is desirable that these claims should be preserved by principles of the substantive law and should not be vulnerable to the exercise of judicial discretion. In any event, the clear inference from the advice which we have received from practitioners, and from the reported cases, is that time will almost always begin to run against the relatives at the date of death. We therefore adhere to the provisional proposal and **recommend:**

7. Where a person has died in consequence of personal injuries sustained by him, time should run against a relative of his from the date of death, or, if later, from the date of the relative's knowledge.[5]

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[1]See para. 1.10.

[2]Where the injured person acquired the necessary knowledge less than a year before his death.

[3]Para. 121.

[4]See para. 3.17 above.

[5]The draft Bill in Appendix A refers to the knowledge of the "pursuer in the action" (cl. 2, s. 18(2)(*b*)); see para. 3.8 above.

3.22 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.* There is no special rule applying to an executor's claim if the obligation is one to which Part I of the 1973 Act applies—in other words, the executor is bound by the period of the short negative prescription applying to the deceased himself, and if, say, a person dies four years after an obligation becomes enforceable by him, his executor has at most one year in which to raise an action. Moreover, under the Damages (Scotland) Act 1976, the executor's claim is now restricted to patrimonial loss up to the date of death,[1] and this will usually form a small part of the total claim by executors and relatives. There is, therefore, a case for following the rule in Part I or possibly for imposing a fixed period of time to run against an executor from the date of death.

3.23 However, for purely practical reasons, we proposed in the consultative memorandum that the same rules should apply to claims by relatives and executors. Section 5 of the Damages (Scotland) Act 1976 aims at 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,[2] whether executors or relatives, 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.[3] More recently we have recommended the repeal of section 5, for reasons not directly connected with the subjectmatter of this report, and its replacement by rules of court.[4] If different rules were to apply to claims by executors and relatives, an executor's claim might be time-barred before that of the relatives. In terms of section 5, he might be required to bring the relatives 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. They might, for example, have a 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 abandon the principle of section 5, but the consequence—that a defender might be exposed to more than one action arising out of the same incident—strikes us as undesirable. The majority of commentators agreed with our provisional proposal, and we accordingly **recommend:**

8. The principle of Recommendation 7 should apply also to claims by an executor where death has resulted from the injuries.[5]

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[1]S. 2(3).
[2]S. 5(6).
[3]S. 5(5).
[4]S. 5 has now been repealed (prospectively) by the Administration of Justice Act 1982, ss. 75 and 76(4).
[5]See draft Bill, Appendix A, cl. 2, s. 18(2)(*b*). As to whether knowledge should be attributed to an injured person or to his executor, see para. 3.8 above. For the case where death is not caused by the injuries, see para. 3.28.

3.24 The list of relevant facts, for the purpose of determining knowledge, is not precisely the same in the context of claims arising on death. When we were discussing the knowledge of the injured person himself, we identified three relevant facts—that the injuries were sufficiently serious to justify bringing an action; that they were attributable in whole or in part to an act or omission; and the identity of a person liable.[1] The first of these facts is not relevant to a relative's claim. Where death has supervened there is no need to refer to the injuries or to the degree of their severity. The first important element here is knowledge that the injuries were attributable in whole or in part to an act or omission. Ignorance of the injured person's death is not by itself a relevant fact under the present law, and we do not advocate that it should be.[2] The other important element is knowledge of the identity of a person liable.

3.25 We therefore **recommend:**

9. For the purposes of determining the knowledge of an executor or a relative, the relevant facts are:
   (i) that the injuries of the deceased were attributable in whole or in part to an act or omission; and
   (ii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part, or the employer or principal of such a person.[3]

3.26 It may happen that some claimants (especially the closest relatives) have the necessary knowledge at the date of death, and others do not. It would be unfair to attribute knowledge, at the date of death, to those claimants who did not then possess it. In practice the procedure designed to channel all claims into a single action ought to solve this problem. Most of those who have a genuine financial interest in the proceedings and who are unaware of the relevant facts will become aware of their rights after an action has been commenced by the other claimants. In exceptional circumstances a claimant's right to raise a separate action will be preserved.[4]

3.27 There was one further point arising out of section 5 of the 1976 Act to which we drew attention on consultation. It may happen that some or all of the potential claimants—whether executors or relatives—are already time-barred when an action is raised by another claimant. We took the view that the section 5 procedure should not serve to resuscitate rights of action which were already time-barred, and this view was shared on consultation. It has been argued in the Outer House that section 5(2) has the effect of resuscitating a right but this argument has consistently been rejected.[5] In any event this particular argument will no longer be tenable when the repeal of section 5 is brought into effect.

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[1]See Recommendation 5, para. 3.15.

[2]Though it would not make much practical difference if the legislation referred to knowledge that the death was so attributable. We refer to "injuries" in the draft Bill mainly in order to preserve consistency in terminology.

[3]See draft Bill, Appendix A, cl. 2, s.18(2)(*b*).

[4]See para. 3.23.

[5]*McArthur* v. *Raynesway Plant Ltd.* 1980 S.L.T. 74; *Marshall* v. *Black* 1981 S.L.T. 228.

3.28 Finally, we consider the case where an injured person dies from a cause unconnected with the delictual act which caused his injuries. In this case there is no relatives' claim, nor, in terms of section 2(3)(*a*) of the 1976 Act, can the executors maintain a claim by way of solatium. In the consultative memorandum we rejected the possibility that the executors should be given a fresh period in which to sue, calculated from the date of death. We concluded that, as the special circumstances of death caused by the delictual act of another do not exist, the executor's claim should be treated in the same way as a claim by an executor in respect of any other contractual or delictual obligation.[1] This view was shared on consultation, and we therefore make no recommendation for any change in the law.[2]

The length of the limitation period

3.29 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[3]—three years was selected in England in 1954 as a compromise between 12 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. Three years is now the well-established period in both England and Scotland. In the consultative memorandum we invited views whether the period should remain at three years or whether, for the sake of uniformity throughout our own law, a period of five years should now be introduced.

3.30 On consultation views were almost equally divided. Those opposed to change commented that, as actions are very seldom put into court until the last possible moment, the only effect of selecting a five-year period would be to delay the raising of actions for a further two years. It is difficult to disagree with this contention. There are already a number of factors which lead pursuers (or rather their advisers) to delay for as long as possible before commencing proceedings. There will always be a certain period of delay while a pursuer may seek appropriate advice, the circumstances of his accident can be properly investigated, a claim made against the defender, and so forth. It is generally regarded as being in the interest of an injured person to achieve, wherever possible, a negotiated settlement, and thus to avoid the need for litigation, with its attendant stress and potential expense. A defender, or to be more precise his insurer, will be fully aware of this, and will often seek to prolong negotiations throughout the whole limitation period. In consequence many solicitors, especially Court of Session practitioners in Edinburgh, do not receive instructions to raise proceedings from other solicitors or from trade unions until the last possible moment.

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[1]Under Part I of the 1973 Act.

[2]For these reasons an executor's claim, where there is no causal connexion between the injuries and the death, is regulated by s. 17 contained in cl. 2 of the draft Bill, and not by s. 18 (which concerns actions where death has resulted from personal injuries).

[3]See paras. 1.6 *et seq.*

3.31 The main reason advanced for extending the limitation period is that there are a number of cases in which the present three-year period may be too short—notably in orthopaedic cases where the future development of the injury may be difficult to predict. If the long-term effects of an injury are uncertain, or may become more severe, it will not usually be in a pursuer's interest to have the question of damages resolved too soon. It may be, however, that the most satisfactory solution in cases of this type is for the pursuer to raise an action and then to move the court for a sist pending a firmer prognosis of the injuries. There is also no reason in principle why the issue of liability cannot, in suitable cases, be disposed of before the issue of quantum. This is already competent under Rules of Court in the Court of Session,[1] and we note that the Kincraig Committee made certain proposals on this point.[2] We doubt whether a general extension of the period could be justified in order to take account of the problems which may arise in a minority of cases: this would simply lead to additional delay in all actions. Three years is quite long enough in the case of most injuries, especially as the period may in appropriate circumstances be calculated from the date of the injured person's knowledge rather than from the date of the accident. A general extension, moreover, would be hard to justify so long as the courts have a discretion to dispense altogether with the limitation period. We therefore **recommend:**

10. The length of the short limitation period, in relation to personal injury claims, should remain at three years.

3.32 We did, however, give careful consideration to a suggestion made to us by one experienced practitioner, that there should be a statutory procedure enabling the pursuer to serve on the defender a formal notice of intention to raise an action. This notice would have to be served within the triennium, but would extend the time available to the pursuer for raising an action. This procedure bears some similarities to the English system, whereby a writ has to be served within the triennium, but a detailed case, in the form of a statement of claim, does not have to be prepared until a later date.[3] It might be argued in favour of such a procedure that it would provide a mechanism for the early resolution of certain claims: it would thus prevent unnecessary or premature litigation, and would save the expense of preparing and serving a summons. A defender would realise that, if further negotiations were to fail, the claim would be pursued in the courts. The procedure would be valuable in the type of case mentioned above, for example where the pursuer had sustained orthopaedic injuries, and especially where a number of separate and perhaps small claims arising out of the same incident are being negotiated together. As a suggestion of this nature had not been canvassed in the consultative memorandum, we considered that it would be appropriate to

[1]Rule of Court 108. It is for consideration whether a rule of this kind might usefully be extended to the sheriff courts.

[2]Report of the Committee on Procedure in the Court of Session in Personal Injuries Litigation: consultative document, April 1979.

[3]There are two ways in which the extended period might be calculated: either the pursuer might have an additional period such as one year from the date of the notice in which to raise an action; or the effect of the notice might be to extend the original limitation period from three to four years. In practice, assuming the notice was served very late in the triennium, there would be very little difference.

seek further advice from the judges, the Faculty of Advocates and the Law Society of Scotland.

3.33 In the event the judges and the professional bodies were unanimous in rejecting the proposal. The main objection was that already described[1]—a four-year limitation period would rapidly become the norm. It would become the standard practice for solicitors to serve a notice, and indeed it is possible that a solicitor who failed to take advantage of the statutory procedure might, in certain circumstances, be exposed to a claim for professional negligence. It was unlikely that claims would be resolved more swiftly, and indeed there was a danger that settlements would be further delayed. There might also be practical difficulties: for example, if no statutory notice were served, or a notice was served on the wrong defender, would the courts be more or less inclined to exercise their discretion? Moreover, we believe that the disadvantages of commencing litigation can be overstated. In the sheriff courts a very simple writ will suffice.[2] In the Court of Session a summons need not be overelaborate.

3.34 We are impressed by these objections and do not therefore make any recommendation in terms of the proposal made to us. Indeed, the only circumstances in which such a procedure would appear to represent an improvement in the present law would be in the comparatively rare case where a large number of claims are presented arising out of a single incident. We think that this benefit would be outweighed by what would amount to a general extension of the limitation period to four years.

Legal disability

3.35 Under the present law[3] 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.[4] 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.

3.36 Under Part I of the 1973 Act,[5] in the computation of the short negative prescription, 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;[6] if the creditor was mentally ill, time would not begin to run against him until his incapacity ceased:[7] if the

[1]See para. 3.30.

[2]Sheriff Courts (Scotland) Act 1907, Sched. 1; see *British Railways Board* v. *Strathclyde Regional Council* 1982 S.L.T. 55, especially per L.J.-C. Wheatley at 58.

[3]1973 Act, s. 17(2).

[4]A parent 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 adopter.

[5]S. 6.

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

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

creditor became mentally ill during the prescriptive period, the period would[1] be suspended for as long as he was mentally ill.[2]

3.37 There are two broad courses which the law might adopt. The first, in consonance with Part I of the Act, is to disregard legal disability in the computation of the short limitation period in all cases. The second is to disregard it only where the claimant's legal disability so requires. Thus if a parent is attending to a child's claim, or a curator is representing an adult incapax, there is a case for saying that time should be running against the claimant. The second course, it might be thought, is the present policy of the law in relation to personal injury claims, but on closer inspection the picture appears to be somewhat different. By no means all of those acting on behalf of an incapax are included within the definition of "parent". The definition includes step-parents and grandparents, but excludes other close relatives and guardians. It excludes a local authority which has assumed parental responsibilities over a child. It excludes the curator of an adult incapax. It might, therefore, be more logical to widen the category to include all those who have responsibility for the affairs of an incapax.

3.38 To maintain or extend the "custody of a parent" rule would, however, be open to objections of a different kind. The rule might discriminate against a child whose parent or guardian has a contrary interest, for example the person whose fault led to a motor accident which caused the child's injuries. It might discriminate against a child whose parent is himself under a disability either at the time of the accident or at some time during the triennium, or who dies subsequently during the triennium. It might discriminate against any incapax whose affairs are not being properly looked after. In the consultative memorandum we provisionally advocated the extension of the principles of Part I to personal injury claims, a view which was unanimously endorsed on consultation. The Lord Chancellor's Law Reform Committee have also recommended the abolition of the rule,[3] and their recommendation was given effect in the 1975 Act.[4] There is much to be said for a simple rule which prevents time running against an incapax in all cases. In practice, if an adult is incapax and a curator is appointed, there is unlikely to be any serious delay in prosecuting the claim. Of the two possible courses which the law might adopt, therefore, we prefer the first.

3.39 The abolition of the "custody of a parent" rule without qualification would have implications not only where the incapax is the injured person, but also where he is a relative of a person who dies from his injuries. It may be thought strange that different time-limits should apply, say, to claims by a widow and her children: but we have earlier stressed the independent nature of a relative's claim,[5] and a child's claim is in no way parasitic on that of another relative, such as his mother. We do not consider that there will be problems in practice. A child's claim will form only one element—and usually a small one—of the total claim presented by the relatives, and there would

[1]Subject again to the long negative prescription.

[2]The period would not begin to run again in full after he ceased to be incapax—only the unexpired portion would remain.

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

[4]S. 2. See now Limitation Act 1980, s. 28.

[5]See para. 3.17 above.

be no question of the same rule applying to other claimants, such as a widow. In the great majority of cases all the claims would be litigated in the same action.

3.40 In one way, however, we recommend that the rules on legal disability should be narrower than under the present law. Section 17(2) applies these rules to any person to whom a right of action has accrued—a test which is sufficient to include executors and assignees of an injured person, and assignees of a relative. As regards executors the rule is inconsistent with the provision in Part I, which suspends prescription during any period when the *original* creditor was under legal disability, and only while he is the creditor.[1] We think this is the preferable rule. It would be difficult to justify the suspension of the limitation period, to the prejudice of the defender, simply because the claim had been assigned by the injured person to an incapax. In the case of an executor it would be undesirable if time was suspended on account of the incapacity of only one of several executors. Where the sole executor is incapax the Trusts (Scotland) Act 1921 contains a procedure for replacing him, and the incapax will only cease to be an executor on the appointment of a new executor.[2]

3.41 If the approach of Part I of the 1973 Act were adopted, supervening disability would suspend the running of time, contrary to the present rule. The Law Reform Committee commented:

> "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."[3]

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. 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 concern 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. In addition 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 problem does not require a special rule for supervening disability.

3.42 We therefore **recommend:**

11. The principles relating to legal disability contained in Part I of the Prescription and Limitation (Scotland) Act 1973 should be extended to actions for personal injury, with the result that time would not run

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[1] S. 6(4)(*b*). Cf. the English rule (Limitation Act 1980, s. 28(2)), whereby the limitation period is not extended by virtue of a claimant's disability if the right of action first accrued to a person who is not under a disability. Moreover, by virtue of s. 28(3) no extension is allowed by English law if the executor of a person under a disability is himself under a disability.

[2] S. 22.

[3] Para. 92.

against a person, such as a child, for as long as he was under legal disability. This principle should also apply to supervening disability.[1]

Extension and interruption

3.43 In our 1970 report[2] 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 are: 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.[3]

3.44 There is no analogue to these recommendations in Part II of the Act, apart from section 17(2) which relates to legal disability.[4] In all other cases, an *action*[5] must be raised within the triennium. In the consultative memorandum[6] we suggested that the other rules on extension or interruption of prescription contained in Part I of the 1973 Act should be applied to actions for personal injuries. The proposal in the consultative memorandum was, however, made on the assumption that the courts would not have a discretion to override the period and that, accordingly, it would be possible to apply rules of prescription, rather than of limitation, to personal injury claims. For reasons which we set out below,[7] we have concluded that a system of prescription is incompatible with the availability of judicial discretion, and that limitation should continue to apply in this area. The question, therefore, is whether it would be possible or desirable to apply any of the other rules to personal injury claims.

3.45 As to written acknowledgement of liability, the writing for the purposes of Part I 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."[8]

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."

In practice, unequivocal written admissions of liability are rare in personal injury cases, even where a claim is settled in full. There may be cases where liability is not contested, but where there is a dispute over the quantum of damages which renders litigation necessary. Even where a payment to account of damages is made by the defender, it is generally made on the express

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[1]See draft Bill, Appendix A, cl. 2, ss. 17(3) and 18(3).

[2]Paras. 89–93, and the recommendations at paras. 170 and 171.

[3]Ss. 6, 9 and 10.

[4]Discussed at paras. 3.35 to 3.42 above.

[5]The legislation does not make express provision for an arbitration, which constitutes "appropriate proceedings" for the purposes of interrupting prescription under Part I (ss. 4 and 9). Where, however, parties agree to submit a claim to arbitration, it is not competent for one party to repudiate the agreement without the consent of the other.

[6]Provisional Proposal 24.

[7]Para. 7.17.

[8]See 1970 report, para. 91.

understanding that liability is not admitted. It seems, therefore, that few claims would be affected if time were to run from either of these dates.

3.46 The remaining factors are fraud and error. Section 6(4) of the 1973 Act provides that

> "(*a*) any period during which by reason of—
>
> (i) fraud on the part of the debtor or any person acting on his behalf, or
>
> (ii) error induced by words or conduct of the debtor or any person acting on his behalf,
>
> the creditor was induced to refrain from making a relevant claim in relation to the obligation . . .
>
> shall not be reckoned as, or as part of, the prescriptive period."

It seems unlikely that either fraud or error will be of particular significance in the context of personal injury claims. It is possible to imagine cases where there has been fraud or induced error in connection with the identity of the wrongdoer, for example the driver responsible for an accident. That particular example would be covered by our earlier recommendation to add reasonable ignorance of the identity of the person liable to the list of factors which prevent time from running.[1] We are not here concerned with cases where an injured person, often because of his youth or inexperience, accepts a modest offer of a settlement in ignorance of his legal rights and subsequently applies to the court to set aside a discharge of liability which he has granted. We regard this as an aspect of the law of defective consent, on which we have already made provisional proposals.[2]

3.47 We have concluded, therefore, that it is unnecessary to add any of these factors so as to extend the limitation period, and accordingly we make no recommendation in the terms provisionally proposed in the consultative memorandum.

PART IV JUDICIAL DISCRETION

4.1 In the consultative memorandum we discussed the possible introduction of a judicial discretion, whereby the courts might be permitted to allow an action to proceed in certain circumstances even though in theory it 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.[3]

4.2 The first 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; it would encourage the bringing of hopeless actions into court and would make the writing-off of claims more difficult.[4] No support for this

[1] See paras. 3.11–12.

[2] Consultative Memorandum No. 42, Defective Consent and Consequential Matters, June 1978.

[3] E.g. a three-year period susceptible of extension by virtue of lack of knowledge, such as is contained in Part II of the 1973 Act.

[4] Cmnd. 1829 (1962), para. 31.

solution was forthcoming on consultation and we do not therefore pursue it further.

4.3 The second possibility is the solution presently adopted by both English and Scots law. It was the intention of the Law Reform Committee that the discretion should only be exercised by the English courts 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]

4.4 The present English provision is in the following terms:

> "(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—
>
> (*a*) the provisions of section 11 or 12 of this Act prejudice the plaintiff or any person whom he represents; and
>
> (*b*) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;
>
> the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.
>
> (2) The court shall not under this section disapply section 12(1) except where the reason why the person injured could no longer maintain an action was because of the time limit in section 11.
>
> If, for example, the person injured could at his death no longer maintain an action under the Fatal Accidents Act 1976 because of the time limit in Article 29 in Schedule 1 to the Carriage by Air Act 1961, the court has no power to direct that section 12(1) shall not apply.
>
> (3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—
>
> (*a*) the length of, and the reasons for, the delay on the part of the plaintiff;
>
> (*b*) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 or (as the case may be) by section 12;
>
> (*c*) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
>
> (*d*) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (*e*) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

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[1]Para. 55.
[2]Para. 57.

(*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."[1]

4.5 Since the publication of the consultative memorandum a discretion on this model has also been introduced into Scots law. The Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 provides by section 23:

"23. In the Prescription and Limitation (Scotland) Act 1973—

(*a*) after section 19 there shall be inserted the following section—

Power of court to override time-limits, etc.

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

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

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

4.6 Several points should be noted. The first is that the discretion conferred on the Scottish courts is unfettered, subject to any restrictions which may in future be imposed by the superior courts. There are, for example, no guidelines to which the court may or must have regard, such as appear in subsection (3) of the English provision.[2] Secondly, the discretion may be exercised not only in favour of an injured person himself, but also in favour of a person entitled to claim damages on his death—that is, an executor or relative. Thirdly, the court is given no power to override the long negative prescription.[3] Fourthly, the provision is retrospective: provided that decree of absolvitur has not been granted to the defender, and that the long negative prescription has not intervened, any claim which has been dismissed on the ground of time-bar alone, or any claim apparently time-barred under the pre-1980 law, may competently be brought before the court.

4.7 There have already been a number of applications to the court under section 19A of the 1973 Act. The two cases so far reported both involved difficulty in identifying the defender.[4] One of the unreported cases concerned

[1]Limitation Act 1980, s. 33. There are five further subsections which it is not necessary to quote for our purposes.

[2]The precise effect of these guidelines is discussed at para. 4.8 below.

[3]The discretion is linked to ss. 17 to 19 of the 1973 Act; these sections do not affect the general application of s. 7, which is qualified only by Sched. 3. We have already recommended, however, that the long negative prescription should no longer apply to personal injury claims: para. 2.8.

[4]*McCullough* v. *Norwest Socea Ltd.* 1981 S.L.T. 201; *Carson* v. *Howard Doris Ltd.* 1981 S.L.T. 273.

progressive industrial deafness;[1] two concerned alleged professional negligence on the part of a solicitor;[2] and in one case the pursuer experienced difficulty in obtaining relevant information from the defenders.[3] On each occasion the court exercised its discretion in the pursuer's favour. The only case in which, so far as we are aware, the court has refused to exercise its discretion is *Munro* v. *Anderson-Grice Engineering Co. Ltd.*,[4] where the pursuer had contracted Reynaud's Phenomenon, vibration white fingers, as a result of prolonged use of pneumatic tools in his employment. It was stressed by Lord Ross in *Carson* v. *Howard Doris Ltd.* that the court's discretion should only be exercised in exceptional circumstances:[5] a view specifically endorsed by Lord Grieve in *Munro*.

4.8 The English provision has been in force for seven years, and there has accordingly been rather more experience of how it is working in practice. By no means all of the decisions have been in the claimant's favour, partly because guideline (*b*) refers to the cogency of the evidence likely to be adduced by the defender.[6] Some difficulty has been experienced by the English courts in deciding whether and to what extent the discretion is unfettered. For example, in *Firman* v. *Ellis*, the first case on the exercise of the discretion to reach the Court of Appeal, Ormrod L.J. detected an inconsistency between the discussion in the body of the Law Reform Committee's report and its final recommendations:

> ". . . reference to the report proved unhelpful from a practical point of view because the final recommendations in paragraph 69, with which the Act is in line, are not entirely consistent with certain passages in the body of the report which seem to suggest that the committee may have had in mind that the discretionary powers would only be used in 'residual' cases. No such ambiguity appears in the Act itself."[7]

More recently Lord Diplock has commented[8] that, while the onus (of showing that in the particular circumstances it would be equitable to allow an action to proceed) rests on the plaintiff, the court's discretion is otherwise unfettered. We note that, although no draft legislation was appended to the Law Reform Committee's report, the legislation itself is in identical terms to their recommendations. It seems to us that the problem arises less from any alleged inconsistencies in the report than from the disadvantages of including guidelines in legislation. Taken by themselves, factors (*a*) to (*f*)[9] may have a limiting effect, but the preamble to the subsection enjoins the court to "have regard to all the circumstances of the case and in particular to" factors (*a*) to (*f*). Strictly speaking, therefore, the discretion appears to be unfettered, but the overall effect is to make clear to the courts that it should be exercised

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[1] *Black* v. *British Railways Board* 26 March 1982.

[2] *Henderson* v. *Singer (U.K.) Ltd.* 21 May 1982; *Donald* v. *Rutherford* 9 July 1982. In *Donald* there had been an interim payment to account of damages during the triennium.

[3] *Falconer* v. *British Railways Board* 24 June 1982.

[4] 8 June 1982.

[5] 1981 S.L.T. 273, 275.

[6] E.g. *Davies* v. *British Insulated Callender's Cables Ltd.*, "The Times", 5 February 1977 (unreported).

[7] [1978] Q.B. 886, 911.

[8] *Thompson* v. *Brown* [1981] 1 W.L.R. 744, 752.

[9] In s. 33(3), quoted at para. 4.4 above.

sparingly. We believe that this is the construction which a Scottish court would place on such a provision if it were enacted for Scotland.

4.9 The principal question which concerns us is whether the discretion should be retained at all in our law. It is true that the balance of opinion received on consultation was generally hostile to a power of judicial discretion, but these comments were made against the background of the pre-1980 law. In other words, consultees were not asked to express an opinion on whether discretion should be *removed* from the law, rather on whether it should be *introduced*. Given the recent decision by Parliament it is by no means clear that those consultees who opposed judicial discretion would adopt the same view today. We have noted that, in the debate on section 19A in the House of Lords, the new provision was described as "a fairly interim solution"[1] (pending the publication of this report): but we think it would be wholly inappropriate to recommend the repeal of a provision such as this until experience of its working has been gained over a much longer period. Accordingly, we make no recommendation on this question.

4.10 Finally, we have concluded that guidelines should not be added to section 19A for the benefit of the courts. We have already noted that the presence of guidelines in the English legislation has created difficulties; and in any event it would appear that they all refer to matters which, when relevant, would be taken into consideration by the court.

PART V AMENDMENT OF PLEADINGS

5.1 The present law places restrictions on a pursuer's right to make amendments to the record after the expiry of a time-limit.[2] The present law is usually said to be embodied in a dictum of Lord Justice-Clerk Cooper in *Pompa's Trustees* v. *Edinburgh Magistrates*:[3]

> "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."

In so far as it relates to the choice of defender, this dictum simply restates one of the main principles of the law of prescription and limitation. We have already discussed the difficulties which pursuers have sometimes encountered in ascertaining who is liable to make reparation, and we have recommended that knowledge of that person's identity should be one of the relevant facts which the pursuer must know or be in a position to know before time begins to run against him.[4]

5.2 The remainder of the dictum has not in practice proved to be a satisfactory statement of the law. There is, for example, considerable scope for argument over what constitutes a "radical incompetence" in an action, or what "changes

[1]Hansard (H.L.), vol. 413, col. 1898 (21 October 1980).

[2]Including the long or the short negative prescriptions, although all the reported decisions since 1954 concern the triennium.

[3]1942 S.C. 119 at 125.

[4]Paras. 3.11–12 above.

the basis" of a case. The question is one partly of competency and partly of discretion. What the courts have traditionally attempted to do is to decide the point at which the action can no longer be regarded as that originally raised, but must be treated as an altogether new action.

5.3 A gradual change of attitude may be detected in the judgments of the Inner House since *Pompa's Trustees.* In *Dryburgh* v. *National Coal Board,*[1] for example, it is clear that the court's main concern was to penalise the pursuer for excessive delay. No intimation of the claim was made to the defender until a month before the expiry of the triennium; the action had only just been raised within the triennium; and the amendment itself was tendered on the eve of proof. It is clear from the opinions of the judges that they wished to prevent the last-minute postponement of a proof. In the words of Lord President Clyde,

> ". . . if delays are to be eliminated, these last-minute amendments on the eve of inquiry by proof or jury trial must, except in highly special circumstances, in my view, be refused."[2]

In more recent cases, however, less emphasis has been placed on this aspect. In *Hynd* v. *West Fife Co-operative Ltd.,*[3] the Division observed that the limitation statutes do not in terms make it incompetent to amend, provided the action is brought within the triennium, and that

> ". . . the competency of any amendment at any time is recognised by rule 92 of the Rules of Court under which the allowance of amendment becomes a pure question of discretion for the court in all the circumstances of the particular case, provided that the amendment is one which is necessary for determining in the existing action the real question in controversy between the parties."[4]

In *Greenhorn* v. *J. Smart & Co. (Contractors) Ltd.,* the court, in holding that the proposed amendment was a "change in the basis" of the case, commented:

> "If the pursuer's case as amended were allowed to proceed the defenders would be deprived of the protection which they were intended to enjoy under s. 17(1) of the [1973] Act. The clear policy of this section was to protect defenders against stale claims which after the passage of time would be difficult to investigate and resist."[5]

5.4 It is not clear what effect the introduction of judicial discretion will have on the admissibility of late amendments. If it is now the policy of the 1973 Act, as amended, to permit a judge of first instance to disregard altogether the rules of limitation in deciding whether to allow an action to proceed, it is at least arguable that the judge has, or should have, the same measure of discretion in allowing an amendment to be made. It would be anomalous to favour a pursuer who raises his action late, but to penalise a pursuer who makes every effort to raise his action in time and whose pleadings subsequently require amendment. It is possible, therefore, that the courts will in future come to regard the question as principally one for the exercise of discretion.

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[1](First Division) 1962 S.C. 485.

[2]At 491.

[3](First Division), decided in 1975, but not reported until 1980 S.L.T. 41, after the publication of the consultative memorandum.

[4]At 43.

[5](First Division) 1980 S.L.T. 70, 73.

5.5 The prevailing view on consultation was that the problem should be left to the courts themselves to resolve, although some commentators thought that the time had come to seek a statutory solution. It was suggested that legislation might lay down guidelines as an aid to determining what amounts to a new action, the intention being to clarify rather than to enlarge the grounds for amendment. We doubt, however, whether guidelines could achieve the necessary degree of precision: the courts would still have to be permitted to have regard to all the circumstances of the case. It has also been suggested that an amendment alleging an unsafe system of work should be allowable, but that fresh allegations of fault on the part of a fellow employee should not. The reason appears to be that, years after the event, it is easier for a defender to investigate the former than the latter.[1] While this may well be true in the majority of cases, we would hesitate to draft a rule based on distinctions of this kind. It is equally arguable that, as soon as an action is raised, or even at the stage of intimation of a claim, it is open to the defender to carry out his own investigation of an accident, and this investigation may well reveal certain facts which may only be ascertained by the pursuer at a later date. Here again, much will turn on the facts of the particular case. It might be possible to state that the question was to be one solely for the court's discretion, but this would not guarantee uniformity of approach and the courts would still look to the existing authorities for guidance. A further objection to this solution is that it assumes that the question should no longer be regarded in any way as one of competency.

5.6 We conclude, therefore, that this is a problem which should be left to the courts to resolve, and accordingly we make no recommendation for legislation.

PART VI ACTIONS OF RELIEF

6.1 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.[2] The court's power does not extend to ordering a person who has not been called as a defender to pay damages.[3] Thus if the court holds that the defender was 20% to blame for an accident, and that a third party, called by the defender under third party notice procedure, was 80% to blame, the pursuer cannot recover damages from the third party.[4] He may, if time permits, raise separate proceedings against that third party, but his right against the third party will generally at that stage be time-barred.

6.2 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

[1]See the opinion of the Lord Ordinary (Lord Wylie) in *Hynd* at 42.

[2]S. 1(1).

[3]E.g. *Findlay v. National Coal Board* 1965 S.L.T. 328.

[4]This is despite the apparent generality of Rule of Court 85(*f*): "In any action in which a third party notice has been served, the Court may after a proof or jury trial pronounce a decree in favour of the pursuer against the third party . . . as if he had been a party to the original action . . .".

been held liable if sued.[1] Until 1963 there was no special time-limit on the exercise of a right of relief by one person against another. Section 10 of the 1963 Act imposed a two-year limitation (not a prescription) on this right. It is a rule of general application to actions of relief for damages in delict, and is not confined to cases where the damages claimed are for personal injuries. Where the person seeking relief is under a disability, he has two years in which to claim after the disability ceases.

6.3 There was no opposition on consultation to the present provision and we do not therefore recommend any substantive change. However, we see no need for the continued classification of the time-limit as limitation rather than prescription. In the first place, most actions of relief do not stem from claims for personal injuries. Moreover, the special features of actions for personal injuries do not arise in any action of relief—in particular, there is no possibility of the exercise of judicial discretion in favour of the pursuer, a feature of the present law which has led us to conclude that the time-limit in personal injury actions should continue to be classified as limitation rather than as prescription.[2] We therefore **recommend:**

12. The rule presently contained in section 20 of the Prescription and Limitation (Scotland) Act 1973 should be retained, but should be reclassified as a two-year prescription.[3]

PART VII PRIVATE INTERNATIONAL LAW QUESTIONS

7.1 Finally, we consider certain questions involving a foreign element. These fall broadly into two categories: the characterisation of our own rules as prescription or limitation, and the treatment of foreign rules of prescription or limitation by our courts. We touched on the characterisation of our own rules in our consultative memorandum, where we proposed provisionally that our rules relating to personal injury claims should in future be classified as substantive rather than procedural, in consonance with the policy already adopted in Part I of the 1973 Act.[4] We reverted to the topic in a consultation paper prepared for limited circulation in July 1980, which was mainly devoted to a discussion of the treatment of foreign rules by our courts. It is this latter point which we discuss first.

Where a foreign law is the *lex causae*

7.2 At common law a distinction is drawn[5] between rules of a procedural character[6] and those which affect the substance of the obligation.[7] If an obligation is governed in principle by the law of a foreign country—the *lex causae*—a Scottish court will ignore the procedural limitations of the *lex causae*

[1]S. 2(2). This occurs less commonly in the Court of Session since the introduction of third party notice procedure. This procedure has not yet been extended to the sheriff courts.

[2]See para. 7.17 below.

[3]See draft Bill, Appendix A, cl. 1, s. 8A.

[4]Provisional Proposal 15.

[5]*Don* v. *Lippmann* (1837) 2 Sh. & Macl. 682.

[6]Such as rules which, while not affecting the substance of the obligation, declare that it may not be enforced after the lapse of a specified period; or which, after such a period, change the onus of proof of the substance of the obligation.

[7]Notably rules which, after the lapse of a specified period, extinguish an obligation.

and will apply only those prescriptions of that system which affect the substance of the obligation. If, therefore, the obligation is extinguished by the *lex causae,* no action upon it is competent in the Scottish courts.[1] Where the *lex causae* merely states a time after which no action on the obligation remains competent, the Scottish courts will ignore the foreign limitation and apply the relevant limitation, if any, of Scots law.[2] However, even where an obligation subsists under the *lex causae,* the common law of Scotland holds that action upon it may be barred in Scotland by reason of the application of the procedural or evidential rules of Scots law.[3]

7.3 The present rules of Scots private international law operate satisfactorily where both Scots law and the *lex causae* have adopted rules which are characterised by the courts of the two systems as rules of substance. The rules of the *lex causae* alone fall to be applied. The general aim, therefore, of choice of law rules is attained: to secure that, despite the fact that an action may have to be raised in courts other than those of the *lex causae,* a decision will be reached similar to that which would be reached by the courts of the *lex causae.*

7.4 Difficulties emerge only where one or both of the systems concerned adopt rules which are procedural in their effect. Assuming that the action is brought in a Scottish court, three cases may be distinguished:

(1) Scots law and the foreign *lex causae* both adopt procedural classifications of their respective rules: in such a case Scots law as the *lex fori* must be applied.

(2) Scots law adopts a procedural classification and the foreign *lex causae* adopts a substantive classification: in such a case it seems reasonably clear that the Scottish court would first look to the *lex causae* to see whether the pursuer's claim was barred under that law and, if it was not barred under that law, apply any relevant limitations of a procedural character under Scots law founded on by the defender.[4]

(3) Scots law adopts a substantive classification[5] and the foreign *lex causae* adopts a procedural classification: it is thought that actions time-barred under the *lex causae* may be pursued in Scotland. This is because a Scottish court could not apply the foreign rule because of its procedural character nor the relevant Scottish prescription because of its substantive effect.

7.5 It seems *prima facie* unacceptable in all three situations specified above that the result which would have been achieved under the *lex causae* would not or might not be achieved in Scotland. In the first case it seems quite wrong that the effect of the *lex causae* may be circumvented if a pursuer is able to found jurisdiction in Scotland. In the second case everything depends upon whether the Scottish limitation is shorter in duration. Where it is shorter it may be applied to frustrate a claim subsisting under its proper law. This seems inappropriate. The third case is the most startling. A claim will be admissible in the Scottish courts despite the fact that it would be barred in the courts

[1]See *Higgins* v. *Ewing's Trs.* 1925 S.C. 440.
[2]E.g. *Westminster Bank Ltd.* v. *McDonald* 1955 S.L.T. (Notes) 73.
[3]See *Stirling's Trs.* v. *Legal and General Assurance Society* 1957 S.L.T. 73.
[4]See *Higgins* v. *Ewing's Trs.* 1925 S.C. 440; *McElroy* v. *McAllister* 1949 S.C. 110.
[5]E.g. the rules on prescription contained in Part I of the 1973 Act.

of the *lex causae* and would have been barred in the Scottish courts if Scots law had been the *lex causae*. This is clearly unsatisfactory.

7.6 It could no doubt be argued that these difficulties arise mainly because certain systems of law, including that of Scotland, continue to apply time-bars which are essentially procedural in effect; and that the problems would be largely solved if an extinctive or substantive approach were prevalent. It would, however, be unrealistic to expect other legal systems to modify their law so as to adopt rules of prescription rather than of limitation.[1] We have therefore sought to deal with the problem by amending the present Scottish choice of law rules.

7.7 In *Don* v. *Lippmann*[2] it was suggested that, whereas it may be easy to ascertain a foreign rule of substance, it may be very difficult to ascertain a foreign rule of procedure. We consider this difficulty to be exaggerated. In any event, it is clear that the failure to apply a foreign rule may prevent our courts doing justice in particular cases by giving adequate effect to the rights of the parties under the relevant *lex causae*. Unless this is done, one or other party may be surprised. A debtor in an obligation governed by a system containing a short procedural limitation may have discarded his receipts, only to be sued in a country where there is no procedural limitation or one operating at a later date. The creditor, too, in an obligation may consider that his rights under the proper law have been defeated if, having been obliged to sue in another country, he is met by a procedural limitation unknown to the proper law. In our view, the aim of the law should be to secure that fair effect is given to the proper law as a whole. The foreign rules should be applied whether their effect is to extinguish the obligation or merely to bar a right of action after the lapse of time. A provisional proposal to this effect in the consultation paper was generally welcomed, and we note that the Law Commission have now made a recommendation to the same effect.[3] Accordingly we **recommend:**

13. The rules of prescription or limitation of the *lex causae,* including any relevant rules of suspension and interruption, should be applied by a Scottish court, however they may be classified for choice of law purposes under the *lex causae,* to the exclusion of any corresponding rule of Scots law.[4]

7.8 In the consultation paper we considered the effect of public policy. We suggested that, after the lapse of a long period, it might become grossly inequitable to enforce certain rights against defenders.[5] We therefore proposed that a general rule should be introduced applying to claims governed by foreign law the principle of the long negative prescription.[6] As a result of consultation, however, we have re-examined this proposal. It is not clear, for example, whether the application of a 20-year time-limit should be regarded

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[1]The Lord Chancellor's Law Reform Committee, in their Twenty-First Report (1977, Cmnd. 6923) favoured the retention of the present English procedural approach.

[2](1837) 2 Sh. & Macl. 682 at 725.

[3]Classification of Limitation in Private International Law (Law Com. No. 114, June 1982), Recommendation (1).

[4]See draft Bill, Appendix A, cl. 4, s. 23A.

[5]Para. 35. This suggestion would not have applied to a few special obligations which our law declares to be imprescriptible, such as the right to recover stolen property from a thief: see 1973 Act, Sched. 3.

[6]1973 Act, ss. 7 and 8.

specifically as a rule of public policy, or merely as a general rule of law which would be applied irrespective of public policy considerations. If it were the former, the courts might be reluctant to take into account other relevant aspects of public policy such as the effect of delay. The proposal is, moreover, inconsistent with Article 10(1)(*d*) of the EEC Convention on the Law Applicable to Contractual Obligations, where the foreign rule would have to be applied irrespective of any domestic time-limit such as 20 years. It is, in any case, by no means clear that it is appropriate to apply a domestic time-bar if it conflicts with the *lex causae*. We also note that, since the enactment of the 1973 Act, the long negative prescription appears to be confined to the extinction of rights and obligations: it no longer seems to apply, as it did under the previous law, to the barring of remedies.[1] For all these reasons we do not now make any recommendation in terms of the provisional proposal.

Foreign judgments

7.9 We come next to the question whether foreign judgments proceeding upon rules of prescription or of limitation of actions fall to be recognised in Scotland as judgments on the merits. This question was discussed by the House of Lords in *Black-Clawson International Ltd.* v. *Papierwerke Waldhof-Aschaffenburg A. G.*[2] The plaintiffs, an English company, had brought an action in Germany against a German company on two bills of exchange which had been drawn, negotiated and were payable in England. This action was dismissed in Germany on the ground that it was time-barred under a German statute of limitation. The plaintiffs, after the commencement of the proceedings in Germany, had initiated concurrent proceedings in England against the German defendants, who eventually argued that the English action could not be maintained because the judgment of the German court dismissing the action fell to be recognised under section 8(1) of the Foreign Judgments (Reciprocal Enforcement) Act 1933. The House of Lords (Lord Diplock dissenting) rejected this contention on the ground that a decision applying a period of limitation was not a judgment on the merits conclusive as between the parties, so that further proceedings in England on the part of the plaintiffs were not barred.

7.10 The majority decision in the *Black-Clawson* case has been criticised in England by various commentators on technical grounds,[3] and was examined by the Law Commission in their Working Paper No. 75[4] and in their report.[5] In the former, they provisionally recommended that a foreign judgment on a limitation point should be regarded as a judgment "on the merits" giving rise to an estoppel *per rem judicatam*. In our own consultation paper, we accepted that this approach would lead to appropriate results where the foreign judgment was one rendered by the courts of the *lex causae,* but we expressed more hesitation as to the appropriate approach when the judgment was rendered by a court other than a court of the *lex causae,* since that other court might well be applying—as in the result it did in the *Black-Clawson* case—a rule of limitation of actions forming no part of the *lex causae*. In their

[1]See *Stirling's Trs.* v. *Legal and General Assurance Society* 1957 S.L.T. 73 at 77.
[2][1975] A.C. 591.
[3]Lipstein, [1974] C.L.J. 229; Cohn, (1974) 90 L.Q.R. 306; Jaffey, (1975) 38 M.L.R. 585.
[4]Classification of Limitation in Private International Law, paras. 64 to 71.
[5]Law Com. No. 114 (June 1982), paras. 4.58–71.

report, the Law Commission discussed these two situations separately, but reaffirmed their provisional proposal even where the foreign court is not a court of the country of the *lex causae*. They have recommended that—

> "where a foreign court has given a judgment in any matter by reference to the law of limitation of its own or of any other country (including that of England and Wales) that judgment should be regarded as conclusive 'on the merits' for the purposes of its recognition or enforcement in England and Wales."

7.11 We continue to accept that a judgment of the courts of the *lex causae* upon a limitation point should be regarded as a judgment falling to be recognised in Scotland. In the overwhelming majority of cases the matter will not be arguable, since under our earlier recommendation[1] the Scottish court will be applying the test which the foreign court has itself applied. Accordingly no separate legislative provision appears to be called for. In relation, however, to the decisions of courts other than those of the *lex causae*, those who submitted comments upon our consultation paper differed in their advice and we have accordingly considered the matter anew. We have concluded, for the following reasons, that legislation would be inappropriate and that this is an area which should be left for development by the courts.

7.12 Where the foreign court is not the court of the *lex causae* the merits of the case may not have been investigated. In Scots law a decree of dismissal founded upon a principle of limitation (as distinct from prescription) is merely a judgment relating to the competence of the court to entertain the action, and the decree is not regarded as a judgment upon the merits of an issue which the court was competent to adjudicate. In our view, a judgment should be authority only for whatever it *meant* to decide. The important question is which legal system should be applied in determining whether a foreign judgment on a limitation point is to be viewed as a decision on the merits. In our view, it should be the *lex causae*. In order to ascertain whether the *lex causae* has been applied it would be necessary for the Scottish court to examine the judgment of the foreign court.[2] This approach, in our view, would better conduce to achieving one of the principal objects of rules of private international law, to ensure that the same result will be achieved wherever the matter is litigated. It would also reduce the risk of forum-shopping.

7.13 This approach has even more justification if the *lex causae* being applied by the foreign court is the law of Scotland. It would seem wholly inappropriate if a subsisting obligation under Scots law were to be regarded as discharged by a prior judgment of a foreign court which had purported to dismiss an action solely on some procedural ground unknown to Scots law. As Lord Reid said in the *Black-Clawson* case—

> "If further justification for my view be needed, it would, I think, be unjust if a foreign judgment on a preliminary point were in itself sufficient to prevent inquiry into the merits here."[3]

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[1] At para. 7.7.

[2] This is not to say that the Scottish court should refuse to recognise the judgment as a decision on the merits merely because the *lex causae* appeared to have been misapplied. The Scottish courts, like their English counterparts, are in general prepared to recognise and enforce judgments even where the court rendering the judgment has demonstrably misapplied Scots or English law, as the case may be: *Godard* v. *Gray* (1870) L.R. 6 Q.B. 139.

[3] 1975 A.C. at 618.

7.14 We doubt in any event whether the special problems presented by the *Black-Clawson* case would have arisen if the proper law of the bills of exchange had been Scots law. Our conclusion does not flow from differences between the relevant rules of private international law in England and Scotland, but rather from the likelihood that the German court, on examining the relevant Scottish prescription, would have found it to be of a substantive character and would have applied it to the effect of extinguishing the obligation. The German court's judgment would therefore have been a judgment on the merits falling to be recognised in Scotland.

7.15 Finally in this context we refer to the E.E.C. Judgments Convention.[1] Article 26 of the Convention provides—

> "A judgment given in a Contracting State shall be recognised in the other Contracting States without any special procedure being required"

and Article 25 provides that—

> "For the purposes of this Convention, 'judgment' means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court."[2]

The terms of the Convention do not themselves give any clear guidance as to whether a judgment on a limitation point falls to be recognised.[3] It will be a matter ultimately for decision by the European Court of Justice in terms of Article 1 of the 1971 Protocol to the Convention, and such a decision will be binding in issues to which the Convention applies upon United Kingdom courts.

The characterisation by Scots law of its own rules of prescription and limitation

7.16 Finally we consider the characterisation of our own rules. In the consultation paper we expressed doubts whether any useful purpose would be served by declaring that, for choice of law purposes, our own rules of prescription or limitation should be classified as substantive.[4] From the evidence available to us it seems unlikely that most civilian systems would apply a principle of Scots private international law simply because Scots law was the *lex causae*. A more fruitful course, in our view, is to adopt, wherever possible, solutions which extinguish obligations rather than bar remedies—a policy already adopted in Part I of the 1973 Act. There is, of course, no guarantee that courts in foreign countries would apply our rules of prescription, but this is not a problem which can be solved within the context of Scots law.

7.17 A proposal in the consultative memorandum that time-limits in personal injury claims should be classified as substantive[5] was supported by almost all those who submitted comments. The proposal was, however, made on the

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[1]The E.E.C. Convention on jurisdiction and enforcement of judgments in civil and commercial matters, 1968, as amended by the Accession Convention, 1978, implemented by the Civil Jurisdiction and Judgments Act 1982, s. 2.

[2]See 1982 Act, Sched. 1.

[3]See the Jenard Report on the 1968 Convention, Official Journal of the European Communities No. C.59/43 (5 March 1979), and the Schlosser Report on the Accession Convention (*ibid*, at 128).

[4]Para. 31.

[5]Provisional Proposal 15.

assumption that judicial discretion would not be introduced. The question now arises whether a system of prescription would be compatible with a judicial discretion. It has been suggested that the combination of prescription and discretion would be scarcely more anomalous than a short prescription of flexible duration, such as is contained in Part I of the 1973 Act, which makes allowance for lack of knowledge on the part of the creditor. This is because, the argument runs, the court in exercising its discretion is saying that in all the circumstances of the case the three-year period did not begin until a date less than three years before the commencement of the action, that date being when the pursuer ought to have become aware of certain facts.[1] It may be said that, in many cases, the defender cannot be certain whether or not an obligation has been extinguished until a claim is settled or waived, or until the court pronounces on the question of time-bar. On this view the characterisation of the time-bar is of little practical importance. On balance, however, we consider that a combination of prescription and discretion would be conceptually unsatisfactory. It would create practical difficulties which would have to be resolved by legislation. It would, for example, have to be made clear whether the effect of the exercise of discretion was that the right had never been extinguished, despite the principles of the substantive law, or that the right was in some way being revived. Even if the first possibility were adopted the court would be declaring retrospectively that a right still subsisted. We are not therefore inclined to recommend any change in the classification of the time-limit insofar as it relates to actions for personal injuries.

PART VIII SUMMARY OF RECOMMENDATIONS

The long negative prescription

1. The long negative prescription should no longer apply to personal injury claims.
(Paragraph 2.8; draft Bill, Schedule 1, paragraph 2.)

The short limitation period

Date of commencement

2. The short limitation period should run from the date of injury, or, if later, the date of the injured person's knowledge.
(Paragraph 3.2; clause 2, sections 17(2) and 18(2).)

3. The date of injury should be the date on which an injured person sustained injuries attributable to an act or omission; or, where the act or omission to which the injuries were attributable was a continuing one, that date or the date on which the act or omission ceased, whichever is the later.
(Paragraph 3.5; clause 2, section 17(2)(*a*).)

4. The date of the injured person's knowledge should be the date on which he became aware, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become aware, of the relevant facts. The legislation should not contain any references to seeking "appropriate advice".

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[1]See James R. Campbell, "Limitation of Actions: too little? too late?" 1981 S.L.T. (News) 221 at 225.

(Paragraph 3.7; clause 2, section 17(2)(*b*).)

5. For the purposes of Recommendation 4, the relevant facts are:

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

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

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

However, knowledge that any act or omission was or was not, as a matter of law, actionable should be irrelevant.
(Paragraph 3.15; clause 2, section 17(2)(*b*) and clause 3, section 22(3).)

Claims arising on death

6. Where a person has not brought an action of damages for personal injuries within the limitation period, and subsequently dies in consequence of those injuries, his executors and relatives should not be entitled to bring an action of damages in respect of the death.
(Paragraph 3.18; clause 2, section 18(4).)

7. Where a person has died in consequence of personal injuries sustained by him, time should run against a relative of his from the date of death, or, if later, from the date of the relative's knowledge.
(Paragraph 3.21; clause 2, section 18(2)(*b*).)

8. The principle of Recommendation 7 should apply also to claims by an executor where death has resulted from the injuries.
(Paragraph 3.23; clause 2, section 18(2)(*b*).)

9. For the purposes of determining the knowledge of an executor or relative, the relevant facts are:

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

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

(Paragraph 3.25; clause 2, section 18(2)(*b*).)

The length of the limitation period

10. The length of the short limitation period, in relation to personal injury claims, should remain at three years.
(Paragraph 3.31; clause 2, sections 17(2) and 18(2).)

Legal disability

11. The principles relating to legal disability contained in Part I of the Prescription and Limitation (Scotland) Act 1973 should be extended to actions for personal injury, with the result that time would not run against a person,

such as a child, for as long as he was under legal disability. This principle should also apply to supervening disability.
(Paragraph 3.42; clause 2, sections 17(3) and 18(3).)

Actions of relief

12. The rule presently contained in section 20 of the Prescription and Limitation (Scotland) Act 1973 should be retained, but should be reclassified as a two-year prescription.
(Paragraph 6.3; clause 1, section 8A.)

Private international law

13. The rules of prescription or limitation of the *lex causae*, including any relevant rules of suspension and interruption, should be applied by a Scottish court, however they may be classified for choice of law purposes under the *lex causae*, to the exclusion of any corresponding rule of Scots law.
(Paragraph 7.7; clause 4, section 23A.)

APPENDIX A

Prescription and Limitation (Scotland) Bill

ARRANGEMENT OF CLAUSES

Clause
1. Extinction of obligations to make contribution between wrongdoers.
2. Limitation of actions.
3. Provisions supplementary to section 2.
4. Private international law application.
5. Transitional provisions.
6. Minor and consequential amendments and repeals.
7. Short title, commencement and extent.

SCHEDULES

Schedule 1—Minor and consequential amendments.
Schedule 2—Repeals.

DRAFT

OF A

BILL

TO

Make new provision for Scotland with respect to the extinction of obligations to make contributions between wrongdoers; to amend the law relating to the time-limits for bringing actions which consist of or include a claim of damages in respect of personal injuries or a person's death; to make provision relating to the application of rules of law of a country other than Scotland in respect of the extinction of obligations or the limitation of time within which proceedings may be brought to enforce obligations; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Extinction of obligations to make contributions between wrongdoers.

1. After section 8 of the Prescription and Limitation (Scotland) Act 1973 (in this Act referred to as "the principal Act") there shall be inserted the following section:—

"Extinction of obligations to make contributions between wrongdoers.

8A.—(1) If any obligation to make a contribution by virtue of section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 in respect of any damages or expenses has subsisted for a continuous period of 2 years after the date on which the right to recover the contribution became enforceable by the creditor in the obligation—

(*a*) without any relevant claim having been made in relation to the obligation; and

(*b*) without the subsistence of the obligation having been relevantly acknowledged;

then as from the expiration of that period the obligation shall be extinguished.

(2) Subsections (4) and (5) of section 6 of this Act shall apply for the purposes of this section as they apply for the purposes of that section."

Limitation of actions.

2. For sections 17 to 19 of the principal Act there shall be substituted the following sections:—

Clause 1

This clause implements Recommendation 12. It substitutes a new section 8A for section 20 of the Prescription and Limitation (Scotland) Act 1973. The only change of substance is to reclassify the two-year limitation applying to actions of relief as a two-year prescription. The section uses language appropriate to Part I of the Act, and in particular incorporates the concept of enforceability of an obligation contained in sections 6 and 7.

Section 20(3), which contains a special provision relating to an arbitration under the Carriage by Air Act 1961, and section 20(4), which refers to the commencement of an arbitration, are not reproduced. The expression "relevant claim" in section 8A(1)(*a*), and the amendments to section 9 proposed by paragraph 3 of Schedule 1 to this Bill, have the effect of incorporating the provisions on arbitration contained in Part I of the Act.

Section 8A(2)

This subsection adopts the rules contained in section 6 for extending prescription on the grounds of fraud, error and legal disability.

Clause 2

Clause 2 replaces sections 17 to 19 in Part II of the Prescription and Limitation (Scotland) Act 1973.

Proposed section 17

This section applies to all actions for personal injuries where the injuries do not result in the death of the injured person. All claims where death has resulted from personal injuries are governed by section 18.

Section 17 therefore applies to a claim for damages (including patrimonial loss and solatium) by the injured person himself; to a claim made on behalf of the injured person (e.g. by a tutor or curator, or by a judicial factor); and to a claim made by an assignee of the injured person (such assignation being competent in respect of both patrimonial loss and solatium—*Cole-Hamilton* v. *Boyd* 1963 S.C. (H.L.) 1).

The section also applies to actions raised by, or continued by, an executor of an injured person where death has resulted from a cause other than the personal injuries. In this case the injured person's claim is transmitted to the executor, with the exception of the claim for solatium, which is not transmissible on death (Damages (Scotland) Act 1976, section 2(3)(*a*)). The executor's claim is therefore limited to patrimonial loss up to the date of death (1976 Act, section 2(3)(*b*)).

The section also applies whenever one or more heads of claim relate to personal injuries, even if there are other heads of claim (e.g. for damage to property) which arise out of the same cause of action. This represents no change in the present law, the existing section 17 also using the words "consist of or include damages . . . in respect of personal injuries". In terms of Schedule 1 to the 1973 Act, paragraph 2(*g*), the five-year short negative prescription does not apply to "any obligation to make reparation in respect of personal injuries within the meaning of Part II of this Act or in respect of the death of any person as a result of such injuries".

"Actions in respect of personal injuries not resulting in death.

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

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

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

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

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

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

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

Section 17(1)

The definition of "personal injuries" (see proposed section 22(1)) is the same as the definition presently contained in section 22(1) of the 1973 Act and in section 10(1) of the Damages (Scotland) Act 1976.

Section 17(2)

The only event which interrupts the limitation period is the raising of an action in a competent court. This is the present law. Arbitration agreements (which are thought to be rare in the context) are not included, but where parties agree to submit a claim to arbitration, it is not competent for one party to repudiate the agreement without the consent of the other (see paragraph 3.44, note 5).

The limitation period is to remain at three years, in implementation of Recommendation 10.

Paragraph (*a*) implements Recommendations 2(*a*) and 3. The date on which the injuries were sustained is not defined—this is consistent with the present law (see paragraph 3.3).

The words "to which the injuries were attributable" have been added in an attempt to provide an indication that time begins to run where a continuing act or omission has ceased to be a cause of the injuries (see paragraph 3.4).

Paragraph (*b*) implements Recommendations 2(*b*), 4 and 5. It preserves the general principle of the present law that time does not begin to run until the injured person knows certain relevant facts. The paragraph refers to the knowledge of the "pursuer in the action". In the normal case this will be the injured person himself. The proposed section 22(2) (see clause 3) ensures that, in the event of the assignation of a claim, it is the assignor's knowledge, and not the assignee's, which is relevant. In other cases—e.g. where the pursuer is an executor or curator—it is the knowledge of the pursuer, rather than the injured person, which is relevant. It will be for the court to determine whether, and to what extent, facts known to the injured person himself can be attributed to the executor or curator. The draft Bill does not attempt to deal specifically with the other aspect of constructive knowledge—whether facts in the possession of a solicitor or other adviser should be attributed to an injured person. This is a question of fact to be determined by the court (see paragraph 3.7).

The words "reasonably practicable for him in all the circumstances" are designed to reflect the fact that the test of knowledge is mainly objective but not wholly so. This will afford the courts a certain degree of flexibility in order to take account of the different circumstances of individuals and the differing nature of their injuries (see paragraph 3.7).

Sub-paragraphs (i) *to* (iii) set out the relevant facts. There are no other relevant considerations, e.g. ignorance of fault or liability. The proposed section 22(3) (see clause 3) specifically provides that this factor is to be irrelevant.

The first relevant fact is knowledge of the injuries (sub-paragraph (i)). This is also a relevant fact under the present law (section 22(2)), although it is differently expressed. The language is in line with the present English legislation (section 14(1)(*a*) and (2) of the Limitation Act 1980). "Injuries" are not defined, but the formula is intended to provide a clear indication to the courts that the injuries must have achieved a reasonably advanced stage before time begins to run (see paragraph 3.9).

The second relevant fact is knowledge of causation (sub-paragraph (ii)). A similar relevant fact appears in the present English legislation (section 14(1)(*b*) of the Limitation Act 1980).

The third relevant fact is knowledge of the appropriate person to sue (sub-paragraph (iii)). Ignorance of this fact has created considerable problems for pursuers over the last decade (see paragraphs 3.11 and 3.12), especially where there are a number of linked companies with very similar names. The word "defender" makes clear that the

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

Actions where death has resulted from personal injuries.

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

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

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

question of time-bar against a particular defender cannot arise until the identity of that defender has been ascertained and he has been made a party to the action. It will not apply, e.g. to a person such as an employee where it is the employer rather than the employee who is sued. In this respect the provision is narrower than the corresponding English provision (contained in section 14(1)(*c*) and (*d*) of the Limitation Act 1980), where ignorance of the identity of either of these persons will prevent time from running. In Scots procedure, where a person is sued as being vicariously liable, it is not necessary to specify the employee whose actual fault was responsible for an accident. The reference to an employer or principal makes clear that, where such a person is sued, it is knowledge of his identity, rather than that of an employee or agent, which is relevant.

Section 17(3) implements Recommendation 11, in so far as it relates to claims by an injured person. In the context of section 17 time will not begin to run against an injured person until he reaches the age of 18. If an adult injured person is under disability at the time of injury, time will not begin to run against him until the disability ceases. Where the disability commences after the date of injury, time is suspended for as long as the disability lasts, but the limitation period does not begin to run again in full. The principal change from the present law is to abolish the "custody of a parent" rule (see paragraphs 3.35 *et seq.*), and to that extent the subsection widens the scope of the present rule. In another respect, however, it narrows its scope. The present section 17(2) operates in favour of any person to whom a right of action accrues. The new subsection does not operate in favour of any person other than the injured person, such as an executor or an assignee, and is therefore consistent with section 6(4)(*b*) of the 1973 Act (which operates only in favour of the original creditor: see paragraph 3.40).

Proposed section 18

This section applies to all actions where personal injuries result in the death of the injured person. It therefore applies to claims by relatives for loss of support and loss of society under section 1(3) and (4) of the Damages (Scotland) Act 1976, and for loss of personal services under section 9 of the Administration of Justice Act 1982. It applies to claims by executors for patrimonial loss attributable to the period up to the injured person's death (see section 2(3)(*b*) of the 1976 Act). It also applies to claims made on behalf of a relative (e.g. by a tutor or curator, or by a judicial factor), and to claims made by an assignee. As to assignations, see note to proposed section 17.

In common with section 17, this section applies where part only of the claim relates to the injuries or the death (see note to proposed section 17).

Section 18(1)

For the definition of "personal injuries", see note to section 17(1).

The phrase "in respect of the injuries or the death" refers to the claims respectively by the executors and the relatives. The executors' claim (for part of the damages which the injured person himself might have claimed) is based on the same ground as the injured person's own action, viz the injuries. The relatives' claim flows from the death—they have no independent action during the injured person's lifetime (see *Robertson* v. *Turnbull* 1982 S.L.T. 96 and paragraph 3.17 above).

Section 18(2)

For an explanation of the reference to an "action", see note to section 17(2).

The limitation period is to remain at three years, in implementation of Recommendation 10.

Paragraph (*a*)

In this paragraph there is a reference to the date of death rather than to the date on which the injuries were sustained (cf. section 17(2)(*a*)). The paragraph therefore implements Recommendation 7(*a*) and partly implements Recommendation 8.

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

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

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

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

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

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

Provisions supplementary to s. 2.

3. For section 22 of the principal Act there shall be substituted the following section:—

"Interpretation of Part II and supplementary provisions.

22.—(1) In this Part of this Act—

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

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

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

Paragraph (*b*) implements Recommendations 7(*b*) and 9 and partly implements Recommendation 8. It is in the same terms as the corresponding paragraph in section 17 (section 17(2)(*b*)), except that the first relevant factor is omitted. Where death has supervened there is no need to refer to the injuries or to the degree of their severity. It is regarded as unnecessary to substitute a reference to knowledge of the death of the injured person rather than of his injuries: knowledge of the death is not a relevant fact under the present law (see paragraph 3.24), As to sub-paragraphs (i) and (ii), see notes on section 17(2)(*b*)(ii) and (iii)).

The same rules are applied to executors as to relatives (see Recommendation 8 and paragraph 3.23). The test of knowledge is applied to each pursuer individually, and accordingly there may be different limitation periods applying to different pursuers in the same action. It is the knowledge of the particular pursuer, and not of the injured person, which is relevant. It will be for the court to determine whether, and to what extent, facts known to the injured person can be attributed to an executor or a relative after his death. The proposed section 22(2) (see clause 3) ensures that, in the event of the assignation of a claim, it is the assignor's knowledge, and not the assignee's, which is relevant (cf. section 17(2)(*b*)). The section does not attempt to deal specifically with the other aspect of constructive knowledge—whether facts in the possession of a solicitor or other adviser should be attributed to an executor or a relative. This is a question of fact to be determined by the court (cf. section 17(2)(*b*)).

Section 18(3) implements Recommendation 11, in so far as it relates to claims on death. It applies the same rule on legal disability to relatives as is contained in section 17(3). The new rule does not apply to executors and assignees. (See note to section 17(3).)

Section 18(4) reproduces, in different language, the proviso to section 17(1) of the 1973 Act. It is designed to ensure that, if an injured person's claim is time-barred at the date of his death, the claims of his executors and relatives are similarly time-barred. This rule is expressly subject to the exercise of the court's discretion under section 19A of the 1973 Act: this discretion may be exercised on behalf of any claimant, whether the injured person himself, his executors or relatives.

For the phrase "in respect of the injuries or the death", see note to section 18(1).

Clause 3

Proposed section 22

Section 22(1). The definition of "personal injuries" is unchanged.

Section 22(2): see note to clause 2, section 17(2)(*b*).

(3) For the purposes of subsection (2)(*b*) of the said section 17 or 18, knowledge that any act or omission was or was not, as a matter of law, actionable is irrelevant.

(4) An action which would not be entertained but for subsection (2)(*b*) of the said section 17 or 18 shall not be tried by jury."

Private international law application.

4. At the beginning of Part III of the principal Act there shall be inserted the following section:—

"Private international law application.

23A. Where the substantive law of a country other than Scotland falls to be applied by a Scottish court as the law governing an obligation, the court shall apply any relevant rules of law of that country relating to the extinction of the obligation or the limitation of time within which proceedings may be brought to enforce the obligation to the exclusion of any corresponding rule of Scots law."

Transitional provisions.

5.—(1) Section 2 of this Act shall have effect as regards rights of action accruing both before and after the coming into force of this Act.

(2) Section 4 of this Act shall not have effect as regards any proceedings commenced before the coming into force of this Act.

(3) The amendment to section 7(2) of the principal Act specified in paragraph 2 of Schedule 1 to this Act shall have effect as regards any obligation which has not been extinguished before the coming into force of this Act.

Minor and consequential amendments and repeals.

6.—(1) The enactments mentioned in Schedule 1 to this Act shall have effect subject to the amendments respectively specified in that Schedule, being minor amendments and amendments consequential on the provisions of this Act.

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

Short title, commencement and extent.

7.—(1) This Act may be cited as the Prescription and Limitation (Scotland) Act 1982.

(2) This Act shall come into force at the end of a period of 2 months beginning with the date on which it is passed.

(3) This Act extends to Scotland only.

Section 22(3): see note to clause 2, section 17(2)(*b*), sub-paragraphs (i) to (iii).

Section 22(4): this subsection preserves the operation of section 22(6) of the 1973 Act.

Clause 4

This clause implements Recommendation 13.

Clause 5

There is no need for any transitional provision in relation to clause 1, which merely reclassifies the time-limit applying to actions of relief as a prescription rather than as a limitation.

Subsection (1)

The principal provisions of the Bill, contained in clause 2, are to apply to rights accruing before its enactment. This is in accordance with the transitional provisions in recent legislation in this field, e.g. the 1963, 1971 and 1975 Acts. There is one minor change, however: it is thought unnecessary to restrict the application of the subsection in cases where a final judgment has been pronounced, in view of the provisions of section 19A of the Act.

Subsection (2)

A different transitional provision is, however, adopted in relation to clause 4—private international law application. Here the state of the present law may have influenced the choice of forum, and it would therefore be inappropriate to apply clause 4 to proceedings already commenced.

Subsection (3)

This provision abolishes the long negative prescription in so far as it relates to any obligation to make reparation for personal injuries which has not yet been extinguished by the prescription. The provision has no effect on any obligation which has already been extinguished by the prescription.

SCHEDULE 1 Section 6(1

MINOR AND CONSEQUENTIAL AMENDMENTS

The Limitation (Enemies and War Prisoners) Act 1945 (c.16)

1. In subsection (1) of section 1, as substituted for Scotland b paragraph (a) of section 4, in the list of enactments appended to th subsection for the words "sections 17 and 20(1) of the Prescriptio and Limitation (Scotland) Act 1973" there shall be substituted th words "sections 8A and 17 of the Prescription and Limitatio (Scotland) Act 1973".

The Prescription and Limitation (Scotland) Act 1973 (c.52)

2. At the end of section 7(2) there shall be added the words "o an obligation to make reparation in respect of personal injuries withi the meaning of Part II of this Act or in respect of the death of an person as a result of such injuries."

3. In section 9—

(*a*) in subsection (1) for the words "and 7" in both places wher they occur there shall be substituted the words "7 and 8A"

(*b*) in subsection (3) for the words "or 8" there shall b substituted the words "8 or 8A".

4. In section 10, for the words "and 7" wherever they occur ther shall be substituted the words "7 and 8A".

5. In section 13, for the words "or 8" there shall be substituted th words "8 or 8A".

6. In section 14(1)(*b*) for the words "section 6(4)" there shall b substituted the words "subsection (4) of section 6 of this Act includin that subsection as applied by section 8A of this Act".

7. In section 15(1), in the definition of "prescriptive period" fo the words "or 8" there shall be substituted the words "8 or 8A".

8. In section 19A—

(*a*) in subsection (1) for the words "(as read with sections 1 and 19)" there shall be substituted the words "or sectio 18";

(*b*) after subsection (3) there shall be added the followin subsection—

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

Schedule 1

The Limitation (Enemies and War Prisoners) Act 1945

Section 1 of this Act provides that time should not run, for certain purposes, during any period while a person who would have been a necessary party to an action was an enemy or was detained in enemy territory.

The Prescription and Limitation (Scotland) Act 1973

Paragraph 2

This paragraph implements Recommendation 1 (disapplying the long negative prescription to personal injury claims).

SCHEDULE 2 Section 6(2)

REPEALS

Chapter	*Short Title*	*Extent of Repeal*
1973 c.52	The Prescription and Limitation (Scotland) Act 1973	In section 11(4) the words from "and in the" to the end. Sections 20 and 21. In section 25, in subsection (2) the words "Subject to subsection (3) below", and subsection (3). In Part II of Schedule 4, the entry relating to the Limitation (Enemies and War Prisoners) Act 1945.
1980 c.55	The Law Reform (Miscellaneous Provisions) (Scotland) Act 1980	In section 23, paragraphs (*b*), (*c*) and (*d*).

Schedule 2

Section 20

For the repeal of this section, see note to clause 1.

Section 21

A similar transitional provision to that contained in section 21(1) is to be found in clause 5(1). The proviso to section 21(1)—which refers to rights of action which accrued before 4 June 1954—is spent.

Subsection (2) refers to decrees pronounced before 31 July 1963: this, too, will be spent before this Bill is enacted.

APPENDIX B

List of those who submitted written comments on Consultative Memorandum No. 45

Association of Scottish Police Superintendents
British Insurance Association
British Insurance Brokers' Association
Mr James Campbell
Committee of Scottish Clearing Bankers
Committee of Senators of the College of Justice
The Hon. Lord Dunpark
Faculty of Advocates
Faculty of Law, University of Glasgow
The Rt. Hon. the Lord Fraser of Tullybelton
The Rt. Hon. the Lord Keith of Kinkel
Law Society of Scotland
The Hon. Lord Maxwell
Scottish Law Agents Society
Scottish Legal Action Group
The Sheriffs Principal
Society of Writers to H.M. Signet
Professor D. M. Walker, Q.C.

APPENDIX C

List of those who submitted written comments on the Consultation Paper on Prescription and Limitation in Private International Law

Dr James Blaikie
Professor E. M. Clive
Mrs Elizabeth B. Crawford
The Rt. Hon. the Lord Emslie
Mr Ian Karsten
The Law Society of Scotland
Dr R. D. Leslie
Dr F. A. Mann, C.B.E.
Scottish Law Agents Society
Sir Ian Sinclair, K.C.M.G., Q.C.
Sheriff Principal Robert R. Taylor, Q.C.
Professor D. M. Walker, Q.C.

Printed in Scotland by Her Majesty's Stationery Office at HMSO Press, Edinburgh
Dd 735642/4318 C16 2/83 (205757)

Her Majesty's Stationery Office

Government Bookshops

13a Castle Street, Edinburgh EH2 3AR
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ISBN 0 10 215383 3