



SCOTTISH LAW COMMISSION  
(Scot Law Com No 122)

# Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues)

Report submitted under section 3(1)(e) of the Law  
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Presented to Parliament by the Lord Advocate  
by Command of Her Majesty  
October, 1989

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

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SCOTTISH LAW COMMISSION

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CORRECTION

On page 67, second paragraph – for the reference to ‘footnote 5 on page 34’ substitute a reference to ‘footnote 1 on page 35’.

EDINBURGH: HER MAJESTY'S STATIONERY OFFICE

*October 1989*

# Scottish Law Commission

*Item 3 of the First Programme*

## **Prescription and Limitation of Actions (Latent Damage and Other Related Issues)**

*To: The Right Honourable the Lord Fraser of Carmyllie, QC,  
Her Majesty's Advocate*

We have the honour to submit our Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues).

*(Signed)* C K DAVIDSON, *Chairman*  
E M CLIVE  
PHILIP N LOVE  
GORDON NICHOLSON  
W A NIMMO SMITH

KENNETH F BARCLAY, *Secretary*  
*2 August 1989*

We wish to acknowledge the considerable contribution to this exercise made by our immediate former Chairman, Lord Maxwell, and one of our former Commissioners, Mr John Murray, now Lord Dervaird. We are heavily indebted to them for their expertise and interest in this project.



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# Part I Introduction

## General developments in the law of prescription and limitation of actions in Scotland

1.1 The subject of prescription and limitation of actions was one of the branches of law included for examination in our First Programme of Law Reform<sup>1</sup> approved on 21 October 1965.

1.2 Since that date we have carried out considerable work in this field publishing Reports in 1970<sup>2</sup> and 1983.<sup>3</sup> The recommendations put forward in the 1970 Report, which rationalised and restated the law in relation to the positive prescription of right to immoveable property and the long negative prescription, and introduced a new five year short negative prescription, were implemented by the Prescription and Limitation (Scotland) Act 1973 ('the 1973 Act'). The recommendations put forward in the 1983 Report, which reviewed the law relating to personal injury cases, and examined problems arising from the operation of the rules of prescription and limitation in private international law, were implemented by the Prescription and Limitation (Scotland) Act 1984 ('the 1984 Act').<sup>4</sup>

## Recent developments in Scotland, England and Wales in the law of prescription and limitation of actions in relation to problems arising from latent damage (not involving personal injuries)

1.3 In Scotland in the mid nineteen eighties interest began to focus specifically on whether the rules of prescription operate adequately in relation to an obligation to make reparation<sup>5</sup> particularly where the damage sustained as a consequence of some act, neglect, or default, is not immediately apparent to the potential claimant ('latent damage').<sup>6</sup> We began to receive informal approaches from the Secretary of State for Scotland and from the Faculty of Advocates and the Law Society of Scotland to resume work on prescription in order to consider the problems arising in latent damage cases (other than those involving personal injury).

1.4 A similar concern involving latent damage claims had arisen in England and Wales within the context of their limitation rules. The Lord Chancellor's Law Reform Committee gave consideration to this issue in their Twenty-First Report<sup>7</sup> published in 1977. In that Report the view was expressed that although it was probably not very

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1. Item 3.

2. *Reform of the Law Relating to Prescription and Limitation of Actions*: Scot Law Com No 15 ('the 1970 Report').

3. *Prescription and the Limitation of Actions—Report on Personal Injuries Actions and Private International Law Questions*: Scot Law Com No 74 ('the 1983 Report').

4. The 1984 Act inserted new provisions into the 1973 Act.

5. I.e. reparation for delict, breach of contract and unilateral undertakings—see s 11(1) of the 1973 Act and para 1.24 below.

6. See the Consultation Paper *The Future of Building Control in Scotland* circulated by the Scottish Development Department in 1983, and the Report and Supplementary Report prepared by the Contractual and Delictual Working Party set up by the Law Reform Committee of the Law Society of Scotland on *The Application of the Five Year Short Negative and Twenty Year Long Negative Prescriptive Periods to Defects in Construction Works* issued in 1984 and 1986 respectively.

7. Final Report on *Limitation of Actions* Cmnd 6923.

often that a plaintiff was unable to discover within the limitation period of 6 years<sup>1</sup> that he had suffered damage, nevertheless if he should fail to make the discovery the consequences could involve considerable hardship.

“Such hardship is particularly likely to arise out of building or civil engineering contracts, where a breach of contract may give rise to physical damage which remains latent for very many years and then causes heavy financial loss. Apart from building and engineering contracts, hardship can also be caused in the context of professional negligence where defective advice may cause the adviser’s client to take steps which prove to be financially unsound, but only after the lapse of a period much longer than the limitation period; an obvious example is the purchase of a house from a vendor with a defective title, where the defect comes to light only when the purchaser tries to re-sell”.

1.5 This hardship referred to by the Committee became highlighted by the House of Lords in the case of *Pirelli General Cable Works Ltd v Oscar Faber and Partners*<sup>2</sup> (‘the *Pirelli* case’). The circumstances of that case involved the faulty construction of a chimney built in June and July 1969 and which formed part of an extension carried out to the plaintiffs’ factory premises. It was established during the hearing that cracks had developed at the top of the chimney by April 1970, although the plaintiffs did not actually discover the damage until November 1977, the writ being issued in the following year. The Court held that although the plaintiffs could not with reasonable diligence have discovered the damage before October 1972 the starting point for the limitation period was the date when the damage actually occurred in 1970. As a consequence the plaintiffs’ claim became time barred. Lord Fraser of Tullybelton in his judgment expressed considerable misgivings about the implications of this decision.

“I am respectfully in agreement with Lord Reid’s view expressed in *Cartledge v Jopling and Sons Ltd* [1963] AC 758, that such a result appears to be unreasonable and contrary to principle, but I think the law is now so firmly established that only Parliament can alter it”.

Again Lord Scarman in his judgment offered the following observations:

“It must be, as Lord Reid said in *Cartledge v Jopling and Sons Ltd* [1963] A.C. 758 and quoted by my noble and learned friend in his speech, unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury (or damage). A law which produces such a result,... is harsh and absurd”.

1.6 The Committee’s work, which took into consideration the implications of the decision made in the *Pirelli* case, culminated in the publication in 1984 of their Twenty-fourth Report (Latent Damage)<sup>3</sup> in which it put forward recommendations for changes in the rules of limitation in relation to negligence cases involving latent defects (other than personal injuries).<sup>4</sup> These recommendations received legislative effect by the passing of the Latent Damage Act 1986 (‘the 1986 Act’) which came into operation on 18 September of that year.

1.7 There were two main proposals for reform recommended by the Committee. The first introduced discoverability into the formula for defining the starting point of the limitation period by providing that “in negligence cases involving latent defects the existing six year period of limitation should be subject to an extension which would allow a plaintiff three years from the date of the discovery, or reasonable

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1. In England and Wales the six year limitation period in relation to an obligation to make reparation (not involving personal injuries) starts to run from the date damage occurs, where the action of reparation is founded on negligence, and where the action arises from a breach of contract, from the date of that breach.

2. [1983] 2AC 1.

3. Cmnd 9390.

4. The terms of reference did not cover breach of contract cases involving latent defects.

discoverability, of significant damage ('the discoverability formula').<sup>1</sup> The second introduced a 'longstop' which would prevent a plaintiff from instituting court proceedings more than 15 years after the defendant had committed a breach of duty, even if damage had not occurred or had occurred but was not discoverable, by that time.<sup>2</sup>

1.8 Subsequent to the publication of the Committee's Twenty-fourth Report we received a request from the Lord Advocate to resume our work on prescription in order to consider the problems arising in relation to an obligation to make reparation<sup>3</sup> involving latent damage. We agreed to review the law in this area in response to this request.

1.9 We approached the exercise, however, in the knowledge that problems arising out of our examination of the current law should be of a less fundamental nature than those identified by the Lord Chancellor's Law Reform Committee in that Scots law has already adopted a discoverability formula and a 'long stop' provision.

1.10 During the preparation, but prior to the publication, of our Consultative Memorandum, a further development took place in this area of the law by the introduction of legislation for England, Wales and Scotland, which adopted new rules of prescription/limitation in relation to an obligation to make reparation for damage caused by a defective product.

1.11 In July 1985 the Council of the European Communities had issued an EEC Directive (85/374/EEC) providing for strict liability for defective products ('the Products Liability Directive') the terms of which were to be implemented throughout the United Kingdom by July 1988.

1.12 The Directive provided among other things for a three year limitation period for the bringing of a reparation action for damage involving death or personal injuries, or for damage to or destruction of property (other than the defective product itself), as a result of a defective product; introduced a discoverability formula for defining the starting point of the limitation period; and adopted a ten year long stop provision after which the potential claimant's right to reparation may be extinguished. Part I and Schedule 1 of the Consumer Protection Act 1987 ('the 1987 Act'), which came into operation on 1 March 1988,<sup>4</sup> implements the Product Liability Directive.

1.13 In preparing the Consultative Memorandum our main aim was to examine the adequacy of the rules of prescription as they operate at present in relation to an obligation to make reparation involving latent damage. Parts I to V of the Memorandum were concerned with this area of the law.

1.14 During the course of this exercise we identified some general miscellaneous issues arising out of our consideration of the provisions of the 1973 Act—issues which we thought should be put to consultees but which do not relate exclusively, and in some instances do not relate at all, to latent damage problems. These miscellaneous issues were incorporated in Part VI of the Consultative Memorandum.<sup>5</sup>

1.15 The Consultative Memorandum on *Prescription and Limitation of Actions (Latent Damage)* No 74, ('the Memorandum') published in September 1987, was widely circulated for comment. Subsequent to its publication a Seminar, arranged

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1. Part V, Conclusions and Recommendations para 5.3(b) of the Report. S 14A of the Limitation Act 1980 (inserted by s 1 of the 1986 Act) implemented and extended the scope of the discoverability formula to include in addition to significant damage, knowledge of its cause, the identity of the defendant, and where it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts which support the bringing of an action against the defendant.

2. Part V, Conclusions and Recommendations, para 5.3(c) of the Report. S 14B of the Limitation Act 1980 (inserted by s 1 of the 1986 Act) implemented this recommendation.

3. Reparation in this context does not cover claims involving personal injuries which do not prescribe, but which are subject to a three year limitation period.

4. The Consumer Protection Act 1987 (Commencement No 1) Order 1987 (SI 1987/1680).

5. It was not intended that Pt VI should suggest that a comprehensive review of all the provisions of the 1973 Act had been carried out.

by the Law Faculty of Edinburgh University to discuss the provisional proposals put forward in the Memorandum, was held in January 1988.

1.16 We are very grateful to all those who responded to the Memorandum and participated in the Seminar. The comments made, both in response to the Memorandum and at the Seminar, have been of great assistance to us in the preparation of this Report. A full list of those consultees who commented on the Memorandum can be found at Appendix B to this Report.

## Scope of Report

1.17 Notwithstanding that some of the recommendations for reform put forward in this Report have a wider application<sup>1</sup> our primary objective is to focus our attention on the adequacy of the rules of the short and the long negative prescriptions as they apply to an obligation arising in any circumstances to make reparation for damage sustained particularly where that damage is not immediately discoverable on its occurrence.

1.18 Although consultees expressed views on the miscellaneous issues put forward in Part VI of the Memorandum and offered further suggestions for reform of the provisions of the 1973 Act, we have decided, after giving the matter some thought, that it would be more satisfactory to include in this current exercise only those miscellaneous issues which have some direct bearing upon our primary objective, leaving the others for inclusion in some possible future more comprehensive examination of the statutory rules of prescription and limitation.

1.19 As a consequence of this decision we have omitted from the Report a reference to the issues raised in the Memorandum which concern the prescription of a right to enforce a decree,<sup>2</sup>—although we do provide in the draft Bill annexed, that, for the avoidance of doubt, a decree within the context of Schedule 1 paragraph 2(a) of the 1973 Act, shall include a constructive decree.<sup>3</sup> Furthermore we do not consider the query raised as to whether, again for the avoidance of doubt, a provision should be incorporated in the 1973 Act to specifically safeguard public rights of way and positive servitudes, constituted by continuous possession or use for the prescriptive period prevailing prior to the coming into operation of that Act.<sup>4</sup> Insofar as this latter issue is concerned one consultee was particularly opposed to adopting any such provision on the basis that pre-existing rights of way etc. are preserved by section 16 of the Interpretation Act 1978 and accordingly implementation of our provisional proposal would raise doubts as to the meaning of that section where none at present exist.

1.20 The Recommendations put forward by us in Parts II and III of this Report are concerned with the rules of the short and long negative prescriptions as they apply only in relation to an obligation to make reparation. Part IV is wider in scope. Although, again, this Part is primarily concerned with reparation obligations, some of the Recommendations in this context are relevant, not only to the rules of the short and long negative prescriptions, but also to the rules of limitation/prescription which apply in relation to claims for personal injury and death or defamation under sections 17, 18 and 18A of the 1973 Act, and for damage arising from defective products under sections 22A—D of that Act. In addition some of the proposals have relevance for non reparation obligations, and two of such proposals extend to unexercised rights relating to property which can be extinguished under section 8 of the 1973 Act. Part V is a summary of our recommendations and Appendix A contains a draft Bill with explanatory notes.

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1. See Recommendations 17–34.

2. Paras 6.101 to 6.111 of the Memorandum and Questions 22 (a)—(d).

3. Paras 6.103 to 6.105 of the Memorandum.

4. Paras 6.112 to 6.124 and provisional proposal 23.

## Objectives underlying our proposals for reform

1.21 From the responses received to the Memorandum two points were made which have particularly influenced our thinking in formulating our proposals for reform.

1.22 First, some consultees expressed concern that the provisional proposals put forward in the Memorandum might give rise to further fragmentation in this area of the law.

1.23 These consultees were referring to the three statutory schemes currently in operation under the 1973 Act for providing rules of prescription/limitation in relation to an obligation to make reparation. For the purpose of future reference throughout the Report it is perhaps useful at this stage to identify briefly the three schemes involved.

1.24 Under the first scheme an obligation (whether arising from any enactment, or from any rule of law, or from, or by reason of any breach of a contract or promise) to make reparation for damage sustained (other than damage involving personal injury or death under sections 17 and 18 of the 1973 Act, defamation under section 18A, or resulting from a defective product within the strict liability scheme operated under sections 22A—D<sup>1</sup>) prescribes under the five year short negative prescription (subject to a twenty year long negative prescription), the relevant statutory provisions being sections 6, 7, 9–16 and Schedules 1 and 2 of the 1973 Act.

1.25 The second scheme imposes a three year limitation period for the bringing of a reparation action where the damages claimed consist of or include damages in respect of personal injuries, or death resulting from such injuries, (not caused by a defective product), and in respect of defamation, the relevant statutory provisions being incorporated in sections 17—23 of the 1973 Act.<sup>2</sup>

1.26 The third scheme concerns defective products under the 1987 Act referred to above,<sup>3</sup> the main relevant statutory provisions being sections 7(2), and 22A—22D of the 1973 Act.<sup>4</sup>

1.27 It was suggested to us that recommendations for the application of special rules of prescription in relation to reparation claims involving latent damage could give rise to yet a fourth scheme. We appreciate the point made, and accordingly in framing our recommendations for reform we have endeavoured to minimise fragmentation where practicable. We use the words ‘where practicable’ here, because we are aware that, in certain areas, the reparation claims identified under the three schemes can be distinguished from each other. A brief reference is made to this distinction in the Memorandum.<sup>5</sup>

1.28 Second, several consultees brought to our attention the current difficulties experienced in securing adequate professional insurance cover against the possibility of claims for reparation. As one consultee observed, an important practical consideration is to be able to evaluate the potential claimant’s prospects of obtaining reparation from the person responsible. The point was made that these prospects depend to a considerable extent upon insurance being available to meet the cost of any claim, which in turn depends on whether the cost of indemnity insurance is affordable.

1.29 The suggestion was put to us that any proposals for reform of the rules of prescription should help to facilitate the future availability of insurance by securing

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1. A claim for reparation based on negligence for damage sustained as a result of a defective product would fall under this first scheme—see s 2(6) of the 1987 Act. Subsequent reference however in this Report to damage resulting from a defective product is a reference to the scheme operated under ss 22A to 22D of the 1973 Act.

2. Under the second scheme the 20 year long negative prescription does not apply to reparation claims involving personal injuries or death (s 7(2) of the 1973 Act) but does apply to claims involving defamation.

3. See paras 1.10 to 1.12 above.

4. As incorporated by Sched 1 Pt II of the 1987 Act.

5. See paras 4.86 to 4.87, 5.5. See also paras 2.41 and 2.76—2.79 below.

a greater degree of certainty in this area of the law and a possible reduction in the responsible person's period of risk. Subject to ensuring that such objectives will not unduly prejudice the potential claimant's position, in formulating our recommendations we have kept in mind the need to secure adequate insurance facilities.

1.30 In putting forward our proposals for reform our main concern is to achieve an equitable balance between the interests of the potential claimant (referred to throughout the Report as 'the claimant') and the person against whom the obligation is enforceable (hereinafter referred to as 'the defender') so that the former is given sufficient time in which to identify the damage and pursue his claim for reparation, and the latter is protected from stale claims, and is provided with a degree of certainty as to his period of risk.

# Part II The Statutory Rules Governing the Operation of the Short Negative Prescription in Relation to an Obligation to Make Reparation

## THE PRESENT LAW

2.1 An obligation to make reparation under the first scheme referred to above<sup>1</sup> prescribes under the five year short negative prescription which was introduced into our law by section 6 of the 1973 Act.

2.2 Section 6 provides that if after “the appropriate date” an obligation to which this section applies<sup>2</sup> has subsisted for a continuous period of five years without any relevant claim having been made in relation to the obligation, and without the obligation having been relevantly acknowledged, then as from the expiration of that period the obligation shall be extinguished.

2.3 The “appropriate date” identifies the starting off point for the running of the prescriptive period and, unless where specifically provided otherwise in Schedule 2, (irrelevant for this present exercise), is “the date when the obligation becomes enforceable”.<sup>3</sup>

2.4 The date when an obligation to make reparation becomes enforceable is identified in section 11. The basic principle behind section 11 is that before such an obligation becomes enforceable, and accordingly before time can start to run against the claimant, some loss, injury or damage, (often collectively referred to by the legal profession as ‘*damnum*’, but referred to from time to time in this Report as ‘the damage’), caused by an act, neglect or default must have been sustained (ie there must have been concurrence between the damage and the act, neglect or default.<sup>4</sup> Subsection (1) reflects this principle.

2.5 Subsection (2) is concerned with the situation where, as a result of a continuing act, neglect or default, damage has occurred before the cessation of that act, neglect, or default. It provides that in such a case the damage is deemed to have occurred on the date upon which the act, neglect or default ceases, this date constituting the date when the obligation becomes enforceable for the purposes of fixing the start of the prescriptive period.

2.6 As we point out in paragraph 2.7 of our Memorandum, if the concurrence of the act, neglect or default and the damage always constitutes the starting point for the prescriptive period the interests of the claimant could be prejudiced if the damage sustained is not immediately discoverable. Subsection (3) attempts to deal with this problem by introducing a ‘discoverability formula’.

2.7 It was intended that subsection (3) should reflect the policy put forward in our 1970 Report that where damage arising from an act, neglect or default is not immediately ascertainable, the starting point for the running of prescription should

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1. See para 1.24.

2. The obligations which prescribe under the short negative prescription are identified in Sched 1.

3. See s 6(3).

4. *Dunlop v McGowans and Others* 1979 S C 22 and 1980 S C (HL) 73.

be the date when that damage is or could with reasonable diligence have been discovered by the claimant.<sup>1</sup>

2.8 It is, however, questionable whether subsection (3) accurately reflects this policy. Lord McDonald, in the Outer House case *Dunfermline District Council v Blyth and Blyth Associates* (the *Dunfermline District Council* case)<sup>2</sup> offered a wider interpretation of the terms of this subsection (albeit obiter).

“They mean loss, injury or damage caused not only by the act, neglect or default of someone, but also giving rise to an obligation to make reparation. In other words the creditor must not only know that he has suffered loss, but that this has occurred in circumstances giving rise to an obligation upon someone (who may not be immediately identifiable) to make reparation to him. From that date he has five years in which to identify the person concerned and bring his claim against him. Counsel were agreed that there was, so far, no authority on this matter and, although not essential to my decision, I offer this interpretation of s. 11(1) and (3) of the 1973 Act for what it is worth. If it is correct it is a further reason for allowing proof before answer quoad the third defenders”.

2.9 This interpretation suggests that before time starts to run against the claimant he must have actual or constructive knowledge of the damage sustained, the act, neglect or default which gave rise to the damage, and possibly that such act, neglect or default is actionable in law.

2.10 Subsections (4) and (5) of section 6 provide that the running of the short negative prescription in relation to any obligation prescribable thereunder will be postponed or suspended for any period during which the claimant is induced to refrain from making a relevant claim because of the defender’s fraudulent actings, or through error induced by his words or conduct (providing neither was discoverable by the claimant with reasonable diligence), or where the original claimant is under a legal disability.

## ASSESSMENT OF THE PRESENT LAW AND PROPOSALS FOR REFORM

### Introduction

2.11 In making our assessment of the present law governing the short negative prescription in its application to an obligation to make reparation we have been influenced by the need to secure for the claimant a reasonable time in which to discover the facts necessary for the purpose of pursuing a claim for reparation.

2.12 Although in achieving this objective we have endeavoured to retain an equitable balance between the interests of the defender and the claimant some of our recommendations for reform may appear unduly favourable to the claimant and to the apparent disadvantage of the defender who is looking for a greater certainty as to, and a possible reduction in, his period of risk.

2.13 We would suggest, however, that these recommendations should be considered in conjunction with our subsequent proposals for reform of the rules applicable to the long negative prescription, which are framed so as to protect the defender against undue exposure to potential claims. Taken together we hope that our recommendations for reform will help to ensure an equitable balance between the interests of both parties.

2.14 Before we examine the adequacy of the current rules governing the operation of the short negative prescription in relation to an obligation to make reparation we would like to put forward one preliminary recommendation at this stage.

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1. See paras 97 and 98 of the Report.  
2. 1985 SLT 345.

2.15 We propose that the use of the words ‘act, neglect or default’, as they arise at present under section 11 of the 1973 Act should be replaced by the words ‘act or omission’. This proposal if implemented will establish consistency with the language adopted by the limitation rules applicable to personal injury claims arising under section 17 of the 1973 Act,<sup>1</sup> thus helping to minimise fragmentation in this area of the law.

2.16 Accordingly we recommend that:

1. **The words ‘act, neglect or default’, currently used in the formula for identifying the date when an obligation to make reparation prescribable under the short negative prescription becomes enforceable, should be replaced by the words ‘act or omission’.**

(Paragraphs 2.14 to 2.15; clause 1, proposed new section 6 of the 1973 Act)

## The Discoverability Formula

2.17 In the Memorandum<sup>2</sup> we accepted that a discoverability formula for fixing the start of the prescriptive period, where damage is latent, is a necessary protection to the claimant notwithstanding the disadvantages which may be experienced by the defender in ascertaining his period of risk. We queried, however, whether the existing statutory formula adequately safeguarded the claimant’s position, and gave consideration to the facts which should be in the claimant’s knowledge before prescription started to run against him.

### Knowledge of damage

2.18 The current discoverability formula includes knowledge of the damage sustained as a consequence of an act, neglect or default. As we point out in the Memorandum<sup>3</sup> this formula fails to indicate the severity of damage required to be within the claimant’s knowledge before time starts to run against him.

2.19 We are concerned that this omission could cause hardship, particularly in cases where the damage sustained involves physical damage to property which is of a progressive nature. An example which illustrates this concern is that of minor cracks developing in a newly constructed building which are followed some years later by more serious building defects disclosing, on investigation, that the foundations are faulty, and as a consequence extensive remedial work is required to render the building safe.

2.20 It is thought that in such circumstances, where the minor settlement cracks are the first evidence of faulty foundations, prescription will start to run against the claimant under existing law when he becomes aware, or could with reasonable diligence have become aware, of the minor cracks. Accordingly by the time he ascertains the full extent of the damage the obligation to make reparation to him may have been extinguished.

2.21 In our view the discoverability formula should provide that the damage within the claimant’s actual or constructive knowledge must be material damage, as distinct from purely minimal damage, before time starts to run against him. In implementation of this policy we suggested in the Memorandum that the discoverability formula should incorporate a provision similar to that adopted under section 17(2)(b)(i) of the 1973 Act for personal injury claims<sup>4</sup>:

“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”.

1. The words ‘act or omission’ are also used in ss 14 and 14A of the Limitation Act 1980 (applicable to England and Wales).

2. See paras 4.1 to 4.5.

3. See para 4.7.

4. Provisional proposal 1(a).

2.22 Although the majority of consultees accepted in principle that prescription should not start to run until the claimant has actual or constructive knowledge of material damage, several criticised the proposed formula.

2.23 One consultee suggested that it did not provide a link to the real seriousness of the damage in question. Another anticipated difficulty in interpreting such words as ‘damage’ and ‘serious’. The Faculty of Advocates were doubtful whether any formula could be adequately devised so as to determine the degree of damage which will be necessary before fixing the start of the prescriptive period.

2.24 We are, however, unaware of any difficulties which have arisen in operating this formula within the context of personal injury claims, and have noted that it has also been adopted in relation to an obligation to make reparation in respect of a defective product under the third scheme referred to above.<sup>1</sup> Furthermore, as already indicated, we are concerned to discourage further fragmentation in the rules of prescription/limitation where practicable. Accordingly we are persuaded that our suggested formula should be recommended.

2.25 We therefore recommend that:

2. **The discoverability formula should provide that the damage within the claimant’s actual or constructive knowledge must be sufficiently serious to justify his bringing an action of damages on the assumption that the defender does not dispute liability and is able to satisfy a decree.**

(Paragraphs 2.18 to 2.24; clause 1, proposed new section 6(3)(c)(i) of the 1973 Act)

#### Definition of damage

2.26 No attempt was made in the 1973 Act to define ‘loss, injury or damage’, and we did not suggest in the Memorandum<sup>2</sup> that a statutory definition should be provided, pointing out that although there are certain broad categories of actionable damage—personal injuries, physical damage to property, economic loss—, there are limitless variations in the nature of damage which can arise as a result of an act, neglect or default—the cracks which appear in a building as a consequence of faulty foundations<sup>3</sup>; the loss incurred in receiving something less than, or different from what one contracted to purchase; the loss of a landlord’s legal right to obtain vacant possession of his property owing to his solicitor’s failure to serve a notice to quit timeously upon the tenant.<sup>4</sup> As the Lord Justice Clerk observed in *Dunlop v McGowans and Others*—<sup>5</sup>

“The phrase ‘loss, injury and damage’ is a phrase of style commonly used to comprehend the various types of loss which may be sustained as a result of breach of a legal duty or obligation. It covers all kinds of *damnum* [damage]”.

2.27 We did acknowledge indirectly, however, that failure to define damage could give rise to difficulties in identifying the start of the prescriptive period.<sup>6</sup> One situation which we had in mind in this context in relation to an obligation to make reparation based on delict, involved the discovery of faulty foundations in a building which would eventually give rise to physical damage.

2.28 In the Memorandum, we came to the tentative conclusion<sup>7</sup> that, in this hypothetical situation, prescription would start to run when the defect is discovered, on the basis that at that stage the owner of the building, if he has a claim against the builder, has a claim either for the loss in value of the property as a result of the defect or the cost of rectifying the defect (the actionable damage falling within the category of economic loss). The physical damage subsequently arising would be a

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1. S 22B(3)(c) of the 1973 Act.

2. See para 2.12 to 2.14.

3. *Dennis & Another v Charnwood Borough Council* [1983] Q B 409.

4. *Dunlop v McGowans and Others* 1979 SC 22 and 1980 SC (HL) 73.

5. 1979 SC 22 at p 33.

6. See paras 4.56 to 4.75 in the Memorandum.

7. On the basis of the decision reached in *Junior Books Ltd v Veitchi Co Ltd* 1982 S C (HL) 244, but see the more recent judgment given in *D & F Estates Ltd and Others v Church Commissioners for England and Others* [1988] 2 ALL ER 992 subsequent to the publication of the Memorandum.

factor relevant only in quantifying the claimant's loss. We pointed out, however, that the observations made by Lord Allanbridge in *Renfrew Golf Club v Ravenstone Securities Ltd*<sup>1</sup> raise doubts as to the validity of this view—

“... the distinction between defect and actual damage to a building or other property is of vital importance and must be applied by me in this case. Thus in the case of a golf course any defect in design or workmanship will not give rise to *damnum* until actual damage is caused to the course”.

2.29 We suggested in the Memorandum that this uncertainty in the present law would best be resolved by the courts in their development of the law of reparation, but we did put forward the proposal that if consultees favoured clarification of this issue a new rule of prescription along the following lines might be adopted—

“For the avoidance of doubt, where actionable damage, including economic loss, is sustained through the breach of a duty, the prescriptive period in relation to an obligation to make reparation in respect of that and all consequential damage caused by that breach of duty, other than personal injuries, should commence from the date that damage was discoverable (ie. from the date when the pursuer first had actual or constructive knowledge of material damage, its cause and the identity of the person liable)”.<sup>2</sup>

2.30 The majority of consultees were against the adoption of such a rule, and accordingly we have decided to abide by our initial view that the courts should be left to define, in any particular case, what constitutes damage, for the purpose of fixing the start of the prescriptive period.

2.31 We therefore recommend that:

**3. No statutory definition of damage should be provided, the courts being left to define, in any particular case, what constitutes damage for the purpose of fixing the start of the prescriptive period.**

(Paragraphs 2.26 to 2.30)

#### **Knowledge of the cause of the damage**

2.32 Although we have suggested, on the basis of Lord McDonald's obiter opinion in the *Dunfermline District Council* case, that knowledge of the cause of damage sustained may already form part of the discoverability formula under section 11(3) of the 1973 Act,<sup>3</sup> we favour placing this matter beyond doubt.

2.33 There is of course the argument that this proposal may be unnecessary if knowledge of material, as opposed to, minimal damage is included in the discoverability formula, in that once such damage becomes discoverable its cause in all probability will be identifiable at that stage. Although this argument may have validity in many instances it is our view that owing to the technical nature of many projects today which give rise to reparation claims, further enquiries may still be necessary after material damage becomes apparent before its cause is known.

2.34 A few consultees were against our proposal on the basis that the adoption of such a rule could lengthen the period before prescription starts to operate,<sup>4</sup> resulting in stale claims and introducing a degree of uncertainty as to the defender's period of risk. The majority of consultees supported us on this issue.

2.35 Knowledge of the cause of damage already forms part of the discoverability formula applicable to reparation obligations under the second<sup>5</sup> and third schemes referred to above. Once again, in order to minimise fragmentation in this area of

1. 1984 SLT 170. This view has been given further support recently in relation to an obligation to make reparation based on delict (tort) in *D & F Estates Ltd and Others v Church Commissioners for England and Others* cited above...

2. Para 4.73.

3. See para 2.9 above.

4. This comment supports our view that even when material damage becomes discoverable its cause may not be evident at that time.

5. Other than an obligation to make reparation for defamation under s 18A of the 1973 Act.

the law we favour adopting a formula similar to that provided for personal injury claims by section 17(2)(b)(ii) of the 1973 Act.

2.36 We therefore recommend that:

**4. Knowledge that the loss, injury or damage was attributable in whole or in part to an act or omission should be included in the discoverability formula.**

(Paragraphs 2.32 to 2.35; clause 1, proposed new section 6(3)(c)(ii) of the 1973 Act)

**Knowledge of the identity of the person liable for the damage sustained**

2.37 In our Memorandum we proposed that the short negative prescription should not start to run against the claimant until the defender became identifiable.<sup>1</sup>

2.38 We justified this approach by referring to the problems of identification which had arisen in the past in court actions involving personal injury claims<sup>2</sup> instituted before knowledge of the defender's identity formed part of the discoverability formula in fixing the start of the three year limitation period.<sup>3</sup> The point was made that such problems were particularly apparent where the responsible party was one of a number of linked companies, illustrating this difficulty with reference to *Comer v James Scott & Co (Electrical Engineers) Ltd*<sup>4</sup> where during the course of the hearing the evidence disclosed that there were no less than seven companies registered with the Registrar of Companies whose name began with James Scott. We considered that the problem of linked companies was just as likely to arise where the reparation claim involved damage to property.

2.39 We were also encouraged in our view by the fact that knowledge of the defender's identity is part of the discoverability formula applicable to reparation obligations involving personal injuries under section 17 of the 1973 Act. This aspect of knowledge also applies in relation to reparation claims arising from defective products<sup>5</sup> and forms part of the law of England and Wales in relation to personal injury claims<sup>6</sup>, and more recently to negligence cases involving latent defects (other than personal injury).<sup>7</sup>

2.40 By a small majority consultees were not in favour of our proposal, primarily because they considered that it was too generous to the claimant and extended unreasonably the defender's period of risk. In their opinion a period of five years (assuming that the present length of the short negative prescription is to remain unaltered<sup>8</sup>) running from the discoverability of material damage and its cause should provide the claimant with sufficient time in which to identify the defender.

2.41 It was argued that the discoverability formula in this respect should not necessarily be the same as that adopted by section 17 in that personal injury claims are subject to the shorter limitation period of three years. We would suggest, however, that if a comparison is to be made between the five year prescription and the three year limitation period there should also be taken into consideration the limitation rule which confers upon the court the discretion under section 19A of the 1973 Act to extend the three year period if it appears equitable in the circumstances to do so—a discretion not available, and which we propose should not be made available,<sup>9</sup> in relation to a reparation obligation prescribable under the short negative prescription.

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1. Provisional proposal 3(a)

2. See *Love v Haran Sealant Services Ltd* 1979 SC 279; *Kerr v J A Stewart (Plant) Ltd & Another* 1976 SC 120; and *Comer v James Scott & Co (Electrical Engineers) Ltd* 1978 SLT 235.

3. S 17(2)(b)(iii) of the 1973 Act introduced by s 2 of the 1984 Act.

4. 1978 SLT 235.

5. S 22B(3)(d) of the 1973 Act.

6. S 14(1)(c) of the Limitation Act 1980.

7. S 14A(8)(b) of the 1980 Act as incorporated by s 1 of the 1986 Act.

8. See Recommendation 10 below.

9. See Recommendation 11 below.

2.42 If our proposal is seen as unfairly favouring the claimant's interests to the detriment of the defender, the balance is arguably restored in our later recommendation to limit the defender's period of risk by reducing the length of the long negative prescription.<sup>1</sup>

2.43 After giving this matter considerable thought we are of the view that the defender's identity should form part of the discoverability formula to be adopted for reparation obligations under the first scheme referred to above. Its inclusion safeguards the principle underlying this proposal, that if possible an obligation to make reparation should not prescribe until the claimant knows who is responsible for the damage sustained.

2.44 We therefore recommend that:

**5. Knowledge of the identity of a person liable for the damage sustained should be included in the discoverability formula.**

(Paragraphs 2.37 to 2.43; clause 1, proposed new section 6(3)(c)(iii) of the 1973 Act)

2.45 We pointed out in the Memorandum,<sup>2</sup> however, that a potential claimant may identify a person liable for the damage sustained and then subsequently discover that another is also responsible. In these circumstances where the claimant has knowledge of material damage and its cause we consider that the fairest approach is to introduce a rule in which prescription will start to run in favour of each defender at the time he is identified.

2.46 This policy seems to accord with that adopted in relation to an obligation to make reparation for personal injuries where the discoverability formula includes knowledge "that the defender was a person to whose act or omission the injuries were attributable *in whole or in part*<sup>3</sup>..." (our emphasis).

2.47 We therefore recommend that:

**6. Where material damage and its cause have become discoverable prescription will start to run in favour of each person liable at the time his or her identity becomes discoverable by the claimant.**

(Paragraphs 2.45 to 2.46; clause 1 proposed new section 6(4) of the 1973 Act)

2.48 In the Memorandum<sup>4</sup> we also examined how prescription should operate where the claimant identifies one person liable for the damage, and then subsequently discovers that that person's employer is vicariously liable for his employee's act or omission.

2.49 We invited consultees' views on whether such a situation would justify making an exception to Recommendation 6 above on the basis that where the claimant identifies a person liable for damage sustained ('the first person') and subsequently discovers that another is vicariously liable for that person's wrongful actions ('the second person') prescription will start to run in favour of the first and second persons at the same time as the second person is identified.<sup>5</sup>

2.50 We suggested that it seems conceptually wrong to recommend a rule—that prescription should start to run in favour of each person liable at the time he is identified—which could result in a person who is vicariously liable for another becoming responsible for the consequences of the other person's wrongful actions at a time when any claim for reparation against that other person may have prescribed.

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1. See Recommendation 16 below. It should be noted here that the defender's period of risk in respect of a personal injuries claim could be far greater in that under s 7(2) of the 1973 Act the long negative prescription does not apply to such claims.

2. See para 4.24.

3. S 17(2)(b)(iii) of the 1973 Act.

4. See para 4.25.

5. Question 3(c) in the Memorandum.

2.51 The majority of consultees however were strongly opposed to the adoption of such an exception to Recommendation 6 and accordingly we have decided not to proceed with any recommendation in this respect.

#### Knowledge of fault or liability

2.52 We examined in the Memorandum whether the discoverability formula should include knowledge, not only that the defender's act or omission has given rise to the loss, injury or damage sustained by the claimant, but also that such act or omission is actionable *in law*.<sup>1</sup>

2.53 We are not in favour of including this aspect of knowledge in the formula, supporting the view put forward by The Lord Chancellor's Law Reform Committee that its inclusion would cause considerable hardship to the defender "by enabling a plaintiff to institute proceedings, many years after receiving advice that he had no case, on the basis that the advice was wrong when given or that a later decision had shown the law to be other than it was thought to be or that a later statute had changed the law."<sup>2</sup> The majority of consultees agreed with our view on this issue.

2.54 It is unclear however whether the existing discoverability formula in section 11 of the 1973 Act includes or excludes knowledge of the defender's liability in law. As we pointed out in the 1983 Report there is a danger that the words used in subsection (1)—"act, neglect or default"—could be taken "to connote elements of fault and liability as well as of causation".<sup>3</sup> Furthermore we wonder whether Lord McDonald's observations in the *Dunfermline District Council* case<sup>4</sup> go as far as to suggest that this aspect of knowledge forms part of the discoverability formula.

2.55 Implementation of Recommendation 1 above which proposes substituting the words 'act or omission' for 'act, neglect or default' would go some way towards excluding knowledge of the defender's liability in law from the discoverability formula but for the avoidance of doubt we recommend that:

**7. The discoverability formula should incorporate a proviso to the effect that knowledge that any act or omission is or is not, as a matter of law, actionable, is irrelevant.**<sup>5</sup>

(Paragraphs 2.52 to 2.55; clause 1, proposed new section 6(6) of the 1973 Act)

#### The test for imputing knowledge

2.56 The discoverability formula provided in section 11(3) of the 1973 Act is based on the claimant's actual or constructive knowledge of the relevant facts—"when the creditor first became, or could with reasonable diligence have become" aware of these facts.

2.57 Consultees agree with our view that constructive knowledge should form part of the discoverability formula in that the alternative option of defining knowledge only in terms of what the claimant actually knows would be unduly prejudicial to the defender. Such an approach would effectively enable the claimant to elect when prescription should start to run against him.

2.58 We are, however, unhappy with the current test for imputing knowledge prescribed under section 11(3) in that it seems to impose upon the claimant a positive duty to go searching for damage even where there may not be reasonable grounds for suspecting its existence.

2.59 Accordingly, in our Memorandum we suggested as an alternative option that the test should be what it would be reasonable for the claimant to discover taking

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1. See paras 4.27 to 4.36.

2. Interim Report on *Limitation of Actions: In Personal Injury Claims* Cmnd. 5630 para 50.

3. See para 3.10.

4. 1985 SLT 345.

5. A similar proviso has been adopted under s 22(3) of the 1973 Act in relation to the discoverability formula applied by section 17 to personal injury claims, and under s 22(B)(5) relative to defective products.

into account his or her particular characteristics and circumstances<sup>1</sup> thus removing any suggestion that there is a duty to search for defects.

2.60 There was a mixed reaction to this proposal. By a small majority consultees supported this approach. Others, however, thought that it offered too subjective a test giving rise to greater uncertainty as to the defender's period of risk, the starting point for the prescriptive period being dependent upon the particular characteristics and circumstances of the claimant. Those dissenting favoured a more objective test—the test of the reasonableness of the average man.

2.61 After giving further consideration to this issue we have decided to adopt what we suggest offers a suitable compromise between the very subjective approach put forward by our initial proposal, and the objective test of the reasonable man. We propose a formula, for fixing the start of the prescriptive period where knowledge is imputed, similar to that provided by section 17 of the 1973 Act in respect of a personal injury claim—the date on which it would have been reasonably practicable for the claimant in all the circumstances to become aware of all the relevant facts.

2.62 In our view this formula would not be so overtly subjective as that put forward in the Memorandum and has the added benefit of helping, once again, to minimise fragmentation in this area of the law. A similar test has already been applied to reparation claims arising from defective products under the third scheme referred to above.<sup>2</sup>

2.63 We also examined in our Memorandum<sup>3</sup>, within the context of defining constructive knowledge, whether any specific reference should be made therein to seeking the advice of experts. We had already considered this issue in our 1983 Report<sup>4</sup> in relation to personal injuries and had decided against recommending such a reference. A similar approach was adopted in the Memorandum, and was supported by consultees.

2.64 We therefore recommend that:

- 8. The date of the claimant's knowledge should be the date on which he became, or on which 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 the advice of experts.**

(Paragraphs 2.56 to 2.63; clause 1, proposed new section 6(3)(c) of the 1973 Act)

2.65 Under current law<sup>5</sup> it is the knowledge of 'the creditor' which fixes the start of the prescriptive period. A person becomes a creditor (referred to in the Report as 'the claimant') within the context of a reparation claim when the defender's act or omission gives rise to damage, whether discoverable or not at that time. Accordingly a reference to 'the creditor' without further qualification could be, at any one time, a reference to the person who has sustained damage which is not yet discoverable; to the person who has sustained damage which has become discoverable; or to an assignee of a contingent<sup>6</sup> or enforceable right<sup>7</sup> to claim reparation.

2.66 Where damage has become discoverable and the right to claim reparation has been subsequently assigned to another it is arguable that under the present law 'the creditor' whose knowledge fixes the start of the prescriptive period would be the assignee. It seems wrong in principle that the prescriptive period can be extended to the detriment of the defender simply because the creditor who has sustained the

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1. Provisional proposal 5(b).

2. S 22B(2) of the 1973 Act.

3. Paras 4.47 to 4.55.

4. Para 3.7.

5. S 11(3) of the 1973 Act.

6. A creditor may assign to another all his potential rights under a contract which may include a right to claim reparation for damage sustained which has not become discoverable at the time of the assignation.

7. Is a right to claim reparation for damage which has become discoverable at the time of the assignation.

damage elects to assign his right of reparation to another. A similar view was expressed by us in the 1983 Report in relation to the rules of limitation applicable to personal injuries.<sup>1</sup>

2.67 In order to retain an equitable balance between the interests of the claimant and the defender we have incorporated in the draft Bill<sup>2</sup> a specific provision which excludes from the definition of 'the creditor' in the discoverability formula an assignee of an enforceable right to claim reparation.

**Application of the discoverability formula where damage is not latent**

2.68 The discoverability formula was presented in the Memorandum on the basis that it would only apply in fixing the start of the prescriptive period where the damage sustained as a consequence of some act, neglect or default is not immediately discoverable.

2.69 After consultation, however, we began to question whether latent damage should be a prerequisite for the operation of that formula. The alternative option would be to delay the start of the prescriptive period until the claimant has actual or constructive knowledge of all the relevant facts—material damage, its cause, and the identity of the person responsible—, even where the damage is immediately discoverable on its occurrence.

2.70 It seems to us that it is illogical to delay fixing the start of the prescriptive period in a latent damage situation until material damage, its cause, and the person responsible have become discoverable, but start the running of prescription in a patent damage situation immediately the damage occurs notwithstanding that the claimant at that time may be unaware of its cause or of the defender's identity.

2.71 Accordingly we came to the conclusion that the discoverability formula should apply to an obligation to make reparation under the first scheme, whether the damage sustained is patent or latent, so that prescription will not start to run until all the relevant facts have become discoverable by the claimant.

2.72 We are reassured in this decision by the fact that this approach has already been adopted for personal injury claims under section 17 of the 1973 Act in that the three year limitation period does not start to run until all the relevant facts have become discoverable by the injured party. Latent injury is not a prerequisite for adoption of the discoverability formula under that section.<sup>3</sup>

2.73 We recommend therefore that:

**9. The short negative prescription will not start to run in respect of any obligation to make reparation until the claimant has actual or constructive knowledge of material damage, its cause, and the identity of the person responsible.**

(Paragraphs 2.68 to 2.72; clause 1, proposed new section 6(3)(c) of the 1973 Act)

## **Duration of the short negative prescription in relation to an obligation to make reparation**

2.74 If the above discoverability formula is adopted for fixing the starting point for the short negative prescription in relation to an obligation to make reparation, it will be similar to that applicable to the three year limitation period in respect of personal injury claims under section 17 of the 1973 Act.

2.75 Although this similarity might suggest that a five year prescriptive period cannot continue to be justified where the limitation period is only three years, we

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1. See para 3.8 which was implemented by s 22(2) of the 1973 Act.

2. See para 2(b) of Sched 1 to the Bill which incorporates a new subs (5) into s 15 of the 1973 Act.

3. A similar approach is adopted under s 22B(2) and (3) of the 1973 Act and s 14A(5)—(10) of the Limitation Act 1980.

expressed doubt in the Memorandum that a comparison in this respect between these two categories of reparation claim is appropriate.

2.76 As we pointed out in our 1983 Report,<sup>1</sup> in Scotland “less time is allowed for pursuing claims for personal injuries than for enforcing other obligations”—possibly because of the greater reliance placed upon the evidence of eye witnesses rather than documents in such claims, and consequently the corresponding need to bring the reparation action into court before memories of the facts become less accurate.

2.77 A similar approach is adopted under English law, which provides a three year limitation period for personal injury claims, and with regard to other reparation claims arising in tort, a six year period calculated from the date damage occurs or a three year period from its discoverability, whichever is the later.<sup>2</sup> To reduce the present five year period to three years in Scotland could place the claimant in a far less favourable position than under English law and consequently might encourage ‘forum shopping’.

2.78 We also made the point earlier in this Report<sup>3</sup>, when consideration was given to including the defender’s identity in the discoverability formula, that where the claimant experiences hardship in relation to the three year limitation period the court has the power to extend the time limit—a power not available in relation to the short negative prescription.

2.79 The majority of consultees supported our proposal in the Memorandum to retain the five year period.<sup>4</sup> In our view this is not an issue which would justify adopting a three year period so as to minimise fragmentation in this area of the law.

2.80 Accordingly we recommend that:

**10. The short negative prescription applicable to an obligation to make reparation should be retained at five years.**

(Paragraphs 2.74 to 2.79; clause 1, proposed new section 6(2) of the 1973 Act)

## Extension of the running of the short negative prescriptive period in relation to an obligation to make reparation

### **The introduction of judicial discretion to extend the prescriptive period**

2.81 We considered in the Memorandum<sup>5</sup> whether discretion should be conferred upon the courts to allow a claimant to bring an action outwith the prescriptive period if it appears equitable to do so. Although judicial discretion has been introduced in relation to the three year limitation period for personal injuries,<sup>6</sup> we have already expressed the view in our 1983 Report that the exercise of a judicial discretion is incompatible with a system of prescription.

“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”.<sup>7</sup>

2.82 Furthermore, in our opinion, the exercise of such a discretion in relation to claims not involving personal injury would give rise to an unacceptable degree of

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1. See para 3.29.

2. S 14A(4) of the Limitation Act 1980.

3. See para 2.41 above.

4. Provisional proposal 7.

5. See paras 4.82 to 4.88.

6. S 19A of the 1973 Act.

7. Para 7.17.

uncertainty as to the period during which the defender is at risk, with a possible adverse effect on the insurance facilities available to cover such risk. The majority of consultees shared our reluctance to recognise judicial discretion in relation to a reparation obligation prescribable under the short negative prescription.

2.83 Accordingly we recommend that:

- 11. No judicial discretion should be conferred upon the courts to permit the claimant to raise his reparation action outwith the short negative prescription.**

(Paragraphs 2.81 to 2.82)

#### Successors-in-title to damaged property

2.84 In the case of newly built property which has been damaged through the negligence of the builder should the five year prescriptive period for submitting a claim against that builder for reparation based on delict start to run at the time all the relevant facts become discoverable, not only against the owner of the property at that time, but also against all successors-in-title to that property? We asked this question in the Memorandum<sup>1</sup> indicating that the alternative option would be not to start the running of prescription against each subsequent owner until the date on which he acquired his interest in the property.

2.85 Although it was not altogether certain whether the builder would necessarily be liable in law to make reparation to subsequent owners of the damaged property, we examined this issue on the assumption that such a liability could arise. We came to the conclusion that the first option referred to above offered a more equitable balance between the interests of the defender and claimant and accordingly we provisionally proposed that for the avoidance of doubt section 11(3) of the 1973 Act should be clarified to reflect this option.<sup>2</sup> The majority of consultees supported our approach.

2.86 Subsequent to publication of the Memorandum, the judgment issued in the case of *D & F Estates Ltd and Others v Church Commissioners for England and Others*<sup>3</sup> suggests that it would be very unlikely that successors in title to the damaged property would have a claim in delict for reparation against the builder. Accordingly we take the view that there is now no need to put forward a recommendation in implementation of our provisional proposals.

### A provisional damages scheme for a reparation obligation

2.87 We suggested in the Memorandum that difficulties might be experienced in accurately quantifying within the five year prescriptive period damage arising from an act or omission, pointing out that notwithstanding that some initial damage may be discovered further damage can subsequently arise from the same act or omission. We illustrated this possibility with the example of the building erected on faulty foundations which initially develops minor settlement cracks, and after the lapse of some years, serious structural defects.<sup>4</sup>

2.88 One argument put forward to alleviate the problem of quantifying future loss—that each item of loss caused by the act or omission gives rise to the start of a new prescriptive period and thus a new right of action against the person responsible—, was rejected by the Court in *Dunlop v McGowans*,<sup>5</sup> which upheld the common law principle laid down in *Stevenson v Pontifex and Wood*<sup>6</sup> that a claim for all the damage arising out of a single delict or breach of contract must be litigated in the same action.

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1. See paras 4.89 to 4.100 of the Memorandum.

2. Provisional proposals 9(a) and (b).

3. [1988] 2 All ER 992.

4. *Dennis and Another v Charnwood Borough Council* [1983] Q B 409.

5. 1979 S C 22.

6. 1887 15 R 125.

2.89 If our proposed discoverability formula is adopted in which the prescriptive period does not start to run until the claimant has actual or constructive knowledge of damage sufficiently material to justify court proceedings and the cause of that damage, it is arguable that the problem of quantifying loss within the prescriptive period may become less apparent. However, even physical damage to property which is sufficiently serious to justify court proceedings can still develop further over a period of time particularly in cases of progressive damage in buildings caused by defective foundations, or in large scale engineering works such as the building of a bridge.

2.90 The problems of quantifying uncertain future loss in personal injury claims were examined in the Law Commission's Report on *Personal Injury Litigation—Assessment of Damages*<sup>1</sup> and in the Pearson Report on *Civil Liability and Compensation for Personal Injury*.<sup>2</sup> As a consequence of these investigations a provisional damages scheme for personal injury claims was introduced for England and Wales by section 6, and for Scotland by section 12, of the Administration of Justice Act 1982. Under that scheme the courts were given the discretion, in cases where the medical prognosis indicated that there was a chance that the injured party's condition would deteriorate, or some serious disease develop in the future, to grant a provisional award for damages identified at that time and to allow that party to apply for a further award at a later date should his condition deteriorate or disease develop.

2.91 Consultees were invited to consider whether a similar provisional damages scheme should be adopted in relation to a reparation obligation prescribable under the short negative prescription.

2.92 A few consultees favoured its adoption pointing out that a five year period may not be long enough to identify the extent of damage in cases of progressive damage in buildings; that it seemed arbitrary to allow provisional damages only in cases involving personal injury, the problems of assessing loss being apparent in all latent damages cases; and that the present scheme of 'once and for all' damages mitigates against one of the objectives of prescription which is to encourage the institution of court proceedings as quickly as possible so as to avoid stale claims.

2.93 The majority of consultees, however, rejected adoption of such a scheme. In their view the courts, and those who represent the claimant, have developed such an expertise over the years in quantifying loss that there is no need to introduce a provisional damages scheme. The observation was made that such a scheme would extend unnecessarily the period of litigation. It would give rise to uncertainty in that it might discourage the claimant from undertaking a thorough examination of the damage sustained knowing that if it becomes more extensive a second claim might be made. The Working Party set up by the Judges of the Court of Session were unable to identify any cases likely to occur which would benefit from such a remedy or which offered a true analogy with personal injury cases. They also made the observation that the personal injuries provisional damages scheme was still at an early stage of development, and all the implications and consequences of its adoption have not been worked out.

2.94 We are persuaded by the view of the majority on this issue, and accordingly do not support adoption of a provisional damages scheme for reparation obligations prescribable under the short negative prescription.

2.95 Accordingly we recommend that:

**12. A provisional damages scheme for claims not involving personal injury should not be introduced.**

(Paragraphs 2.87 to 2.94)

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1. Law Com No 56—see in particular the section on Provisional Damages—paras 231 to 244.

2. Cmnd 7054—see in particular Declaratory Judgments paras 584 to 585.

# Part III The Statutory Rules Governing the Operation of the Long Negative Prescription in Relation to an Obligation to Make Reparation Prescribable Under the Short Negative Prescription

## THE PRESENT LAW

3.1 The twenty year long negative prescription is retained by section 7 of the 1973 Act. It applies to an obligation of any kind (including an obligation to make reparation prescribable under the short negative prescription) except (i) the imprescriptible obligations identified in Schedule 3, and (ii) the obligations to make reparation included in the second and third schemes referred to above, other than an obligation to make reparation for defamation.<sup>1</sup>

3.2 Section 7(1) provides that if after the date when any obligation to which that section applies has become enforceable, the obligation has subsisted for a continuous period of twenty years without any relevant claim having been made in relation to the obligation and without the obligation having been relevantly acknowledged then as from the expiration of that period the obligation shall be extinguished.

3.3 For the purposes of section 7 the date when an obligation to make reparation becomes enforceable is identified in section 11 as the date when damage occurs (whether discoverable or not at that time) as a consequence of some act, neglect or default; or where, as a result of a continuing act, neglect or default damage has occurred before the cessation of that act, neglect or default, on the date that act, neglect or default ceases.

3.4 The twenty year prescription is not suspended to take account of any time during which the claimant is induced to refrain from making a relevant claim because of the defender's fraudulent actings, or through error induced by his words or conduct, or during the claimant's legal disability.<sup>2</sup>

3.5 In normal circumstances an obligation to make reparation prescribable under the five year short negative prescription will have been extinguished long before the expiry of the twenty year period. The long negative prescription will however come into operation in relation to such an obligation where the short negative prescription only starts to run during the last five years of the long negative prescription. This situation could arise, for example, where the damage becomes discoverable more than fifteen years after it has occurred and no 'relevant claim' or 'relevant acknowledgment' has been made thereafter. Should these circumstances arise the long negative prescription will act as a 'cut off' point extinguishing the reparation obligation twenty years after the damage has occurred.<sup>3</sup>

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1. S 7(2) of the 1973 Act.

2. Ss 7 and 14(1)(b) of the 1973 Act.

3. On the other hand where damage becomes discoverable more than fifteen years after it has occurred, and a 'relevant claim' or 'relevant acknowledgment' is subsequently made during the running of the short negative prescription, the long negative prescription will not act as a cut off point. This rule is examined more fully below in paras 4.56 to 4.64.

# ASSESSMENT OF THE PRESENT LAW AND PROPOSALS FOR REFORM

**Introduction** 3.6 As a consequence of the role of the long negative prescription as a 'cut off provision', it is possible that the obligation to make reparation could be extinguished under that prescription before damage becomes discoverable. In the Memorandum we gave examples which illustrate this possibility—the client who acquires, as a result of his solicitor's negligence, a faulty title to his house which is not discovered until he attempts to sell the property more than twenty years later; the bridge with inherent defects which do not manifest themselves for more than twenty years after the bridge construction is completed. The possibility that damage may only become discoverable after the obligation to make reparation is extinguished may seem unfair to the claimant.

3.7 In assessing the adequacy of the rules governing the operation of the long negative prescription in relation to an obligation to make reparation prescribable under the short negative prescription it is important to ensure, once again, that the right balance is achieved between the interests of the claimant and the defender. There are, in our view, three factors to keep in mind in approaching this task.

3.8 The first recognises that the long negative prescription is primarily for the defender's benefit. Its rules should create a degree of certainty in the conduct of his affairs, reduce the likelihood of stale claims, and facilitate the availability of insurance cover for the period during which the defender is at risk.

3.9 The second concerns the earlier comments made by us in this Report<sup>1</sup> that the opportunity could be taken in framing our proposals for reform of the rules governing the long negative prescription, to rectify any imbalance between the interests of the claimant and defender brought about by our recommendations for reform of the rules of the short negative prescription which arguably favour the claimant.

3.10 The third accepts that whatever attempts are made to protect the interests of both parties there will inevitably be some hard cases where one of the parties finds himself at a disadvantage.

## Do we need to retain the long negative prescription in relation to an obligation to make reparation?

3.11 As we indicated above retention of the long negative prescription can deprive the claimant of his right to reparation in circumstances where the damage sustained is initially latent and only becomes discoverable after the lapse of twenty years.

3.12 This consequence has already been considered by us in relation to personal injury claims particularly within the context of a progressive illness such as pneumoconiosis or asbestos poisoning, which may not become apparent until many years after it has been contracted. In our 1983 Report<sup>2</sup> we indicated that this effect of the operation of the long negative prescription upon an obligation to make reparation for personal injuries is unacceptable, and accordingly we recommended that the long negative prescription should not apply to such claims.<sup>3</sup>

3.13 We made the point in the Memorandum, however, that in our view it would be inappropriate to adopt a similar approach in relation to a reparation obligation prescribable under the short negative prescription, arguing that the benefits of its retention—greater certainty as to the defender's period of risk and the avoidance

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1. See paras 2.12 to 2.13 above.

2. See paras 2.1 to 2.8.

3. This recommendation was implemented by Sched 1, para 2, to the 1984 Act, which provided the appropriate amendment to s 7(2) of the 1973 Act.

of stale claims—outweigh the disadvantages which arise in the few cases where damage is not discoverable during the long prescriptive period.<sup>1</sup>

3.14 We justified this different approach by suggesting that in latent damage claims involving personal injuries a greater emphasis is placed upon the injured party in attempting to balance the interests of the claimant and the defender than in claims involving damage other than personal injury.<sup>2</sup>

3.15 The majority of consultees supported our views on this issue.

3.16 Accordingly we recommend that:

**13. The long negative prescription should be retained in respect of an obligation to make reparation prescribable under the short negative prescription.**

(Paragraphs 3.11 to 3.15; clause 1, proposed new section 6(7) of the 1973 Act)

## Judicial discretion

3.17 If, as anticipated, the recommendation to retain the long negative prescription gives rise to some hard cases it is arguable that the disadvantages experienced by the claimant in such cases could be alleviated by providing the court with a statutory discretion to permit him to raise his action outwith the twenty year period notwithstanding the reservations earlier expressed that such a discretion operates more appropriately where legislation provides for limitation of action rather than extinction of obligation.<sup>3</sup>

3.18 In the Memorandum<sup>4</sup> we expressed reluctance to support the introduction of a judicial discretion in this context, which in our view would give rise to greater uncertainty as to the defender's period of risk, and consequently increase the difficulties in securing adequate professional indemnity cover. Consultees supported our reluctance in this respect.

3.19 Accordingly we recommend that:

**14. No judicial discretion should be conferred upon the courts to permit the claimant to raise his action outwith the long negative prescription.**

(Paragraphs 3.17 to 3.18)

## The starting point for the long negative prescription in its application to an obligation to make reparation

3.20 In submitting recommendations for reform in this context our primary consideration is to achieve an element of certainty for the defender—by selecting a starting date<sup>5</sup> which is easily ascertainable—, and to minimise the incidence of stale claims.

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1. We were further encouraged in this view by the adoption of a 10 year long stop provision under s 22A of the 1973 Act in relation to claims involving defective products and by the introduction for England and Wales of a 15 year long stop provision under s 14B of the Limitation Act 1980 for reparation claims not involving personal injuries.

2. The Lord Chancellor's Law Reform Committee in their Twenty Fourth Report also concluded that a different balance is drawn between plaintiffs and defendants in personal injury claims. See para 4.19 of the Report.

3. See para 2.81 above.

4. See para 5.9.

5. As indicated in paras 3.2 and 3.3 above, under the current law the starting date for the long negative prescription in its application to an obligation to make reparation is the date when damage occurs as a consequence of some act, neglect or default; or where, as a result of a continuing act, neglect or default damage has occurred before the cessation of that act, neglect or default, is the date when that act, neglect or default ceases.

3.21 We identified various possible options in the Memorandum<sup>1</sup>—the date of the act, neglect or default (which we propose replacing by the date of the act or omission)<sup>2</sup>; the date when damage or material damage occurs; or the date of completion—, and although we favoured the adoption of only one starting point for the long negative prescription, so as to avoid unnecessary complications in this area of the law, we invited consultees to consider the alternative option of operating one starting point for claims involving latent damage to property, and a different starting point for other latent damage claims.<sup>3</sup>

3.22 Consultees representing the interests of the building/construction industries tend to favour the date of completion, or to suggest a variation of this option—the date of practical completion; the earlier of the date of completion or the date of the act, neglect or default; or the date of delivery, defined so as to extend its scope beyond the professional services offered by these industries.<sup>4</sup>

3.23 The Lord Chancellor’s Law Reform Committee in their Twenty Fourth Report had already considered, and rejected, the possibility of adopting the completion date for the starting point of their proposed fifteen year long stop provision.<sup>5</sup> During the progress through Parliament of the Latent Damage Bill, which implemented the Report’s recommendations, a renewed plea for adoption of this date was put forward, again unsuccessfully, at the Committee stage of the debate on the Bill provisions in the House of Lords.<sup>6</sup>

3.24 Accordingly in view of the continued interest expressed in this option in our present exercise we examined very carefully the reasons given by consultees for advocating the date of completion, practical completion, or delivery, referred to above.

3.25 In the Memorandum we expressed our doubts about adopting this option, both in relation to the building and construction industries, and to services provided by other professional bodies.<sup>7</sup> One consultee who responded to the Memorandum echoed our reservations in relation to the former by identifying difficulties which can arise in ascertaining the date of completion. We were advised that many building contracts provide that the work is to be undertaken in sections—the completion of each section being evidenced by the issue of a Certificate of Completion, with a Final Certificate being released when the work is finished—and where the contract does not so provide, it is, nevertheless, often the practice for an engineer to issue interim certificates of completion, from time to time, after a substantial part of the work has been completed to the mutual satisfaction of the employer and the engineer. In either of these situations, where the act or omission, which gives rise to damage, takes place during the early stages of a project the issue which arises is whether the long negative prescription should start to run from the date of the first interim Completion Certificate issued after that act or omission, or from the date of the final Certificate of Completion. Our attention was also drawn to the obligation imposed upon a contractor, under the Standard Form of Civil Engineering Contract, “to construct, complete and maintain” the works, and to the possible argument, in this context, that the contract is not ‘completed’ until the contractor has fulfilled his maintenance obligations thereunder, and a maintenance certificate has been issued. In our view these difficulties of identifying the starting point of the long negative prescription would also apply if the date of delivery as defined above<sup>8</sup> were adopted.

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1. See paras 5.19 to 5.35.

2. See Recommendation 1.

3. Alternative option 14(e).

4. ‘Date of delivery’ is defined as follows:—“(a) In respect of building, it is the date of substantial completion when the owner takes possession (sometimes known as practical completion); (b) in respect of construction, it is the date of substantial completion of a separately defined section of the work which is then handed over to the owner; (c) in respect of professional services not covered by (a) or (b), it is the time when the advice, report, design, survey or record is received by the client and the transaction is concluded, ie the service has been completed”.

5. The Committee recommended instead the date of the defendant’s breach of duty—see para 4.12 and Recommendation 5.3(c).

6. Hansard (HL) vol 473 (8 April 1986) Cols 111-118.

7. See paras 5.26 to 5.28.

8. For definition of this date see footnote 4 above.

3.26 We also anticipate problems in applying such concepts as ‘delivery’ or ‘completion’ to situations involving latent damage which arise outside these industries. We would illustrate one such difficulty by referring to a situation put to us by one consultee. This situation concerned a conveyancing transaction in which a solicitor’s negligence, which had given rise to a faulty title to property, was not discovered until the property was sold some years after the negligence had occurred. In that situation the question which arises is whether the date of completion/delivery should be the date the client took entry to the property and paid the purchase price; the date when his title was recorded at Register House; or the date when the solicitor rendered his account for payment. We also made the point in the Memorandum that where a claim for reparation arises from negligent advice there is the problem of identifying in all cases when the advisory service provided to the claimant, and which resulted in the damage claimed, was completed.

3.27 We have come to the conclusion that even if the difficulties briefly referred to above in relation to the building and construction industry could be overcome, we still envisage insurmountable problems in applying such concepts as ‘completion’ and ‘delivery’ to situations involving latent damage which arise outside these industries. Moreover we are not in favour of resolving these problems by recommending adoption of this option only in relation to reparation obligations arising in the building and construction industry, and applying a different starting off point for all other obligations to make reparation. We are reassured in this approach by the fact that the majority of consultees appear to support the advisability of selecting only one starting off point for all reparation obligations.

3.28 We also pointed out in the Memorandum<sup>1</sup> that if this date were adopted the long negative prescription could start to run against the claimant and possibly come to an end, before damage has occurred and the claimant has a right of action. Such a situation would give rise to a conceptual problem which is explored more fully below when we give consideration to selecting the date of the defender’s act or omission as the starting off point.<sup>2</sup>

3.29 Accordingly in the circumstances we have decided not to recommend adoption of the date of completion/delivery, either exclusively in relation to reparation obligations involving the building or construction industry, or in relation to all reparation obligations. This reduces the options available for consideration to the date of the act or omission or the date when damage occurs.<sup>3</sup>

3.30 We expressed the view in the Memorandum that selection of the date of the act, neglect or default (now the act or omission) offers fewer evidential problems than those likely to arise where the starting point is fixed at the date when damage occurs. We envisaged problems if the current law is retained in identifying when damage occurs—not only in the situation where damage arises but does not become discoverable until some time thereafter,<sup>4</sup> but also in deciding what constitutes damage—the economic loss arising from a defect discovered, or the subsequent occurrence of physical damage if any.<sup>5</sup> Selection of the former date is also likely to reduce the incidence of stale claims.

3.31 On the other hand we were conscious that adoption of the date of the act, neglect or default gave rise to a conceptual problem in that the long negative prescription could start to run, and might even expire, before the obligation to make reparation has become enforceable. We questioned whether it was appropriate to select a starting point which could give rise to the commencement, and possibly also to the termination of the prescriptive period before the claimant has a right of action.

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1. See para 5.28.

2. See paras 3.31 and 3.33 to 3.34.

3. In the Memorandum we rejected the date when material damage occurs on the grounds that it would increase the incidence of stale claims.

4. The *Pirelli* case; *Dennis and Another v Charnwood Borough Council* [1983] Q B 409.

5. See paras 2.26 to 2.31 above.

3.32 By a small majority, consultees supported the date of the act, neglect or default. As one consultee remarked, on the basis that the long negative prescription must be to benefit the defender, it seems fair to provide a starting point slightly more favourable to him.

3.33 Those who indicated a preference for retention of the existing law were however very persuasive in their arguments. Emphasis was placed on the conceptual difficulties of fixing the starting point before concurrence has taken place between the act, neglect or default, and the damage sustained.<sup>1</sup> The point was forcefully made that if the long negative prescription is to remain a prescription of obligations at all, it should not be able to extinguish an obligation before it has become enforceable. No consultee offered specific examples of evidential problems experienced in identifying when damage has occurred. The Working Group set up by the Judges of the Court of Session expressed the view that the date of the occurrence of damage appears to them to give the maximum certainty as to the starting point for the running of the long negative prescription.

3.34 The arguments for and against the selection of either the date of the act or omission, or the date when damage occurs appeared to be fairly evenly balanced. We are however finally persuaded to recommend retention of the existing law for two reasons. First, there is no overwhelming evidence from consultees to suggest that problems have arisen in the past in identifying this starting off point. Second, we are reluctant to recommend reform which could result in the period of the long negative prescription coming to an end before an obligation to make reparation has arisen. Although retention of the date when damage occurs in preference to the adoption of the date of the act or omission is likely to give rise to more stale claims, we consider that this possible disadvantage might be minimised by the period recommended for the length of the long negative prescription. This related issue is considered below.

3.35 Accordingly we recommend that:

15. **The current law should be retained in fixing the starting point for the long negative prescription in relation to an obligation to make reparation prescribable under the short negative prescription.**

(Paragraphs 3.20 to 3.34; clause 1, proposed new section 6(7) of the 1973 Act)

## The length of the long negative prescription in its application to an obligation to make reparation

3.36 Over the past few years there has been a general trend towards selecting a shorter period for the 'long stop' provision than that currently in operation under the 1973 Act.

3.37 The new 'long stop' provision recommended by the Lord Chancellor's Law Reform Committee in their Twenty Fourth Report, and implemented by section 14B of the Limitation Act 1980, extends for a period of fifteen years from the date of the defendant's act or omission. The Product Liability Directive, the terms of which were implemented for England, Wales and Scotland by the 1987 Act, provides for a 10 year prescriptive period calculated from the date the defective product is supplied.

3.38 In the Memorandum we proposed retention of the twenty year period<sup>2</sup> on the basis, however, that the starting point would be the earlier date of the act, neglect, or default (or act or omission), thus offering in effect to reduce the length of the prescriptive period. Many consultees rejected this proposal. The majority favoured a ten year long stop running from the date of delivery/completion or the

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1. As indicated in para 2.26 above damage comprehends all types of loss which may be sustained as a result of a breach of a legal duty or obligation, and consequently within the context of a breach of contract, will cover loss occasioned by not getting what one has contracted for.

2. Provisional proposal 13.

date of the act, neglect or default, and a smaller number supported a fifteen year period calculated either from the date of completion, the date of the act, neglect or default, or from the date damage occurs.<sup>1</sup>

3.39 Various reasons were put forward for rejecting the twenty year period. One reason reflected the problems of securing adequate insurance cover over such a period particularly where the potential defender had retired or was about to retire from business, or where a partnership is dissolved. In this context the point was made that inadequate cover in the building industry increased the likelihood of a claim for damages being directed against the local authority (in respect of their building control responsibilities) on the basis that the authority, unlike the builder, would be able to meet any claim awarded against them.

3.40 Support was given for the views expressed on this issue in the Report on "*Limitation*" published in 1986 by the Institute of Law Research and Reform of Edmonton, Alberta. That Report recommended a period not exceeding ten years for the following reasons:— that most claims will arise during that period so that only a few claimants will suffer injustice in losing a right thereafter to prosecute a claim; that the cost of maintaining insurance cover over a longer period and of retaining records for evidentiary purposes is too high in relation to the benefit conferred on the few claimants whose rights to claim reparation are likely to prescribe if the period is reduced; that a longer period produces stale claims. The Federation of Civil Engineering Contractors, in giving support for a ten year period, observed that notwithstanding such a reduction it could well be anything from twelve to fifteen years before an action is brought to trial, giving rise to possible evidential problems for both parties.

3.41 We are persuaded from the responses received, and also from our decision to recommend the date damage occurs as the starting off point of the long negative prescription, that a twenty year period would no longer be acceptable.

3.42 In selecting an alternative period we are conscious that although the main beneficiary of whatever recommendation we make should be the defender, the period chosen must endeavour to preserve an equitable balance between the interests of both parties. We make this point because we are concerned, notwithstanding some of the responses referred to above, that selection of too short a period will increase the number of cases where damage may not become discoverable until shortly before the end, or after the expiry, of the long negative prescription.

3.43 As indicated above,<sup>2</sup> under current law, in the interests of certainty, the twenty year long negative prescription in relation to an obligation to make reparation is not postponed or suspended to take account of any time during which the claimant is induced to refrain from making a relevant claim because of the defender's fraudulent actings, or through error induced by his words or conduct, or during the claimant's legal disability.<sup>3</sup> If, however, we were to select as short a period as ten years for the long stop provision it would in our view be necessary, as a protection to the claimant, to propose postponement or suspension of that period on the grounds of the defender's fraud, error, or, in certain circumstances, during the claimant's legal disability.<sup>4</sup> Such a proposal would give rise to uncertainty as to the defender's period of risk. On the other hand, adoption of a fifteen year period running from the date damage occurs, would in our opinion, be sufficiently long to justify retention of the current rule against postponement or suspension.<sup>5</sup>

3.44 Consequently the choice lies between adopting a fifteen year period which offers a degree of certainty as to the defender's period of risk, or a shorter period

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1. Some of the responses suggest that in selecting the length of the prescriptive period no obvious connection was made with the starting off point. A longer period recommended did not necessarily attract an earlier commencement date.

2. See para 3.4.

3. Ss 7 and 14(1)(b) of the 1973 Act.

4. See paras 4.13 to 4.23 below for our recommendations in relation to the effect a claimant's legal disability should have upon the operation of the short negative prescriptions and the three year limitation period.

5. See paras 4.8 to 4.11 and 4.30 to 4.32 below and Recommendations 18 and 22.

which would attract less certainty, being subject, in the circumstances referred to in paragraph 3.43, to postponement or suspension.

3.45 After giving this matter some considerable thought, we have decided to opt for greater certainty for the defender, and accordingly recommend a period of fifteen years, which will run, as indicated above, from the date damage occurs. This recommendation, however, should not be considered in isolation but in conjunction with our later recommendations<sup>1</sup> which concern the effect the making of a 'relevant claim' should have upon the operation of the long negative prescription in relation to, among other obligations, a reparation obligation, and the prohibition against contracting out of the statutory periods. The issues evidenced by these recommendations are all closely interrelated.

3.46 Accordingly we recommend that:

**16. The length of the long negative prescription in relation to an obligation to make reparation should be fifteen years.**

(Paragraphs 3.36 to 3.45, clause 1, proposed new section 6(7) of the 1973 Act)

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1. See Recommendations 26 and 29/30.

# Part IV Wider Issues

## Introduction

4.1 Our recommendations for reform have so far focused on the rules of the short and the long negative prescriptions as they operate only in relation to an obligation to make reparation under the first scheme referred to above.

4.2 In this Part of the Report although we continue to be primarily concerned with reparation obligations we examine in this context not only the rules of the short and long negative prescriptions in relation to such obligations, but also the limitation/prescription rules which apply to reparation obligations identified under the second<sup>1</sup> and third schemes<sup>2</sup> referred to above.

4.3 Some of the issues raised, however, go beyond the scope of reparation obligations. In the situation where fraud on the part of the defender or error induced by his conduct persuades the claimant not to make a 'relevant claim' we examine the statutory rules which define the effect such fraud or error should have upon the operation of the short and long negative prescriptions in relation to all obligations prescribable thereunder. We consider, in relation to all obligations which are subject to a period of prescription or limitation, the effect the claimant's legal disability should have upon the operation of such periods. Our recommendations for reform which concern (i) the effect a 'relevant claim' or 'relevant acknowledgment' should have upon the operation of prescription and (ii) whether contracting out of the statutory prescriptive periods should be permitted, apply to all obligations prescribable under the five year short negative prescription, the two year negative prescription,<sup>3</sup> the long negative prescriptions, and also to rights relating to property which can prescribe under section 8 of the 1973 Act.

## Postponement or suspension of the prescriptive periods through the defender's fraud or error

### **The five year short negative prescriptive period, and the two year negative prescriptive period applicable to the obligation to make contribution between wrongdoers**

4.4 As referred to earlier in this report<sup>4</sup> in terms of section 6(4) and (5) of the 1973 Act prescription is postponed or suspended for the period during which the claimant is induced to refrain from making a relevant claim because of the defender's fraud or through error induced by the defender's words or conduct.<sup>5</sup> We indicated in the Memorandum<sup>6</sup> that we did not propose to recommend altering the principle underlying this provision—that the defender's fraud or error should postpone or suspend the running of the prescriptive period. No adverse comments were received from consultees to this proposal.

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1. The second scheme covers obligations to make reparation for personal injuries or death resulting from such injuries (not caused by a defective product) and in respect of defamation—see para 1.25 above.

2. The third scheme is concerned with defective products—see para 1.26 above.

3. See s 8A of the 1973 Act which applies to an obligation to make contribution between wrongdoers by virtue of s 3(2) of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1940.

4. See para 2.10.

5. These provisions are applied to an obligation to make contribution between wrongdoers by s 8A(2) of the 1973 Act.

6. See para 4.101.

4.5 There is however one qualification under current law to this provision. The period of postponement or suspension will cease after the claimant could with reasonable diligence have discovered the fraud or error so that as soon as the claimant has actual or constructive knowledge of that fraud or error prescription will start or restart to run against him.

4.6 It appeared to us that the test for imputing knowledge to the claimant under this qualification should be consistent with that adopted in relation to the discoverability formula for imputing knowledge of the relevant facts.<sup>1</sup> This approach was supported by the majority of consultees.

4.7 Accordingly we recommend that:

- 17. In imputing knowledge to the claimant of the defender's fraud or the error induced by the defender, which persuades the claimant from making a relevant claim against him, the test to be applied should be when it would have been reasonably practicable for him in all the circumstances to become aware of the fraud or error as the case may be.**

(Paragraphs 4.4 to 4.6; clause 1, proposed new section 9(2) of the 1973 Act)

### **The long negative prescriptions**

4.8 Unlike the rules applicable to the operation of the short negative prescription, those relating to the long negative prescription do not provide for the postponement or suspension of prescription for the period during which the claimant is induced to refrain from making a 'relevant claim' because of the defender's fraud or through error induced by the defender's words or conduct.<sup>2</sup>

4.9 The prohibition of postponement or suspension in this context introduces greater certainty into this area of the law, and helps to minimise the likelihood of stale claims. Nevertheless it is for consideration whether it is appropriate to retain rules which afford protection to a defender—by limiting his period of risk—, in a situation where he has fraudulently induced the claimant to refrain from making a 'relevant claim'.

4.10 We proposed in the Memorandum<sup>3</sup> that, subject to retaining a twenty year long negative prescription, in the interests of certainty there should be no alteration in the present rules. In our view a twenty year period ought to provide the claimant with sufficient time in which to discover the fraud, or error, which induced him from making a 'relevant claim'. The majority of consultees, some of whom recommended a reduction in the twenty year period, supported us in this approach.

4.11 Although the twenty year period will continue to apply to obligations not involving reparation we have recommended earlier in this Report that reparation obligations should be subject to a fifteen year long negative prescription.<sup>4</sup> In selecting this period we expressed the view that a fifteen year period should still be sufficient to justify retention of the current rule against postponement or suspension on the grounds of the defender's fraud or error.<sup>5</sup>

4.12 Accordingly we recommend that:

- 18. The fifteen and twenty year long negative prescriptions should not be postponed or suspended for any period during which the claimant is induced to refrain from making a 'relevant claim' because of the defender's fraud, or through error induced by the defender's words or conduct.**

(Paragraphs 4.8 to 4.11)

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1. See Recommendation 8 above.

2. S 7 of the 1973 Act and see para 3.4 above.

3. Provisional proposal 15.

4. Recommendation 16.

5. See para 3.43.

## Postponement or suspension of the prescriptive/limitation period during the claimant's legal disability

### **The five year short negative prescriptive period, the two year negative prescriptive period, and the three year limitation period under sections 17, 18 and 18A of the 1973 Act**

4.13 We next consider the effect a claimant's legal disability has upon the operation of the above prescriptive/limitation periods.

4.14 Under existing law the running of the five year short negative prescription, and the two year negative prescription applicable to an obligation to make contribution between wrongdoers, are postponed or suspended for any period during which the original creditor<sup>1</sup> (while he is the creditor) is under a legal disability.<sup>2</sup> Legal disability is defined in section 15 of the 1973 Act as meaning 'legal disability by reason of nonage or unsoundness of mind'. Similarly in the computation of the three year limitation period applicable to reparation obligations under the second scheme referred to above any time during which the injured party (or the relative of an injured party who has died from his injuries) or the person who is alleged to have been defamed, is under a legal disability is disregarded.<sup>3</sup>

4.15 We are concerned that the postponement or suspension of the prescriptive or the limitation period during the claimant's<sup>4</sup> legal disability could be detrimental in securing an equitable balance between the interests of the claimant and the defender. It unduly extends the defender's period of risk, and where the legal disability involves mental illness creates uncertainty as to its duration. It arguably over protects the claimant in the situation where he has a tutor, curator, or *curator bonis*, ('the representative') as the case may be, to act on his behalf.

4.16 Although we examined this issue in the Memorandum in relation to all obligations which are subject to the short negative prescriptive period, or the limitation period referred to in Part II of the 1973 Act, we were primarily concerned with the effect legal disability has on the operation of these periods in relation to an obligation to make reparation.<sup>5</sup> In this context we expressed a preference for not postponing or suspending the running of the prescriptive/limitation periods during the claimant's legal disability. This view was justified on the basis that normally there is someone responsible in law to pursue on behalf of the legally disabled any claim for damages arising from an act or omission, and where this is not the position, the test for imputing knowledge to the claimant under the discoverability formula in fixing the start of the prescriptive/limitation period should take into account the claimant's lack of representation. The majority of consultees agreed with this approach.

4.17 There are circumstances, however, in which the vulnerability of a legally disabled claimant may justify introducing certain exceptions to this proposed rule.

4.18 The first situation envisaged arises because of the manner in which the rules of prescription operate in fixing the start of the prescriptive period in relation to an obligation not involving reparation. The discoverability formula, including the test for imputing knowledge to the claimant of the relevant facts, proposed in this Report for fixing the start of prescription for reparation obligations not involving personal injury, and already adopted in relation to personal injury claims, takes into account to some extent the claimant's circumstances. This formula, however, is not relevant for fixing the start of the prescriptive period for non reparation obligations. Consequently if the above proposed rule governing legal disability is adopted and the obligation

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1. The reference to the 'original creditor' indicates that the legal disability of an assignee of that creditor's rights would not postpone or suspend the prescriptive period.

2. Ss 6(4)(b) and 8A(2) of the 1973 Act.

3. Ss 17(3), 18(3), 18A(2)

4. Where the rights of a creditor in an obligation which has become enforceable are assigned, the reference in paras 4.13 to 4.26, and 4.30 to 4.32, and Recommendations 19, 20 and 22 of the Report to 'the claimant', is a reference to the assigning creditor.

5. Paras 6.13 to 6.20.

arising does not involve reparation, the fact that the claimant is legally disabled and has no representative to protect his interests will not be taken into account in fixing the start of the prescriptive period. Prescription will run against him as soon as the obligation becomes enforceable.

4.19 The second situation applies in relation to any obligation which prescribes under the five or two year prescriptive period or is subject to the three year limitation period. It involves the claimant who becomes mentally ill during the running of prescription/limitation but where a *curator bonis* is not appointed to protect his interests until some time later and possibly after the prescriptive/limitation period has expired. Although we appreciate that it might be difficult evidentially to establish that legal disability occurred prior to the representative's appointment, on the assumption that proof in this respect may be possible, the legally disabled claimant could be placed at a disadvantage if the prescriptive/limitation period is not suspended from the time mental illness can be established until the representative is appointed.

4.20 These last two situations focus on the legally disabled claimant who has no representative. The third situation which we anticipate may give rise to difficulties for the legally disabled claimant is where the debtor in the obligation enforceable by the claimant happens to be his representative.

4.21 We came to the conclusion that in these three situations application of the rule, without qualification, that the claimant's legal disability should not postpone or suspend the running of the prescriptive/limitation period would not secure an equitable balance between the interests of the claimant and the defender.

4.22 We could approach the problem of restoring the appropriate balance between the parties by specifically identifying the circumstances referred to above as exceptions to the proposed rule against postponement or suspension. We are inclined, however, to adopt a simpler solution to this problem.

4.23 Accordingly we recommend that:

**19. Where the claimant is under a legal disability the running of the five and two year negative prescriptive periods and the limitation period referred to under sections 17, 18 and 18A of the 1973 Act will not be postponed or suspended unless**

**(i) the claimant has no representative to protect his interests; or**

**(ii) the claimant, does have a representative, but the representative is the debtor in the obligation enforceable by the claimant.**

(Paragraphs 4.13 to 4.22; clause 1, proposed new section 9(1)(b) and (3) of the 1973 Act, and Schedule 1, paragraphs 3, 4, and 5)

4.24 The purpose of a representative's appointment is to ensure that the interests of the legally disabled claimant are protected. Consequently where an obligation to make reparation to that claimant arises it is reasonable to anticipate that the representative will carry out enquiries on behalf of the claimant in order to ascertain the relevant facts necessary for the enforcement of that obligation.

4.25 We propose, therefore, that, in applying the discoverability formula in such circumstances it will be the representative's actual or constructive knowledge of the relevant facts which will fix the start of the prescriptive or limitation period in relation to an obligation to make reparation unless the obligation is enforceable against the representative.

4.26 This suggestion was acceptable in principle by the majority of consultees, subject to the view referred to above by some consultees regarding the test which should be applied in imputing knowledge.<sup>1</sup>

4.27 Accordingly we recommend that:

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1. See para 2.60 above.

- 20. Where the claimant is under a legal disability and has a representative, who is not the defender against whom the claimant has a claim, the start of the five year short negative prescriptive period, or the limitation period referred to in sections 17, 18 and 18A of the 1973 Act, in relation to an obligation to make reparation, will be fixed at the date upon which the representative became, or on which it would have been reasonably practicable for him in all the circumstances to become, aware of the relevant facts.**

(Paragraphs 4.24 to 4.26; clause 1, proposed new section 6(5) of the 1973 Act, and Schedule 1, paragraphs 2(b), 3, 4 and 5)

4.28 We have already recommended that the test for imputing knowledge to the claimant<sup>1</sup> of the defender's fraud or error induced by the defender, which persuades the claimant from making a 'relevant claim' against him, should be consistent with that adopted for imputing knowledge of the relevant facts under the discoverability formula.<sup>2</sup> Consequently where the claimant is legally disabled but has a representative to protect his interests, a similar formula should be adapted for imputing knowledge of the fraud or error as indicated in paragraph 4.25 above.

4.29 Accordingly we recommend that:

- 21. Where the claimant is under a legal disability and has a representative who is not the defender against whom the claimant has a claim, the postponement or suspension of the five or two year short negative prescriptive period brought about by the defender's fraud or error induced by the defender which persuades the claimant from making a 'relevant claim' against him, will come to an end on the date when the representative became, or on which it would have been reasonably practicable for him in all the circumstances to become, aware of that fraud or error.**

(Paragraph 4.28; clause 1, proposed new section 9(2) of the 1973 Act)

#### **The long negative prescriptions**

4.30 The rules which apply to the long negative prescription do not provide for the postponement or suspension of the prescriptive period during the claimant's legal disability.<sup>3</sup>

4.31 On the basis that the long negative prescription helps to provide the defender with a limit on his period of risk and to minimise the incidence of stale claims, we proposed in the Memorandum<sup>4</sup> that subject to retaining a long negative prescription of twenty years duration there should be no alteration in the present law. Consultees supported this proposal.

4.32 Notwithstanding that we have recommended that the long negative prescription in relation to a reparation obligation should now be reduced to fifteen years,<sup>5</sup> the twenty year period being retained for all other obligations prescribable under section 7 of the 1973 Act, we are still of the view that the claimant's legal disability should not postpone or suspend the operation of either long negative prescription.

4.33 Accordingly we recommend that:

- 22. The claimant's legal disability should not postpone or suspend the running of the fifteen and twenty year long negative prescriptions.**

(Paragraphs 4.30 to 4.32; clause 1, proposed new sections 6(7), 7(2) and 10(1) of the 1973 Act)

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1. In this context 'the claimant' could be either the original claimant or an assignee of that claimant's right to enforce an obligation.

2. See Recommendation 17 above.

3. See s 14(1)(b) of the 1973 Act and para 3.4 above.

4. Provisional proposal 15.

5. Recommendation 16.

## Interruption or extension of the prescriptive periods in relation to the giving of a 'relevant acknowledgment' or the making of a 'relevant claim'

### The effect of a 'relevant acknowledgment' or 'relevant claim' on the running of the five year short negative prescriptive period and the two year negative prescriptive period

#### Introduction

4.34 As indicated above, section 6 of the 1973 Act provides that if after the appropriate date an obligation to which this section applies<sup>1</sup> has subsisted for a continuous period of five years without any 'relevant claim' having been made in relation to the obligation, and without the obligation having been relevantly acknowledged, then as from the expiration of that period the obligation shall be extinguished.<sup>2</sup>

4.35 A 'relevant claim' is defined by section 9 of the 1973 Act. Very briefly it covers a claim made in court proceedings; in an arbitration; in a sequestration or liquidation, or under a voluntary trust deed for creditors; and by executing diligence directed to the enforcement of the obligation.<sup>3</sup> A 'relevant acknowledgment' is defined by section 10 of the 1973 Act and includes an unequivocal written admission of the obligation by the debtor, or such actings on his part which clearly indicate that the obligation still exists.

4.36 In our 1970 Report we recommended that the effect of a 'relevant acknowledgment' or 'relevant claim' should be to interrupt and bring to an end the running of prescription, and to commence the start of a new prescriptive period.<sup>4</sup>

#### Relevant acknowledgment

4.37 This recommended policy would appear to have been implemented under the present law insofar as the making of a 'relevant acknowledgment' is concerned.

4.38 Although we appreciate that such a rule operates to extend considerably the defender's period of risk, we take the view that this extension is justifiable in that it is brought about by the defender, and consequently is within his control. Furthermore we anticipate that it will not prejudice the availability of insurance cover, where appropriate, in that the validity of any such cover will be dependent upon the insurance company giving its consent to the admission of liability in respect of any insurable claim. On the other hand if an acknowledgment does not serve to interrupt the running of prescription it could be to the disadvantage of the claimant who may be persuaded, on the strength of the acknowledgment given, to refrain from making a relevant claim in time to prevent prescription operating so as to extinguish the obligation.

4.39 We proposed in the Memorandum that the current law should be retained.<sup>5</sup> The majority of consultees gave support for this proposal.

4.40 Accordingly we recommend that:

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1. See Sched 1 para 1 for identification of obligations covered by this provision.
  2. A similar provision is applied in s 8A of the 1973 Act in relation to an obligation to make contribution between wrongdoers.
  3. In relation to all obligations which are extinguished by the short or long negative prescriptions, or rights affecting property which prescribe under the twenty year long negative prescription, our Bill adopts the section 9 definition of 'relevant claim' subject to excluding therefrom 'the execution of diligence'. This exclusion is justified in relation to the operation of prescription in respect of obligations which are subject to the five and two year negative prescriptions on the ground that a reference to diligence is unnecessary in that context. With the exception of diligence carried out on the dependence of a court action, diligence only arises during the enforcement of an obligation to obtemper a decree (decree being redefined in para 11(c) of Sched 1 to the Bill—see para 1.19 above), an arbitration award, or an order of a tribunal or authority exercising jurisdiction under any enactment, such obligations being subject to the twenty year long negative prescription (see Sched 1 para 2(a) of the 1973 Act). As a court action already falls within the definition of 'relevant claim' under s 9 of the 1973 Act we consider that it is unnecessary to provide that 'the execution of diligence' should also constitute a 'relevant claim' in relation to obligations prescribable under the five and two year periods. See paras 4.69 to 4.70 below for the reasons given for adopting this amended definition of 'relevant claim' in relation to obligations, and rights, which only prescribe under the twenty year long negative prescription.
  4. Para 99.
  5. Provisional proposal 19.

23. The giving of a ‘relevant acknowledgment’ during the running of the five year short negative prescriptive period or the two year negative prescriptive period in relation to an obligation prescribable thereunder should have the effect of interrupting prescription and bringing about the start of a new prescriptive period.

(Paragraphs 4.37 to 4.39; clause 1, proposed new section 11A(2) of the 1973 Act)

**Relevant claim** 4.41 Doubts have arisen as to the effect under current law of the making of a ‘relevant claim’ on the operation of prescription.<sup>1</sup> Accordingly we took the opportunity in our Memorandum to consider as a matter of policy what effect such a claim should have upon the running of the short negative prescription putting forward five possible options for examination.<sup>2</sup> We favoured at that time the Fourth Option,<sup>3</sup> which provides that interruption of the short negative prescription by the making of a ‘relevant claim’ should have the effect of suspending the running of prescription until the proceedings in which the ‘relevant claim’ have been made come to an end. The majority of consultees gave support for this approach.

4.42 Subsequent to consultation, we gave further thought to the available options, keeping in mind our objectives to minimise fragmentation in this area of the law, and to reduce, where practicable, a defender’s period of risk.

4.43 We came to the view that these objectives would be more easily achieved if we were to adopt the Fifth Option referred to in the Memorandum which is already in operation in relation to an obligation to make reparation arising out of a defective product under the third scheme referred to above.<sup>4</sup>

4.44 The Fifth Option offers a different approach to that achieved by the other four options—the effect of making a ‘relevant claim’ being to extend in certain circumstances, rather than to interrupt or suspend the running of, the prescriptive period. This Option provides that if a ‘relevant claim’ has been made during, but has not been disposed of or abandoned by the end of the prescriptive period, the obligation to which the claim relates will not be extinguished until the claim is finally disposed of in favour of the defender or is abandoned. The circumstances in which final disposal takes place are defined in subsection (3)(a)—(c) of section 22A of the 1973 Act.

4.45 This Option, in contrast to what is believed to be the position under the present law, improves the defender’s situation by reducing his period of risk, but in our view does not unduly prejudice the claimant, who is given the opportunity to pursue his claim beyond the prescriptive period providing it is started off during that period. The option achieves a result not dissimilar to that operated under the current rules of limitation which stipulate that although a court action to enforce an obligation must be raised within three years, the claimant will be able to pursue his claim beyond that period until the action is finally disposed of.

4.46 There is a difficulty in adopting the Fifth Option, without qualification, which requires to be resolved if we are to ensure that some limit is placed upon the defender’s period of risk.

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1. *British Railways Board v Strathclyde Regional Council* 1982 SLT 55; *George A Hood and Co v Dumbarton District Council* 1983 SLT 238; see also paras 6.47—6.53 of the Memorandum.

2. Paras 6.56-6.79.

3. Provisional proposal 18(a).

4. S 22A of the 1973 Act. ‘Relevant claim’ in that section however attracts a narrower definition than that provided by s 9 of the 1973 Act, in that it omits reference to the claim by a creditor to the trustee acting under a voluntary trust deed, (as defined in s 5(2)(c) of the Bankruptcy (Scotland) Act 1985), and the execution of diligence. This difference in definition will be reduced by our proposal to exclude ‘the execution of diligence’ from the section 9 definition of ‘relevant claim’—see footnote 3 p 33.

4.47 This difficulty arises where a claim has been made in an arbitration, or in insolvency proceedings<sup>1</sup>, which are still current at the end of the five year prescriptive period, but which subsequently come to an end before adjudication of the claim takes place.

4.48 Arbitration proceedings can come to an end prematurely before the issue in dispute has been examined and a decree arbitral awarded.

4.49 The legal framework within which arbitration proceedings take place is based primarily on a number of contracts two of which are essential—the contract of submission and the contract of appointment of the arbiter. There may also be other ancillary contracts involved.

4.50 Such contracts can be brought to an end on much the same grounds as other contracts governed by Scots law—by lapse of time;<sup>2</sup> on the death of one of the parties;<sup>3</sup> by agreement; by frustration or impossibility of performance; by a material breach of contract followed by rescission; where an arbiter is removed for misconduct.<sup>4</sup>

4.51 Insolvency proceedings may also come to an end before the claim has been adjudicated in various circumstances—for example— in a sequestration by the granting of a petition for its recall;<sup>5</sup> by an action of reduction, where recall is no longer competent; and by recourse to the *nobile officium* in the rare case where recall and reduction are both incompetent;<sup>6</sup>—under a voluntary trust deed where the trustee,<sup>7</sup> or a non-acceding creditor,<sup>8</sup> petitions for an award of sequestration.

4.52 Where insolvency or arbitration proceedings are brought to an end before the claim has been adjudicated such a claim will not be regarded as ‘finally disposed of’ within the context of the Fifth Option. As a consequence uncertainty will arise as to the extent of the period thereafter during which the defender’s obligation will remain enforceable.

4.53 We consider that some time limit should be placed on the defender’s period of risk in these circumstances and accordingly we propose that the claimant should be given a further six months’ period—calculated from the date on which the proceedings are brought to an end or, where a trust deed is superseded by a sequestration, from the date sequestration is awarded—, in which to enforce the obligation. We envisage that if a further ‘relevant claim’ is made during the extended period the obligation will not prescribe until final disposal of that further claim is made, or if the obligation should be ‘relevantly acknowledged’ by the defender during that time the five or two year prescriptive period will recommence as at the date of the acknowledgment.

4.54 We consider that adoption of the Fifth Option subject to the qualification referred to above offers the best solution to the problem of deciding what effect the making of a ‘relevant claim’ should have upon the operation of the five year short negative prescription and the two year negative prescriptive period in its application to an obligation prescribable thereunder. The solution helps to minimise fragmentation, and by imposing some limitation upon and possibly reducing the defender’s period

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1. For the purpose of this part of the Report insolvency proceedings cover the sequestration of a defender’s estates under the Bankruptcy (Scotland) Act 1985; the operation of a voluntary trust deed for creditors (as defined in s 5(2)(c) of the Bankruptcy (Scotland) Act 1985); and the winding up of a company under the Insolvency Act 1986.

2. The submission will often provide for a period of time within which the arbiter must give his decision. Where there is no reference to any time-limit in the deed of submission relating to the arbitration the arbitration prescribes under the twenty year prescriptive period—See *Hill v Dundee & Perth & Aberdeen Railway Junction Co* (1852) 14D 1034.

3. This could arise, for example, in the case of the arbiter’s death where no provision has been made in the contracts for the substitution of another person as arbiter.

4. *Dundee Corporation v Guthrie* 1969 SLT 93.

5. Ss 16 and 17 of the Bankruptcy (Scotland) Act 1985.

6. See para 8.18 of our Report No 68 on the *Bankruptcy and Related Aspects of Insolvency and Liquidation*.  
7. S 5(2)(c) of the 1985 Act.

8. See Sched 5, para 7 of the 1985 Act with regard to protected trust deeds and for voluntary trust deeds generally, and para 24.1 onwards of our Report No 68.

of risk without unduly prejudicing the claimant, secures an equitable balance between the interests of both parties.

4.55 Accordingly we recommend that:

**24. If in relation to an obligation prescribable under the five year short negative prescription or the two year negative prescriptive period a 'relevant claim' has been made but has not been disposed of or abandoned by the end of the five or two year period the obligation shall not be extinguished—**

(i) unless and until the claim is finally disposed of in favour of the debtor in the obligation—final disposal being defined in accordance with section 22A(3), paragraphs (a), (b) and (c) of the 1973 Act—; or

(ii) unless and until the claim is abandoned; or

(iii) subject to (iv) below if the claim has been made in arbitration or insolvency proceedings, and such proceedings have come to an end or been superseded by an award of sequestration (where the claim was lodged under a voluntary trust deed) before the claim has been adjudicated upon, until 6 months have elapsed commencing with the date on which the proceedings came to an end or the sequestration was awarded, as the case may be;

(iv) If during the six month period referred to in (iii) above a 'relevant acknowledgment' is given, or a further 'relevant claim' is made, the said period will be subject to interruption or extension, as the case may be, in accordance with Recommendations 23 or 24 (i) to (iii).

(Paragraphs 4.41 to 4.54; clause 1, proposed new sections 11B(1) to (4) and 11C of the 1973 Act)

**The effect of a 'relevant acknowledgment' or 'relevant claim' on the running of the long negative prescription in relation to an obligation prescribable under the five year short negative prescription and the two year negative prescriptive period**

#### **Introduction**

4.56 As indicated above section 7(1) of the 1973 Act provides that if after the date when any obligation to which that section applies has become enforceable, the obligation has subsisted for a continuous period of twenty years<sup>1</sup> without any 'relevant claim' having been made in relation to the obligation and without the obligation having been 'relevantly acknowledged' then as from the expiration of that period the obligation shall be extinguished.

4.57 The definition, and possible effect, of a 'relevant acknowledgment' or 'relevant claim' under current law on the operation of the five year short negative prescription and the two year negative prescriptive period have already been examined. The same definition and effect apply in relation to the long negative prescription.

4.58 We are primarily concerned here with the function of the long negative prescription as a cut off point in respect of an obligation prescribable under the five or two year negative prescription. Under current law, as we have already explained within the context of a reparation obligation, the long negative prescription does not necessarily operate in this manner in that an obligation can be kept alive beyond the period of twenty years if the five or two year negative prescription has been interrupted on at least one, if not on several, occasions by a 'relevant acknowledgment' or 'relevant claim'.<sup>2</sup> On the basis that the policy underlying the use of the long negative prescription as a cut off point is to protect the defender against a stale claim, minimise uncertainty, and consequently facilitate insurance cover, where appropriate, it is for consideration whether the present effects of a 'relevant acknowledgment' or 'relevant claim' in this context are desirable.

4.59 Although a few consultees were of the opinion that the long negative prescription should operate as an absolute cut off provision, the majority qualified this approach on the basis that such a rule should not apply if during the prescriptive

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1. Now 15 years under our Recommendation 16 in relation to an obligation to make reparation.

2. See footnote 3 p 20.

period litigation in respect of a claim had commenced and is still in progress at the end of that period.

**Relevant acknowledgment**

4.60 We take the view, however, as we have already done, and for the reasons given above,<sup>1</sup> in relation to the short negative prescription, that in reaching a decision on this issue a distinction should be made between a 'relevant acknowledgment' and a 'relevant claim' in the effect each should have upon the operation of the long negative prescription.

4.61 As a 'relevant acknowledgment' is wholly within the control of the defender, and should not prejudice the availability of indemnity insurance, where required, we consider that the current law should be retained for the purposes of defining the effect a 'relevant acknowledgment' should have upon the running of the long negative prescription in relation to an obligation prescribable under the five or the two year short negative prescriptions.<sup>2</sup>

4.62 Accordingly in this context we recommend that:

**25. In relation to an obligation prescribable under the five or two year negative prescriptive period, a 'relevant acknowledgment' given during the running of the long negative prescriptive period should have the effect of interrupting that prescription and bringing about the start of a new long prescriptive period.**

(Paragraphs 4.60 to 4.61; clause 1, proposed new section 11A(2) of the 1973 Act)

**Relevant Claim<sup>3</sup>**

4.63 A different approach is necessary in considering the effect of the making of a 'relevant claim' in that there is a need here to protect the defender by imposing some limit on his period of risk. However, whereas we recognise this need we have sympathy for the reluctance of some consultees to go as far as to recommend that the long negative prescription<sup>2</sup> should operate as an absolute 'cut off' point possibly extinguishing an obligation at a time when the claimant is actively pursuing his claim through the courts, or by arbitration, or has lodged, but has not yet received settlement of, his claim with a trustee or liquidator in insolvency proceedings.

4.64 In our view a suitable compromise between the apparent position under current law,<sup>4</sup> and the function of the long negative prescription as an absolute cut off point, would be to adopt the Fifth Option referred to above in relation to the short negative prescriptions.<sup>5</sup> Such an approach would reduce the defender's period of risk, but at the same time would afford some protection to the claimant particularly within the context of a reparation obligation, where the relevant facts necessary to start the operation of the short negative prescription only become discoverable shortly before the expiry of the long negative prescription. We also propose the adoption of the qualification to the Fifth Option referred to within the context of the short negative prescriptions. This qualification concerns a claim made in arbitration or in insolvency proceedings which are still current at the end of the prescriptive period, but which subsequently come to an end before adjudication of the claim takes place.<sup>6</sup>

4.65 Accordingly we recommend that:

**26. If in relation to an obligation prescribable under the five or two year negative prescriptive period, a 'relevant claim' has been made but has not been disposed of or abandoned by the end of the long negative prescriptive period, the obligation shall not be extinguished—**

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1. See para 4.38.

2. The long negative prescription in this context is either fifteen years in relation to a reparation obligation or twenty years for a non reparation obligation.

3. See footnote 3 p 33 for our proposed definition of 'relevant claim'.

4. It was intended that the effect of the making of a 'relevant claim' during the running of the long negative prescription should be to interrupt and bring to an end the running of prescription and commence the start of a new prescriptive period—but see para 4.41 above.

5. This option provides that if a 'relevant claim' has been made during, but has not been disposed of or abandoned by the end of the prescriptive period the obligation to which the claim relates will not be extinguished until the claim is finally disposed of in favour of the defender or is abandoned.

6. See paras 4.46 to 4.53 above.

- (i) unless and until the claim is finally disposed of in favour of the debtor in the obligation—final disposal being defined in accordance with section 22A(3) paragraphs (a), (b) and (c) of the 1973 Act; or
- (ii) unless and until the claim is abandoned; or
- (iii) subject to (iv) below, if the claim has been made in arbitration or insolvency proceedings, and such proceedings have come to an end or been superseded by an award of sequestration (where the claim was lodged under a voluntary trust deed) before the claim has been adjudicated upon, until 6 months have elapsed commencing with the date on which the proceedings came to an end or the sequestration was awarded, as the case may be.
- (iv) If during the six month period referred to in (iii) above a ‘relevant acknowledgment’ is given, or a further ‘relevant claim’ is made, the said period will be subject to interruption or extension, as the case may be, in accordance with Recommendations 25 or 26(i) to (iii).  
(Paragraphs 4.63 to 4.64; clause 1, proposed new sections 11B(1) to (4) and 11C of the 1973 Act)

**The effect of a ‘relevant acknowledgment’ or ‘relevant claim’ on the running of the twenty year long negative prescription in relation to an obligation, or right relative to property, which only prescribes on the expiry of the twenty year period**

4.66 The long negative prescription, in addition to acting as a cut off point for obligations which prescribe under the two and five year negative prescriptions, also applies to obligations, and rights relating to property,<sup>1</sup> which only prescribe after twenty years.

4.67 For reasons similar to those outlined above in paragraphs 4.34—4.54 in relation to obligations which are subject to the two and five year prescriptions, we take the view that our recommendations<sup>2</sup> for defining the effect a ‘relevant acknowledgment’ or ‘relevant claim’ should have upon the operation of these short negative prescriptions should also apply in relation to obligations which prescribe under the twenty year long negative prescriptive period. Furthermore for the sake of consistency and because the Fifth Option (subject to the qualification referred to above<sup>3</sup>) appears to be fair to the claimant we propose that it should also apply in defining the effect a ‘relevant claim’ should have upon the operation of the twenty year prescription in relation to rights affecting property.

4.68 As we have already indicated<sup>4</sup> our Bill provides a new definition of ‘relevant claim’ which excludes reference to ‘the execution of diligence’. We justified this exclusion in relation to obligations which are subject to the five and two year negative prescriptions by pointing out that, with the exception of the execution of diligence on the dependence of a court action, (a court action already constituting a ‘relevant claim’ under the 1973 Act), diligence, within the context of prescription only takes place in relation to the enforcement of an obligation to recognise or obtemper a decree,<sup>5</sup> order, or award, which prescribes under the twenty year period.<sup>6</sup>

4.69 When we attempted to examine what effect the execution of diligence (as a ‘relevant claim’ under the existing law) should have upon the operation of the twenty year period, however, we identified difficult policy issues—issues which we had not consulted upon in the Memorandum—. Such issues arose not only in relation to applying the Fifth Option formula to the various kinds of diligence which are competent,<sup>7</sup> but also in deciding whether we can justify adopting the Fifth Option in a situation where the claimant has already been granted a decree, order or award.

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1. S 8 of the 1973 Act.

2. Recommendations 23 and 24.

3. See paras 4.46 to 4.53.

4. See footnote 3 on p 33.

5. See para 1.19 above and para 11(c) of Sched 1 of the Bill.

6. See Sched 1 para 2(a) of the 1973 Act.

7. For example, deciding in relation to each type of diligence when the claim has been made and finally disposed of.

4.70 As our primary objective is to examine the rules of prescription as they apply to reparation obligations we have decided that we should not attempt to resolve these policy issues in our present exercise.<sup>1</sup> Consequently in the Recommendations put forward for identifying the effect a 'relevant claim' should have upon the operation of the twenty year prescription in relation to obligations (and rights) which only prescribe thereunder the 'execution of diligence' is excluded from our definition of 'relevant claim'. In accordance with the present law, however, the execution of diligence will continue to prevent an obligation to obtemper a decree etc. from prescribing.<sup>2</sup>

4.71 Accordingly we recommend that:

**27. The giving of a 'relevant acknowledgment' during the running of the twenty year long negative prescriptive period in relation to an obligation which only prescribes thereunder should have the effect of interrupting prescription and bringing about the start of a new prescriptive period.**

**28. If in relation to an obligation, or to a right applicable to property, which only prescribes under the twenty year long negative prescription, a 'relevant claim' has been made but has not been disposed of or abandoned by the end of the twenty year period the obligation or right shall not be extinguished—**

**(i) unless and until the claim is finally disposed of—final disposal being defined in accordance with section 22A(3), paragraphs (a), (b) and (c) of the 1973 Act—; or**

**(ii) unless and until the claim is abandoned; or**

**(iii) subject to (iv) below if the claim has been made in arbitration or insolvency proceedings, and such proceedings have come to an end or been superseded by an award of sequestration (where the claim was lodged under a voluntary trust deed) before the claim has been adjudicated upon, until 6 months have elapsed commencing with the date on which the proceedings came to an end or the sequestration was awarded, as the case may be;**

**(iv) If during the six month period referred to in (iii) above a 'relevant acknowledgment' is given (only in relation to an obligation prescribable under the twenty year period) or a further 'relevant claim' is made the said period will be subject to interruption or extension, as the case may be, in accordance with Recommendations 27 or 28(i) to (iii).**

Paragraphs 4.66 to 4.70; clause 1, proposed new sections 11A(2), 11B and 11C of the 1973 Act)

## Contracting out

4.72 Section 13 of the 1973 Act provides that:—

“Any provision in any agreement purporting to provide in relation to any right or obligation that sections 6, 7, 8 or 8A of this Act shall not have effect shall be null”.

4.73 Two closely related issues arise for consideration in relation to this provision. The first examines whether, as a general principle, parties should be permitted to contract out of the statutory time limits imposed by sections 6, 7, 8 and 8A of the 1973 Act by entering into an agreement to reduce or extend the length of, or to dispense with, the prescriptive periods.

4.74 The second is arguably part of the first issue, but as it gives rise to different considerations, it is treated separately. This second issue, which was not examined

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1. These issues can be more fully considered at a later date in one of our current exercises on diligence.

2. See Clause 1 of our Bill incorporating a new section 11B(6) into the 1973 Act.

in the Memorandum, but arose from a proposal put to us by some consultees concerning the current practice of issuing 'protective writs' to avoid the running of prescription, is concerned only with an obligation to make reparation under the first scheme referred to above. In that context the issue examined is whether the claimant and the defender should be permitted to enter into an agreement to extend the period of the short or long negative prescription after damage has been sustained.

### The First Issue

4.75 In the Memorandum we focused our attention and invited views from consultees on whether section 13 of the 1973 Act should be amended so as to permit parties to contract out of the prescriptive periods by agreeing to extend the length of, or to dispense with, such periods.

4.76 In our view the ability to extend the prescriptive periods will provide scope for lengthening the defender's period of risk, give rise to uncertainty, and possibly increase the cost, or reduce the likelihood, of securing, where appropriate, insurance cover against potential claims. It will also result in an increase in the incidence of stale claims.

4.77 Accordingly, although we recognise as a general principle that a party's freedom to contract should be protected, in this instance, it appears to us to be contrary to public policy to remove the existing prohibition against contracting out of the statutory rules of prescription by permitting parties to extend or dispense with the prescriptive periods. The majority of consultees supported this approach.

4.78 We expressed the view in the Memorandum that section 13 did not prohibit parties from agreeing to a reduction in the period of prescription—a practice with which we did not propose to interfere. During the course of consultation, however, two consultees indicated disagreement with our interpretation of this provision. In their opinion parties were also prohibited from entering into an agreement to reduce the prescriptive period.

4.79 We are unable to identify any public policy reasons which would justify restricting a party's freedom to contract for a reduction in the prescriptive period. Furthermore, if such a contracting out provision proved to be unreasonable in the particular circumstances the party adversely affected might be able to challenge its enforceability under the Unfair Contract Terms Act 1977. Accordingly as there would appear to be some doubt as to the interpretation of section 13 in this respect we propose that this doubt should be dispelled by ensuring that legislation specifically permits parties to agree to a reduction in the statutory periods.

4.80 Consideration of the second issue referred to above has persuaded us that one exception should be made to our suggestion that there should be an absolute prohibition against parties extending the periods of prescription identified in sections 6, 7, 8 and 8A of the 1973 Act. With this exception in mind, to which we refer below, we accordingly recommend that:

**29. Subject to Recommendation 30 below parties should be prohibited from entering into any agreement which purports to lengthen or dispense with the periods of the prescriptions<sup>1</sup>, short and long negative but should be free to agree to shorten any such prescriptive periods.**

(Paragraphs 4.72 to 4.80; clause 2, proposed new section 13(1) and (2) of the 1973 Act)

### The Second Issue

4.81 The second issue was brought to our attention by some consultees who invited us to find a method of reducing the current practice of serving 'protective writs' so as to avoid the prescription of an obligation to make reparation under the first scheme referred to above.

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1. In the existing five and two year short negative prescriptions, the twenty year long negative prescription, and the fifteen year long negative prescription proposed in relation to a reparation obligation.

4.82 Under existing law if the claimant institutes court proceedings against the wrong defender shortly before the end of the short or long negative prescriptions, and his action is subsequently dismissed, he may not have the opportunity to rectify the position by commencing proceedings against the correct defender before the obligation to make reparation to him is extinguished. Consultees pointed out that in order to prevent the obligation prescribing the claimant frequently protects his position by commencing court proceedings against all possible defenders providing only minimal pleadings in the writ served. By adopting the procedure of issuing 'protective writs' he interrupts the running of the prescriptive period.<sup>1</sup>

4.83 As a consequence of this procedure, however, the parties cited become involved in the time consuming task of investigating the validity of the claim made against them, in seeking legal advice, and consequently in incurring expenses, all of which we understand are not necessarily recoverable from the claimant even if the action is subsequently withdrawn.<sup>2</sup>

4.84 The Working Party set up by the Judges of the Court of Session made reference to this problem giving the example of a building contract where the employer wishes to pursue his claim for damages against the contractor while at the same time keeping open his possible remedies against the architect or engineer. In their view the need to issue writs against the architect or engineer might be avoided if each specialist were prepared to acknowledge that if there is a valid claim against him that claim should not be extinguished by the running of the prescriptive period. In our view this objective could be achieved by the specialist agreeing, without admission of liability, to an extension of the prescriptive period for a specified time so that the employer could complete his enquiries.

4.85 Such an agreement would of course constitute a method of contracting out of the statutory prescriptive period—not at the time that the parties initially negotiate and conclude the building contract—, but at the later stage when damage becomes discoverable and the claimant is investigating his claim. This contracting out device will not necessarily prejudice the availability of insurance facilities, as presumably any person who has professional indemnity cover will require to secure the insurance company's consent to such an arrangement. Furthermore if such a scheme avoids the need for a court action it will possibly help to minimise any expenses which might become the insurance company's responsibility under the indemnity policy.

4.86 The argument might possibly be put forward that whereas in relation to the long negative prescription such a contracting out device would serve to minimise the need for 'protective writs', it would be unnecessary in relation to the short negative prescription if our recommended discoverability formula is adopted and the five year period only starts to run in favour of each person responsible when he becomes identifiable by the claimant.<sup>3</sup>

4.87 The discoverability formula, however, does not offer the claimant absolute certainty as to the starting off point of the five year period in that this may be dependent upon a court deciding at what stage in the claimant's enquiries it was reasonably practicable for him to become aware of the relevant facts.

4.88 In the example given above the claimant may have managed to identify the contractor, architect or engineer as those likely to be responsible for the damage sustained but is not yet certain against which specialist the action should be raised. His uncertainty may not prevent prescription starting to run in favour of the person responsible if it can be argued subsequently that he should have known the identity of the defender at that stage. In these circumstances, notwithstanding the extended discoverability formula, the claimant may still endeavour to protect his position by serving 'protective writs' against all potential defenders.

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1. Ss 6(1) and 7(1) of the 1973 Act.

2. Insofar as legal expenses are concerned the loss to the defender is presumably the difference between the fees charged on party/party basis and these charged on an agent/client scale.

3. Recommendations 5 and 6.

4.89 We take the view that if in relation to a reparation obligation the claimant is able to negotiate an extension of either the short or the long negative prescriptive periods with a potential defender for the purpose of completing his enquiries the current need to issue 'protective writs' should be reduced.

4.90 Accordingly we recommend that:

**30. As an exception to the rule put forward in Recommendation 29 above, it shall be competent for the claimant and any potential defender in a reparation obligation, at any time after damage is sustained, to enter into an agreement to extend the running of the long or short negative prescriptive periods against the claimant for such period as is specified in the agreement so that the claimant can make further enquiries as to the cause of, and the person responsible for, that damage.**

(Paragraphs 4.81—4.89; clause 2, proposed new section 13(3) of the 1973 Act).

## Product Liability Directive and the Consumer Protection Act 1987

### Introduction

4.91 In presenting our recommendations for reform of the rules of prescription in relation to an obligation to make reparation under the first scheme referred to above one of our underlying objectives has been to minimise fragmentation between the rules operating under that scheme, and the rules of prescription/limitation arising under the second and third schemes which govern reparation obligations.

4.92 Our attempt to achieve this objective is apparent in our recommended discoverability formula for fixing the start of the short negative prescription, which adopts terminology similar to that used in the discoverability formula applicable to personal injury claims; in defining the effect a 'relevant claim' should have upon the running of the short and long negative prescriptions by applying the Fifth Option which is already in operation in relation to reparation obligations involving defective products under the third scheme referred to above; by extending our recommendation for reform of the rules of prescription in relation to the claimant's legal disability to the limitation rules applicable to actions for personal injuries and death or defamation under the second scheme.

4.93 We have however been a little hesitant to pursue our objective to minimise fragmentation by suggesting amendments to the rules of prescription/limitation arising under sections 22A—D of the 1973 Act in relation to defective products because of the very recent enactment of this legislation<sup>1</sup> and the need to ensure that the statutory provisions comply with the terms of the Product Liability Directive.

4.94 After giving the matter further consideration, however, we have made the decision to recommend certain minor drafting amendments to sections 22A—D, which are reflected in the Bill annexed to this Report, and in our view do not alter the policy behind these provisions.

4.95 We also propose, however, to put forward two policy changes in relation to the defective products scheme—changes which we suggest do not conflict with the terms of the Product Liability Directive.<sup>2</sup>

### **The effect of making a 'relevant claim' on the running of the ten year prescription**

4.96 The first policy change concerns the effect the making of a 'relevant claim' should have upon the operation of the ten year negative prescriptive period under

1. These provisions were inserted into the 1973 Act by Pt II of Sched 1 to the 1987 Act, and came into operation on 1 March 1988.

2. See Articles 10 and 11 upon which ss 22A—D of the 1973 Act are based.

section 22A of the 1973 Act. That section provides that if a 'relevant claim' has been made during, but has not been disposed of finally by the end of the prescriptive period, the obligation to which the claim relates will not be extinguished until final disposal of the claim is made.

4.97 This effect upon prescription of the making of a 'relevant claim' is referred to earlier in the Report,<sup>1</sup> and in the Memorandum,<sup>2</sup> as the Fifth Option, and as already indicated we have recommended adoption of this Option in relation to the short and long negative prescriptions, as they apply to a reparation obligation under the first scheme referred to above, subject however to one qualification which does not at present apply to the defective products scheme.

4.98 This qualification concerns the problem of identifying when a 'relevant claim' is finally disposed of in the situation where the claim has been made in arbitration or insolvency proceedings which are still current at the end of the prescriptive period, but which subsequently come to an end before adjudication of the claim takes place.<sup>3</sup>

4.99 We examined this problem in relation to the short and long negative prescriptions, and proposed as a solution that in the event of such circumstances arising the claimant should be given a further six months' period in which to enforce the obligation, envisaging that if a further 'relevant claim' is made during the extended period the obligation will not prescribe until final disposal of that further claim is made or if the obligation should be 'relevantly acknowledged' by the defender during that time the prescriptive period will recommence as at the date of the acknowledgment. These proposals are reflected in Recommendations 24(iii) and (iv), 26(iii) and (iv) and 28(iii) and (iv).

4.100 A similar problem could arise under the defective products scheme, and we propose therefore that the Recommendations referred to in paragraph 4.99 above should be incorporated in section 22A of the 1973 Act, suitably adapted however to take into account the narrower definition of 'relevant claim' provided in section 22A and the fact that a 'relevant acknowledgment' does not interrupt the ten year prescriptive period.

4.101 Accordingly we recommend that:

**31. (i) Section 22A should be amended to provide that if a claim for reparation has been made in arbitration or insolvency proceedings<sup>5</sup> which are still current at the end of the ten year negative prescriptive period and such proceedings subsequently come to an end before the claim has been adjudicated upon, then subject to (ii) below the obligation shall not be extinguished until 6 months have elapsed commencing with the date on which the proceedings came to an end.**

**(ii) In the event of a further 'relevant claim' being made during the six month period the obligation will not be extinguished until final disposal of that further claim is made.**

(Paragraphs 4.91 to 4.100; Schedule 1 paragraph 7)

### **The effect of the claimant's legal disability on the running of the three year limitation period**

4.102 The second policy change concerns the effect a claimant's legal disability should have upon the operation of the three year limitation period under sections

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1. See para 4.44.

2. See paras 6.69 to 6.71.

3. See paras 4.46 to 4.53.

4. See footnote 4 on p 34 above.

5. Insolvency proceedings in this context covers the sequestration of a defender's estates under the Bankruptcy (Scotland) Act 1985 and the winding up of a company under the Insolvency Act 1986 but *not* the operation of a voluntary trust deed for creditors (as defined in s 5(2)(c) of the 1985 Act).

22B and 22C of the 1973 Act. The current rule in this context provides that the limitation period is postponed or suspended during the claimant's<sup>1</sup> legal disability.

4.103 We proposed earlier in the Report that the current statutory rule, which provides—in relation to obligations prescribable under sections 6 and 8A of the 1973 Act or which are subject to the three year limitation period under Part II of that Act—, that the running of the prescriptive/limitation period is postponed or suspended during the original claimant's legal disability, should be altered on the basis that where the original claimant is under a legal disability the running of the prescriptive/limitation period is only postponed or suspended where that claimant has no representative to protect his interests or where the claimant's representative happens to be the debtor in the obligation enforceable by the claimant. This proposal is reflected in Recommendation 19.

4.104 As a consequential to this Recommendation we also put forward the suggestion under Recommendation 20 that unless the claim is directed against the representative it should be the representative's actual or constructive knowledge of the relevant facts<sup>2</sup> which fixes the start of the prescriptive/limitation period.

4.105 We propose that these Recommendations should apply under the defective products scheme.

4.106 Accordingly we recommend that:

**32. Sections 22B and C should be amended to provide that, subject to Recommendation 33 below, the legal disability of the claimant will not postpone or suspend the running of the limitation period.**

**33. Notwithstanding Recommendation 32 above, the limitation period will be postponed or suspended where the original claimant is under a legal disability and**

**(i) that claimant has no representative to protect his interests; or**

**(ii) that claimant does have a representative, but the representative is the debtor in the obligation enforceable by the claimant.**

**34. Where the original claimant is under a legal disability and has a representative who is not the defender against whom the claimant has a claim, the start of the limitation period will be fixed at the date upon which the representative became aware, or on which, in the opinion of the court, it was reasonably practicable for him in all the circumstances to become aware, of the relevant facts.<sup>3</sup>**

(Paragraphs 4.102 to 4.105; Schedule 1 paragraphs 8, 9, and 10)

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1. The claimant under s 22B is not necessarily the original claimant, but could be an assignee of the original claimant's rights—subs (4); whereas under s 6 and Pt II of the 1973 Act the rules of prescription/limitation are only postponed or suspended where the original claimant is under a legal disability.

2. Material damage, its cause and the identity of the defender.

3. The relevant facts are identified in s 22B(3).

# Part V Summary of Recommendations

## **I THE SHORT NEGATIVE PRESCRIPTION APPLICABLE TO A REPARATION OBLIGATION**

### **The discoverability formula for fixing the start of the short negative prescription**

#### **Use of the words 'act or omission'**

1. The words 'act, neglect or default', currently used in the formula provided under section 11 of the 1973 Act for identifying the date when an obligation to make reparation becomes enforceable, should be replaced by the words 'act or omission'.  
(Paragraphs 2.14 to 2.15; clause 1, proposed new section 6 of the 1973 Act)

#### **Knowledge of material damage**

2. The discoverability formula should provide that the damage within the claimant's actual or constructive knowledge must be sufficiently serious to justify his bringing an action of damages on the assumption that the defender does not dispute liability and is able to satisfy a decree.  
(Paragraphs 2.18 to 2.24; clause 1, proposed new section 6(3)(c)(i) of the 1973 Act)

#### **Definition of Damage**

3. No statutory definition of damage should be provided, the courts being left to define, in any particular case, what constitutes damage for the purpose of fixing the start of the prescriptive period.

(Paragraphs 2.26 to 2.30)

#### **Knowledge of the cause of the damage**

4. Knowledge that the loss, injury or damage was attributable in whole or in part to an act or omission should be included in the discoverability formula.  
(Paragraphs 2.32 to 2.35; clause 1, proposed new section 6(3)(c)(ii) of the 1973 Act)

#### **Knowledge of the identity of the person liable for the damage sustained**

5. Knowledge of the identity of a person liable for the damage sustained should be included in the discoverability formula.

(Paragraphs 2.37 to 2.43; clause 1, proposed new section 6(3)(c)(iii) of the 1973 Act)

6. Where material damage and its cause have become discoverable prescription will not start to run in favour of each person liable until his or her identity becomes discoverable by the claimant.

(Paragraphs 2.45 to 2.46; clause 1 proposed new section 6(4) of the 1973 Act)

#### **Knowledge of fault or liability in law**

7. The discoverability formula should incorporate a proviso to the effect that knowledge that any act or omission is or is not, as a matter of law, actionable, is irrelevant.

(Paragraphs 2.52 to 2.55; clause 1, proposed new section 6(6) of the 1973 Act)

#### **The test for imputing knowledge of the relevant facts to the claimant<sup>1</sup>**

8. The date of the claimant's knowledge should be the date on which he became, or on which it would have been reasonably practicable for him in all the circumstances

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1. Where the rights of the claimant in a reparation obligation which has become enforceable are assigned, the claimant is the assignor.

to become, aware of the relevant facts. The legislation should not contain any references to seeking the advice of experts.

(Paragraphs 2.56 to 2.63; clause 1, proposed new section 6(3)(c) of the 1973 Act and Schedule 1 paragraph 2(b))

#### **Latent damage is not a prerequisite for applying the discoverability formula**

9. The short negative prescription will not start to run in respect of any obligation to make reparation until the claimant has actual or constructive knowledge of material damage, its cause, and the identity of the person responsible.

(Paragraphs 2.68 to 2.72; clause 1, proposed new section 6(3)(c) of the 1973 Act)

#### **Duration of short negative prescriptive period**

10. The short negative prescription applicable to an obligation to make reparation should be retained at five years.

(Paragraphs 2.74 to 2.79; clause 1, proposed new section 6(2) of the 1973 Act)

#### **Judicial discretion**

11. No judicial discretion should be conferred upon the courts to permit the claimant to raise his reparation action outwith the short negative prescription.

(Paragraphs 2.81 to 2.82)

#### **Provisional damages scheme**

12. A provisional damages scheme for claims not involving personal injury should not be introduced.

(Paragraphs 2.87 to 2.94)

## **II THE LONG NEGATIVE PRESCRIPTION APPLICABLE TO A REPARATION OBLIGATION**

#### **The need for a long negative prescription**

13. The long negative prescription should be retained in respect of an obligation to make reparation prescribable under the short negative prescription.

(Paragraphs 3.11 to 3.15; clause 1, proposed new section 6(7) of the 1973 Act)

#### **Judicial discretion**

14. No judicial discretion should be conferred upon the courts to permit the claimant to raise his action outwith the long negative prescription.

(Paragraphs 3.17 to 3.18)

#### **The starting point of the long negative prescription**

15. The current law should be retained in fixing the starting point for the long negative prescription in relation to an obligation to make reparation prescribable under the short negative prescription.

(Paragraphs 3.20 to 3.34; clause 1, proposed new section 6(7) of the 1973 Act)

#### **The length of the long negative prescription**

16. The length of the long negative prescription in relation to an obligation to make reparation should be fifteen years.

(Paragraphs 3.36 to 3.45, clause 1, proposed new section 6(7) of the 1973 Act)

## **III WIDER ISSUES**

#### **The postponement or the suspension of the prescriptive periods through the defender's fraud or error**

#### **The five year short negative prescriptive period, and the two year negative prescriptive period applicable to the obligation to make contribution between wrongdoers**

17. In imputing knowledge to the claimant of the defender's fraud or the error induced by the defender, which persuades the claimant from making a 'relevant claim' against him, the test to be applied should be when it would have been reasonably practicable for him in all the circumstances to become aware of the fraud or error as the case may be.

(Paragraphs 4.4 to 4.6; clause 1, proposed new section 9(2) of the 1973 Act)

#### **The long negative prescriptions**

18. The fifteen and twenty year long negative prescriptions should not be postponed or suspended for any period during which the claimant is induced to refrain from making a 'relevant claim' because of the defender's fraud or through error induced by the defender's words or conduct.

(Paragraphs 4.8 to 4.11)

#### **Postponement or suspension of the prescriptive/limitation period during the claimant's legal disability**

##### **The five year short negative prescriptive period, the two year negative prescriptive period, and the three year limitation period under sections 17, 18 and 18A of the 1973 Act**

19. Where the claimant is under legal disability the running of the five and two year prescriptive periods and the limitation period referred to in sections 17, 18 and 18A of the 1973 Act will not be postponed or suspended unless

- (i) the claimant has no representative to protect his interests; or
- (ii) the claimant, does have a representative, but the representative is the debtor in the obligation enforceable by the claimant.

(Paragraphs 4.13 to 4.22; clause 1, proposed new section 9(1)(b) and (3) of the 1973 Act, and Schedule 1 paragraphs 3, 4, and 5)

#### **The representative's knowledge of the relevant facts in fixing the start of the prescriptive/limitation period**

20. Where the claimant is under legal disability and has a representative, who is not the defender against whom the claimant has a claim, the start of the five year short negative prescriptive period, or the limitation period referred to in sections 17, 18 and 18A of the 1973 Act, in relation to an obligation to make reparation, will be fixed at the date upon which the representative became, or on which it would have been reasonably practicable for him in all the circumstances to become, aware of the relevant facts.

(Paragraphs 4.24 to 4.26; clause 1, proposed new section 6(5) of the 1973 Act, and Schedule 1, paragraphs 3, 4 and 5)

#### **The representative's knowledge of the defender's fraud or error induced by the defender**

21. Where the claimant is under legal disability and has a representative who is not the defender against whom the claimant has a claim, the postponement or suspension of the five or two year short negative prescriptive period brought about by the defender's fraud, or error induced by the defender, which persuades the claimant from making a 'relevant claim' against him, will come to an end on the date when the representative became, or on which it would have been reasonably practicable for him in all the circumstances to become, aware of that fraud or error.

(Paragraph 4.28; clause 1, proposed new section 9(2) of the 1973 Act)

#### **The long negative prescriptions**

22. The claimant's legal disability should not postpone or suspend the running of the fifteen and twenty year long negative prescriptions.

(Paragraphs 4.30 to 4.32; clause 1, proposed new sections 6(7), 7(2) and 10(1) of the 1973 Act)

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1. Where the rights of the claimant in an obligation which has become enforceable are assigned the reference in Recommendations 19, 20 and 22 to 'the claimant' is a reference to the person by whom or on whose behalf these rights were assigned.

**The effect of a 'relevant acknowledgment' on the running of the five year short negative prescription and the two year negative prescription relative to an obligation prescribable thereunder**

23. The giving of a 'relevant acknowledgment' during the running of the five year short negative prescriptive period or the two year negative prescriptive period in relation to an obligation prescribable thereunder should have the effect of interrupting prescription and bringing about the start of a new five year or two year prescriptive period.

(Paragraphs 4.37 to 4.39; clause 1, proposed new section 11A(2) of the 1973 Act)

**The effect of a 'relevant claim' on the running of the five year short negative prescription and the two year negative prescription relative to an obligation prescribable thereunder**

24. If in relation to an obligation prescribable under the five year short negative prescription or the two year negative prescriptive period a 'relevant claim' has been made but has not been disposed of or abandoned by the end of the five or two year period the obligation shall not be extinguished—

- (i) unless and until the claim is finally disposed of in favour of the debtor in the obligation—final disposal being defined in accordance with section 22A(3), paragraphs (a), (b) and (c) of the 1973 Act—; or
- (ii) unless and until the claim is abandoned; or
- (iii) subject to (iv) below, if the claim has been made in arbitration or insolvency proceedings, and such proceedings have come to an end or been superseded by an award of sequestration (where the claim was lodged under a voluntary trust deed) before the claim has been adjudicated upon, until 6 months have elapsed commencing with the date on which the proceedings came to an end or the sequestration was awarded, as the case may be;
- (iv) if during the six month period referred to in (iii) above a 'relevant acknowledgment' is given, or a further 'relevant claim' is made, the said period will be subject to interruption or extension, as the case may be, in accordance with Recommendations 23 or 24 (i) to (iii).

(Paragraphs 4.41 to 4.54; clause 1, proposed new sections 11B(1) to (4) and 11C of the 1973 Act)

**The effect of a 'relevant acknowledgment' on the running of the long negative prescription in relation to an obligation prescribable under the five year short negative prescription or the two year negative prescriptive period**

25. In relation to an obligation prescribable under the five or two year negative prescriptive period, a 'relevant acknowledgment' given during the running of the long negative prescriptive period should have the effect of interrupting that prescription and bringing about the start of a new long prescriptive period.

(Paragraphs 4.60 to 4.61; clause 1, proposed new section 11A(2) of the 1973 Act)

**The effect of a 'relevant claim' on the running of the long negative prescription in relation to an obligation prescribable under the five year short negative prescription or the two year negative prescriptive period**

26. If in relation to an obligation prescribable under the five or two year negative prescriptive period a relevant claim has been made but has not been disposed of or abandoned by the end of the long negative prescriptive period, the obligation shall not be extinguished—

- (i) unless and until the claim is finally disposed of in favour of the debtor in the obligation—final disposal being defined in accordance with section 22A(3) paragraphs (a), (b) and (c) of the 1973 Act—; or
- (ii) unless and until the claim is abandoned; or
- (iii) subject to (iv) below if the claim has been made in arbitration or insolvency proceedings, and such proceedings have come to an end or been superseded by an award of sequestration (where the claim was lodged under a voluntary trust deed) before the claim has been adjudicated upon, until 6 months

have elapsed commencing with the date on which the proceedings came to an end or the sequestration was awarded, as the case may be;

- (iv) If during the six month period referred to in (iii) above a 'relevant acknowledgment' is given, or a further 'relevant claim' is made, the said period will be subject to interruption or extension, as the case may be, in accordance with Recommendations 25 or 26(i) to (iii).

(Paragraphs 4.63 to 4.64; clause 1, proposed new sections 11B(1) to (4) and 11C of the 1973 Act)

**The effect of a 'relevant acknowledgment' or 'relevant claim' on the running of the twenty year long negative prescription in relation to an obligation, or right relative to property, which only prescribes on the expiry of the twenty year period**

27. The giving of a 'relevant acknowledgment' during the running of the twenty year long negative prescriptive period in relation to an obligation which only prescribes thereunder should have the effect of interrupting prescription and bringing about the start of a new long negative prescription.

28. If in relation to an obligation, or to a right applicable to property, which only prescribes under the twenty year long negative prescription, a 'relevant claim' has been made but has not been disposed of or abandoned by the end of the twenty year period the obligation or right shall not be extinguished—

- (i) unless and until the claim is finally disposed of—final disposal being defined in accordance with section 22A(3), paragraphs (a), (b) and (c) of the 1973 Act—; or
- (ii) unless and until the claim is abandoned; or
- (iii) subject to (iv) below, if the claim has been made in arbitration or insolvency proceedings, and such proceedings have come to an end or been superseded by an award of sequestration (where the claim was lodged under a voluntary trust deed) before the claim has been adjudicated upon, until 6 months have elapsed commencing with the date on which the proceedings came to an end or the sequestration was awarded, as the case may be;
- (iv) If during the six month period referred to in (iii) above a relevant acknowledgment is given (only in relation to an obligation prescribable under the twenty year period) or a further 'relevant claim' is made the said period will be subject to interruption or extension, as the case may be, in accordance with Recommendations 27 or 28(i) to (iii).

(Paragraphs 4.66 to 4.70; clause 1, proposed new sections 11A(2), 11B and 11C of the 1973 Act)

**Contracting out**

29. Subject to Recommendation 30 below parties should be prohibited from entering into any agreement which purports to lengthen or dispense with the periods of the short and long negative prescriptions<sup>1</sup> but should be free to agree to shorten any such prescriptive periods.

(Paragraphs 4.72 to 4.80; clause 2, proposed new section 13(1) and (2) of the 1973 Act)

30. As an exception to the rule put forward in Recommendation 29 above, it shall be competent for the claimant and any potential defender in a reparation obligation, at any time after damage is sustained, to enter into an agreement to extend the running of the long or short negative prescriptive periods against the claimant for such period as is specified in the agreement so that the claimant can make further enquiries as to the cause of, and the person responsible for, that damage.

(Paragraphs 4.81 to 4.89; clause 2, proposed new section 13(3) of the 1973 Act)

**The Product Liability Directive and the Consumer Protection Act 1987**

- 31. (i) Section 22A of the 1973 Act should be amended to provide that if a claim for reparation has been made in arbitration or insolvency proceedings which

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1. I.e. the existing five and two year short negative prescriptions, the twenty year long negative prescription, and the fifteen year long negative prescription proposed in relation to a reparation obligation.

are still current at the end of the ten year negative prescriptive period and such proceedings subsequently come to an end before the claim has been adjudicated upon, then subject to (ii) below the obligation shall not be extinguished until 6 months have elapsed commencing with the date on which the proceedings came to an end.

- (ii) In the event of a further 'relevant claim' being made during the six month period the obligation will not be extinguished until final disposal of that further claim is made.

(Paragraphs 4.91 to 4.100; Schedule 1 paragraph 7)

32. Sections 22B and 22C should be amended to provide that, subject to Recommendation 33 below, the legal disability of the claimant will not postpone or suspend the running of the limitation period.

33. Notwithstanding Recommendation 32 above, the limitation period will be postponed or suspended where the original claimant is under legal disability and

- (i) that claimant has no representative to protect his interests; or
- (ii) that claimant does have a representative, but the representative is the debtor in the obligation enforceable by the claimant.

34. Where the original claimant is under legal disability and has a representative who is not the defender against whom the claimant has a claim, the start of the limitation period will be fixed at the date upon which the representative became aware, or on which, in the opinion of the court, it was reasonably practicable for him in all the circumstances to become aware, of the relevant facts.

(Paragraphs 4.102 to 4.105; Schedule 1 paragraphs 8, 9 and 10)

# Appendix A

## **PRESCRIPTION (SCOTLAND) BILL**

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### ARRANGEMENT OF CLAUSES

#### Clause

1. Extinction of obligations.
2. Contracting out.
3. Transitional provisions and minor and consequential amendments and repeals.
4. Short title, commencement and extent.

#### SCHEDULES:

- Schedule 1 Minor and consequential amendments.
- Schedule 2 Repeals of 1973 Act.



DRAFT  
OF A  
**BILL**  
TO

A.D. 1989.

Amend the law of Scotland with respect to the extinction of obligations by negative prescription and with respect to the effect of a person's legal disability on the time-limit for bringing certain actions of damages; and for connected purposes.

**B**E 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:—

*Prescription (Scotland) Bill*

Extinction of obligations.

1. For sections 6 to 11 of the Prescription and Limitation (Scotland) Act 1973 (in this Act referred to as “the 1973 Act”) there shall be substituted the following sections—

“Prescription of reparation obligations.

6.—(1) For the purposes of this Part of this Act, “a reparation obligation” means an obligation (whether arising from any enactment, or from any rule of law or from, or by reason of any breach of, a contract or promise) to make reparation for loss, injury or damage caused by an act or omission, but does not include—

- (a) an 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;
- (b) an obligation to which section 22A of this Act applies; or
- (c) an obligation to make reparation or otherwise to make good in respect of defamation within the meaning of section 18A of this Act.

(2) If, after the date when a reparation obligation has become enforceable, the obligation has subsisted for a continuous period of 5 years, then, subject to sections 9, 11A and 11B of this Act, as from the expiration of that period the obligation shall be extinguished.

(3) For the purposes of this section, a reparation obligation shall be regarded as having become enforceable on—

- (a) the date when the loss, injury or damage occurred; or
- (b) if the act or omission was a continuing one and loss, injury or damage occurred before the cessation of the act or omission, the date of that cessation; or
- (c) the date (if later than the date mentioned in paragraph (a) or (b) above) on which the creditor became, or on which it would have been reasonably practicable for him in all the circumstances to become, aware of all the following facts—

## EXPLANATORY NOTES

### *Clause 1*

#### *General*

This clause implements Recommendations 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 15, 16, 17, 18, 21, 22, 23, 24, 25, 26, 27 and 28, and partly implements Recommendations 19 and 20. It substitutes new sections 6, 7, 8, 9, 10, 11, 11A, 11B and 11C for sections 6 to 11 of the Prescription and Limitation (Scotland) Act 1973 ('the 1973 Act'). The new provisions are still concerned with the rules of prescription as they apply to obligations prescribable under the five year short negative prescription, the two year negative prescriptive period, and the twenty year long negative prescription—but in formulating such rules an obligation to make reparation is now treated separately. The sections not only give effect to the above Recommendations but also re-enact part of the current law. The main changes of substance concern the rules applicable to reparation obligations. In this context the discoverability formula for fixing the start of the short negative prescription is expanded and the long negative prescription is reduced from twenty to fifteen years. Other changes, which affect all obligations subject to the five year short negative prescription and the two year negative prescription, involve (i) the application of a different test for imputing knowledge to the creditor in the obligation of the fraud of the debtor or error induced by his words or conduct, which persuades the creditor from making a 'relevant claim'; and (ii) an alteration in the effect a creditor's legal disability has upon the operation of the short negative prescriptions. The effect the making of a 'relevant claim' (from which the execution of diligence is now omitted) should have upon the running of prescription is redefined (i) in relation to all obligations which are subject to the five year short negative prescription, the two year negative prescriptive period or the twenty year long negative prescription and (ii) in relation to rights affecting property (whether heritable or moveable) which prescribe under the twenty year long negative prescription.

#### *Section 6*

The provisions of this new section apply only to an obligation to make reparation as defined in subsection (1) thereof. Where after the rights of a creditor in a reparation obligation have become enforceable these rights are assigned any reference in this section to 'the creditor' is to be construed as a reference to the assignor of these rights—see paragraph 2(b) of Schedule I to the Bill which introduces a new subsection (5) into section 15 of the 1973 Act.

#### *Subsection (1)*

This subsection defines a reparation obligation. The definition is achieved by adopting the formula currently provided in section 11(1) of the 1973 Act, subject to substituting the words 'act or omission' for 'act, neglect or default' in implementation of Recommendation 1; and by specifically excepting from that formula those reparation obligations which are subject to a three year limitation period under sections 17, 18, 18A and 22B and 22C of the 1973 Act.

#### *Subsection (2)*

This subsection implements Recommendation 10, retaining a five year period of prescription in relation to an obligation to make reparation. This five year period is subject to postponement or suspension in accordance with the proposed new section 9 below, or to interruption or extension in accordance with the proposed new sections 11A and 11B below.

#### *Subsection (3)*

This subsection, together with subsections (4), (5) and (6), identify the starting off point of the five year prescriptive period.

#### *Paragraphs (a) and (b)*

These paragraphs substantially re-enact the provisions of section 11(1) and (2) of the 1973 Act.

#### *Paragraph (c)*

This paragraph identifies the relevant facts which have to be within the creditor's actual or constructive knowledge before prescription starts to operate against him, and provides the test for imputing knowledge of these facts to the creditor (referred to in the Report as 'the discoverability formula'). It implements Recommendation 9 in that the damage sustained does not require to be latent for the purpose of applying the discoverability formula. In drafting these provisions an attempt has been made, wherever practicable, to use terminology similar to that adopted under section 17 of the 1973 Act which defines the start of the three year limitation period in relation to personal injury claims. This approach is taken so as to minimise fragmentation in this area of the law (see paragraph 1.27 of the Report).

The introductory provisions of the paragraph implement Recommendation 8 by introducing a new test for imputing knowledge of the relevant facts to the creditor (see section 11(3) of the 1973 Act for the existing test). It offers a formula similar to that provided under section 17(2)(b) of that Act in relation to personal injuries. No reference is made in the test to seeking the advice of experts (see paragraph 2.63 of the Report) reliance being placed upon the courts to decide in any particular case what knowledge can be reasonably imputed to the creditor. The words "reasonably practicable for him in all the circumstances" are designed to provide a test of knowledge which is not wholly subjective, but which still affords the courts a degree of flexibility in order to take account of the different circumstances of individuals.

*Prescription (Scotland) Bill*

- (i) that the loss, injury or damage was 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 loss, injury or damage was attributable in whole or in part to an act or omission; and
- (iii) without prejudice to subsection (4) below, the identity of the person to whose act or omission the loss, injury or damage was attributable.

(4) Where more than one person is a debtor in a reparation obligation, the prescriptive period of 5 years shall not start to run in favour of any such person until the date on which the creditor becomes, or it would have been reasonably practicable for him in all the circumstances to become, aware that that person is a person to whose act or omission the loss, injury or damage is partly attributable.

(5) Where the creditor is under legal disability and has a representative, subsection (3)(c) and (if applicable) subsection (4) above shall have effect, except where the representative is under an obligation to make reparation to the creditor for the loss, injury or damage concerned, as if for the reference to the creditor there were substituted a reference to the representative.

(6) For the purposes of this section, knowledge that any act or omission is or is not, as a matter of law, actionable is irrelevant.

(7) Where, by virtue of the foregoing provisions of this section or of section 9 of this Act, a reparation obligation is subsisting at the end of the period of 15 years commencing with the date referred to in paragraph (a) or (b) of subsection (3) above (as the case may be), then, notwithstanding those provisions but subject to sections 11A and 11B of this Act, the obligation shall be extinguished as from the expiration of that period.

Prescription of other obligations after 5 years.

7.—(1) If after the appropriate date an obligation to which this section applies has subsisted for a continuous period of 5 years, then, subject to sections 9, 11A and 11B of this Act, as from the expiration of that period the obligation shall be extinguished.

(2) Where, by virtue of section 9 of this Act, an obligation to which this section applies is subsisting at the end of the period of 20 years commencing with the appropriate date, then, notwithstanding that section but subject to sections 11A and 11B of this Act, the obligation shall be extinguished as from the expiration of that period.

(3) Schedule 1 to this Act shall have effect for defining the obligations to which this section applies.

(4) In subsections (1) and (2) above the reference to the appropriate date, in relation to an obligation of any kind specified in Schedule 2 to this Act, is a reference to the date specified in that Schedule in relation to obligations of that kind, and in relation to an obligation of any other kind is a reference to the date when the obligation became enforceable.

## EXPLANATORY NOTES

### *Sub-paragraphs (i) to (iii)*

These sub-paragraphs set out the relevant facts. Lack of knowledge of the debtor's fault or liability in law is not included among the relevant facts. The proposed new section 6 specifically provides that this factor is irrelevant.

*Sub-paragraph (i)* implements Recommendations 2 and 3. Damage is not defined but the formula is intended to suggest that material as opposed to minimal damage must have occurred before time starts to run (see paragraph 2.21 of the Report). The terminology used is similar to that provided in section 17(2)(b)(i) of the 1973 Act.

*Sub-paragraph (ii)* implements Recommendation 4 by stipulating that knowledge of the cause of the damage is a relevant fact. Once again it is expressed in terms similar to those provided in respect of personal injuries, under section 17(2)(b)(ii).

*Sub-paragraph (iii)* implements Recommendation 5, the relevant fact being knowledge of the identity of the person liable for the damage sustained. Ignorance of this fact has caused considerable problems in the past especially where there are a number of linked companies with very similar names (see paragraph 2.38 of the Report).

*Subsection (4)* implements Recommendation 6, introducing the rule that where more than one person is liable for the damage sustained, then even although the creditor has actual or constructive knowledge of material damage and its cause, prescription will not start to run in favour of any particular debtor until he has been identified.

*Subsection (5)* implements Recommendation 20 in part. It provides that where the creditor is under legal disability and has a representative to act on his behalf, it will be the representative's actual or constructive knowledge of the relevant facts which will fix the start of the prescriptive period unless he is the person who is under an obligation to make reparation to the creditor. 'Representative' is defined for the purposes of this subsection in Schedule 1 paragraph 2(a)(ii) to the Bill.

*Subsection (6)* implements Recommendation 7. See general note above in relation to sub-paragraphs (i) to (iii) of subsection (3)(c).

*Subsection (7)* implements Recommendations 13, 15, 16, 18, 22 and 25 and 26 in part. It reduces the long negative prescription in its application to a reparation obligation from twenty years to fifteen years, but retains its existing starting off point, namely, the date when damage occurs (whether discoverable or not) as a result of an act or omission. A reparation obligation may still be subsisting fifteen years after damage has occurred. This situation can arise, for example, where the damage only becomes discoverable, and consequently the short negative prescription only starts to operate against the creditor, more than ten years after it has been sustained. If no 'relevant claim' or 'relevant acknowledgment' is made thereafter the long negative prescription will effectively act as a cut off point extinguishing the reparation obligation fifteen years after damage has been sustained.

### *Section 7*

This new section applies to all obligations, other than an obligation to make reparation, which, under the existing law, prescribe under the five year short negative prescription. It re-enacts the existing law in relation to the identity of the obligations concerned, and to the duration and starting off point of the short and long negative prescriptions applicable to such obligations. The existing law in this respect is at present reflected in subsections (1), (2) and (3) of section 6; section 7 (insofar as that section applies to such obligations prescribable under the short negative prescription); and Schedules 1 and 2 to the 1973 Act, subject to removing from Schedule 1 any reference to an obligation to make reparation. Schedule 1 paragraph 11 and Schedule 2 to this Bill provide the necessary amendments to Schedule 1 to the 1973 Act in this connection. The five year period may be subject to postponement or suspension by virtue of the proposed new section 9 below, and both the short and the long negative prescriptions may be interrupted or extended by a 'relevant acknowledgment' or a 'relevant claim', as the case may be, in accordance with the proposed new sections 11A and 11B below.

*Prescription (Scotland) Bill*

Extinction of obligations to make contributions between wrongdoers.

8.—(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, then, subject to sections 9, 11A and 11B of this Act, as from the expiration of that period the obligation shall be extinguished.

(2) Where, by virtue of section 9 of this Act, an obligation referred to in subsection (1) above is subsisting at the end of the period of 20 years commencing with the date on which it became enforceable, then, notwithstanding that section but subject to sections 11A and 11B of this Act, the obligation shall be extinguished as from the expiration of that period.

## EXPLANATORY NOTES

### *Section 8*

This new section replaces section 8A of the 1973 Act, as read with section 7 thereof. It provides for a two year negative prescriptive period in relation to an obligation to make contribution between wrongdoers calculated from the date the right to recover the contribution becomes enforceable by the creditor in the obligation, and is subject to the twenty year long negative prescription. The two year period may be postponed or suspended by virtue of the proposed new section 9 below; and both the two and twenty year periods may be interrupted or extended, as the case may be, by a 'relevant acknowledgment' or 'relevant claim', in accordance with the proposed new sections 11A and 11B below.

*Prescription (Scotland) Bill*

Effect of fraud,  
error or legal  
disability on  
prescriptive  
periods under ss.  
6 to 8.

9.—(1) In the computation of the prescriptive period of 5 years referred to in sections 6 and 7 and of the prescriptive period of 2 years referred to in section 8 of this Act in relation to an obligation, there shall be disregarded—

- (a) subject to subsection (2) below, 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, and
- (b) any period during which the creditor was under legal disability and—
  - (i) did not have a representative; or
  - (ii) did have a representative but the representative is the debtor in the obligation.

(2) Any period to be disregarded under subsection (1)(a) above shall not include any period after the creditor became, or it would have been reasonably practicable for him in all the circumstances to become, aware of the fraud or error, as the case may be, referred to in that subsection; but where the creditor is under legal disability and has a representative, this subsection shall have effect, except where the representative is the debtor in the obligation concerned, as if for the reference to the creditor there were substituted a reference to the representative.

(3) Where—

- (a) after the rights of a creditor in a reparation obligation or in an obligation to which section 8 of this Act applies have become enforceable, those rights are assigned; or
  - (b) after the appropriate date the rights of a creditor in an obligation to which section 7 of this Act applies are assigned,
- then, in subsection (1)(b) above, the reference to the creditor shall be construed as a reference to the person by whom or on whose behalf those rights were assigned while he was the creditor.

(4) Any period to be disregarded under subsection (1)(a) or (b) above shall not be treated as separating the time immediately before it from the time immediately after it.

## EXPLANATORY NOTES

### *Section 9*

This new section identifies the circumstances which give rise to a postponement or suspension of the five year short negative prescription and the two year prescriptive period in relation to any obligation prescribable thereunder.

#### *Subsection (1)*

##### *Paragraph (a)*

This paragraph re-enacts the existing law (see sections 6(4) and 8A(2) of the 1973 Act) in that, subject to subsection (2) below, the five year short negative prescription, and the two year negative prescription, are postponed or suspended for any period during which the creditor is persuaded from making a 'relevant claim' because of the fraud of the debtor or any person acting on his behalf, or through error induced by the words or conduct of the debtor or his agent.

Within the context of an assignation of the right to enforce an obligation which is subject to the five year short negative prescription or the two year prescription 'the creditor' referred to in this paragraph would be the assignee.

##### *Paragraph (b)*

Subsection 6(4)(b) of the 1973 Act, and that subsection as applied by section 8A(2), provide for postponement or suspension of the five year short negative prescription or the two year negative prescription where the original creditor (while he is the creditor) is under legal disability.

Contrary to this existing rule paragraph (b) provides that such postponement or suspension will only take place where that creditor has no representative or his representative is the debtor in the obligation. Subsection (3) below further clarifies the identity of the 'creditor' in this paragraph by providing that, where after the right to enforce an obligation prescribable under the proposed new sections 6, 7 and 8 has arisen under the 1973 Act that right is assigned to another, the new rules of postponement or suspension will only operate in relation to the assigning creditor, and will only apply in this context for any period during which that creditor is under a legal disability prior to the assignation of his right.

Paragraph (b) and subsection (3) below implement Recommendation 19 in part.

'Legal disability' is defined by section 15 of the 1973 Act. See paragraph 2(a)(ii) of Schedule 1 to this Bill for definition of 'representative'.

#### *Subsection (2)*

This subsection deals with two policy issues.

The first issue is reflected in Recommendation 17. It re-enacts the existing law (see the proviso to section 6(4), and section 8A(2) of the 1973 Act) insofar as it provides that the postponement or suspension of the five or two year negative prescriptive periods will end when the creditor has actual or constructive knowledge of the debtor's fraud, or the error induced by the debtor's actions. The test for imputing knowledge of the fraud or error to the creditor, however, is altered, by substituting for the existing test that adopted under the proposed new section 6(3)(c) above for imputing knowledge of the relevant facts to the creditor under the discoverability formula.

The second issue specified therein is reflected in Recommendation 21. Where the creditor is under legal disability and has a representative who is not the debtor in the obligation concerned, it will be the representative's actual or constructive knowledge of the fraud, or error, which will bring to an end the period of postponement or suspension.

#### *Subsection (3)*

See note above in relation to subsection (1)(b).

#### *Subsection (4)*

This subsection re-enacts the existing section 6(5) of the 1973 Act.

*Prescription (Scotland) Bill*

Extinction of obligations by prescriptive periods of 20 years.

**10.—(1)** If, after the date when an obligation to which this section applies has become enforceable, the obligation has subsisted for a continuous period of 20 years, then, subject to sections 11A and 11B of this Act, as from the expiration of that period the obligation shall be extinguished.

(2) This section applies to an obligation of any kind other than—

- (a) a reparation obligation;
- (b) an obligation to which section 7 of this Act applies;
- (c) an obligation referred to in section 8 of this Act;
- (d) an 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;
- (e) an obligation to which section 22A of this Act applies; or
- (f) an obligation specified in Schedule 3 to this Act as an imprescriptible obligation.

## EXPLANATORY NOTES

### *Section 10*

This proposed new section replaces section 7 of the 1973 Act. It identifies those obligations which prescribe only under the twenty year long negative prescription (not being subject to a short negative prescription). This identification is achieved in subsection (2) thereof by listing those categories of obligations to which this new section does not apply. It repeats those categories which are currently excluded from the application of the twenty year long negative prescription under the existing subsection (2) of section 7 and adds to such categories (i) an obligation to make reparation, which prescribes under the five year short negative prescription, and, as indicated in the proposed new section 6(7) above, is subject to a fifteen year long negative prescription; (ii) all other obligations prescribable under the five year short negative prescription, which as indicated in the proposed new section 7(2) above, are subject to a twenty year long negative prescription; and (iii) an obligation to make contribution between wrongdoers which prescribes under a two year negative prescription, and as indicated in the proposed new section 8(2) above, is subject to a twenty year long negative prescription. The twenty year period applicable to the obligations prescribable under section 10 is also subject to interruption or extension, as the case may be, in accordance with the proposed new sections 11A and 11B below.

*Prescription (Scotland) Bill*

Extinction of other rights relating to property by prescriptive period of 20 years.

**11.**—(1) If, after the date when any right to which this section applies has become exercisable or enforceable, the right has subsisted for a continuous period of 20 years unexercised or unenforced, then, subject to section 11B of this Act, as from the expiration of that period the right shall be extinguished.

(2) This section applies to any right relating to property, whether heritable or moveable, not being a right specified in Schedule 3 to this Act as an imprescriptible right or falling within section 6, 7 or 10 of this Act as being a right correlative to an obligation to which any of those sections applies.

Effect of relevant acknowledgment

**11A.**—(1) An obligation shall not be extinguished at the end of the prescriptive period if during that period the subsistence of the obligation has been relevantly acknowledged.

(2) The relevant acknowledgment under subsection (1) above of the subsistence of an obligation shall start the running of a new prescriptive period (commencing with the date when the relevant acknowledgment was given) of the same length as the period which was interrupted by the acknowledgment.

(3) This section does not apply in relation to an obligation under a bill of exchange or a promissory note.

(4) The subsistence of an obligation shall be regarded for the purposes of this section as having been relevantly acknowledged if, and only if, either of the following conditions is satisfied, namely—

- (a) that there has been such performance by or on behalf of the debtor towards implementation of the obligation as clearly indicates that the obligation still subsists;
- (b) that there has been made by or on behalf of the debtor to the creditor or his agent an unequivocal written admission clearly acknowledging that the obligation still subsists.

(5) Subject to subsection (6) below, where two or more persons are bound jointly by an obligation so that each is liable for the whole, and the subsistence of the obligation has been relevantly acknowledged by or on behalf of one of those persons, then—

- (a) if the acknowledgment is made in the manner specified in paragraph (a) of subsection (4) above, it shall have effect for the purposes of this section as respects the liability of each of those persons, and
- (b) if it is made in the manner specified in paragraph (b) of that subsection, it shall have effect for those purposes only as respects the liability of the person who makes it.

(6) Where the subsistence of an obligation affecting a trust estate has been relevantly acknowledged by or on behalf of one of two or more co-trustees in the manner specified in paragraph (a) or (b) of subsection (4) above, the acknowledgment shall have effect for the purposes of this section as respects the liability of the trust estate and any liability of each of the trustees.

(7) In this section references to performance in relation to an obligation include, where the nature of the obligation so requires, references to refraining from doing something and to permitting or suffering something to be done or maintained.

## EXPLANATORY NOTES

### *Section 11*

This proposed new section replaces section 8 of the 1973 Act providing for the extinction of rights relating to property (whether heritable or moveable) which remain unexercised or unenforced for twenty years. The twenty year period is subject to extension in accordance with the proposed new section 11B below.

### *Section 11A*

This proposed new section is concerned with the effect a 'relevant acknowledgment' has upon the running of the five year short negative prescription, the two year negative prescription and the fifteen and twenty year long negative prescriptions in relation to any obligation prescribable thereunder. The current definition of the expression 'relevant acknowledgment' in section 10 of the 1973 Act also operates within the context of this new section.

### *Subsections (1), and (2)*

These subsections implement Recommendations 23, 25 and 27. The policy is to retain what would appear to be the existing law governing the effect a 'relevant acknowledgment' has upon the operation of the short or long negative prescription in relation to all obligations prescribable thereunder (see sections 6(1)(b), 7(1)(b) and 8A(1)(b) of the 1973 Act), namely, the interruption and termination of the existing prescriptive period and the start of a new prescriptive period (see paragraphs 4.36, 4.37 and 4.57 of the Report).

### *Subsection (3)*

This subsection excludes from the operation of a 'relevant acknowledgment' an obligation under a bill of exchange or a promissory note, thus retaining the existing law in this respect (see the proviso to sections 6(1)(b) and 7(1)(b) of the 1973 Act).

### *Subsections (4)-(7)*

These subsections explain what is meant by the phrase 'relevant acknowledgment'. They replace section 10 of the 1973 Act.

*Prescription (Scotland) Bill*

Effect of  
relevant claim  
etc.

**11B.**—(1) If, in relation to any obligation, a relevant claim has been made but has not been disposed of or abandoned by the end of the prescriptive period, the obligation shall not be extinguished—

- (a) unless and until the claim is finally disposed of in favour of the debtor in the obligation or the claim is abandoned; or
- (b) subject to subsection (7) below, if the claim has been made—
  - (i) in arbitration proceedings—
  - (ii) in sequestration proceedings under section 22 or 48 of the Bankruptcy (Scotland) Act 1985;
  - (iii) in liquidation proceedings in accordance with rules made under section 411 of the Insolvency Act 1986; or
  - (iv) to the trustee acting under a trust deed as defined in section 5(2)(c) of the Bankruptcy (Scotland) Act 1985, and the arbitration, sequestration or liquidation proceedings have come to an end, or the trust deed has been superseded by an award of sequestration of the debtor's estate, before the claim has been adjudicated upon, until 6 months have elapsed commencing with the date on which the proceedings came to an end or sequestration was awarded, as the case may be.

(2) For the purposes of subsection (1)(a) above, a claim is finally disposed of when—

- (a) a decision disposing of the claim has been made against which no appeal is competent;
- (b) an appeal against such a decision is competent with leave, and the time limit for leave has expired and no application has been made or leave has been refused; or
- (c) leave to appeal against such a decision is granted or is not required, and no appeal is made within the time limit for appeal.

(3) In subsection (1)(b) above “arbitration proceedings” means—

- (a) an arbitration in Scotland; or
- (b) an arbitration in a country other than Scotland, being an arbitration an award in which would be enforceable in Scotland.

(4) The foregoing provisions of this section and section 11A of this Act shall apply where during the period of 6 months referred to in subsection (1)(b) above—

- (a) the subsistence of the obligation is relevantly acknowledged; or
- (b) a relevant claim is made in relation to it,

as they apply where the acknowledgment is given or the claim is made within the prescriptive period.

(5) The foregoing provisions of this section shall apply in relation to a right to which section 11 of this Act applies as they apply in relation to any obligation but as if—

- (a) in subsection (1)(a) for the words “in favour of the debtor in the obligation” there were substituted the words “by its rejection on any ground”; and
- (b) in subsection (4), paragraph (a) and the words “the acknowledgment is given or” were omitted.

## EXPLANATORY NOTES

### *Section 11B*

This proposed new section is concerned with the effect a 'relevant claim' has upon the running of the five year short negative prescription, the two year negative prescription, and the fifteen and twenty year long negative prescriptions in relation to any obligation prescribable thereunder and in relation to a right affecting property (which prescribes under the twenty year prescription). The current definition of the expression 'relevant claim' in section 9 of the 1973 Act operates within the context of this new section subject to the removal from that definition of 'the execution by or on behalf of the creditor in an obligation of any form of diligence directed to the enforcement of the obligation'.

### *Subsection (1)*

The effect which a 'relevant claim' has under existing law upon the operation of the short and long negative prescriptions in relation to all obligations prescribable thereunder (see sections 6(1)(a), 7(1)(a), and 8A(1)(a) of the 1973 Act) appears to be uncertain (see paragraph 4.41 of the Report). This subsection, which implements Recommendations 24, 26 and 28, in part, defines the effect a 'relevant claim' will have upon the operation of these prescriptions and adopts for this purpose, subject to one qualification, a scheme similar to that in operation in relation to reparation obligations involving defective products under section 22A of the 1973 Act. The subsection provides that where a 'relevant claim' is made but has not been disposed of, or abandoned, by the end of the two, five, fifteen or twenty year period, the obligation will not be extinguished until it is finally disposed of in favour of the debtor in the obligation, or is abandoned, or, if the claim has been made in arbitration or insolvency proceedings (see footnote 5 on page 34 of the Report for the definition of "insolvency proceedings") and such proceedings have come to an end, or been superseded by an award of sequestration (where the claim was lodged under a voluntary trust deed) before the claim has been adjudicated upon, until 6 months have elapsed since the proceedings came to an end or the sequestration was awarded.

### *Subsection (2)*

This subsection implements Recommendations 24(i), 26(i) and 28(i). It defines what is meant by "final disposal of a claim", and for this purpose adopts, in pursuance of the policy to minimise fragmentation, a formula similar to that provided in section 22A(3) (a)-(c) of the 1973 Act in relation to defective products.

### *Subsection (3)*

This subsection defines 'arbitration proceedings' for the purposes of subsection (1) above, adopting the same definition as that provided in section 4(2)(b) and (c) of the 1973 Act.

### *Subsection (4)*

This subsection implements Recommendations 24(iv), 26(iv) and 28(iv). It provides that if during the six month period referred to in subsection (1) above a 'relevant acknowledgment' is given, or a further 'relevant claim' is made, the said period will be subject to interruption or extension, as the case may be, in accordance with section 11A and subsections (1)-(3) above (see paragraph 4.53 of the Report).

### *Subsection (5)*

The Recommendations reflected in subsections (1)-(4) above, suitably adjusted to omit reference to a 'relevant acknowledgment' made during the six month period, also apply where a 'relevant claim' is made in relation to a right affecting property which is subject, under the proposed new section 11 above, to the twenty year long negative prescription. Under section 11 a 'relevant acknowledgment' does not interrupt the prescriptive period.

*Prescription (Scotland) Bill*

(6) Without prejudice to the foregoing provisions of this section, where, in relation to an obligation referred to in paragraph 2(a) of Schedule 1 to this Act, any form of diligence is executed during the prescriptive period by or on behalf of the creditor in the obligation directed to its enforcement, the obligation shall not be extinguished at the expiration of that period.

Meaning of relevant claim.

**11C.—**(1) In sections 9(1) and 11B of this Act “relevant claim”, in relation to any obligation, means a claim made by or on behalf of the creditor for implementation or part-implementation of the obligation, being a claim made—

- (a) in appropriate proceedings;
- (b) by the presentation of, or the concurring in, a petition for sequestration or by the submission of a claim under section 22 or 48 of the Bankruptcy (Scotland) Act 1985;
- (c) by the submission of a claim in liquidation proceedings in accordance with rules made under section 411 of the Insolvency Act 1986; or
- (d) by a creditor to the trustee acting under a trust deed as defined in section 5(2)(c) of the Bankruptcy (Scotland) Act 1985.

(2) In section 11B of this Act “relevant claim”, in relation to a right to which section 11 of this Act applies, means a claim made in appropriate proceedings by or on behalf of the creditor to establish the right or to contest any claim to a right inconsistent therewith.

(3) Where a relevant claim is made in an arbitration, and the nature of the claim has been stated in a preliminary notice relating to that arbitration, the date when the notice was served shall be taken for the purposes of sections 9(1) and 11B of this Act to be the date of the making of the claim.

(4) In this section “appropriate proceedings” and, in relation to an arbitration, “preliminary notice” have the same meanings as in section 4 of this Act.”.

Contracting out.

2. For section 13 of the 1973 Act there shall be substituted the following section—

“Contracting out.

**13.—**(1) Subject to the following provisions of this section, any provision in any agreement purporting to provide in relation to any right or obligation that any of sections 6 to 11C of this Act shall not have effect shall be null.

(2) Subsection (1) above is without prejudice to a provision in an agreement which purports to shorten the prescriptive period required for the operation of any of the sections mentioned in that subsection.

(3) It shall be competent for the creditor (or where appropriate his representative) and any potential debtor in a reparation obligation, at any time after the occurrence of the loss, injury or damage concerned, to enter into an agreement to suspend the running in favour of that potential debtor of the period of 5 years or 15 years referred to in subsection (2) or (7) of section 6 of this Act for such period as is specified in the agreement to enable the creditor or his representative to make further enquiries as to the cause of, or the persons responsible for, that loss, injury or damage.”.

## EXPLANATORY NOTES

### *Subsection (6)*

As indicated above the execution of diligence no longer constitutes a 'relevant claim'. (See the explanation given in paras 4.68 to 4.70 of the Report for omitting diligence from the definition of 'relevant claim').

This subsection provides, however, that where diligence is executed for the purpose of enforcing an obligation arising under a decree of court, an arbitration award, or an order of a tribunal or authority exercising jurisdiction under any enactment—which obligation is subject to the twenty year long negative prescription—that obligation will not be extinguished on the expiry of the 20 year period.

For definition of 'decree of court' see paragraph 11(c) of Schedule 1 to this Bill.

### *Section 11C*

This proposed new section defines the meaning of 'relevant claim'. Subject to the exclusion from that definition of 'the execution of diligence', it replaces section 9 of the 1973 Act.

### *Clause 2*

This Clause replaces section 13 of the 1973 Act.

### *Subsections (1) and (2)*

These subsections implement Recommendation 29. Subject to subsection (3) below they prohibit parties from contracting out of the rules of prescription laid down by the proposed new sections 6, 7, 8, 9, 10, 11A, 11B and 11C of the 1973 Act, with one exception. This exception recognises the right of parties to enter into an agreement to shorten any prescriptive period referred to in these sections in relation to any obligation, or right affecting property prescribable thereunder.

### *Subsection (3)*

This subsection implements Recommendation 30. Its provisions apply only in relation to the prescription of an obligation to make reparation. The objective behind the provision is to reduce the current practice of serving 'protective writs' discussed in paragraphs 4.81-4.89 of the Report. It enables parties to enter into an agreement, after damage has occurred, to suspend the running of either, or both, prescriptive periods referred to in the proposed new section 6 of the 1973 Act for a specified period so as to enable the creditor to complete his enquiries as to the cause of, or persons responsible for, the damage sustained.

*Prescription (Scotland) Bill*

Transitional provision and minor and consequential amendments and repeals.

**3.—(1)** This Act shall not apply in relation to an obligation arising or right accruing from anything which occurred before the commencement of this Act.

(2) The enactments mentioned in Schedule 1 to this Act shall have effect subject to the minor and consequential amendments respectively specified in that Schedule.

(3) Schedule 2 to this Act shall have effect for the purpose of repealing the 1973 Act to the extent specified in column 3 of that Schedule.

Short title, commencement and extent.

**4.—(1)** This Act may be cited as the Prescription (Scotland) Act 1989.

(2) This Act shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint.

(3) This Act extends to Scotland only.

## EXPLANATORY NOTES

### *Clause 3*

#### *Subsection (1)*

This subsection incorporates transitional provisions by providing that the provisions of this Bill shall not apply in relation to an obligation arising, or right accruing, from anything which occurred before the Bill is enacted.

SCHEDULES

SCHEDULE 1

Section 3(2).

MINOR AND CONSEQUENTIAL AMENDMENTS

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

1. In section 14(1)(b) for the words from “subsection” to “8A” there shall be substituted the words “subsection (1)(b) of section 9”.

2. In section 15—

(a) in subsection (1)—

(i) in the definition of “prescriptive period” for “6, 7, 8 or 8A” there shall be substituted “6(2) or (7), 7(1) or (2), 8, 10 or 11”;

(ii) after the definition of “promissory note” there shall be inserted the following definition—

“‘representative’ of any person means—

(a) a tutor, factor *loco tutoris*, curator or *curator bonis* of that person;

(b) a local authority or voluntary organisation in whom the parental rights and powers in respect of that person are vested under any enactment; or,

(c) where the substantive law of a country other than Scotland falls to be applied, anyone with similar powers under that law in relation to that person to any of the persons referred to in paragraphs (a) and (b) above;”;

(b) at the end there shall be added the following subsections—

“(4) For the purposes of this Part of this Act, any loss, injury or damage for which a person is liable under any enactment or rule of law without the need for it to be established that the loss, injury or damage was caused by that person’s act or omission shall be deemed to have been so caused.

(5) Where, after the rights of a creditor in a reparation obligation or in an obligation referred to in section 8 of this Act have become enforceable, those rights are assigned, any reference to the creditor in section 6 or (as the case may be) section 8(1) of this Act shall be construed as a reference to the assignor of those rights.”.

## EXPLANATORY NOTES

### *Schedule 1*

#### *The Prescription and Limitation (Scotland) Act 1973*

### *Paragraph 2*

This paragraph amends section 15 which provides the interpretation provisions for Part I.

### *Sub-paragraph (a)(ii)*

The expression 'representative' arises in the proposed new sections 6 and 9. The purpose of defining this expression is to identify those persons or bodies who are entitled by law to protect and represent the interests of a legally disabled creditor. The definition extends to a representative appointed under the law of another country. 'Legal disability' is already defined under section 15.

### *Sub-paragraph (b)*

This sub-paragraph adds two new subsections to section 15.

### *Subsection (4)*

The purpose of this provision is to ensure that the five and fifteen year prescriptive periods will apply to an obligation to make reparation based on strict liability (see footnote 1 on page 42 of the Memorandum).

### *Subsection (5)*

This subsection defines 'the creditor' within the context of the proposed new sections 6 and 8. The purpose of this provision is to ensure that (i) where after the right to claim reparation for damage sustained has become enforceable that right is assigned it will be the assignor's knowledge of the relevant facts which will fix the start of the five year prescriptive period and (ii) where the right to recover a contribution by virtue of section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 is assigned, the two year prescriptive period referred to in the new section 8(1) will run from the date on which the assignor's right to recover the contribution became enforceable.

*Prescription (Scotland) Bill*

3. In section 17—

(a) at the end of subsection (3) there shall be added the words

“and

(a) did not have a representative; or

(b) did have a representative, but the representative is the defender in the action.”;

(b) after subsection (3) there shall be added the following subsections—

“(4) Where the pursuer—

(a) is under legal disability by reason of minority; and

(b) has a representative who is consenting to the action,

subsection (2)(b) above shall have effect as if for the reference to the pursuer in the action there were substituted a reference to the representative.

(5) Where the action is being brought by virtue of the assignation of a right of action, subsection (3) above shall have effect as if after the word “mind” there were inserted the words “before his right of action was assigned”.

## EXPLANATORY NOTES

### *Paragraph 3*

This paragraph amends section 17. Section 17 applies to an action to make reparation for damage, which consists of or includes personal injuries. The action is subject to a three year limitation period which starts to run from the date on which the pursuer in the action (as defined in section 22(2)) acquires actual or constructive knowledge of the relevant facts. Where the injured party is under legal disability by reason of nonage or unsoundness of mind, the said period is postponed or suspended during the period of disability.

### *Sub-paragraph (a)*

This sub-paragraph implements Recommendation 19 in part. It amends subsection (3) of section 17 by providing that, contrary to the existing law which recognises postponement or suspension of the three year limitation period where the injured party is under legal disability, such postponement or suspension will only take place where the legally disabled injured party has no representative or his representative is the defender in the action.

### *Sub-paragraph (b)*

This sub-paragraph introduces two new subsections—subsections (4) and (5)—into section 17.

### *Proposed new Subsection (4)*

This subsection implements Recommendation 20 in part. Section 17(2)(b) already partly reflects this Recommendation by providing that it is the knowledge of 'the pursuer in the action' which fixes the start of the limitation period. In most instances, where the injured party is legally disabled, the pursuer in the action will be his representative, for example, his tutor, factor *loco tutoris*, or *curator bonis*. The main exception to this rule is where the injured party is a minor, in which case the action is raised by the minor, with his curator's consent. The proposed new subsection (4) takes account of this exception by providing that it will be the knowledge of the curator and not that of the pursuer (the minor) which will be relevant in fixing the start of the limitation period.

There is one further exception to the above rule. Where the injured party is a pupil the normal procedure adopted in the Court of Session and the Sheriff Court is that the reparation action will be brought in the name of the tutor. Some cases suggest, however, that it is possible for the action to be raised by the pupil, providing that the tutor subsequently concurs in the action or the court appoints a curator *ad litem*—see *Keith v. Archer* 1836 S.C. 116; *Ward v. Walker* 1920 S.C. 80. As it is improbable under current court procedures that this situation will arise we have not taken account of it in the draft Bill. Consequently in the unlikely event of the pupil instituting court proceedings it will be his knowledge which fixes the start of the limitation period. For definition of 'representative' see paragraph 6(a) of Schedule 1 to the Bill. It should be noted that a curator *ad litem* is excluded from the definition provided, his knowledge of the facts not being relevant in fixing the start of the limitation period.

### *Proposed new subsection (5)*

This subsection provides that in the event of the injured party's right of action being assigned to another the new rules of postponement or suspension referred to in sub-paragraph (a) above will only operate for any period during which that injured party is under a legal disability prior to the assignation of his right of action. This rule is in line with that adopted within the context of the five and two year prescriptive periods—see proposed new section 9(3).

*Prescription (Scotland) Bill*

4. In section 18—

(a) in subsection (3)—

(i) for the word “pursuer” there shall be substituted the words “aggrieved party by whom or on whose behalf the action is being brought”;

(ii) at the end there shall be added the words

“and

(a) did not have a representative; or

(b) did have a representative, but the representative is the defender in the action”;

(b) after subsection (3) there shall be inserted the following subsections—

“(3A) Where the aggrieved party by whom the action is being brought—

(a) is under legal disability by reason of minority; and

(b) has a representative who is consenting to the action,

subsection (2)(b) above shall have effect as if for the reference to the pursuer in the action there were substituted a reference to the representative.

(3B) Where the aggrieved party by whom or on whose behalf the action is being brought is a relative of the deceased and the action is being brought by virtue of the assignation of a right of action of another relative of the deceased, the time to be disregarded under subsection (3) above shall be any time during which that other relative before his right of action was assigned was under such legal disability and—

(a) did not have a representative; or

(b) did have a representative, but the right of action was against the representative.”.

## EXPLANATORY NOTES

### *Paragraph 4*

This paragraph amends section 18. Section 18 applies to an action for reparation in which following the death of the injured party referred to in paragraph 3 above, damages are claimed in respect of the injuries or death. The action is subject to a three year limitation period which starts to run from the injured party's death, or if later, the date on which the pursuer in the action acquired actual or constructive knowledge of the relevant facts. Where the pursuer in the action is a relative of the deceased and is under a legal disability, the said period is postponed or suspended during the period of disability.

### *Sub-paragraph (a)*

This sub-paragraph reflects Recommendation 19 in part. It adopts a policy similar to that reflected in paragraph 3 by providing at the end of subsection (3) of section 18 that, where the aggrieved person bringing the action or on whose behalf the action is being brought, is a relative of the deceased, the three year limitation period will only be postponed or suspended for any time during which the relative is under a legal disability and has no representative, or his representative is the defender in the action.

### *Sub-paragraph (b)*

This sub-paragraph introduces two new subsections—subsection (3A) and (3B)—into section 18.

### *Proposed new subsection (3A)*

This new subsection implements Recommendation 20 in part. For an explanation of this provision see the note above relative to paragraph 3(b).

### *Proposed new subsection (3B)*

This new subsection qualifies the limitation rule specified in paragraph 4(a) above where the relative of the deceased is pursuing the action by virtue of an assignation of the right of action granted by another relative of the deceased. In these circumstances the limitation period will only be postponed or suspended for any period during which the assignor, before his right of action is assigned, is under a legal disability and does not have a representative, or does have a representative but his right of action is against that representative.

*Prescription (Scotland) Bill*

5. In section 18A—

(a) at the end of subsection (2) there shall be added the words

“and

(a) did not have a representative; or

(b) did have a representative, but the representative is the defender in the action.”;

(b) after subsection (2) there shall be inserted the following subsection—

“(2A) Where the action is being brought by virtue of the assignation of a right of action, subsection (2) above shall have effect as if after the word “mind” there were inserted the words “before his right of action was assigned.”;

(c) at the end there shall be added the following subsection—

“(5) Where the pursuer—

(a) is under legal disability by reason of minority; and

(b) has a representative who is consenting to the action,

subsection (4)(b) above shall have effect as if for the reference to the pursuer there were substituted a reference to the representative.”.

6. In section 22—

(a) at the end of subsection (1) there shall be added the following definition—

“‘representative’ of any person means—

(a) a tutor, factor *loco tutoris*, curator or *curator bonis* of that person but does not include a curator *ad litem*;

(b) a local authority or voluntary organisation in whom the parental rights and powers in respect of that person are vested under any enactment; or,

(c) where the substantive law of a country other than Scotland falls to be applied, anyone with similar powers under that law in relation to that person to any of the persons referred to in paragraphs (a) and (b) above;”;

(b) at the end there shall be added the following subsection—

“(5) For the purposes of this Part of this Act, any personal injuries for which a person is liable under any enactment or rule of law without the need for it to be established that the injuries were caused by that person’s act or omission shall be deemed to have been so caused.”.

## EXPLANATORY NOTES

### *Paragraph 5*

This paragraph amends subsection (2) of section 18A and adds new subsections (2A) and (5). Section 18A applies to an action to make reparation for defamation. The action is subject to a three year limitation period which starts to run from the date when the defamatory publication or communication first came to the notice of the pursuer in the action (as defined by section 22(2)). Where the person alleged to have been defamed is under a legal disability the said period is postponed or suspended during that period.

This paragraph implements Recommendations 19 and 20 in part, adopting the same policy as that referred to in paragraphs 3 and 4 above.

### *Paragraph 6*

This paragraph amends section 22 which interprets certain expressions arising in Part II, and introduces some supplementary provisions.

#### *Sub-paragraph (a)*

This sub-paragraph defines “the representative”, referred to in the amendments proposed under paragraphs 3, 4 and 5 above, identifying those persons or bodies who are entitled by law to protect and represent the interests of the legally disabled creditor. A curator *ad litem* is, however, excluded from this definition. A curator *ad litem* can be distinguished from the other representatives identified by the fact that he exercises a limited function, being appointed by the court to protect the interests of the claimant in a litigation, his office terminating on conclusion of the action. He has no right to administer the claimant’s estate.

#### *Sub-paragraph (b)*

The purpose of this provision is to ensure that the three year limitation period will apply to an action to make reparation for personal injuries based on strict liability (see paragraph 2(b) above for a similar provision in relation to a reparation obligation prescribable under the five and fifteen year prescriptive periods).

7. In section 22A—

(a) in subsection (1) for the words from “be extinguished” to “disposed of” there shall be substituted the words, “subject to subsection (2) below, be extinguished if a period of 10 years has expired from the relevant time”;

(b) for subsection (2) there shall be substituted the following subsection—

“(2) If, in relation to such an obligation as aforesaid, a relevant claim has been made but has not been disposed of or abandoned by the end of the said period of 10 years, the obligation shall not be extinguished—

(a) unless and until the claim is finally disposed of in favour of the debtor in the obligation or the claim is abandoned; or

(b) subject to subsection (5) below, if the claim has been made—

(i) in arbitration proceedings;

(ii) in sequestration proceedings under section 22 or 48 of the Bankruptcy (Scotland) Act 1985; or

(iii) in liquidation proceedings in accordance with rules made under section 411 of the Insolvency Act 1986, and the arbitration, sequestration or liquidation proceedings have come to an end before the claim has been adjudicated upon, until 6 months have elapsed commencing with the date on which the proceedings came to an end.”;

(c) at the end there shall be added the following subsection—

“(5) The foregoing provisions of this section shall apply where, during the period of 6 months referred to in subsection (2)(b) above, a relevant claim is made in relation to the obligation as they apply where the claim is made within the said period of 10 years.”.

## EXPLANATORY NOTES

### *Paragraphs 7, 8, 9 and 10*

Paragraphs 7, 8, 9 and 10 amend sections 22A, 22B, 22C and 22D of the 1973 Act. These sections were inserted by Schedule 1 Part II of the Consumer Protection Act 1987, and implement Articles 10 and 11 of the Product Liability Directive (85/374/EEC) which introduce new rules of prescription and limitation in relation to an obligation to make reparation for damage arising from a defective product. The amendments proposed include minor drafting adjustments and some changes of substance. They reflect our objective to minimise fragmentation, where practicable, in the rules of prescription and limitation, as they apply to all reparation obligations, and in our view do not conflict with the underlying policy of the Directive.

### *Paragraph 7*

Section 22A provides for a ten year long negative prescription in relation to an obligation to make reparation as a consequence of a defective product, and defines the effect a 'relevant claim' made during this ten year period has upon the operation of that prescription.

As indicated above, in identifying the effect a 'relevant claim' should have upon the operation of the five and fifteen year prescriptive periods, the proposed new sections 11B and 11C adopt a similar approach to that provided in section 22A, subject, however, to one qualification (see paras. 4.52 and 4.53 of the Report) which does not at present apply to the defective products scheme. Paragraph 7, in implement of Recommendations 31(i) and (ii), amends section 22A by incorporating provisions similar to this qualification suitably adjusted, however, to take account of (i) the narrower definition of 'relevant claim' in section 22A(3) than that provided in the proposed new section 11C of the 1973 Act, and (ii) the fact that a 'relevant acknowledgment' does not interrupt the ten year prescriptive period.

*Prescription (Scotland) Bill*

8. In section 22B—

(a) in subsection (2) for the words from “earliest” to “it was” there shall be substituted the words “date on which the pursuer in the action became aware, or on which, in the opinion of the court, it would have been”;

(b) in subsection (3)(d) after the word “liable” there shall be inserted the words “in whole or in part”;

(c) in subsection (4)—

(i) for the words “seeking to bring the action” there shall be substituted the words “who sustained the damage”;

(ii) at the end there shall be added the words—  
“and

(a) did not have a representative; or

(b) did have a representative, but the representative is the defender in the action.”;

(d) after subsection (4) there shall be inserted the following subsections—

“(4A) Where the pursuer—

(a) is under legal disability by reason of minority; and

(b) has a representative who is consenting to the action,

subsections (2) and (3)(c) above shall have effect as if for the reference to the pursuer in the action there were substituted a reference to the representative.

(4B) Where the action is being brought by virtue of the assignation of a right of action, subsection (4) above shall have effect as if after the word “mind” there were inserted the words “before his right of action was assigned”.

## EXPLANATORY NOTES

### *Paragraph 8*

Section 22B provides that an action for damages arising from a defective product must be raised within three years from the earliest date on which the relevant facts identified in subsection (3) thereof become discoverable by the person who sustained the damage, ie ‘. . . the person seeking to bring (or a person who could at an earlier date have brought) the action . . .’. However, under subsection (4) where the person seeking to bring the action (who may not necessarily be the person who sustained the damage but could be an assignee of that person’s rights) is under legal disability the three year limitation period will be postponed or suspended during his or her legal disability.

### *Sub-paragraph (a)*

This sub-paragraph requires to be considered in conjunction with the proposed new subsection (5) of section 22D inserted by paragraph 10 of this Schedule. As read together this sub-paragraph introduces a minor drafting adjustment to subsection (2) of section 22B, but not a change of substance, the objective being to adopt terminology similar to that provided in section 17(2)(b) of the 1973 Act (as read with section 22(2)). The effect of these amendments will be that where there has been an assignment by the person who has sustained the damage of his right of action it will be the assignor’s knowledge of the relevant facts, and not that of the assignee, which will fix the start of the limitation period.

### *Sub-paragraph (b)*

This sub-paragraph involves a minor adjustment to subsection (3)(d) of section 22B, adopting a formula similar to that provided in section 17(2)(b)(ii) of the 1973 Act. The purpose of the amendment is to make it clear that where there is more than one person liable for the damage sustained, and the creditor has actual or constructive knowledge of the other relevant facts identified in section 22B(3)(a)-(c), the three year limitation period will not start to run in favour of each person liable until his or her identity becomes discoverable.

### *Sub-paragraph (c)*

This sub-paragraph introduces two changes of substance to section 22B implementing Recommendations 32 and 33(i) and (ii). In so doing it adopts the policy already reflected in the proposed new section 9(1)(b), and in sections 17, 18 and 18A of the 1973 Act as adjusted by paragraphs 3, 4 and 5 of this Schedule. The policy changes concern the identity of the person whose legal disability will affect the operation of the three year period, and limit the circumstances in which such legal disability will postpone or suspend that period. It provides that it will be the legal disability of the person who has sustained the damage and not an assignee of that person’s right of action, which will be taken into account in calculating the limitation period, and that person’s legal disability will only postpone or suspend the three year period if he has no representative or his representative is the defender in the action.

### *Sub-paragraph (d)*

This sub-paragraph introduces two new subsections—subsection (4A) and (4B)—into section 22B.

### *Proposed new subsection (4A)*

This new subsection implements Recommendation 34, adopting the policy already reflected in paragraphs 3(b), 4(b) and 5(c) above. For an explanation of this provision see the note relative to paragraph 3(b) above.

### *Proposed new subsection (4B)*

This subsection makes it clear that where the right of action of a person who has sustained damage is assigned to another the rules of postponement or limitation referred to in sub-paragraph (c) above will only operate for any period during which the assignor is under a legal disability prior to the assignment of his right of action. For an explanation of this provision see the note relative to paragraph 3(b) above which among other things inserts a new subsection (5) into section 17 of the 1973 Act.

9. In section 22C—

(a) in subsection (2)(b)—

- (i) for the words from “person seeking” to “it was” there shall be substituted the words “pursuer in the action became aware, or on which, in the opinion of the court, it would have been”;
- (ii) in sub-paragraph (iii) after the word “liable” there shall be inserted the words “in whole or in part”;

(b) in subsection (3)—

- (i) for the words “person seeking to make the claim” there shall be substituted the words “aggrieved party by whom or on whose behalf the action is being brought”;
- (ii) at the end there shall be added the words

“and

- (a) did not have a representative; or
- (b) did have a representative, but the representative is the defender in the action.”;

(c) after subsection (3) there shall be inserted the following subsections—

“(3A) Where the aggrieved party by whom the action is being brought—

- (a) is under legal disability by reason of minority; and
- (b) has a representative who is consenting to the action,

subsection (2)(b) above shall have effect as if for the reference to the pursuer in the action there were substituted a reference to the representative.

(3B) Where the aggrieved party by whom or on whose behalf the action is being brought is a relative of the deceased and the action is being brought by virtue of the assignation of a right of action of another relative of the deceased, the time to be disregarded under subsection (3) above shall be any time during which that other relative before his right of action was assigned was under such legal disability and—

- (a) did not have a representative; or
- (b) did have a representative, but the right of action was against the representative.”.

## EXPLANATORY NOTES

### *Paragraph 9*

Section 22C applies to an action for reparation where a person has died from personal injuries as a result of a defective product and the damages claimed in that action include damages for these injuries or that death. Once again, the action is subject to a three year limitation period calculated from the date of death of the injured party, or if later, the date upon which the original claimant under this provision has actual or constructive knowledge of the relevant facts identified in subsection (2). Where the claimant is a relative of the deceased (and in this context the claimant may be either the original claimant or an assignee of the rights of the original claimant who was also a relative of the deceased) and is under a legal disability the three year limitation period will be postponed or suspended during that claimant's legal disability.

### *Sub-paragraph (a)*

Sub-paragraph (a), read in conjunction with the proposed new subsection (5) of section 22D (inserted by paragraph 10 of this Schedule), introduces minor drafting adjustments to subsection (2)(b) of section 22C, which are similar to, and made for the same reasons as, those introduced into section 22B by sub-paragraphs (a) and (b) of paragraph 8 above.

### *Sub-paragraph (b)*

This sub-paragraph introduces one minor adjustment to subsection (3) of section 22C, and one change of substance similar to that adopted in relation to section 22B by paragraph 8(c) above. It provides that, where the aggrieved person by whom or on whose behalf the action is brought is a relative of the deceased the three year limitation period will only be postponed or suspended for any time during which that relative is under a legal disability and has no representative or his representative is the defender in the action.

### *Sub-paragraph (c)*

This sub-paragraph introduces two new subsections—subsection (3A) and (3B)—into section 22C.

### *Proposed new subsection (3A)*

This new subsection implements Recommendation 34, adopting the policy already reflected in paragraphs 3(b), 4(b) and 5(c) of Schedule 1 to the Bill. For an explanation of this provision see the note relative to paragraph 3(b) above.

### *Proposed new subsection (3B)*

This new subsection qualifies the limitation rule specified in sub-paragraph (b) above where the relative of the deceased is pursuing the action by virtue of an assignation of the right of action of another relative of the deceased. In these circumstances the limitation period will only be postponed or suspended for any period during which the assignor, before his right of action is assigned, is under legal disability and does not have a representative, or does have a representative but his right of action is against that representative.

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**10.** In section 22D at the end there shall be added the following subsections—

“(4) In this Part ‘representative’ has the same meaning as in section 22(1) of this Act.

(5) Where the pursuer in an action to which section 22B or 22C of this Act applies is pursuing the action by virtue of the assignation of a right of action, the reference in subsections (2) and (3)(c) of the said section 22B or subsection (2)(b) of the said section 22C (as the case may be) to the pursuer in the action shall be construed as a reference to the assignor of the right of action.”.

**11.** In Schedule 1—

(a) in the heading and in paragraphs 1 and 2 for the words “section 6” there shall be substituted the words “section 7”;

(b) in paragraph 1(g) after the word “being” there shall be inserted the words “an obligation to make reparation or”;

(c) at the end of paragraph 2(a) there shall be added—

“In this sub-paragraph “decree of court” includes—

(i) an extract of a document which is registered for execution in the Books of Council and Session or in sheriff court books;

(ii) a summary warrant granted under or by virtue of any of the enactments mentioned in Schedule 4 to the Debtors (Scotland) Act 1987;

(iii) an order or determination which by virtue of any enactment is enforceable as if it were an extract registered decree arbitral bearing a warrant for execution issued by the sheriff;

(iv) a civil judgment granted outside Scotland by a court, tribunal or arbiter which by virtue of any enactment or rule of law is enforceable in Scotland; and

(v) a document or settlement which by virtue of an Order in Council made under section 13 of the Civil Jurisdiction and Judgments Act 1982 is enforceable in Scotland.”.

**12.** In Schedule 2, in the heading for the words “section 6” there shall be substituted the words “section 7”.

## EXPLANATORY NOTES

### *Paragraph 10*

This paragraph introduces two new subsections—subsections (4) and (5)—into section 22D.

#### *Proposed new subsection (4)*

This new subsection provides a definition of ‘representative’ similar to that provided in paragraph 6(a) above.

#### *Proposed new subsection (5)*

This new subsection defines the pursuer in the action within the context of sections 22B(2) and (3)(c) and 22C(2)(b) (as amended).

### *Paragraph 11*

#### *Sub-paragraphs (a) and (b)*

The statutory rules of prescription applicable to an obligation to make reparation are now treated separately in the Bill from the other obligations which prescribe under the five year short negative prescription. The other obligations are identified in Schedule 1 to the 1973 Act as amended by these sub-paragraphs and the repeal of paragraphs 1(d) and 2(g), (gg) and (ggg) in Schedule 2 to this Bill. This has been achieved by removing all references in Schedule 1 to an obligation to make reparation.

#### *Sub-paragraph (c)*

This sub-paragraph defines ‘decree of court’. The primary intention is to include ‘constructive decrees’ in this definition (see 1.19 of the Report). The definition provided is similar to that in section 15 of the Debtors (Scotland) Act 1987 but it includes summary warrants and maintenance orders.

*Prescription (Scotland) Bill*

*The Land Compensation (Scotland) Act 1973 (c.56).*

**13.** In section 17(2A)—

- (a) for the words from the beginning to “shall apply” there shall be substituted the words “Sections 7, 9, 11A and 11B of the Prescription and Limitation (Scotland) Act 1973 shall apply”;
- (b) for the words “subsection (1) of the said section 6” there shall be substituted the words “the said section 7”.

**14.** In section 29(7A)—

- (a) for the words from the beginning to “shall apply” there shall be substituted the words “Sections 7, 9, 11A and 11B of the Prescription and Limitation (Scotland) Act 1973 shall apply”;
- (b) for the words “subsection (1) of the said section 6” there shall be substituted the words “the said section 7”.

*The Local Government, Planning and Land Act 1980 (c.65)*

**15.** In section 113(11)—

- (a) for the words from the beginning to “shall apply” there shall be substituted the words “Sections 7, 9, 11A and 11B of the Prescription and Limitation (Scotland) Act 1973 shall apply”;
- (b) for the words “subsection (1) of the said section 6” there shall be substituted the words “the said section 7”.

*The Merchant Shipping (Liner Conferences) Act 1982 (c.37)*

- 16.** In section 8(3) for the words “section 6(4)” and “section 6(1)” there shall be substituted respectively the words “section 9” and “section 7(1)”.

## EXPLANATORY NOTES

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Section 3(3).

*SCHEDULE 2*

REPEALS OF 1973 ACT

<i>Chapter</i>	<i>Short Title</i>	<i>Extent of Repeal</i>
1973 c.52	The Prescription and Limitation (Scotland) Act 1973	In section 22A(3), in paragraph (c) the word "or" and paragraph (d). In section 22B(3)(c) the words "(or other person referred to in subsection (2) above)". In Schedule 1, paragraph 1(d) and paragraph 2(g), (gg) and (ggg).

## EXPLANATORY NOTES

### *Schedule 2 (Repeals)*

#### *The Prescription and Limitation (Scotland) Act 1973*

##### *Section 22A(3)*

The repeal of these words is consequential to the amendments made to subsection (2) thereof by paragraph 7(b) of Schedule 1 to the Bill.

##### *Section 22B(3)(c)*

The repeal of these words is consequential to the amendments made to subsection (2) of this section by paragraph 8(a) of Schedule 1 to this Bill.

### *Schedule 1, paragraphs 1(d) and 2(g), (gg) and (ggg)*

These repeals, together with the amendment made to paragraph 1(g) of this Schedule by paragraph 11(b) of Schedule 1 to this Bill, remove from this Schedule any reference to an obligation to make reparation.

# Appendix B

## List of those who submitted written comments on the Memorandum

Association of British Insurers  
British Institute of Architectural Technicians  
British Insurance and Investment Brokers Association  
British Property Federation  
Building Societies Association  
R C Connal, Solicitor, Glasgow  
Construction Industry Joint Liability Working Party, convened by The Royal  
Incorporation of Architects in Scotland  
Convention of Scottish Local Authorities  
Court of Session Judges  
Faculty of Advocates  
Faculty of Law, University of Aberdeen  
Federation of Civil Engineering Contractors  
Glasgow Chamber of Commerce  
Highlands and Islands Development Board  
Institution of Civil Engineers (Edinburgh and East of Scotland Association)  
Law Society of Scotland  
J G Logie, University of Dundee  
Professor W W McBryde, University of Dundee  
Hugh Macdonald, Advocate, Edinburgh  
Hector L MacQueen, University of Edinburgh  
Royal Institution of Chartered Surveyors in Scotland  
Scottish Building Employers' Federation  
Scottish Consumer Council  
Scottish Development Agency  
Scottish Development Department, Building Control Division  
Scottish Development Department, Building Directorate  
Scottish Law Agents Society  
Scottish Rights of Way Society Ltd  
A J Sim, Solicitor, Edinburgh  
M G Strang Steel, WS, Edinburgh  
William J Stewart, University of Strathclyde  
John A Welsh, Solicitor, Glasgow



