



Scottish Law Commission

promoting law reform

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ISSUED ON BEHALF OF THE SCOTTISH LAW COMMISSION
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A NEWS CONFERENCE WILL BE HELD AT 1100 HOURS ON 5 DECEMBER

VICTIMS TO HAVE LONGER TO MAKE CLAIMS FOR PERSONAL INJURIES

Report recommends a new 5-year time limit for personal injury claims

In a Report published today, the Scottish Law Commission recommends that the limitation period for personal injury actions be extended from three years to five years – in a move aimed at helping claimants and their representatives. The Commission thinks that allowing a longer period will be welcomed particularly in cases involving claims for occupational diseases, where gathering evidence to bring an action can be very time consuming and difficult.

Personal injury claims which were extinguished before 1984 should not be revived

In response to the second part of its review, the Commission recommends that personal injury claims which were extinguished before 1984 should not be revived.

This part of the Commission's work arose from concerns expressed by survivors of alleged institutional child abuse during the 1950s and 1960s that they could not bring claims for damages because their right of action had been extinguished as a result of the law of prescription.

Commenting on the Report, the Chairman of the Commission said -

"We think that our recommendations will make the rules that set a time-bar for the raising of personal injury actions fairer. This applies in particular to pursuers who suffer from industrial diseases such as asbestosis and mesothelioma which require extensive investigation before proceedings can be brought; that is why we recommend that the period of the time bar should be raised from 3 years to 5. At the same time we think that any attempt to revive very old claims, arising before 1964, would face serious difficulties, and we accordingly recommend that such claims should not be revived."

Background

The Report follows from two references by the Scottish Ministers in September 2004 and August 2005. The first reference relates to the current provisions of sections 17(2)(b), 18(2)(b) and 19A of the Prescription and Limitation (Scotland) Act 1973 Act, which set out the rules of limitation in personal injury actions. The Commission was asked to review the provisions following concerns expressed by practitioners that they may not be operating fairly. In April 2005 a petition was presented to the Scottish Parliament by the Association of Personal Injury Lawyers (APIL) (PE 836) calling for a review of the relevant provisions of the 1973 Act.

The second reference, which concerns prescribed claims, stems from concerns by survivors of alleged institutional child abuse that they could not bring claims for damages because their right of action had been extinguished as a result of the law of prescription. A petition was presented to the Scottish Parliament in August 2002 (PE 535) calling for an inquiry into the matter. As part of the response to the petition, Scottish Ministers invited the Commission to consider the position of such claims alongside its review of limitation. During the course of the Commission's work on the project, two further petitions, relating to those who alleged they suffered abuse while in institutions in Scotland, were presented to the Scottish Parliament in September 2005 and June 2006 (PE 888 and PE 976).

Main recommendations

New five-year limitation period for personal injury claims

While the three-year limitation period seemed appropriate in 1954 when the legislation on limitation was introduced, the Commission recognises that the changed circumstances of today call for a slightly longer period. A marked decline in the number of people working in heavy industry has led to changes in personal injury litigation practice and more reliance by those pursuing claims on expert reports to establish employers' liability. Some consultees who commented on the Commission's earlier Discussion Paper outlined the time-consuming steps which have to be taken in preparing a case and the difficulties associated with gathering evidence. For example, before an action can be raised, the injured person's employment history has to be investigated, records have to be obtained, former colleagues need to be traced and statements taken, the defender must be identified, medical evidence gathered and the cause of the injury discovered. These steps can be especially difficult and time-consuming when dealing with elderly victims of personal injury. The Commission concludes that the limitation period should be extended to five years for all personal injury claims.

Changes to date from which time begins to run

The 1973 Act contains provisions that define the date when the limitation period starts to run. The start of the period may be delayed in cases where it was not reasonably practicable for the pursuer to become aware that his injuries were sufficiently serious to justify his bringing an action of damages, although this is subject to certain assumptions that tend to operate against the pursuer. The Commission proposes that this test should be amended to remove those assumptions; the result will be that the test concentrates on the question of the seriousness of the pursuer's injuries. In addition, the Commission proposes that the test should be amended by delaying the start of the limitation period during any time when the pursuer was excusably unaware of the seriousness of his injuries or that they were caused

by an act or omission of the defender. It is thought that, in a limited number of cases, this will produce a result that is fairer to pursuers who are, quite reasonably, unaware of how serious their injuries are.

Judicial discretion to allow a time-barred claim to proceed - guidelines for the courts

The Report also recommends that courts should continue to have discretion to allow otherwise time-barred claims to proceed. It allows the courts to deal with hard cases and has the advantage of mitigating the arbitrariness in a time limit, for example by enabling actions to proceed where the limitation period may have been overshoot by only a very short period. Nearly all the Commission's consultees thought that the judicial discretion should be retained. In addition to recommending the retention of the judicial discretion, the Commission recommends that the 1973 Act should be amended to include a list of factors which the court may take into account when exercising its discretion. The Commission thinks this will be of considerable help to practitioners and the courts.

Prescribed claims

As originally enacted, the 1973 Act provided for the long negative prescription of obligations, including obligations to make reparation in respect of personal injuries. The effect of the provision was that obligations which had subsisted for a continuous period of 20 years were extinguished at the end of that period unless a relevant claim had been made or acknowledged. In September 1984 the provision was amended to abolish prescription for personal injuries and deaths resulting from such injuries. Claims which had already been extinguished by prescription were not affected by this amendment. As a result, any claim for damages which prescribed before September 1984 can no longer be pursued. Such claims would relate to personal injuries arising before September 1964.

The Commission has had to consider this difficult issue from a principled perspective, taking account of the general legal policy underpinning the law of prescription and limitation. It has taken into account the following factors:

- Retroactive legislation would be required to create new liability where none exists at present. The Commission considers that this would raise serious human rights issues and might be incompatible with the European Convention on Human Rights;
- Doubt has been cast on whether it would be competent for the Scottish Parliament to enact legislation which has retroactive effect prior to 1999;
- Even if prescribed claims were to be revived, the rules of limitation would still apply. Most cases would be time-barred as a result of those rules. While the courts have a discretion to allow a time-barred action to proceed, it seems unlikely that that discretion would be exercised in favour of any pursuer whose claims had prescribed, for two reasons. First, any such claim will have arisen more than 40 years ago, in social conditions that are very different from those of today. That makes the evaluation of such a claim extremely difficult. Secondly, because of the lapse of time, it is likely that significant amounts of evidence will have been lost.

While the Commission has sympathy with victims of institutional child abuse and others whose claims have prescribed, it concludes that it would not be appropriate for such claims to be revived. It was not considered appropriate to revive pre-1964 claims in 1984, when

prescription was abolished in respect of personal injuries and it would be even less appropriate to revive such claims now after the lapse of a further period of more than twenty years.

The Commission's Report includes a draft Bill which if implemented would give effect to its recommendations.

NOTES TO EDITORS

1. The Scottish Law Commission was set up in 1965 to promote the reform of the law of Scotland. The Chairman is the Hon Lord Drummond Young, a Court of Session judge. The other Commissioners are Professor George L Gretton, Professor Gerard Maher QC, Professor Joseph M Thomson and Colin J Tyre QC. The Chief Executive is Michael Lugton.

2. **A News Conference will be held on 5 December 2007 at 11.00 hours** at the Commission's office, 140 Causewayside, Edinburgh EH9 1PR (Tel: 0131 668 2131, Fax: 0131 662 4900, email: info@scotlawcom.gov.uk). You are invited to be represented. Media copies of the Report on Personal Injury Actions: Limitation and Prescribed Claims (Scot Law Com No 207) will be available at the News Conference or can be collected from the Commission's office. The Report may also be viewed on our website at www.scotlawcom.gov.uk or purchased from TSO Scotland Bookshop.

3. Further information can be obtained by contacting Susan Sutherland, at the above address.