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**DISCUSSION PAPER ON PERSONAL INJURY ACTIONS: LIMITATION AND
PRESCRIBED CLAIMS**

Today the Commission publishes its Discussion Paper on Personal Injury Actions: Limitation and Prescribed Claims (No 132). Comments on the paper are invited by 31 May 2006.

The paper examines the provisions of the Prescription and Limitation (Scotland) Act 1973, which relate to limitation in personal injury actions. It also considers the position of claims for personal injury which were extinguished as a consequence of negative prescription prior to 1984.

The Commission invites views on a new "knowledge test" for determining when the pursuer knew, or should have known, certain specified facts about the case, and on how judicial discretion should be exercised to enable a case to proceed out of time: the present test has been criticised, particularly by those involved in cases relating to occupational diseases, as too restrictive. In relation to personal injury claims of alleged activities (such as childhood abuse) occurring before September 1964, the Commission proposes that the law should not be changed to enable such claims to be pursued now.

Limitation or prescription are common features in legal systems around the world. Time limits are set on an action being raised, because of the potential injustice to both pursuers and defenders if a case is based on stale or insufficient evidence where records have been lost, witnesses have died or become hard to trace or their recollection has become unclear. It is also proper that events be judged according to the standards of the time in which they happened.

LIMITATION

At present in Scotland if a pursuer does not bring an action within three years of the date when the injuries were sustained (the limitation period), the defender has a defence to the action on the basis that it is out of time. However, a pursuer can still bring the case if he can prove that he did not know certain facts about the case until a date within three years before

the action was raised, or if he can persuade the court to exercise its discretion on the basis that it is equitable for the case to proceed.

Date of knowledge and judicial discretion

The limitation period may run from the date on which the pursuer had knowledge of the relevant facts as set out in the statute or from the date on which, in the opinion of the court, it was reasonably practicable for him to have acquired this knowledge. It is in the second part of the test, in particular the term "reasonably practicable", that the principal problems appear to have arisen. In applying this term the courts have looked to the date when it was reasonably practicable for the pursuer to have found out the relevant facts, without regard to whether or not he had a reasonable excuse for not doing what was reasonably practicable to gain that knowledge. The Commission takes the provisional view that this is not a satisfactory test. In considering a suitable replacement the Commission asks for views on how a revised test should be formulated. One aspect of this is the extent to which a knowledge test should be subjective, that is to say, should what the ordinary reasonable person would have done be considered, or should the test be what a person in the position and with the characteristics of the particular pursuer should reasonably have done?

As regards the judicial discretion under section 19A of the 1973 Act, one of the criticisms of the Scottish legislation giving the court this discretion has been that there are no guidelines, as are found in the English Limitation Act 1980. The Commission currently doubts whether such guidelines would materially alter the way in which the discretion operates, but invites comments on the matter. The Commission also seeks views on whether the judicial discretion should be subject to a further time limit.

The Commission considers that the limitation scheme as it affects personal injuries claims should be considered as a whole in order that it is balanced in its treatment of pursuers and defenders. The formulation of the knowledge test should therefore be linked to the existence and extent of a judicial discretion. Views are sought on a range of options for reform.

PRESCRIBED CLAIMS

Prior to September 1984 the law of negative prescription, as well as the law of limitation of actions, applied to personal injury actions. The effect of prescription was that the obligation to pay damages was extinguished completely after a period of 20 years, so that there was no longer any basis for a claim. But in 1984 an amendment to the 1973 Act changed the law to disapply prescription in relation to personal injury actions. The amendment was not retrospective and applied only to claims which had not already been extinguished by prescription when the amendment came into force. In other words, it disappplied prescription only in the case of claims which arose after September 1964.

Since no liability has existed in respect of those claims for at least 21 years now, to alter the position would require retrospective creation of new liabilities. It is widely recognised that retrospective legislation should be avoided for a number of reasons, including the need for people to be able to rely on the law not being changed retrospectively. Retroactive legislation may also present potential human rights difficulties. The claims with which the reference is concerned arise from events which took place at least 41 years ago and it is unlikely that the courts would favourably exercise their discretion under the limitation rules to allow actions to proceed, because of the length of time that has passed and the resulting difficulties in investigating and deciding such claims.

The Commission also examines the possibility of special rules for those whose claims are in respect of childhood sexual abuse. While appreciating that such victims may have a strong

sense of injustice, the Commission considers that there are problems in defining a special category of victim and, importantly, that selecting a particular class of personal injury claim is likely to be unfair to other people who may have suffered physical or mental harm in different circumstances.

For these reasons the Commission proposes that claims for personal injury which were extinguished by negative prescription before 1984 should not be revived.

BACKGROUND

In September 2004 the Commission received a reference from Scottish Ministers to examine sections 17(2)(b), 18(2)(b) and 19A of the Prescription and Limitation (Scotland) Act 1973. The provisions of sections 17 and 18 allow for the starting of the limitation period from the date when the pursuer was first aware of, or it was reasonably practicable for him to have become aware of the relevant facts to bring an action as set out in the statute. Section 19A gives the court a discretionary power to allow a time-barred action to proceed if it is equitable to do so. The reference was prompted by concerns expressed, particularly by those involved in cases involving occupational diseases, that the "date of knowledge" as defined in the Act is too restrictive.

During the course of work on the first reference a second reference was received from Scottish Ministers inviting the Commission to examine the position of claims for damages in respect of personal injuries which were extinguished by operation of the long negative prescription prior to the coming into force of the 1984 Act. The background to this reference was concerns expressed on behalf of people who consider that they suffered physical or sexual abuse before 1964 in residential homes or other institutions but whose claims were extinguished by prescription.

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 Lord Eassie, a Court of Session judge. The other Commissioners are Professor Gerard Maher QC, Professor Joseph M Thomson and Mr Colin J Tyre QC. The Chief Executive is Mr Michael Lugton.
2. Further information can be obtained by contacting Mrs Susan Sutherland, Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR (Tel: 0131 668 2131, Fax: 0131 662 4900, email: info@scotlawcom.gov.uk).
3. The paper may also be viewed on our website at www.scotlawcom.gov.uk or purchased from TSO Scotland Bookshop.