**SCOTTISH LAW COMMISSION**

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

## A RESPONSE FROM THE ASSOCIATION OF PERSONAL INJURY LAWYERS

The Association of Personal Injury Lawyers (APIL) was formed by pursuers' lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad, with more than 100 members in Scotland. Membership comprises solicitors, advocates, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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**PREFACE**

As acknowledged in the Discussion Paper, APIL has already presented Public Petition No. PE836 to the Scottish Parliament, in respect of the operation of the law of limitation in relation to cases of occupational disease. The impetus for the call for change comes from the experience of our members in their everyday practice in this field. APIL does not believe that the courts fully understand the difficulties faced by claimants and practitioners in occupational disease cases. Claims for damages for occupational disease are radically different from other kinds of personal injury work. Instead of a single event, discrete and easily identifiable, there is exposure to a harmful process or substance stretching perhaps over many years and many employments. There are problems in establishing a work history, in tracing the whereabouts of all potential defenders and their insurers, and problems of apportionment. Our members' experience is that occupational disease instructions tend to be of three separate kinds.

1. The first category is typically asbestos-related disease or other respiratory conditions where there has been a medical diagnosis, generally from an NHS consultant. This diagnosis is very frequently both a diagnosis of injury and effectively a finding on causation e.g. mesothelioma is now universally held to be work-related.
2. The second and perhaps more common presentation is where a client has symptoms which may or may not constitute an injury and may or may not be work related, and for which there is no medical diagnosis e.g. symptoms of noise induced hearing loss ("NIHL") which may or may not amount to

"injury" when measured for age against the median in the general non-noise exposed population, and where the hearing loss may be caused by noise exposure but equally may be caused by disease or other congenital factors. In cases of hearing loss for whatever cause, patients do not generally go to a doctor until a threshold loss of greater than 45 decibels measured across the speech frequencies, even although they might benefit from a hearing aid at a threshold of 25 decibels hearing loss. (Browning, "Clinical Otology & Audiology", 2nd Edition, 1998 at page 4).

All legal practitioners in the field are used to being told by insurance representatives that a medico-legal diagnosis should have been obtained by the client long before either of these stages has been reached, and that the case is effectively time barred. For cases of Hand/Arm Vibration Syndrome ("HAVS"), more commonly known as vibration white finger, the Royal Faculty of Occupational Medicine noted with relation to the symptoms:-

> "During the attack the affected areas become numb and unrecognised injuries may be sustained at this time. There is a steady progression of the areas affected in most cases, with attacks becoming increasingly frequent and *often being ascribed to increasing age or being accepted as part of the job*". ("Hand/Arm Transmitted Vibration: Clinical Effects and Pathophysiology", published by the Royal College of Physicians of London, January 1993 at page 5 our italics).

Again these clients are routinely told by insurance representatives that their cases are time barred and that a diagnosis should have been obtained sooner.

3. The third category of case is where the client has obtained an NHS diagnosis of disease, but has not made enquiry of the NHS consultant as to causation or attributability to occupational exposure. The consultant, more concerned with treatment than legal attributability, does not inform the client of causation. However the factual information obtained from the client will lurk in the medical notes to be brought out by a defender some years later.

The experience of our members is that most of the day to day problems arise in the second and third categories of case, although there are the occasional problems with the first category.

In all occupational disease cases significant investigatory work is required to obtain a whole life work history, a day in the life work process description for each employment, and the exclusion or inclusion of other employments. Clients are frequently poor historians, and a necessary preliminary in all cases is an Inland Revenue work record, the obtaining of which will necessarily take a number of months. Investigations are frequently hampered by difficulties in tracing historic insurers. The Voluntary Code of Practice set up by the Association of British Insurers for the identification of insurers in disease cases is of limited utility , with a reported successful trace rate of only 27% in 2002/2003 ( See the article "Code Red" by Denise Kitchener in the Solicitors' Journal, 31st March 2006). Decisions may have to be made about the economic viability of restoring a dissolved company to the Register.

Even where the claim is intimated to all possible insurers after instruction, the practitioner is left with the uncomfortable feeling that the clock on time bar may have started ticking some considerable time ago. It is our members' routine experience that insurers are happy to spin out pre-action correspondence with detailed requests for particulars, only to spring a time bar defence months or years later.

Increasingly after proceedings are raised, the only defence in occupational disease cases is time bar. This defence is invoked in well nigh every situation where the claim relates to exposure which has ceased more than three years prior to the date of proceedings.

APIL believes that there has been a failure by the Scottish courts to appreciate the nuances and complexities of occupational disease litigation. No doubt from time to time an advocacy deficit has contributed to this failure, but a pleadings system which enables procedure roll and debate decisions to be made against a background which tends to be simplistic and lacking in context, is particularly ill-suited to this kind of action. The presence of the Section 19A equitable discretion, which might be thought to be particularly apt for occupational disease cases, has signally failed to ameliorate the situation.

**A rule against self-diagnosis**

A recurring theme in decisions in this area is the idea that somehow the injured person should have put two and two together himself, at a much earlier date, to make his own diagnosis of the condition from his symptoms. Effectively the argument is that time should run from this notional self diagnosis date. In recent years the Inner House in

particular has tried to reverse this trend. So in *Agnew v Scott Lithgow Limited No 2 2003 SC 348,* a claim for vibration white finger, it was a matter of concession by the defenders that a medical diagnosis was necessary to found knowledge whether actual or constructive; in *Lambie v. Toffolo Jackson Limited in* Liquidation, 2003 SLT 1415, it was held that time might not start in a claim for asbestos related injury, until an evidence based medical diagnosis was available. In the case of *Rennie v. Scott Lithgow Limited,* unreported, 27th January 2005, following *Agnew,* Sheriff Principal Kerr decided that knowledge did not arise until the date of an actual medical diagnosis.

However, this is still not universally accepted. In the case of *Patrick Clark v. Scott Lithgow Limited*, 30th July 2004, the Lord Ordinary held that knowledge of vibration white finger could be acquired without a medical diagnosis and effectively by self diagnosis. He found for the pursuer in any event. The case was reclaimed by the defenders to the Inner House, where it was indicated that the concession made in *Agnew* that a diagnosis was necessary was not to be made in the case of *Clark.* It is suggested that the English case of *Ali v. Courtauld Textiles Limited,* CA 26th May 1999 gives a good example of the approach to be taken

> "The claimant knew he was deaf. The claimant knew, once Mr. Maqsood Ali had told him, that exposure to noise could cause deafness. Equally, he would know that the ageing process could cause deafness. But he did not and could not know whether his deafness had been caused by ageing or noise. Nor could Mr. Maqsood Ali, nor his solicitors, nor any other layman. He could only find that out with the help of expert advice".

It is for these reasons that APIL believes that an equivalent of Section 14(3) in the English legislation is urgently required. A pursuer should not be fixed with medical knowledge based on a putative process of deduction, carried out with the benefit of hindsight. This does not mean that in some cases it might not be held that he should have sought medical advice sooner, but the focus should be on when he was put on enquiry and how long that reasonable enquiry should take. We refer to the Scottish Law Commission's report No. 74 on Prescription and Limitation of Actions 1983 at paragraph 3.7, and cited in the Discussion Paper at page 23:-

> "In the consultative memorandum we invited comment on whether the legislation should refer specifically to the seeking of advice. There was general approval for the view that it should not. One judge considered that references to seeking "appropriate advice" were unnecessary and served only to complicate matters, and that the test of constructive knowledge might reasonably be expected to be developed judicially. We agree with this view. Moreover the Court of Session judges urged us to adopt a test which allowed the court
>
> "… a modicum of discretion directly related to the pursuer's state of knowledge at a critical time"
>
> and suggested that one way to achieve this result would be to refer in legislation, not to the date on which the injured person could reasonably have become aware of the relevant facts: but to the date on which, in the opinon of the court it was reasonable for him in all the circumstances to have become so aware – in other words, a formula of the kind which already appears in the

statute. A formula along these lines would seem to afford the courts the desired degree of flexibility, and would have the further merit of not attempting to regulate the test of knowledge in too much detail. It would enable the court to take account of the differing circumstances of individuals and the differing nature of their injuries. It would enable the court, where appropriate, to attribute to an injured person facts in the possession of an adviser, such as a solicitor or a trade union official. Accordingly we endorse the judges' suggestion and recommend:-

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

We believe from a present day vantage point the Scottish Law Commission made the wrong decision at that time. The transition in the commentary from what was *reasonable* for a pursuer, to what was *reasonably practicable* in the legislation, is a *non sequitur*. Judicial discretion has not operated to soften the interpretation and respectfully APIL believes it unwise to rely on it for the future. We unequivocally state that there should be a specific provision in the primary legislation with regard to knowledge which is ascertainable only with medical or expert help.

As will be seen, APIL believes that the Discussion Paper accurately sets out most of the current difficulties. Our particular perspective is strongly experience and practitioner based. We agree broadly with most of the recommendations. Where we

disagree with any specific proposals, it is because we believe that the proposals are inadequate to deal with the current difficulties relating to occupational disease cases.

Please note that, because of the very different nature of personal injury claims and historic child abuse claims, the two types of claim have been covered in separate sections of this paper.

## PART 2 DATE OF KNOWLEDGE

**Proposals in Discussion Paper:**

**Proposal 1**. We agree that the legislation on limitation of actions in personal injury cases should continue to include a "date of knowledge" as a starting date for the running of the limitation period.

**Proposal 2**. Yes. We agree for the reason given by the SLC.

**Proposal 3**. APIL contends that where a claim for a sufficiently serious injury is not pursued timeously, the subsequent emergence of additional injury, if distinct, should give rise to a fresh date of knowledge and a further consequential limitation period for a claim for that additional injury.

We accordingly do not agree with the proposal by the SLC.

APIL believes in practical terms that the areas likely to be affected are:-

(i). Psychiatric injury cases where the injury develops some time after the initial physical injury e.g. in a road traffic accident. If the physical injury passes the sufficiently serious threshold, but is not seriously disabling, many clients will understandably take no action. The true injury here is the later emerging psychiatric injury and time should run from its emergence,

rather than the date of the first injury. The concern would be in that kind of case that concentration on the physical injury might lead to some claims for psychiatric injury being time barred.

The experience of APIL members in general is that there are no particular difficulties with these kind of cases and with the law as it stands at present. Where there is pure psychiatric injury without physical injury e.g. in bullying or harassment cases, there will almost certainly require to be a constellation of symptoms to justify a formal diagnosis under DSM IV or ICD 10. Time should run from that diagnosis, or an earlier constructive date of diagnosis.

(ii) However disease cases in this area present different problems. Asbestos exposure can cause pleural plaques, asbestosis and mesothelioma. At the time of writing, following the case of *Rothwell v. Chemical and Insulating Company Limited* C.A., 26th January 2006 the Court of Appeal in England has held that the condition of pleural plaques does not constitute an injury but the decision is being appealed to the House of Lords. APIL would certainly not support any law reform which prevented an asbestosis victim from claiming because they should have been aware of pleural plaques, or a mesothelioma victim being time barred because he was aware of a previous diagnosis of asbestosis. Excessive noise exposure can cause hearing loss and

also tinnitus, conditions with very different symptoms and onsets. Again we would oppose any reform which would suggest that one claim was time barred with reference to the other. Whilst APIL understands the logical basis for the approach suggested by the SLC, we do not think this approach fits the occupational disease model. We do not believe that in practice there is any real unfairness to defenders. We believe that any difficulties for defenders in this area are more theoretical than real.

**Proposal 4.** Knowledge that any act or omission was or was not, as a matter of law, actionable should continue to be irrelevant in the date of knowledge test. APIL agrees with the SLC proposal, subject to the following;

It is a remarkably common feature of instructions that many clients do not realise that their routine daily working practices have in fact negligently exposed them to harmful substances or processes, and in particular to excessive noise or excessive vibration. This characteristic is perhaps most marked in the generation of workers in heavy industry such as shipbuilding or steel making, which is no longer a significant part of the industrial landscape. APIL is aware that the Law Commission in England originally recommended a formulation for knowledge of the primary limitation period which took into account a plaintiff's lack of knowledge that he had a cause of action. However we are persuaded that lack of such awareness should not prevent the

primary limitation period running. To do otherwise would be to introduce significant uncertainty, and we believe that lack of awareness in the sense described above, has materially decreased at all levels of society. However it is still a factor in a number of individual cases, particularly amongst the cohort of former heavy industry workers identified above.

APIL agrees with the proposal, subject to the proviso that there is a change in the primary limitation regime as later argued for , that the judicial discretion in Section 19A is maintained and structured, and in particular that lack of awareness that an act or omission was actionable should be a specific category of facts to which a judge must have recourse in considering the Section 19A discretion.

**Proposal 5** We agree that the terminology of "awareness" should continue to be used. We observe that the current phraseology in Section 17 of "becoming aware" gives an indication that the courts should look at a process of the acquisition of knowedge, and we consider that this is entirely appropriate.

**Proposal 6** We agree that the legislation on date of knowledge should continue to contain a constructive awareness test.

**Proposal 7** We believe that paragraph 2.37 succinctly summarises our concerns with the operation of the law in this area, and puts the matter extremely

well. APIL emphatically agrees that the current statutory test of whether it was "reasonably practicable" for the pursuer to become aware of a relevant fact is not a satisfactory test.

**Proposal 8** We believe that the test should incline towards subjectivity. In any situation a reasonable man may behave in a number of different ways. He may choose to sit on the Clapham omnibus, but he might just as well take the Tube. The addition of a subjective element would ensure judicial recognition of the variety of human behaviours. We have already adverted to the reluctance of patients (not claimants) to seek the advice of a general practitioner in cases of NIHL and HAVS. The courts should be alive to the spectrum of responses which the individual might make , especially when viewing these with hindsight. That is why context is so important. A useful example from England is the case of *Milner v. Hepworth* , unreported, Court of Appeal, 28th July 1998.

"Perception of deafness is a subjective matter, and it is common experience that reasonable people whose hearing has been slowly diminishing do not appreciate that it has done so to a significant extent, or to an extent which would lead a reasonable person to think of consulting a doctor".

To stay with the example, it would come as a significant disappointment to APIL if after reform in this area the courts continued

to hold that otherwise uninformed pursuers should obtain medical advice before patients in fact do so. We believe that the approach contained in the English Law Commission Report No. 270 Limitation of Actions, 9th July 2001 should now be followed.

Their proposed Section 2 defines knowledge, and there is a proposed separate Section 4 for constructive knowledge. We think that Section 2 should be adapted. We see no reason in Scots law to have the proposed Sections 2(3) and 2(4) which are unnecessary. Constructive knowledge is dealt with in proposed Section 4. We see no reason for Section 4(3) or (4), which simply re-states existing Scottish practice.

The proposals are reproduced in the Appendix of this response. In the case of *Adams v. Bracknell Forest BC* 2004 UK HL 29, Lady Justice Hale called on Parliament to implement the Law Commission's proposals for England, and APIL adds its voice for Scotland. We believe that the result in *Adams v. Bracknell Forest* was unjust to a claimant who issued proceedings within three years of ascertaining that he was dyslexic. It follows from the above that as a matter of general approach we believe that the awareness test should incline towards subjectivity rather than objectivity.

**Proposal 9** In general terms APIL does not believe there are significant practical problems in investigating and commencing claims for single event accidents. This is subject to the exception for occupational disease

cases as mentioned throughout this response. APIL believes that the primary limitation period of three years should be retained.

**Proposal 10 (b)**

For the reasons stated in the SLC Discussion Paper, we agree that the reference to incapacity should not be qualified in the way described.

**Proposal 10(c)**

We do not believe that the appointment of a guardian should lift the suspension of the running of time. We do not think the operation of the present law in this area presents any real difficulties. Whilst no doubt in most cases proceedings are raised promptly on the appointment of a c*urator bonis*, frequently such an appointment is made purely for the purposes of raising proceedings where damages will be significant. The concept of guardianship is more flexible and appointments will not be limited to high value claims, and there may already be a guardian appointed at the time of injury to the *incapax*. If time runs from the injury, or from the appointment of a guardian, then sooner or later a time bar will be missed through the inactivity of the guardian, and through no fault of the *incapax*. It appears to us that the notion of the *incapax* acquiring a cause of action against a guardian in these circumstances is an unattractive development.

## PART 3 JUDICIAL DISCRETION

We would first of all observe that the presentation of the current exercise of judicial discretion in the Discussion Paper by the SLC appears to APIL to give it a structure, coherence and organisation which does not exist in practice. This problem is particularly marked in the Sheriff Court. Following the argument in the Discussion Paper it might be expected that the current stringent awareness test might lead to a wider application of the equitable discretion, but this in fact has not occurred. Many cases appear to be dismissed on the basis that the loss of the claim and the loss of the cast iron defence simply cancel each other out. As is pointed out in the Discussion Paper, this should give rise to a search for wider factors, but very frequently such a search is not undertaken. Justice in these cases should not be at the mercy of the skill or ingenuity (or more frequently lack of either) of the pleader. We note with interest the formulation contained in *B v. Murray No. 2,* 2005 SLT 982 which is certainly helpful. We would observe that it has been pieced together from previous cases, and it has taken around 20 years for a convenient practitioner's check list to emerge. Even then the critical question of evidential prejudice does not appear on the list drawn up by Lord Drummond Young. We would also observe that the existence of an alternative remedy against the negligent solicitor is now more or less universally accepted as a factor against the exercise of the discretion although the reverse does not always seem to be the case. At present there has been no matrix formula specifically sanctioned by the Inner House.

The approach of the Inner House in *Elliot v. Finney* 1989 SLT 605 in explaining that the discretion is completely unfettered appears to have had the effect for claimants

and practitioners that more in fact means less. The Discussion Paper does not appear to concede that the law at present in this area is dysfunctional. The practical problems are probably more marked in the sheriff court than in the Court of Session. APIL does not agree with the general approach of the Discussion Paper that the Section 19A discretion is now well settled by reason of judicial decisions. We would observe that it appears to be implicit in the approach of the Discussion Paper to the question of awareness and the primary limitation period that the current formulation is unsatisfactory, and we are disappointed that there is not the same acknowledgment in respect of the discretionary regime. In England the presence of the non-exhaustive statutory checklist contained in Section 33, to which judges must have regard, has meant the elevation of the test of evidential prejudice. From time to time this has been accepted by the Scottish courts. (See e.g. *McLaren v. Harland & Wolf Ltd,* 1990 SLT 85.)

"On this matter, I consider it important that this action involves averments as to regular exposure of the deceased as an apprentice plumber in the defenders' shipyard machine shop to asbestos dust over a lengthy period, and not, for example, to an allegation of a single transient event on which a witness or witnesses no longer available could prospectively have provided evidence".

However it does not appear in the list by Lord Drummond Young and has never been specifically approved by the Inner House.

In *Hartley v. Birmingham City Council* [1992] 1 WLR 968 it was stated:-

> "In my view, however, as the prejudice resulting from the loss of the limitation will always or almost always be balanced by the prejudice to the plaintiff from the operation of the limitation provision the loss of the defence as such will be of little importance. What is of paramount importance is the effect of delay on the defendants' ability to defend."

We also believe that the approach of the Court of Appeal in *Allen v. British Rail Engineering Limited* [2001] PIQR Q10, a case in which a number of plaintiffs pursued claims for HAVS, is instructive. Some of these were time barred in terms of the primary limitation regime:-

> "It is correct that the judge, as can be seen from the passage in the judgment we have already quoted, did not consider the appellant to have been blameworthy. Far from being an irrelevant consideration, it seems to us that this must be one of the matters to which the judge has to have regard under Section 33(3)(a) when considering the reasons for the delay which he identified on the part of the appellant. This argument comes ill in any event from the respondents, who had full knowledge of the connection between VWF and vibrating machines for some years, but withheld that knowledge from employees such as the appellant. This would certainly be a matter which the judge would have been entitled to take into account under Section 33(3)(c).

> In the circumstances we see nothing which persuades us that the judge exercised her discretion wrong in any way. Accordingly the cross appeal so far as the appellant is concerned is dismissed".

Again in the case of *Burgin v. Sheffield City Council and Another* [2005] EWCA Civ 482 a claim for HAVS arising from the use of vibrating tools it was accepted in argument that:-

> "There seems to be substance in Mr. Lewis's point that the tools used when the respondent was employed by both the defendants were notoriously associated with VWF and that justice and equity required the action to proceed against both defendants".

In so far as these might be treated as statements of policy as to when the discretion should be exercised, APIL thinks the points are well made.

We believe that this approach is particularly important for industrial disease cases which generally involve exposure to processes rather than single event accidents. It should be a critical factor in dealing with this kind of claim that general evidence on the merits can still be brought. Very many of the cases involving NIHL or HAVS involve repeated flagrant and continuing breaches of duty of care at statute and common law, frequently justifying the description of gross negligence. These cases should be particularly appropriate for the exercise of the discretion.

We would observe that in abstract, concepts of fairness or equity without any indication of their contents, are so subjective as to be well nigh meaningless.

APIL's proposal would be to adopt the English statute, adapted as a non-exhaustive checklist.

Accordingly:-

**Proposal 11** We agree that the judicial discretion to allow a time barred action should be retained.

**Proposal 12** There should be no time limit in respect of the exercise of the judicial discretion.

**Proposal 13** We agree that there should be a non-exhaustive list of matters.

Looking to the English list in s33 we believe the court should be required to have regard to the factors there as follows:-

| | |
|---|---|
| Sub-section (a) | Yes |
| Sub-section (b) | Yes |
| Sub-section (c) | Yes |
| Sub-section (d) | Not applicable |
| Sub-section (e) | Yes |
| Sub-section (f) | Yes |

**Additional Factors**

(g) The availability of any alternative remedy against a solvent defender.

(h) Prejudice to the parties if the application is to be granted or refused.

(i) The awareness of the pursuer that he had a cause of action.

(j) Any other factor which in the opinion of the court would make it equitable that the action should proceed or not.

We believe that the adoption of such a test would achieve:-

1. A degree of consistency in judicial approach and a regard to the key question of evidential prejudice.
   As ever the weight for each factor would be a matter for the individual judge.

2. A clear indication to the pleader of the factors which the court must take into consideration whilst leaving the court an unfettered discretion to look at additional matters.

3. A consistency of approach throughout the United Kingdom so that success in this issue does not depend on jurisdiction.

**Options**

We agree that there should be a correlation between the stringency of the awareness test and the parameters of the judicial discretion to disapply time bar.

**Proposal 14**

Our preferred scheme is is Option 3 and in particular consists of :-

1. A primarily subjective test for awareness and constructive knowledge, applied to actings which should be reasonable, not reasonably practicable, and with the specific provision for the acquisition of knowledge from experts.

2. The existing three year time limit for the bringing of actions.

3. A wide-ranging judicial discretion subject to a non-exhaustive list of factors to which a judge shall have regard.

## PART 4 PRACTICE AND PROCEDURE

In latent injury disease cases by definition injury exists although symptoms might not be manifest. Very frequently e.g. HAVS, symptoms exist in circumstances where the sufferer does not understand that they constitute a disease. APIL's objection to these kind of cases being decided on the pleadings is our experience that very frequently factual assumptions are made which fail to take into account the nuances and complexities both of the medical condition and the pursuer's response. In the case of *Steel v. Begg & Cousland* 1999 SLT (Sh. Ct) page 74, a claim for NIHL, the averments were that the pursuer ceased employment and work related noise exposure with the defenders in 1982. There was an initial slight hearing loss noticed in 1989. The pursuer thought that it was due to natural causes. He obtained a medico legal report in 1994. The action was dismissed at debate both on the basis of the primary limitation argument, and also the Section 19A discretion. The case also provides a compendious review of a number of Sheriff Court decisions on similar facts, almost all of which came to the same decision to dismiss on the primary limitation ground, and on the Section 19A discretion. All were decided on the pleadings.
Practitioners with any knowledge of NIHL will know that it is insidious in its effects. Although the noise induced element of the hearing loss is static following cessation of exposure, the condition appears to be progressive because of the overlay of age associated hearing loss.

The current medico-legal guidelines used by ENT consultants are the King, Coles, Lutman & Robinson, "Medico Legal Guidelines: Assessment of Hearing Disability",

Whurr Publishers, 1992 which were written specifically for use by the medical profession in legal cases.

These contain a set of tables which enable a comparison to be carried out between the noise exposed sufferer, and the notional median person suffering from only age-related hearing loss. ENT consultants in evidence will always say that sufferers are reluctant to admit to hearing loss, that it is generally borne in on them after years of complaints from family members, driven to distraction by e.g. excessive television volumes. Where a medical report is finally obtained, the sufferer then typically dates the onset of hearing loss to the time of the initial familial complaint. This does not mean that at that time he believed he had suffered injury but almost inevitably sets in motion a time bar defence. There is an explanation for all of this, but it is complicated and can be quite difficult to make in the pleadings. We do not know the full background detail to the case of *Steel* and the other Sheriff Court cases cited there, but from experience suggest that at the very least a much more complicated picture would have been presented had the pursuer and the medical expert given evidence. It might be said that part of the difficulty lies in a lack of skill in pleading and no doubt this is true. APIL does not believe that a system which depends on a considerable degree to the pleader's art is appropriate for a contemporary legal system. Readers are referred to "The Tyranny of Fact Based Pleadings" by Professor Elizabeth Thornburg, Southern Methodist University, Dallas, published in the Journal of the Law Society of Scotland in January 2003 for a well mannered but devastating critique of the written pleadings system still current in the Sheriff Court.

As already described the situation is particularly marked in the sheriff court where practitioners do not have the same skills and facilities in the exercise of written pleadings as the Faculty of Advocates. Even in the Court of Session problems can still arise. In the case of *Cowan v Toffolo Jackson 1998 SLT 1000* quite a full medical history was given. The facts were that the claimant was suffering from asbestosis. Between 1943 and 1966 he had worked with asbestos. He was advised on retirement in 1986 by his medical advisor that he did not have an asbestos related disease. A further X ray in 1991 showed pleural plaques in both lungs consistent with exposure to asbestos. A medical expert in 1992 confirmed the diagnosis of asbestosis and proceedings were issued in 1992. The defenders took the limitation point and the case was dismissed. The pursuer had not explained what had happened between 1986 and 1991. The pleadings had not provided a full explanation of the gap between the first medical interview in 1986 when he was advised that he did not have an asbestos related disease, and the later diagnosis in 1991 when it was confirmed. The case was dismissed at a preliminary hearing without a word of the pursuer's evidence having been led.

For industrial disease cases we agree with the approach of the Lord Ordinary (Hamilton) in the case of *McGhee v. British Telecom,* unreported, Court of Session December 20th, 1995, an asbestosis case. The court fixed a proof before answer with all pleas standing including a plea of time bar. Lord Hamilton stated:-

> "In my view the issue of limitation cannot be determined without enquiry. In cases involving the onset and development of insidious disease a problem may be presented as to when the relevant injuries were first sustained ... Personal

injuries within the meaning of the Act include any disease ... but the onset of chest pain for example may be symptomatic of an endogenous condition rather than of injuries which have been sustained".

He then narrated the medical investigations into the condition of asbestosis before stating:

"Nor can it be said as a matter of construction that it was reasonably practicable for him in all the circumstances to become so aware [of matters contained in section 17(2)(b)] ... without first ascertaining, insofar as that is now possible, the precise context and content of the information given to him ... In my view the proper procedural disposal in this case is to allow a proof before answer on the whole averments ... I do not understand the observations in the Opinion of the Extra Division in *Clark v. McLean* to disapprove of such a course. It is essentially a matter of convenience in the particular circumstances of the case under discussion. Here the medical evidence which will require to be led relative to limitation is also likely to bear on issues of causation. In my view the potential duplication of testimony in the event of two proofs being necessary outweighs the potential leading of unnecessary evidence if the defence of limitation is well founded".

We are not saying that preliminary proof on timebar or proof before answer with all pleas standing is necessary across the board for all kinds of cases, but they should be the norm and not the exception in occupational disease

cases. Similarly our preference would be for the approach in *McGhee* to be followed i.e. the default position should be a proof before answer with a plea of time bar reserved for the reasons given in *McGhee.* We also suggest that the weight to be given to the Section 19A submissions can only properly be assessed after evidence has been led.

**Proposal 15** APIL believes that the application of the Coulsfield Rules and the use of abbreviated pleadings in the Court of Session should dispose of many of the technical difficulties in the presentation of these cases. The defenders can raise the issue of limitation in their defences, leaving the pursuer to respond with a medical narrative, and particulars of any matters which go to the Section 19A discretion. In so far as these are matters peculiarly within the knowledge of the pursuer, it must be correct to say that the onus of averment is on him. The current procedure should enable the court to do justice to the parties on the facts and not on the pleadings. We have grave concerns about the current situation in the sheriff court. A simple solution would be the adoption of the Coulsfield Rules by the sheriff court and APIL understands that a decision in principle to adopt has already been made by the Sheriff Court Rules Council. With this in mind APIL makes no specific recommendation in this area.

**Proposal 16**. We do not believe it is necessary for any change of procedure in the Court of Session. Defenders still have the option of a procedure roll hearing for extreme cases, but in general terms there will need to be a

factual enquiry. Preliminary proofs on time bar involve duplication of evidence including expert evidence and can cause significant practical difficulties with regard to the status of findings in fact. The decision by the Inner House in *Alexander Noble v. Cornelius De Boer,* 4th March 2004, a claim for damages arising from an accident on a fishing boat, provides ample illustration of the potential for delay and confusion, with the Inner House deciding by majority that findings in fact in a preliminary proof were not binding at the proof on the merits. The procedural difficulties were that the sheriff made findings in fact at the preliminary proof which impinged on the issues to be determined on the merits. In occupational disease cases it is well nigh inevitable that the merits will require to be traversed at least in part. More often than not no real savings are made, and the defenders have the negotiation benefit of a discrete procedural hurdle.

For the reasons stated above, APIL believes that the standard format of enquiries should be a proof at large with all pleas standing.

## PART 5 HISTORIC CHILD ABUSE

It can be argued that claims for compensation for historic child abuse are a breed apart from other personal injury claims. This is due to:

- the nature of the injury inflicted (which through shame, guilt or as a result of threats made at the time prevents survivors disclosing their experiences for a long time).

- the time when the injury was inflicted (when a child, often without any meaningful support)

- the aetiology of the injury (psychiatric harm may only manifest itself as a recognisable sequelae of the abuse much later)

- the injuries were deliberately caused (although many Defendants may be responsible in negligence as opposed to the tort of trespass to the person - assault and battery)

### 2. Why is limitation such an issue in child abuse claims?

The reasons why potential claimants take so long in coming forward flow directly from the act of abuse itself and it is important that courts understand this when considering limitation.

- Adults who abuse are concerned to conceal their behaviour. They will therefore be keen to establish a climate of fear and secrecy with the children concerned. Threats of violence, death or the death of family members to ensure a victim's silence are common features, which may have a prolonged impact on the psyche of a child.

- Abuse will often be accompanied with understandable feelings of guilt, shame and embarrassment, which may continue long into adulthood. This may be accompanied by the belief that society will judge adults who admit to being abused as a current risk to children, drawing on the myth that abused people grow up to become abusers themselves.

- In the past, children may have attempted to report their abuse at the time, perhaps to the police, social workers, or teachers. In those not so enlightened days, often children were not believed and sent back to the abusive environment, where they were severely punished for speaking out. As adults, the expectation that they will not be believed now, together with a general mistrust of authority figures generally, continue to mark their lives.

- As they have grown up, in order to try and function in every day life, adults abused in childhood will have put the mental anguish and distress they will have suffered to one side. In order to cope with the trauma, the memories are suppressed (the person is said to "disassociate" memories of abuse). Survivors of abuse may have their memories "triggered" much later, possibly by an article in a newspaper or on television, or being contacted as part of a police

investigation.

- One key feature of coming to terms with past abuse is obtaining "justice", the recognition by society that what was done was wrong, and that those responsible should be held to account. This may apply as much to securing a criminal conviction as to obtaining compensation through the civil courts.

All these factors are supremely relevant in understanding the reasons for the delay in bringing claims in the first place. Understanding ones client and his/her own particular story is imperative as limitation issues are decided on the facts of the individual case.

**3. The current law in England & Wales**

One reason why representing survivors of childhood abuse is such a challenge is that the case law seems to change at an alarming rate. Subject to arguments of capacity and minority, the current law is as follows:

3.1 Suing the abuser/ his employer: Trespass to the person [assault and battery] / false imprisonment

Suing the abuser: A fixed 6 years from the assault, or the age of 18/ the end of a period of mental incapacity: section 2 of the Limitation Act 1980. No date of knowledge arguments (*Stubbings -v- Webb (1993)*) and no arguments to dis-apply the limitation period allowed.

Suing the employer of the abuser: Vicarious liability for trespass/ intentional breach of duty: Again a fixed 6 years as above. (*KR & others v Bryn Alyn Community Holdings Ltd & another (2003))* although the non-extendable 6 year limitation period appears at odds with the House of Lords' assumptions in *Lister and others -v- Hesley Hall Ltd* (2001). It should be noted that whilst in *Lister* their Lordships allowed a claim brought by claimants against the employers of a school warden for his deliberate assaults (the claim failed in negligence, but succeeded on arguments of 'breach of duty'), their Lordships did not consider limitation as it was not raised. Having said that, had the House of Lords accepted a 6 year non-extendable time limit, the claimants in *Lister* would have been statute barred in 1991, and they had issued proceedings in 1997. See also the cases of *A v Hoare; H v Suffolk County Council; X & Y v London Borough of Wandsworth (2006)* where the Master of the Rolls giving the judgment of the Court of Appeal, has given permission to the appellants to appeal to the House of Lords to argue that *Stubbings* is wrong or can be distinguished, and that *Bryn Alyn* should be overturned.

As a result of these non-extendable time limits, it is more likely that a claim will be brought in negligence.

3.2 Negligence/ breach of duty

Suing the negligent party: 3 years from the date upon which the claimant's cause of action accrued, or the date of knowledge (if later) – section 11 (4) Limitation Act 1980 [Note that if a cause of action accrued before 4th June 1954, the claimant's solicitor must refer to older legislation]

Suing the employer: Vicarious liability exists for non-intentional breaches of duty with a 3 year limitation period as above.

(See the anomaly that is *S -v- W & another (1995)*, where a claimant was out of time for suing her father for abusing her, but was within time for suing her mother in negligence for failing to protect her from that abuse. On this basis, one cannot sue an employer vicariously for the deliberate acts of an abusing employee by relying on sections 11, 14 and 33 of the Limitation Act. However one can sue an employer vicariously for (for example) another employee's failure to report the abuse which he/ she knew was going on, and use date of knowledge and section 33 discretion arguments.)

Date of knowledge arguments under sections 11 and 14 of the Limitation Act 1980: 3 years from the date when the victim knew or should have known that:

Section 14(1)

(a) **The injury in question was significant** (defined as when a claimant would have considered it serious enough to issue proceedings for damages against a defendant who did not dispute liability and had the funds to meet a judgment). In *Bryn Alyn*, the Court of Appeal spent some time on this issue. It concluded that in cases of psychiatric injury the time when that injury became significant to the claimant was when he/ she realised they were suffering from a psychiatric injury which could be caused by the abuse. The claimants had

realised that they were being abused at the time, but did not understand the effects of that abuse, and the psychiatric injuries for which they were claiming had not manifested themselves at that time. The Court of Appeal likened the development of the psychiatric injury in such cases to progressive industrial disease cases (see paragraph 95 of the judgment).

(b) **the injury was attributable to the breach of duty**. Possibly, knowledge that the claimant was assaulted is not enough. Could it be argued that the claimant only had requisite knowledge when he knew of the precise systemic failings for which he sues the defendant? In a case where the claimant sues the local authority who ran the children's home where he was abused by their employee, does the claimant's date of knowledge only crystallise when he knows that the defendant's failure to have in place proper recruitment processes, calling for references for example, is the basis for the claimant's cause of action?

**(c) the identity of the defendant …**

Section 33: There is discretion to bring proceedings after this time under section 33 but *Bryn Alyn* re-stated the law that this remedy is an exceptional one (following *Thompson –v- Brown (1981)*). The court's discretion is informed by balancing arguments of prejudice to each party (s. 33 (1)) and having "regard to all the circumstances of the case" and in particular to those issues detailed at section 33 (3), paraphrased below:

a) the length of and reasons for the claimant's delay;
b) the effect of the delay on the cogency of the evidence
c) the conduct of the defendant after the cause of action arose, including the extent to which it responded to requests for information from the claimant which may have been relevant to the claimant's cause of action
d) the duration of any disability of the claimant arising after the date of the accrual of the cause of action
e) the extent to which the claimant acted promptly and reasonably once he knew he had a cause of action
f) the steps taken by the claimant to take legal and other expert advice and the nature of any such advice

In *Bryn Alyn*, the Court of Appeal stated as a general rule of thumb that the longer the delay, the more the prejudice shifts to the defendant and that if date of knowledge arguments are applied correctly, then the allowance of a further delay under section 33 will be limited, but dependant on an examination of the facts of each case.

3.3 Concealment

Outlined in section 32 of the Limitation Act, this applies to both actions defined by section 2 (deliberate torts) and section 11 (negligence/ nuisance/ breach of duty claims leading to personal injury).

If any fact relevant to a claimant's right of action has been concealed by a defendant the limitation period will not begin to run until the claimant has – or should have -

discovered that concealment. For example where perhaps a local authority tells the claimant that it did not employ the abuser, but in fact later it is discovered that it did, this would be a relevant fact and the claimant would have a good argument for obtaining an extension to the limitation period.

**4. Issues raised by the Scottish Law Commission's discussion paper**

Page 8 – 'Legislative Competence'

The Commission notes that the ECHR have accepted that limitation periods are not incompatible with the European Convention (*Stubbings v UK (1996)*). It should however be noted that the ECHR in that case did provide a caveat to that:

*"54. There has been a developing awareness in recent years of a range of problems caused by child abuse and its psychological effects on victims, and it is possible that the rules on limitation actions applying in Member States of the Council of Europe may have to be amended to make special provision for this group of claimants in the near future."*

**Proposal 17** *Claims in respect of personal injury which have been extinguished by negative prescription before 1984 should not be revived. (Paragraph 5.24)*

There may be good reasons for marking out abuse cases as special cases to allow those claims to be revived where they have been extinguished before 1964:

a) To harmonise the dealing of these cases with the English & Welsh jurisdiction (where there is no prescription). NB The Law Commission of England & Wales looked into imposing a long stop date on personal injury claims in its report in 2001 and rejected the idea, mainly because of the problems caused by abuse cases and some industrial disease claims (see Law Commission Report No. 270, para. 3.107).

b) The category of case can we believe be easily defined – where a Pursuer pursues damages as a result of negligence/ breach of duty or intentional harm (in England & Wales, trespass to the person/ assault and battery) arising out of abuse or neglect in childhood.

c) The justice of such a move may lie in the fact that in 1984, when prescription in Scotland was abolished, there were no precedents for claims brought in relation to abuse in childhood/ neglect when in institutional care. In England & Wales, the first major public enquiry in relation to social services failings was the Leicestershire 'pin down' enquiry in 1992/3, and the Waterhouse enquiry 'Lost in Care' relating to the North Wales

cases didn't report until 2000. The case law in this area is all very recent: The leading case of *Stubbings v Webb* (later *Stubbings v UK*) started with a writ issued in 1987 and did not come to judicial attention until 1989 when the action was summarily struck out on limitation. "Failure to remove" cases (where it is alleged that social services should have intervened in a family where a child was being abused at home and failed to protect the child) were only given the green light with *X v Bedfordshire Council (1995)* when it went to the European Court as *Z v UK (2001*). The law is constantly changing and updating in a way that legislators and practitioners could not have imagined in 1984.

d) Commonly cases are being allowed by the English courts where the claimants were in care 30 – 40 years ago. To quote some recent decisions in the English courts on limitation:

*Albonetti v Metropolitan Borough of Wirral, 10th May 2006,* Mckinnon J – Claimant abused in 1969 to 1970 at a children's home. Primary limitation expired in 1976 (when aged 21), claim issued in 2001, yet judgment for the Claimant on limitation/ date of knowledge arguments.

*Young v Catholic Care & The Home Office, 18th November 2005,* HHJ Cockroft (unreported) – Claimant abused between

1969 and 1977 at a residential school and later a detention centre. Primary limitation expired in 1980, claim issued in 2003, yet judgment for the Claimant on limitation/ date of knowledge arguments.

*Wood & others v Kirklees Metropolitan District Council, 14th December 2004,* HHJ Hawkesworth QC (unreported) – earliest abuse in 1976 in a care home, primary limitation expiring for that Claimant in 1986, claim issued in 2000, judgment again for the Claimants on limitation /date of knowledge.

*Bryn Alyn* – The earliest date for the abuse was in 1973 (case of KJM), primary limitation expired in 1980, claim issued in 1999, case allowed through on date of knowledge grounds and damages awarded.

It is not we submit beyond the bounds of possibilities that a claim could be brought in relation to abuse prior to 1964 which would still meet the test on date of knowledge and be allowed to proceed were it not for the prescription provisions. In addition of course any claim in England and Wales brought by a patient (by means of mental incapacity) could proceed as of right notwithstanding when the abuse occurred, as time does not run against that individual at all.

e) The reasons why many claimants fail to come forward promptly with their allegations is due to the nature of the injury – the fact that the psychological element only manifests itself (sometimes) after a considerable period and the fact that threats were made to them as children not to tell, which has a profound psychiatric effect on a young mind. To prevent claimants from suing as of right as a result of prescription means the defendants (whether their actual abusers, or their negligent care provider [local authority/ religious institution etc]) profit from the way they inflicted the injury in the first place.

f) The distinguishing factor here between other personal injuries is that these injuries were deliberately caused.

g) The law in Scotland already has sufficient safeguards to consider the Defendant's prejudice in the delay in actions commencing should prescribed actions be allowed to proceed.

h) In the alternative, should these submissions not be accepted, then perhaps recommendation could be made to the Scottish Parliament to set up a body equivalent to the Irish Redress Board to deal with those abuse cases which would otherwise be prescribed, where the abuse occurred prior to 1964, and take them out of the jurisdiction of the civil courts altogether, whilst

satisfying the requirement for justice to be done to the victims of historical abuse.

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