Revisiting the law of limitation: Kelman v Moray Council considered

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Published in:
Scots Law Times

Publication date:
2022

Document Version
Author accepted manuscript

Revisiting the Law of Limitation: *Kelman v Moray Council* considered

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In this article the author examines the recent decision handed down by Lady Wise in Kelman v Moray Council *[2021] CSOH 131 which involved consideration of key provisions of the Prescription and Limitation (Scotland) Act 1973.*

Introduction

The matter of limitation is a vitally important one in the context of personal injury litigation. The concept of the "triennium busting" writ is well known to civil court practitioners, such practitioners being acutely aware that a professional negligence suit may follow should their carelessness result in an action becoming time-barred. (See, for example, *Duncan v Ross Harper & Murphy* 1993 S.L.T. 105.) Professional advisers are not always to blame, however, when limitation periods are missed. Many clients do not consult their solicitors until many years after their injuries have been sustained. Not all such cases will be time-barred however. It might be argued successfully that the pursuer's right of action has not suffered limitation because he had no awareness that his injuries were sufficiently serious to justify litigation until a date within three years prior to the raising of proceedings. In the event that such an argument is not accepted, it may be necessary to rely on the equitable discretion vested in the court to allow a time-barred action to proceed. These are the very matters which would confront the court in the recent case of *Kelman v Moray Council* [2021] CSOH 131. Before addressing the alleged facts and decision in that case, the rationale for rules of limitation and the key statutory provisions which apply to personal injury actions will be outlined. Some relevant case law will also be considered.

Rules of limitation and their rationale

Rules of limitation differ from those of prescription. While negative prescription serves to extinguish an obligation, rules of limitation render a right of action unenforceable. "Limitation is a denial of action…without regard to the actual subsistence of the debt…Prescription is a legal presumption of abandonment or of satisfaction, and so extinguishes the debt." (Bell, *Principles* s.586). Unlike prescription, which is a matter of substantive law, limitation is a procedural concept and a plea must be taken by any defender who wishes to rely upon it. (There are rare instances of such a plea not being taken albeit that it was available to the defender-see, for example, *J v Fife Council* 2007 S.L.T. 85; 2009 S.C. 163). While obligations to make reparation in respect of personal injuries and death resulting from such injuries do not prescribe, actions arising from personal injuries and death resulting therefrom are subject to limitation. Sections 17 and 18 of the Prescription and Limitation (Scotland) Act 1973 apply a three-year limitation period (the "triennium") to such actions.

What then is the rationale for such rules? Essentially, they seek to prevent stale litigation and to ensure that disputes are brought to the courts before evidence degrades or is lost. It is considered inappropriate that defenders should be vexed by stale claims. Legal certainty demands that there should come a time when persons can organise their affairs in the knowledge that claims can no longer be brought against them. Essentially, they should not face a permanent threat of legal action or "liability …for an indeterminate time" (to borrow the words of Cardozo CJ in *Ultramares Corporation v Touche* (1931) 255 NY 170 at p.179). It has been said in the High Court of Australia that the public interest requires disputes to be settled as quickly as possible. (See *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at p.553 (per McHugh J whose detailed discussion of limitation statutes generally would later be described by Lord Drummond Young in *B v Murray (No.2)* 2005 S.L.T. 982 (at para. 21) as "illuminating")).
In our own jurisdiction, the matter was put in the following terms by Lord Hope in *AS v Poor Sisters of Nazareth* 2008 S.C. (H.L.) 146 (at para. 5):
"[W]here there is delay the quality of justice diminishes. Witnesses may have died, memories may have become dimmed and relevant documents may have been destroyed or lost. As time goes on these effects may become less easy to detect, and this in itself is apt to produce injustice. Times change too, and conduct which may seem reprehensible today may have been regarded as acceptable or even as normal many years ago."

Key statutory provisions in relation to personal injury actions

The general rule as to the time within which a personal injury action must be brought is set out in s.17(2) of the 1973 Act which provides as follows:

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

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

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

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

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

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

In most cases the *terminus a quo* will be the date on which the injuries were sustained but it is of course open to the pursuer to argue for a later date, namely (1) the date on which a continuing wrong ceased or (2) the date on which the pursuer acquired awareness of *all* three statutory facts stated in s.17(2)(b). Situation (1) may arise, for example, in relation to a period of wrongful noise exposure in the workplace which extends beyond the date of injury. Situation (2) may arise, for example, in cases of latent disease. It should be noted that the pursuer may be fixed with constructive (or imputed) awareness before he had actual awareness of the statutory facts. (See *Elliot v J. & C. Finney* 1989 S.L.T. 208). The date of awareness provision was incorporated into the legislation in response to the "wholly unreasonable outcome" produced in *Cartledge v Jopling & Sons* [1963] A.C. 758 (per Lord Reid at p.772) where a cause of action was held to have accrued notwithstanding that the injured party could not reasonably have discovered the existence of the disease (pneumoconiosis) which afflicted him. Lord Reid went on to state (at p.773) that "some amendment of the law [was] urgently necessary."

Section 17(3) of the 1973 Act provides that in the computation of the limitation period there is to be disregarded "any time during which the person who sustained the injuries was under legal disability by reason of nonage or unsoundness of mind." (This provision would have no application in *Kelman*.)

The 1973 Act invests the court with a discretion to allow an action to proceed notwithstanding that it is time-barred in terms of s.17(2). Section 19A(1) of the Act provides:

"Where a person would be entitled, but for any of the provisions of section 17…of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision."

Section 19A (which has retrospective effect in terms of s.19A(2)) was inserted by s. 23(a) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980. The introduction of the statutory discretion resulted from the House of Lords' decision in *McIntyre v Armitage Shanks Ltd* 1980 S.C. (H.L.) 46. There, an injured employee in possession of the relevant facts found his action to be time-barred, notwithstanding that he had been advised by a representative of his trade union that he could not sue in respect of his pneumoconiosis. Lord Hailsham LC stated (at p.58): "I would have preferred to see the appellant … receive some compensation" while Lord Fraser stated (at p.64): "I hope that the law may be amended by Parliament before very long."

It is clear that the statutory provisions concerning awareness and the equitable discretion (s.17(2)(b) and s.19A respectively) were introduced to address hardship which had been brought to notice in cases decided under the pre-existing legislation. Both of these provisions would fall for consideration in *Kelman*. Before turning attention to that case however, it is appropriate to examine some previous decisions on s.17(2)(b) and s.19A of the 1973 Act.

Analysis of case law

The awareness provision in s.17(2)(b) has been considered in a number of cases before the Scottish courts. There are three statutory facts of which the pursuer must be aware before the clock begins to run. By way of brief summary, these facts are: (i) that the injuries were sufficiently serious to justify litigation; (ii) that the injuries were attributable to an act or omission and (iii) that the defender was the person to whose act or omission the injuries were attributable (or that person's employer or principal).

The first statutory fact is likely to come into focus where the pursuer is initially unaware of the seriousness of his injuries. In *Blake v Lothian Health Board* 1993 S.L.T. 1248, for example, an *a*ction was raised nearly four years after the pursuer injured his back in an accident at work. The defenders took a plea of time-bar. The pursuer asserted that, at the time of the accident, he thought he had suffered only a minor back injury. His back problems resurfaced a year later and progressively worsened. Accordingly, the pursuer argued that it was not until some 14 months after the accident that he was aware that his injuries were sufficiently serious to justify raising an action. The defenders argued that the consequences of the accident were known to the pursuer immediately after it had happened and were sufficiently serious to justify raising an action at that stage. In holding that the action was not time-barred, the Lord Ordinary (Caplan) stated that the fact that injuries could not be described as minimal or trivial did not necessarily mean that they were sufficiently serious to justify an action. The question was whether a reasonable claimant in all the circumstances would consider that the facts about the injury which were known or could be ascertained rendered it worthwhile to raise an action. A different outcome resulted in *Mackie v Currie* 1991 S.L.T. 407 where the *immediate* effects of a road traffic accident (namely pain in the left hip and buttock, a small area of bruising, and a twisted knee) were held to constitute sufficiently serious injuries to justify litigation. The pursuer's action was held to be time-barred. (The pursuer had argued unsuccessfully for a later starting date as it was not until some years later that he began to suffer persistent pain in his hip and was diagnosed with traumatic arthritis.)

It is important to note that, for the purposes of this sub-head, one is to assume that liability is undisputed and that the defender is solvent. It follows that s.17(2)(b)(i) is directed solely at the extent of the injury, in terms of quantum of damages. There must be awareness that the injury was sufficiently serious to have been above a minimum threshold in terms of quantum. The First Division has recognised that threshold as being "quite low" in character. Lord President Hamilton stated the position as follows in *AS* v *Poor Sisters of Nazareth* 2007 S.C. 688 (at para.25): "Time does not run against a claimant who lacks actual or constructive awareness that he has suffered injury or that the gravity of his injury is sufficient to bring it above the minimum — and quite low — threshold of justifying proceedings on the assumptions of admitted liability and a solvent defender." In *CG v Glasgow City Council* 2011 S.C. 1*,* in an action served in January 2007, the pursuer sought reparation in respect of brutal physical and sexual abuse allegedly inflicted upon her at Kerelaw Residential Home between 1992 and 1995. She sought to invoke s.17(2)(b)(i) in response to the defender's plea of time-bar. Delivering the opinion of an Extra Division, Lord Eassie stated (at para.31) that "it is the totality of the claim rather than the separate incidents viewed each in isolation, which must be considered in applying the provisions of s.17(2)(b)(i). His Lordship continued (at para.31): "On considering the claim on that basis, and applying the important statutory assumptions that the defenders admit liability and are able to meet any decree, we are unable to see any basis upon which the claim could properly and objectively be judged of insufficient worth to warrant proceedings on those statutory assumptions. In our view, it cannot be said that the catalogue of physical and serious sexual abuse of which the pursuer now complains would not have furnished, on her leaving the school, a claim of damages of sufficient magnitude to make worthwhile the raising of proceedings — again, of course, on the important statutory assumptions." The Court concluded (at para.32) that the pursuer's averments did not contain any relevant basis for postponing her awareness of the statutory

facts until a date within the three years preceding the raising of the action. Her invocation of s.17(2)(b) was accordingly "misconceived" (per Lord Eassie at para.32).

The second statutory fact of which the pursuer must be aware before time starts to run is that the injuries were attributable to wrongdoing. The pursuer might, for example, have attributed his condition to natural causes rather than wrongdoing on the part of another. Thus, he might have attributed his hearing loss to the ageing process rather than wrongful exposure to noise in the workplace. This statutory fact called for consideration in *Young v Borders Health Board* [2016] CSOH 13 which focussed on whether the pursuer ought to have been aware that her health condition was attributable to a delay in diagnosis on the part of a hospital. In the event, her action was held to be time-barred. Similarly, in the earlier case of *Agnew v Scott Lithgow Ltd (No2)* 2003 S.C. 448, the pursuer's action against former employers in respect of vibration white finger was met by a plea of time-bar. The action was raised in June 1999 following a positive diagnosis in March of that year. The pursuer had worked with vibrating tools during the course of his employment and, although he had left his employment in the shipyards in September 1995, he had had conversations with former colleagues about the condition in October 1995. Those conversations ought to have put him on notice that his condition might be attributable to his employment. Had he sought legal advice by the end of 1995 and received a medical report thereafter, he would have been aware of the statutory fact before June 1996. No allowance would be made for "dithering time." The plea of time-bar was sustained.
Similarly, in *Little v East Ayrshire Council* 1998 S.C.L.R. 520, an industrial deafness action was held to have suffered limitation in circumstances where the pursuer had failed to ask his consultant about the cause of his hearing loss. He had not taken all reasonably practicable steps for the purposes of s.17(2)(b).

The third statutory fact of which the pursuer must have awareness is that the defender was the person to whose wrongdoing the injuries were attributable. This sub-head may be invoked where the pursuer was initially unable to identify the wrongdoer. It might, for example, apply in the case of injury sustained as a result of a hit and run incident. The provision was relied upon, albeit unsuccessfully, in *Elliot v J. & C. Finney* 1989 S.L.T. 208, affd 1989 S.L.T. 605. The pursuer was injured in a road traffic accident and was hospitalised as a result. Two days after the accident, and while he remained in hospital, the pursuer was attended by a police officer but failed to enquire of him as to the identity of the lorry driver who was alleged to be responsible for the accident. The summons was not served until three years and six days after the accident. The action was held to be time-barred. The pursuer's argument to the effect that he could not be expected to make enquiries while still in hospital was rejected. It would have been reasonably practicable for him to make enquiries of the police officer who had attended him there. It was not a question of whether the pursuer had a reasonable excuse for failing to take a particular step, but whether it would have been reasonably practicable for him to do so.

The Act provides, in s.22(3), that, for the purposes of s.17(2)(b), knowledge that any act or omission was or was not, as a matter of law, actionable, is irrelevant. Thus, if a pursuer is aware of all three statutory facts but is ignorant that he has a legal remedy, the clock runs against him nonetheless.

Turning now to the discretionary power of the court to override the time-bar, s.19A of the 1973 Act does not (unlike its English equivalent, s.33 of the Limitation Act 1980,) set out a list of factors to which the court must have regard in determining whether to exercise its discretion. Indeed, the wording of the Scottish provision has been described as "sparse". (*Donald v Rutherford* 1984 S.L.T. 70 at p.77 per Lord Cameron). What then does the case law disclose about the correct approach to s.19A? In *Donald* (supra), Lord Cameron stated (at p.75): "I must emphasise that the discretion of the court is unfettered, although in every case the relaxation of the statutory bar can and must depend solely upon equitable considerations relevant to the exercise of a discretionary jurisdiction in the particular case, having regard to the fact that it is for the party seeking relief to satisfy the court that it is, in the view of the court and in the circumstances of the case and of the legitimate rights and interests of the parties equitable to do so." Accordingly, the decision whether to exercise the discretion is a fact sensitive one. "[T]here is no restrictive table of considerations. Each case has to be decided on its own facts." (*Forsyth v A. F. Stoddard & Co. Ltd.* 1985 S.L.T. 51 per Lord Justice-Clerk Wheatley at p.53). The central question is "where do the equities lie?" (See, *B* v *Murray* (No. 2) 2005 S.L.T. 982 (at para.29); *Forsyth*, supra, at p.55; *Elliot*, supra, at p.608.) In *B*, supra, Lord Drummond Young discussed some of the factors which may be relevant to the exercise of the statutory discretion. These include the conduct of the pursuer's

solicitor, the conduct of the pursuer (including any explanation for the action not having been brought timeously), the issue of prejudice to the respective parties in the event of the operation (or otherwise) of the discretion and the pursuer's ignorance of a legal right to claim damages (the very impetus for the enactment of s.19A –see *McIntyre*, supra). The matter of ignorance of a legal right was central to the decision in *Comber v Greater Glasgow Health Board* 1989 S.L.T. 639 where a time-barred action was allowed to proceed because the pursuer, who was "ill-informed about modern society" (per Lord Morton of Shuna at p.640) had not known that she could raise an action. That same factor was relied upon, albeit unsuccessfully, by the pursuer in *Kane v Argyll and Clyde Health Board* 1999 S.L.T. 823, a case arising from alleged medical negligence. The "picture of ignorance" (at p.827) which the pursuer presented was not accepted by the court however. In refusing to exercise the discretion in the pursuer's favour, the Inner House attached significant weight to the matter of prejudice to the defender, Lord Prosser stating (at p.828): "[I]f there is material prejudice to a defender in having to go to proof, it is difficult to see how, even if there was a reasonable explanation for the delay, the action could reasonably be allowed to proceed." In the House of Lords' decision in *AS v Poor Sisters of Nazareth* 2008 S.C. (H.L.) 146, Lord Hope stated (at para.25) that "it seems more in accord with the legislative policy that the pursuer's lost right should not be revived than that the defender should have a spent liability reimposed on him." His Lordship continued (at para.25): "[P]roof that the defender will be exposed to the real possibility of significant prejudice will usually determine the issue in his favour."

A more recent decision on the s.19A discretion is that in *Jacobsen* v *Chaturvedi* [2017] CSIH 8. There, the pursuer, who accepted that her action was time-barred, sought application of the equitable discretion. The Lord Ordinary held that there were insufficient relevant averments to allow the action to proceed. On a reclaiming motion, the Lord President (Carloway) stated (at para.16): "The Lord Ordinary correctly determined that it is not sufficient, for the exercise of the discretion, simply for a pursuer to assert that the triennium has expired and that the action should be allowed to progress on the basis that otherwise he cannot succeed in his claim for damages…There require to be additional circumstances justifying a revival of the right. It is not possible to circumscribe what these circumstances might be, but they do have to be sufficiently cogent to merit depriving a defender of what will have become a complete defence to the cause. The interests of both parties and all the relevant circumstances must be considered." The Lord President went on to state (under reference to *Forsyth,* supra, at p.54) that a factor militating against an extension of time is the existence of an alternative remedy, such as a right of action against the pursuer's solicitors, and the stronger that alternative case is, the more likely the court is to deny an extension.

Even more recently, the equitable discretion was considered in *Quinn v Wright's Insulations Ltd* 2020 S.C.L.R. 731. There, the deceased was diagnosed with pleural plaques and, some 20 years later, developed mesothelioma. The entries from his medical records indicated that the deceased had the necessary constructive awareness (in terms of s.17) in late 1993 or early 1994, many years before his death in 2017. It was only following his death that an action was raised by his executors and certain relatives. Accordingly, the action could only proceed upon the exercise of the statutory discretion. Following a preliminary proof on s.19A, Lady Carmichael declined to exercise her discretion in favour of the pursuers and dismissed the action. While the pursuers had lost a potentially high value claim in respect of a death from a serious condition, the defender was prejudiced by having lost its chance to settle the claim, if made timeously, on a full and final liability basis at a much lower level. *Quinn* would subsequently be considered in *Kelman*, to which attention is now turned.

Kelman v Moray Council-the background

The pursuer, John Kelman, had been employed as a maintenance electrician by Moray Council's predecessor between 1980 and 1984. During that period of employment, he was exposed to asbestos. Although the pursuer had been diagnosed with pleural plaques in March 1999, he had been discharged from the chest clinic in 2001 (after a number of check-ups at which no changes had been found). He remained well until he began to suffer breathlessness in 2019. He was diagnosed with the terminal condition, mesothelioma, in March 2019, whereupon he sought damages from Moray Council. (The judgment is silent as to the date on which the action was raised.) A plea of time bar was stated by the defender. The pursuer argued, however, that he was not aware that his injuries were sufficiently serious to justify litigation until 2019 and that, accordingly, his action had not suffered limitation. In the event that that argument was not accepted, the pursuer argued, in the alternative, that the court should exercise its discretion in terms of s.19A to allow his action to proceed. A preliminary proof was heard before Lady Wise.

Evidence of the parties

Lady Wise heard evidence from a number of witnesses.

Witnesses for the pursuer

Witnesses for the pursuer included the pursuer himself, the pursuer's wife, and Dr Geoffrey Todd.

The pursuer's evidence was to the following effect. He had attended his GP complaining of a cough in March 1999. He had discussed working with large storage heaters in the early 1980s and thought he might have been exposed to asbestos without the provision of a mask. He was referred to the chest clinic at the local hospital. He was advised that he "only" had pleural plaques due to his previous asbestos exposure and that he would be contacted in a year for a check-up. His cough persisted for a few weeks but did clear up and he had no symptoms thereafter. Subsequent check-ups in September 2000 and September 2001 confirmed that there was no change to the pleural plaques and he was then discharged from the clinic. He recalled the doctor saying in 2001 that he did not need to come back unless there was a significant change to his condition. He felt reassured. He did not think, at that stage, that he had a medical problem. He was asymptomatic. He was not aware in 1999 that he could have pursued a claim in respect of pleural plaques. He had never heard of anyone pursuing claims for an asbestos related condition. He had had no conversations at work or socially about the possibility of making a claim. If he had known that he could have made a claim, he would have probably investigated doing so at the time. If he had been told in 1999 that, in 20 years' time, he would be breathless and unable to do very much, he would have taken action but he had no reason to think that he would get worse in future. He had no knowledge that he could pursue a claim for his asbestos condition until after he was diagnosed with mesothelioma in March 2019. At that stage, he was given an information booklet and advised to contact Clydeside Action on Asbestos. That organisation assisted him in claiming benefits and advised him to contact solicitors.

In cross-examination, it was put to the pursuer that he understood in 1999 that his chest x-ray was not normal. He indicated, however, that a letter sent by a registrar to his GP in September 1999 stated that there was no evidence of any lung disease secondary to asbestos. The condition was not causing him any problems because his coughing had disappeared. Following a further check-up in September 2000, a letter to the pursuer's GP confirmed that the pursuer had been asymptomatic and there was nothing of concern on examination. When he attended his final check-up in September 2001, the pursuer saw a different consultant, Dr Devereaux. He did not recall Dr Devereaux saying to him that he was at slightly increased risk of asbestos related disease. He agreed that on the face of Dr Devereaux's letter to his GP, that must have been what he meant. The pursuer was left thinking that there would be no problems in the future. There was no arrangement for further appointments after the 2001 hospital visit.

The pursuer confirmed that he had not been a member of a trade union during the early 1980s when he worked at the council. He joined the union when he went to work for Scottish Hydro Electric in the mid-1980s and remained in the union until 2000. When it was suggested that he could have approached his trade union and asked what the diagnosis of pleural plaques meant, his response was that he was playing golf three times a week and did not think there was anything seriously wrong with him. He did not recall seeing any publicity over the years about asbestos related disease and, if he had done, it did not register with him.

The pursuer's wife, Linda Kelman, also gave evidence. She recalled her husband having a bad cough in 1999. Although shocked when she heard about the diagnosis of pleural plaques, she had subsequently been under the impression that everything had been sorted out and that there was nothing to worry about. Her husband's cough had stopped, but she understood that, until 2001, the medical professionals were monitoring the position. If her husband had reported something of concern to her about his health in 1999, she thought she would have recalled it.

Evidence was also adduced from Dr Geoffrey Todd, an experienced consultant chest physician. He had been instructed to consider the medical records relating to the pursuer's initial diagnosis of pleural plaques in 1999 and what had been recorded. In his opinion, a doctor imparting a diagnosis of pleural plaques should explain what pleural plaques are, their significance and risk of complications. The patient should be advised that pleural plaques may be compensateable and of the need for action within 3 years of knowledge. The patient should be given appropriate explanatory leaflets and/or advised to seek advice from an appropriate patient support group. The information given to the patient should be

recorded. If a doctor did not record something in the notes, one must assume it had not been done. Ideally, a follow-up letter should be sent to the patient as patients only retain about 30% of what they are told at clinics. It was clear from the records that a doctor discussed the pursuer's asbestos exposure with him on 30 June 1999. Following the June 1999 attendance at the chest clinic, the letter of 30 June from Aberdeen Royal Infirmary recorded: "I found no abnormality on examination. His spirometry is normal and his chest x-ray shows various pleural plaques, some of which are calcified. I have reassured him about that. What he should have is a CT scan to establish that there are no intrapulmonary lesions and I have arranged that." The extent of the pleural plaques was clarified by CT scan on 4 August 1999. The last relevant letter to the GP on 7 September 2001 (following the second follow up appointment) recorded: "Mr Kelman remains well, his spirometry remains within normal limits...There are no symptoms attributable to his chest, his cough is much improved. A chest radiograph today was unchanged with bilateral pleural plaques. I have explained that the pleural plaques indicate asbestos exposure and do suggest that he is at slightly increased risk of asbestos related disease. However the plaques do not have any prognostic significance. As he is well, I have not arranged to review him in the future, but would be more than happy to do so if there are any further problems". Dr Todd's interpretation of events was that, while the pursuer had been told he had pleural plaques, he had been reassured and ultimately discharged from the clinic. There was no mention of medico-legal consequences of the diagnosis or of the risks of the asbestos exposure which caused the plaques, those risks being mesothelioma and lung cancer. Dr Todd explained that while plaques in themselves are not a serious problem, the cumulative asbestos exposure that has caused them does have a prognostic significance. The patient is at increased risk of developing mesothelioma and lung cancer. There is a subtle difference which doctors would appreciate between the prognostic significance of pleural plaques on their own and the complications that arise from the asbestos exposure that caused the pleural plaques. Conveying to the pursuer that the plaques did not have any diagnostic significance may have been confusing for him. Dr Todd noted from the medical records that in 2019 when the pursuer presented with mesothelioma, he said he did not have any problems and did not tell the doctors that he had pleural plaques. The records recorded that the pursuer had previously been playing three rounds of golf per week and had reported no CVS/respiratory issues before early 2019. He had indicated that he had no problems with his lungs, asthma or other such conditions.

Under cross-examination, Dr Todd agreed that the doctors at the chest clinic in 1999 would have been aware of guidance that required them to give clear explanations and ensure a patient had understood the information. He agreed that the question of exposure to asbestos had been raised by the pursuer's GP at the time of his referral in 1999. Dr Todd agreed that the letter from Dr Legge's Elgin outpatient clinic dated 30 June 1999 appeared to show that the consultant had discussed with the pursuer times when he may have been exposed to asbestos in taking an occupational history. Dr Todd highlighted the sentence where Dr Legge recorded "I have reassured him about that". A subsequent letter from Dr Legge's outpatient clinic dated 1 September 1999 was written by Miss Anderson, a career registrar, who had seen the pursuer on that date. She had noted that there was no evidence of any lung disease secondary to asbestos. On 6 September 2000, a letter from Dr Legge confirmed that the pursuer remained asymptomatic and that there was nothing to find on examination and the plaques looked unchanged. The last follow-up was by Dr Devereux whose letter stated that the pursuer remained well and that his lung function tests had been normal. In relation to Dr Devereux's statement that he had explained to the pursuer that the pleural plaques indicated asbestos exposure and suggested that he was at slightly increased risk of asbestos related disease, Dr Todd agreed that doctors would certainly have understood by 2001 that a patient like the pursuer was at risk of asbestosis, asbestos related lung cancer and mesothelioma but a lay person would not know that. He agreed that the subsequent sentence "however the plaques do not have any prognostic significance" would not be obvious in terms of understanding to someone who is not medically qualified. Dr Todd agreed that only the pursuer and the doctors concerned would know what had been said at the various appointments. It was suggested to Dr Todd that, if the pursuer had not understood what pleural plaques were or their significance, he had had an opportunity to ask three different professionals about that. Dr Todd responded that the key clinic appointment was the first one. That would normally be when diagnosis or investigations were explained in detail. At review appointments, patients are typically only given five or six minutes of time. The key time for imparting information would have been the first attendance when the diagnosis was made. If the pursuer had misunderstood what he was being told at the first clinic interview he may not have been aware that he misunderstood. He may have been happy. Most patients are happy when they are reassured and most patients do not want to find out anything to the contrary. Dr Todd was not prepared to assume that the pursuer would have been motivated to ask any more questions. While he could not be certain that the pursuer was not told that pleural plaques were compensateable or advised

of the time limitation, he was working on the basis that it had not been recorded and so he could assume that it had not been said. He was proceeding on the basis of seeing countless medical records and it would be noted in the vast majority of cases.

The defender's evidence

The defenders adduced evidence from Michael Rollo, Daniel Littlewood and Lorraine Paisley.

Mr Rollo, a building services manager with Moray Council, had established the dates of the pursuer's employment with Moray District Council, but indicated that other records from that period were not available. In about 2003/2004 the Building Services Department had moved to a village seven miles from Elgin and files had been "disregarded" when the council had moved to a multiservice depot. Mr Rollo thought the timesheets, incident or accident reports, the provision of PPE and training records would have been retained but he had not been able to find any of them from the period 1980-1984. Mr Rollo had not been employed with the council prior to 2004 but his predecessor, Stuart Wilson, would have been able to provide records of the sort he had described if somebody had asked for them in 2002.

Daniel Littlewood, the insurance officer for the council, spoke to the difficulty that had arisen when evidence was sought of the council's insurance cover for the period 1980 to 1986. He knew that the council should have had insurance cover but, despite considerable effort, he could not find a policy number to prove that it did. There had been flooding and a fire in some of the relevant offices and most services were now centrally based. In earlier times, however, there was no headquarters and each office kept its own paperwork. If a claim had been intimated in about 2002-2004 it would have been easier for the council to investigate.

Lorraine Paisley, chief financial officer with Moray Council, spoke to the sources of the council's income and its financial position. She indicated that normally industrial injury claims would be covered by insurance. However, if a situation arose where an insurance policy would not cover the contingency noted in the accounts, the council would rely on its reserves. For past years going back to the 1980s, some of the records had been destroyed in floods, some were difficult to access and some had disappeared. It was more difficult to deal with a situation when records of a council of which Moray Council is the successor were required.

Decision of the Court

Lady Wise accepted the evidence of the pursuer and his wife as credible and reliable insofar as it pertained to the central issues. Her Ladyship stated (at para.37):

"I found Mr Kelman to be a straightforward witness who was very clear about the matters of detail that he could no longer recollect as distinct from the clear message he considered he had received from the doctors at the chest clinic in 1999, 2000 and 2001. He was able to convey what he understood the doctors were telling him at the time and I accept his evidence on that."

While her Ladyship took the view that Dr Todd was able to speak to practice in relation to dealing with patients with pleural plaques, she considered that certain aspects of his report and evidence strayed into issues which were properly for the court's determination. First, he expressed a view that the pursuer was "completely unaware of the possibility of compensation and the time limitation rules for same". Secondly, he concluded (having regard to the medical records) that the pursuer had not been fully or properly informed about his pleural plaques until he later presented with mesothelioma. It was for the court and not Dr Todd to draw inferences on these matters from the whole evidence led.

Having made these observations regarding the evidence, Lady Wise turned her attention to the key issues for determination. The two principal issues before the Court were those of the pursuer's awareness of his injury and the issue of the equitable discretion. These will be considered in turn.

Dealing with the issue of awareness (the s.17(2) issue), Lady Wise observed that what was relevant was not whether the pursuer had knowledge that any claim was actionable *as a matter of law* but whether he had actual or constructive knowledge that his injuries were sufficiently serious to justify raising proceedings. Her Ladyship stated (at para.39): "The stark issue between the parties in this

case is whether Mr Kelman left his medical appointments at the material time between 1999 and 2001 with any sense that he had such sufficiently serious injuries."

Lady Wise continued (at para.40): "The evidence led at proof clearly illustrated that Mr Kelman did not have *actual* knowledge that the injuries he had sustained were sufficiently serious to justify bringing an action of damages until he was diagnosed with mesothelioma in early 2019. The essential question is whether he had been put on notice by the physicians of relevant facts, such that it would have been *reasonably practicable* for him then to make further inquiries." (emphasis added). Her Ladyship pointed out (at para.40) that although the pursuer understood that there was something to see on a scan of his lungs, "he clearly regarded it as an almost inconsequential matter. This was in large part because of the reassurance given to him. His position was largely supported by the medical records."

Lady Wise stated (at para.41): "An important fact…is that Mr Kelman remained asymptomatic throughout...He understood that the follow-up appointments were routine…There is nothing in the medical records available to indicate that he was advised of the risk of mesothelioma and lung cancer, other than so obliquely that it meant nothing to him. It was clear from his evidence that nothing said to Mr Kelman raised any concern on his part about his having sufficiently serious injuries of a type that would prompt him to make further inquiry…Of those present at the medical appointments between 1999 and 2001 only Mr Kelman gave evidence and he was clear about the impression he had been given at the time."

Lady Wise went on to observe that the evidence of Mrs Kelman supported the conclusion that her husband had not been advised of the potential seriousness of his diagnosis. Her Ladyship accepted Dr Todd's evidence as to the fundamental difference between telling a patient a particular fact or diagnosis and properly informing the patient. She also accepted his evidence that, generally speaking, if a doctor does not record something in the notes, one can assume that the matter not recorded was not said or done.

Taking account of the evidence and medical records, her Ladyship concluded (at paras.42-43):

"[T]he pursuer has established that he did not become aware that he had an injury sufficiently serious to trigger making a claim until he was diagnosed with mesothelioma in 2019. Before that, he was unconcerned about his health because the way in which his diagnosis of pleural plaques was explained to him was reassuring rather than alarming… [The pursuer] had taken no notice of any publicity about asbestos related disease because he didn't think it concerned him... His statement that he had no reason (between 2001 and 2019) to think he would be suffering as he is now was clear and convincing. Mr Kelman [was] unlikely to have regarded something that never prevented him from going to work as serious. He simply had not thought there was anything wrong with him. The subtleties of his diagnosis were lost on him because the real risk, of developing the condition he now has, was either not explained, or not explained in a way he would have understood."

Lady Wise went on to observe that, in the circumstances, no real issue arose as to the reasonable practicability of the steps the pursuer could have taken. Her Ladyship stated (at para.45):

"[The pursuer] had been given no reason by the physicians to think that his health would deteriorate... He was unaware of anyone making claims in respect of asbestos related lung conditions. He was playing golf three times a week and simply had no reason to ask further questions or make further enquiries… His understanding was that he had a current condition that was not serious. In these circumstances I do not consider that Mr Kelman can be criticised for not taking any steps to inform himself about whether he could raise proceedings earlier."

Lady Wise concluded (at para.45):

"[T]he 'injury' Mr Kelman considered he had suffered was so minimal that it did not merit investigation. In the absence of a clear statement from the physicians that he was at risk of developing a life limiting serious consideration in future, Mr Kelman did not have the requisite constructive awareness."

Her Ladyship's ultimate determination, therefore, was that the pursuer was not aware (actually or constructively) that his condition was sufficiently serious to justify the raising of proceedings.

However, in case she was wrong on the awareness point, Lady Wise proceeded to consider whether it would be equitable for the action (if time-barred) to proceed in terms of s.19A. In this connection, Lady Wise noted that account must be taken of a wide range of factors and a balancing exercise carried out.

Her Ladyship observed that, if the action was not allowed to proceed, the pursuer would lose the ability to pursue a claim worth approximately £150,000-£200,000. His lack of awareness that he had a right to claim compensation until his diagnosis with mesothelioma in 2019 was a relevant factor. So, too, was the fact that the pleadings disclosed a relevant *prima facie* case. The prospects of success favoured the pursuer. Employers ought to have been aware in the 1980s of the serious danger occasioned by exposure to asbestos. The foundations of a case against the defenders were present. The pursuer was employed by the defenders at the time in question and the nature of the work he undertook was known. Her Ladyship further observed that, following the diagnosis of mesothelioma in 2019, the pursuer had acted promptly in raising proceedings. Her Ladyship stated (at para.47):

"His previous ignorance of his legal right to claim for an extremely debilitating and life shortening condition is a relevant factor for consideration. His response on discovering that he could pursue a remedy cannot be faulted. While each case turns on its own facts, I note that a difference between this case and that of *Quinn* is that there is here a very clear, reasonable and convincing explanation for the failure to raise proceedings timeously."

As for the defenders, they would suffer prejudice in having to meet the claim (if successful). It was submitted that the prejudice to the defenders was aggravated by the loss of evidence, their inability to trace insurers and the consequent likelihood that any award of damages would be met from a stretched budget. Moreover, if the pursuer died before the action was resolved, his many relatives would have significant claims. Lady Wise took note of Mr Rollo's observation that the loss of evidence was likely to be less of an impediment than the defenders suggested. The lost documents (timesheets, incident accident reports, PPE and training records) would be of limited value, as compared with witnesses who worked for the council at the relevant time and who continued to live in the Elgin area. Her Ladyship stated (at para.49):

"I do not consider that the defenders will face any greater challenge in defending this case as a result of the loss of evidence than any other litigation where evidence from some decades ago requires to be led. Of course it is not sufficient to record that relevant witnesses would appear to remain alive and can be questioned and the quality of the evidence in historic cases of any kind is a factor... In the present case it was conceded that Mr Kelman's case is not without merit and there will be few if any stark issues of credibility. His case is that he serviced heaters that contained asbestos and so was exposed to asbestos when employed by the defenders' predecessor council. It was not suggested that those facts would be the subject of a credibility challenge and the remainder of the evidence will likely be given by skilled witnesses."

As far as the council's inability to trace its insurers was concerned, her Ladyship stated that this was a factor to be weighed in the balance. She went on to observe that this was not a case of an uninsured defender but rather one of a defender who knows he is insured but cannot prove it to the satisfaction of the insurance company. Turning to the "important related matter" (para.50) of how the defenders would fund the claim, her Ladyship noted that, if successful, it would be funded from reserves. She continued (at para.50):

"There was no specific evidence of what impact if any that would have on the provision of any other services. It is an unusual feature of this case that it seems likely that the claim would be met from reserves rather than it being met by the insurance company and I have already indicated that I take that into account. That said, the pursuer would always have had his claim met, either by insurance or through reserves and it would be inequitable in my view to refuse to allow an action to proceed simply because the defenders had to date been unable to find the relevant insurance documents."

Balancing the various factors, her Ladyship considered the prejudice to the defenders if the claim proceeded to be less substantial than the loss to the pursuer if the claim did not proceed. Her Ladyship concluded (at para.51):

"Mr Kelman conducted his life in complete ignorance of the implications of a diagnosis of pleural plaques. As soon as the link between the mesothelioma from which he now suffers and that asymptomatic condition was pointed out, he took immediate action. He has acted reasonably and

appropriately at all times and is not responsible in any meaningful way for the delay in proceedings being raised. I consider that the equities in this particular case lie in favour of allowing the action to proceed. Accordingly, even had I considered that the action was time barred under section 17(2)(b), I would have allowed it to proceed on the basis that it is equitable to do so in terms of section 19(A)."

Conclusion

The matter of limitation is a regular visitor to the Scottish courtrooms. Many of the cases in which the concept arises have involved pursuers who have suffered lung disease. *Quinn* and *Kelman* provide recent examples from that category of claim. While, in *Quinn*, the deceased's medical records indicated that he had the relevant constructive awareness (in terms of s.17 of the 1973 Act) to trigger the running of the triennium, the records in *Kelman* pointed in the opposite direction. Significantly, in *Kelman*, the pursuer had been reassured that nothing serious arose from his radiology results. While the court did not consider it equitable to allow the action to proceed in *Quinn*, the court in *Kelman* considered that, had the action been time-barred (which it was not), it would have been equitable to allow it to proceed. A central feature of the latter decision was the pursuer's ignorance of his entitlement to sue. Of course, it must be emphasised that decisions on the exercise of the equitable discretion are entirely fact sensitive and no two cases will be identical. An important point of distinction between *Kelman* and *Quinn* was the existence in the former case of "a very clear, reasonable and convincing explanation for the failure to raise proceedings" (per Lady Wise at para. 47).

By way of concluding remark, it should be noted that the issue of limitation in asbestos disease cases is currently under review by the Scottish Law Commission, the Commission having issued its Discussion Paper on *Damages for Personal Injury* (No. 174/2022) in February of this year. Any recommendations resulting from that consultation exercise will be awaited with interest.