

Industrial Disease

March 2008

Reasonable Practicability Test for Time Bar Defence

Background

The Outer House of the Court of Session recently considered the reasonable practicability test for a defence of time bar. In *Minshull v The Advocate General for Scotland*, the pursuer sought damages from the Ministry of Defence for injuries sustained in August 1997 while he was working as an engineer for the RAF.

The pursuer averred that he was unavoidably sprayed in the face and mouth with a fluid which contained ingredients that were toxic and hazardous to health. As a result, he claimed to have developed chronic asthma. He was subsequently discharged from the RAF in July 2003 and had not worked since. The pursuer claimed that he was unaware of the cause of his condition until a CT scan in 2001, despite suffering from chest problems for a number of years.

Current Law

This is an area of law which has been developed by the Scottish courts over the years. Under section 17 of the Prescription and Limitation (Scotland) Act 1973, a personal injury action must be brought within three years of the injury being sustained, or alternatively the last date of negligent exposure, whichever is the later.

A pursuer can seek to establish that the three year period runs from the date on which he became, or in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to have become, aware of certain facts. These facts are that the injuries were sufficiently serious to justify bringing an action for damages; that they were attributable to an act or omission; and that the act or omission could be attributed to the defender.

The Decision

Lord Macphail held that there was no evidence of any date when the pursuer became aware that his condition was attributable to any act or omission. His Lordship then went on to consider whether any date could be identified on which it would have been reasonably practicable for the pursuer to become aware that his condition was so attributable. Lord Macphail held that awareness by 28 October 1998 was reasonably practicable based on the pursuer's intelligence, the persistence of his symptoms and his consequent downgrading. This was a test which was partly objective and partly subjective.

The final issue was whether the pursuer should be granted equitable relief under section 19A. In approaching this question it was necessary to balance all the circumstances of the particular case and the interests of all parties concerned. Having reviewed the whole matter, Lord Macphail was unable to find any relevant circumstances which made it equitable to grant relief and therefore dismissed the pursuer's case.

Significance

The Scottish Law Commission has recently recommended a new five year limitation period for personal injury claims. In addition, they have called for the test of reasonable practicability to be replaced. Instead, the Commission has recommended that the limitation period should not run while the pursuer was, in the opinion of the court, excusably unaware of one or more of the statutory facts. If legislation is passed to make these changes, it is likely defenders will find it more difficult to successfully argue a time bar defence in disease claims.

This Alert! is correct to the best of our knowledge and belief at the time of going to press. It is however written as a general guide, so it is recommended that specific professional advice is sought before any action is taken. We are required by law to protect personal data.

© March 2008, Dundas & Wilson CS LLP and Dundas & Wilson LLP.
All rights reserved

If you have any questions on this issue or any other aspect of our disease work, please contact our industrial disease team:

Laura Donald
Jillian Martin-Brown
Lorraine Walkinshaw

laura.donald@dundas-wilson.com
jillian.martin-brown@dundas-wilson.com
lorraine.walkinshaw@dundas-wilson.com

0131 200 7522
0131 200 7501
0131 200 7382