THE LAW COMMISSION

(LAW COM. No. 35)

LIMITATION ACT 1963

ADVICE TO THE LORD CHANCELLOR UNDER SECTION 3(1)(*e*) OF THE LAW COMMISSIONS ACT 1965

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Mr. Claud Bicknell, O.B.E.

Mr. L. C. B. Gower.

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Advice to the Lord Chancellor under section 3(1)(*e*) *of the Law Commissions Act* 1965

To the Right Honourable the Lord Hailsham of Saint Marylebone, Lord High Chancellor of Great Britain.

PART 1—INTRODUCTION

1. Your predecessor in office requested us in pursuance of section 3(1)(*e*) of the Law Commissions Act 1965 to advise on certain questions arising out of the Limitation Act 1963. Before setting out those questions and proceeding to advise on them it may be helpful briefly to describe the main objects of the Act of 1963.

2. The primary purpose of the 1963 Act was to prevent the use of the limitation defence in claims for damages for personal injuries where the plaintiff was ignorant of his right to claim during the whole, or the first two years, of the normal three years limitation period applicable to his case. For this purpose it defines "the situation of ignorance" (we use this expression for convenience) as one in which *material facts of a decisive character*[1] were outside the *knowledge* (*actual or constructive*) of the plaintiff.[2] It precluded the limitation defence where the claimant's ignorance prevailed during

[1] Section 7(3) and (4) of the Limitation Act 1963:—

7(3) "In this part of this Act any reference to the material facts relating to a cause of action is a reference to any one or more of the following, that is to say—

(*a*) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting that cause of action;

(*b*) the nature or extent of the personal injuries resulting from that negligence, nuisance or breach of duty;

(*c*) the fact that the personal injuries so resulting were attributable to the negligence, nuisance or breach of duty, or the extent to which any one of those personal injuries were so attributable.

7(4) For the purposes of this Part of this Act any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice with respect to them, would have regarded at that time as determining, in relation to that cause of action, that (apart from any defence under section 2(1) of the Limitation Act 1939) an action would have a reasonable prospect of succeeding and of resulting in the award of damages sufficient to justify the bringing of the action."

[2] Section 7(5) and (8) of the Limitation Act 1963:—

7(5) "Subject to the next following subsection, for the purposes of this Part of this Act a fact shall, at any time, be taken to have been outside the knowledge (actual or constructive) of a person if, but only if,—

(*a*) he did not then know that fact;

(*b*) in so far as that fact was capable of being ascertained by him, he had taken all such action (if any) as it was reasonable for him to have taken before that time for the purpose of ascertaining it; and

(*c*) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such action (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances.

7(8) In this section 'appropriate advice', in relation to any fact or circumstances, means the advice of competent persons qualified, in their respective spheres, to advise on the medical, legal and other aspects of that fact or those circumstances, as the case may be."

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the whole of the normal limitation period or where it ceased to prevail during the last 12 months of that period, provided that leave of the court to proceed was obtained and that proceedings were actually begun within 12 months of the time when the claimant ceased to be in "the situation of ignorance".[3]

3. The second purpose of the Act was to provide some relief against the limitation defence to personal representatives and dependants desiring to make claims under the Law Reform Act and the Fatal Accidents Acts in respect of loss to the estate or to the dependants of an injured man who had died without bringing an action within the normal period, but who, had he survived, would have been able to take advantage of the benefits provided by section 1 of the Act, which are summarised in paragraph 2 above.

4. Under the law as it was before the 1963 Act claims in respect of personal injuries of the types described in paragraph 3 above could be brought:—

(i) as regards claims under the Law Reform (Miscellaneous Provisions) Act, within three years of the time when a right of action accrued to the deceased;

(ii) as regards claims under the Fatal Accidents Acts, within three years of the death of the deceased, provided that the latter died within three years of the accrual of the cause of action which he would have had in respect of his injury had the injury not proved fatal.

5. Section 3 of the 1963 Act adapted the principles applied under that Act to a living plaintiff to claims made after his death with the following results:—

(i) claimants of the types described in paragraph 4(i) and (ii) above continue to be able to bring claims within the periods set out there;

(ii) such claimants may sue outside those periods if:—

(*a*) the deceased was throughout his life in a "situation of ignorance" (see paragraph 2 above) in respect of the right of action which he had or would have had but for his death *and* leave has been obtained and proceedings commenced within twelve months of the death of the deceased, or,

(*b*) the deceased ceased to be "in a situation of ignorance" in respect of that right of action within twelve months of his death and leave has been obtained and proceedings commenced not later than twelve months after the deceased ceased to be in that situation.

6. The first question on which we were requested to advise (on the 27th October 1969) was what changes, if any, are required in the 1963 Act in the light of the judgments of the Court of Appeal in *Lucy* v. *W. T. Henleys Telegraph Works Company Ltd. and Others*.[4] This involves the rule referred to in paragraph 5(ii)(*a*) above.

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[3] See s. 1 of the Act.

[4] [1970] 1 Q.B. 393. See para. 23 below.

7. The second question on which we were requested to advise (on the 27th April 1970) was whether the twelve month period laid down in section 1 of the Act should be extended in the light of experience of its operation. In terms of this provision a claimant must commence his action within twelve months of his discovery of material facts of a decisive character relating to the cause of action.

8. The two specific matters referred to us relate to an area of the law in which many consider that general and far-reaching reform is required. However, we have not been asked and we have not attempted to make recommendations on the wider aspects of this branch of the law, although we shall make some reference to them at the conclusion of this advice. In particular, we have in our examination of these specific matters adopted the broad framework provided by the Limitation Act 1963 which itself largely follows the recommendations made in 1962 by the Edmund Davies Committee.[5]

9. We propose in our advice to adopt the following arrangement:—

Part 2. The question of extending the twelve months period laid down in section 1 of the 1963 Act. This is the matter referred to in paragraph 7 above.

Part 3. The question of relieving personal representatives and dependants against the rigours of the rule mentioned in paragraph 5(ii)(*a*) above. This is the matter referred to in paragraph 6.

Part 4. Consequential points arising from our examination of the two specific matters referred to us.

[5] *Report of the Committee on Limitation of Actions in Cases of Personal Injury* (1962). Cmnd. 1826.

PART 2—THE EXTENSION OF THE TWELVE MONTH PERIOD PROVIDED UNDER SECTION 1 OF THE 1963 ACT FOR LIVING PLAINTIFFS

10. We approach our consideration of this question on the basis that, in the common run of personal injury cases, little time elapses between a prospective plaintiff suffering his injuries and his appreciation that he has a cause of action in respect of them. Thus (concealed fraud and mistake apart) the limitation period is legitimately made to run from the date of the accident. The reasoning behind the three year limitation period applicable to personal injury cases (under the Limitation Act 1954) taken with the principle that plaintiffs should proceed expeditiously to enforce their legal rights, is that three years is a sufficient period for the mounting of their claims. Once, however, it is accepted that an injured plaintiff who, through no fault of his own, has remained in ignorance of his rights should be given the benefit of an extension of the normal period, which should be related to the date at which he ceased to be in ignorance—which is what Section 1 of the 1963 Act, speaking generally, provides—then it seems right that the length of that extension should be three years. We must, however, bear in mind that the Edmund Davies Committee[6] positively recommended that the extension to be given in these "ignorance" cases should be limited to twelve months, a period which they described as "normally sufficient" and one which they found to be acceptable to the Trades Union Congress and the Federation of British Employers. This recommendation was carried out in section 1 of the 1963 Act.

11. In view of the origin of the twelve months period of extension (see section 1 of the 1963 Act) we have been particularly concerned to inquire:—

(*a*) whether the shortness of this period has caused actual hardship or injustice to individual potential plaintiffs; and

(*b*) whether this period has, in practice, demonstrated itself to be insufficient to enable claims to which section 1 of the 1963 Act applies to be mounted effectively.

On these questions we sought information and opinions from a number of organisations and bodies whom we thought likely to be able to help us.[7]

12. Since it is often, but erroneously, said that an injured plaintiff has only twelve months under section 1 of the Act to discover that he has a reasonable prospect of success in a justified claim for damages[8] against a defendant, it would be helpful on the first of these questions briefly to refer to a number of cases in which the Court of Appeal has been concerned with the interpretation of the relevant provisions of the 1963 Act.[9] Three of these are decisions given *ex parte*, allowing the appeal of applicants against the refusals of judges in chambers to grant them leave to institute

6 (1962) Cmnd. 1826, para. 35.
7 See Appendix.
8 See s. 7(4), n. (1) above.
9 See s. 7(3), (4), (5) and (8) set out in n. (1) and (2) above.

proceedings.[10] In all these cases the Court emphasised that the question whether the applicant had knowledge, actual or constructive, of the relevant facts at a particular time, should be answered by ascertaining whether he himself, having regard to all the special circumstances of his case, knew, or would had he acted reasonably have known, these facts earlier than twelve months before his institution or anticipated institution of proceedings. It mattered not that opportunities to acquire such knowledge had occurred but had not been taken or that a reasonable man would have acquired knowledge. This liberal interpretation of the Act's requirements favours potential plaintiffs.

13. It has, however, been suggested to us that since these decisions were *ex parte,* they furnish little guidance as to the interpretation which the courts might adopt in a contested case. But we have also considered such a case, *Newton* v. *Cammell Laird Ltd.*,[11] where the Court of Appeal dismissed the defendant's appeal from the judge's finding in favour of the plaintiffs upon a preliminary issue as to whether or not the deceased (in respect of whose death the plaintiffs were claiming loss of dependency) knew the relevant facts prior to his death (had he been held to have had such knowledge, the claim would have been too late). The facts were that the deceased knew, approximately five months before his death, that he was dying of an industrial disease contracted in his employment and had he then sought advice, would have known that he had a reasonable prospect of succeeding in a justified claim for damages.[12] But during the last months of his life he was a dying man and was in receipt of a disability pension on account of his disease. The Court, following the cases of *Pickles* and *Skingley*,[13] upheld the judge's decision that, in all the deceased's circumstances, it would not have been reasonable to expect him to seek advice as to his rights of action.[14] Consideration of this and the earlier cases enables us to take the view, which is supported by the absence of any evidence *until now* of cases of individual hardship or injustice, that the tests laid down by section 7 of the 1963 Act are not too hard upon applicants.

14. It has, however, been suggested to us that these tests are, in fact, too lenient and that the 1963 Act should be amended so that knowledge (actual or constructive) of the relevant facts should be limited to knowledge of the applicant's injured condition and its attribution to some connection with the proposed defendant. We disagree with this suggestion because, unless knowledge extends to attribution to a wrongful act or omission on the part of a proposed defendant, there would be no justification for the institution of proceedings against him and this is a vital question for the purposes of the 1963 Act.[15]

15. On the second of the questions set out in paragraph 11 above, we received no evidence that, *until now*,[16] the twelve months allowed from the date of the

[10] *Pickles* v. *National Coal Board* [1968] 1 W.L.R. 997; *Skingley* v. *Cape Asbestos Ltd.* (1968) 2 Ll. L.R. 201; *Drinkwater* v. *Joseph Lucas (Electrical) Ltd.* Unrep. 8th May 1970.
[11] [1969] 1 W.L.R. 415.
[12] See s. 7(4) of the Act quoted in n. (1) above.
[13] See n. (10) above.
[14] Leave to appeal was refused by the House of Lords [1969] 1 W.L.R. 421.
[15] See s. 7(4), n. (1) above.
[16] See, however, paras. 17–19 below as to possible changes in the situation.

potential plaintiffs' acquisition of knowledge of the relevant facts has been insufficient for the effective mounting of their claims, *i.e.* obtaining leave to institute and actually instituting proceedings.

16. On this question, however, we must say that it is perhaps not always appreciated that applications under the 1963 Act for leave to proceed with claims must, under the relevant Rules of Court (R.S.C. O.110, r.2) be supported by an affidavit dealing in detail with the question when the applicant (or in the case of death claims the deceased) first acquired the relevant knowledge. Further, the application must be accompanied by a draft Statement of Claim setting out, with due particularity, all the relevant matters upon which the claimant relies as establishing his cause of action. The position is thus very different from what happens when a writ is issued during the normal limitation period. For this purpose the writ only requires a general endorsement—normally " The plaintiff claims damages for personal injuries caused by the negligence and/or breach of statutory duty of the defendant, his servants and/or agents." There is no need to serve the writ for one year (R.S.C. O.6, r.8) during which the plaintiff's advisers can pursue their inquiries and are under no pressure to complete his case. It is very different when resort is to be had to an application under the 1963 Act, because in such cases it is essential for the applicant and his advisers to collect the information needed to satisfy the vital condition for leave to be given—that is, precisely when and in what circumstances the applicant (or in death cases the deceased) first acquired the relevant knowledge (actual or constructive)—but also to make possibly far-reaching inquiries which will enable the applicant's case to be set out in the draft Statement of Claim. These inquiries may be prolonged and difficult. Yet, as we have said,[17] we have had no evidence that the twelve months at present allowed has so far proved insufficient.

17. It has, however, been made clear to us that situations may arise where a large number of persons discover at about the same time that, subject to the Limitation Acts, they have reasonable prospects of success in a justified claim for damages. If this occurred, such persons would have to apply for leave to commence their actions and, if granted leave, to commence them within a particular period of around twelve months. In such a situation it is clear that the whole machinery of litigation could be clogged by defendants, legal advisers and the courts being unable to cope with the spate of applications for leave and the ensuing actions.

18. It was, in fact, suggested to us that such a situation may be developing at the present time in the following circumstances. Large numbers of miners and ex-miners have in the past years been certified as and are now suffering from pneumoconiosis. The plaintiff in the *Pickles* case[18] was such a person and having obtained leave (as a result of the Court of Appeal's decision) he instituted his action against the National Coal Board. This action was settled in January of this year and during the following two months the settlement received substantial publicity in the mining industry and particularly within the trades unions of which many miners and ex-miners affected by the same disease are members. It is, therefore, possible that many potential claimants in the same position as *Pickles* would be taken to have acquired knowledge

[17] Para. 15 above.
[18] See n. (10) above.

(actual or constructive) of the relevant facts from the time when they came to know of the *Pickles* settlement. Since it was suggested to us that the numbers of these potential claimants might be in excess of 45,000, we requested the National Union of Mineworkers to ascertain for us the total number of potential claims of which the local unions concerned were aware. This they generously agreed to do with the result that we were told that up to mid-October there were only 1,650 known claims of this kind.[19] It is, of course, possible that this picture will look different by the end of the present year.

19. It should be borne in mind, also, that progress in medicine and discoveries about the relationship between health and environment may well give rise, in future, to groups of plaintiffs with identical actions for personal injuries (including diseases) at present unattributable to a wrongful act or omission. Apart from the *Pickles* case (and the facts in *Newton*[20] and *Skingley*[21] were broadly similar), one such instance has come to our notice. In that instance the number of potential plaintiffs was small, but an agreement was reached between the union and the employer under which the latter agreed to allow extra time for the making of claims.[22] We are not, however, convinced that agreements of this kind are or would often be concluded. We will revert to these possible situations in paragraph 22 below.

20. We understand that the Scottish Law Commission have recommended that, as far as Scotland is concerned, a pursuer (plaintiff) should have three years (instead of at present twelve months[23]) from the time when he acquires knowledge (actual or constructive) of the relevant facts within which to raise an action. Since, in this respect, it clearly seems desirable that the law should be the same throughout Great Britain and since a similar extension has been urged upon us by The Law Society and the employees' organisations which we have consulted, we have examined the question whether such an extension would impose hardship upon or do injustice to defendants.

21. It has been represented to us that such an extension would increase the problems which confront defendants faced with stale claims. The passage of time may involve the inability to trace witnesses, the loss or destruction of records and, for example, in the mining industry, the closing down of works and other places of employment. But similar difficulties confront, and have to be overcome by, plaintiffs who in fact carry the onus of proof and for whom such difficulties may be just as formidable as for defendants. Further, the same arguments apply in relation to claims which may be and are effectively mounted under section 1 of the 1963 Act within the twelve months period of extension there given. Such claims may be the subject of leave to institute proceedings years after the claimant has suffered his injury or left his employment. We do not think that an extension such as we are discussing would involve defendants in additional difficulties of a substantial kind.

19 This is the global number of applications for assistance in bringing claims: it does not, of course, follow that the claims are likely to succeed.

20 See n. (11) above.

21 See n. (10) above.

22 The form of agreement was that for a given period the Limitation Act defence would not be pleaded.

23 See s. 7 of the Act which provides for Scotland an extension of twelve months of the normal limitation period but the procedural requirements under the Scottish provisions of the Act are quite different from those applicable in England.

Conclusions upon Part 2

22. Our investigations did not reveal until now any case of individual hardship or of insufficiency of time for the institution of proceedings by reason of the period under Section 1 of the Act being limited to twelve months.[24] Nevertheless we feel bound to say that in our view the extension of that period to three years would not cause hardship or injustice to defendants (bearing in mind the way in which the 1963 Act generally operates)[25] so that if it were decided to make such an extension, as we understand the Scottish Law Commission recommend,[26] we would support the decision, provided that the consequential points discussed in Part 4 are met. Further, such an extension would have the advantage of coping in advance with " spate situations "[27] as well as meeting the argument urged strongly upon us by The Law Society and trades unions[28] that, having regard to the inquiries which have to be made in order to support an application for leave to institute proceedings, twelve months is not enough. We should also say that in the course of our consultations it has been represented to us that the need to apply for leave under the 1963 Act is unsatisfactory, but we believe that the reasons for which some of our consultants hold this opinion are that the present twelve months period gives insufficient time to enable cases to be properly prepared so that leave may be applied for. Although, as we have said, we had no evidence of actual cases of insufficiency of time, we are convinced that an extension of the 12 months period to three years would largely meet the contention that the need to apply for leave should be abolished.

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[24] See paras. 13 and 16 above.
[25] See para. 21 above.
[26] See para. 20 above.
[27] See paras. 17–19 above.
[28] See para. 20 above.

PART 3—LUCY v. HENLEY

23. The plaintiff in the *Lucy* case was a widow claiming damages under the Fatal Accidents Acts in respect of the death of her husband from cancer alleged to have been contracted while in the employment of the defendants some years earlier by exposure to a chemical, "Nonox S," manufactured by I.C.I. Ltd. The deceased had been employed by the defendants between 1935 and 1950 mixing chemicals, including Nonox S, in a rubber mill. In October 1964 he was found to be suffering from cancer of the bladder and he died in December 1964. In November 1965, his widow issued a writ against the defendants having obtained leave for the purposes of Section 1 of the Act of 1963. In November 1968, the defendant sought to put the blame on I.C.I. and joined them as a third party. In May 1968, the widow's solicitors learned that I.C.I. had known prior to 1949 that one of the constituents of Nonox S was liable to cause bladder cancer. In case I.C.I. should be held alone to blame, the widow applied under Section 1 of the 1963 Act for leave to add them as defendants to the action. The majority of the Court of Appeal held that, since more than 12 months had elapsed from the date of death of the deceased, the application was barred by section 3(4)[29] of the 1963 Act. The majority decision in *Lucy* demonstrates that, where the deceased remained throughout his lifetime ignorant of the relevant facts, potential plaintiffs (personal representatives or dependants) claiming damages under the Law Reform Act 1934 in respect of the deceased's estate, or under the Fatal Accidents Acts for loss of dependency owing to the deceased's death, are, assuming that the normal three-year limitation period had expired prior to his death,[30] subject to a rigid limit of 12 months from the date of death. We find it difficult to accept the minority view that the 1963 Act can be construed otherwise. But we agree that, on the majority view, the widows are "left out in the cold" after 12 months has passed from the death in respect of which they might otherwise have a claim, as are the personal representatives and other dependants of the deceased.

24. There are three ways in which the relevant provisions of the Act could be amended so as to ameliorate the position of the potential plaintiffs of the classes referred to above. These are briefly :—

(*a*) To confer a discretion, unlimited in point of time, upon the court to extend the period.

(*b*) To extend the period.

(*c*) To assimilate the position of these plaintiffs to that of live plaintiffs and provide that they have a fixed period after the time at which they discover the relevant facts within which to commence proceedings.

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[29] See para. 5 above.

[30] If it had not, then the personal representatives, apart altogether from the 1963 Act, would have the balance of that period in which to start proceedings under the Law Reform Act and they or the dependants would have a further period of three years from the death in respect of claims under the Fatal Accidents Acts.

Discretion solution

25. With regard to the possible solution described in paragraph 24(*a*), it should be mentioned that the Edmund Davies Committee, when considering the position before the 1963 Act, rejected a proposal to confer a discretion on the court to extend time. What was decisive in this rejection was uncertainty in operation and the likely divergence of judicial practice if such a discretion were conferred. The Committee indicated that the legal witnesses were almost unanimously opposed to the discretion solution. There is no reason to think that the unsatisfactory result of the *Lucy* case would mitigate this opposition.

Extended time solution

26. With regard to the solution mentioned in paragraph 24(*b*) of extending the period of time under section 3(4), it should be pointed out that :—

(*a*) It is quite impossible to specify a time from the accident or from the date of the injured person's death within which it is certain, or indeed probable, that the relevant facts will become known.

(*b*) Although any replacement of section 3(4) by a longer fixed period than 12 months after death will, of course, theoretically enlarge the numbers of plaintiffs who will be able to take advantage of it, the number of claimants who are likely actually to benefit may be small. The plaintiff in the *Lucy* case would not, for example, have profited by an extension of this period to 3 years.

(*c*) If there is a fixed period, it is thought that plaintiffs are likely to delay proceedings in this type of case until a short time before the expiration of the period, irrespective of when during the period they acquired the requisite knowledge.

Assimilation solution

27. Although the solution proposed in paragraph 24(*c*), *i.e.* the assimilation of the position of a potential plaintiff under section 3 to that of a living plaintiff, seems the most attractive, it does encounter difficulties. These difficulties arise mainly from the necessity to answer the question—whose knowledge of the relevant facts should be relevant? The considerations in regard to Law Reform Act claims are somewhat different from those in regard to Fatal Accidents Acts claims, and it is convenient to discuss them separately :—

(*a*) A Law Reform Act action is a claim which the deceased had at his death and which has, by virtue of the Act, survived for the benefit of the estate. In principle it is difficult to see how the knowledge of anyone other than the deceased can be relevant, and consequently the knowledge of the personal representatives seems to be irrelevant. It could be argued that if there is to be someone whose knowledge is relevant, then that someone should be the person who benefits from the bringing of the action. Such person may be a beneficiary under the will of the deceased or may be a creditor of the deceased or may even be the Crown. It would obviously be wholly impracticable to adopt such a solution : and it would obviously

be convenient to treat as relevant the knowledge of the personal representatives. In view of the relative unimportance in most cases of Law Reform Act claims compared with Fatal Accidents Acts claims, we consider that any anomaly involved in this proposal is less important than its practical convenience.

(*b*) In Fatal Accidents Acts claims, knowledge of the relevant facts may or may not be possessed by the personal representatives or by the dependants who sue or on whose behalf the claim is made, or by any one of these categories of persons. Further, there may well be cases where different dependants each know part but not the whole of the relevant facts. Since in Fatal Accidents Acts cases the Statement of Claim is required to particularise those persons for whom or on whose behalf the claim is made (section 4 of the Act of 1846), and since applications for leave to institute proceedings under the 1963 Act have to be accompanied by the proposed Statement of Claim, which must include those particulars (R.S.C. O.110 r.2(2)), the problem of whose knowledge should be relevant in such cases presents no practical difficulty. When leave is applied for, the court will consider the question of absence of knowledge before the relevant date in relation to each claimant and will only grant leave in respect of those claimants who satisfy the tests provided by the 1963 Act as we propose it should be.

(*c*) So far as persons under disability are concerned, we would not propose in this context any change in the provisions of section 7 of the 1963 Act.

Conclusions

28. Our conclusions are:—

(*a*) In claims arising out of death where the deceased remained throughout his life ignorant of the relevant facts, so far as the time for institution of proceedings is concerned the position of plaintiffs should be assimilated to that of live plaintiffs, *i.e.* they should have the same period within which to apply and institute proceedings.

(*b*) The period should be defined:—

(i) in Fatal Accidents Acts claims, in relation to each proposed claimant by reference to the time when that claimant discovered the relevant facts or the date of death, whichever is the later;

(ii) in Law Reform Act claims, by reference to the earliest time when any personal representative discovered the relevant facts or the date of death, whichever is the later.

(*c*) The length of the period would be 12 months or three years depending upon the decision on the question dealt with in Part 2.[31]

(*d*) A satisfactory implementation of this proposal will be dependent on the consequential points discussed in Part 4 being met.

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[31] See para. 22.

PART 4—CONSEQUENTIAL MATTERS

29. In *Lucy* v. *Henley* the deceased had not before death acquired knowledge of material facts of a decisive character; but under the present law where a deceased *has* acquired such knowledge before he died, claims in respect of personal injuries, made by personal representatives on behalf of his estate or on behalf of his dependants, in respect of the death, have to be brought—

(*a*) if the deceased acquired the knowledge more than 12 months before he died, within the periods of limitation applicable apart from the Act of 1963,

(*b*) if he acquired the knowledge within 12 months before his death, within 12 months from his acquisition of the knowledge.

30. If it should be decided to extend the 12 month period in favour of a living injured person to three years from the time of acquisition of knowledge of material facts of a decisive character, then the rationale of the 1963 Act[32] would appear to require that the 12 month period now relevant to the circumstances discussed in the preceding paragraph should also be extended to three years. But, whatever period be chosen as appropriate, our advice gives rise to certain consequential questions which call for an answer. In the following paragraphs we assume the period remains at 12 months: but the same points would arise if it were extended to three years.

31. Where the deceased remained throughout his life ignorant of the material facts, no difficulty would arise, if our advice in Part 3 were accepted. If he died within three years of his accident, his personal representatives would have the balance of the three years in which to bring a Law Reform Act action, his dependants three years from date of death to bring their Fatal Accidents Acts action. Thereafter both the personal representatives and the dependants might obtain leave to bring proceedings if they sought it within 12 months of *their* discovery of the relevant facts.

32. But our advice needs to be supplemented to meet those cases in which the deceased acquired knowledge of the relevant facts before his death. The question then to be answered is:—what effect, if any, should his knowledge have upon the right, or opportunity, of his personal representatives or dependants to bring an action?

33. This question was not one on which our advice was specifically sought. Nevertheless, it calls for an answer if anomalies are to be avoided in the implementation of our advice. We are satisfied that an answer technically sound from a legal point of view can be given: and we endeavour to give it in the following paragraph.

[32] That is to say, that the deceased had a cause of action which was not barred under the pre-1963 legislation or was still in a position to apply for leave under the 1963 Act.

34. Two situations call for consideration:—

(*a*) accrual of the cause of action more than three years before death: deceased's knowledge of the relevant facts more than 12 months before his death: his personal representatives or dependants ignorant at time of death of the relevant facts;

(*b*) as in (*a*), but deceased's knowledge arising within 12 months of his death.

In situation (*a*) we would advise that the successors' claim be barred: time has run out under the 1963 Act as well as under the 1939 Act before the injured man's death. In situation (*b*) we would advise that the deceased's knowledge be treated as immaterial and that his successors have the same rights as they would have under our recommendations if the deceased had died "in a state of ignorance".

35. We recognise that our proposal for meeting situation (*b*) is inconsistent with the principle that a deceased's successors should not be better placed than would have been the deceased had he lived. But whatever be the legal theory of the matter, in fact death does create a new situation in which hardship may be produced if the law imputes the knowledge of the deceased to his personal representatives or dependants. Justice appears to require that a reasonable opportunity should be afforded to his successors to institute proceedings which at his death were still open to the deceased. Once this point is reached, it is difficult to see why personal representatives or dependants, who are in fact ignorant of the relevant facts, should have little or no time in which to bring proceedings if the deceased knew (their time for action depending on the date of his acquisition of knowledge) but a full year from the date of their knowledge if he died ignorant. To accept such a difference is, in our view, too high a price to pay for adherence to a principle, which itself has been under attack since the passing into law of the Fatal Accidents Act 1846.

36. Accordingly we advise that, in cases where a deceased has acquired the relevant knowledge within 12 months of his death (or three years if this period should be accepted in lieu of the 12 months laid down in the 1963 Act), his personal representatives and dependants should, nevertheless, have 12 months (or three years) in which to seek leave to bring an action, from the date of death or acquisition by them of the relevant knowledge, whichever is the later. The critical factor should be either the date of death or the knowledge of the claimant, if acquired later.

(*Signed*) LESLIE SCARMAN, *Chairman.*
CLAUD BICKNELL.
L. C. B. GOWER.
NEIL LAWSON.
NORMAN S. MARSH.

J. M. CARTWRIGHT SHARP, *Secretary.*
27 *October* 1970.

APPENDIX

List of Individuals and Organisations who have been consulted

In writing and orally:—

Trades Union Congress.
National Union of Mineworkers.
National Union of Mineworkers (Durham area).
Transport and General Workers Union.
National Coal Board.
Lloyd's.
British Insurance Association.
The Law Society.

In writing:—

The Treasury Solicitor.
Confederation of British Industry.
National Union of General and Municipal Workers.
Atomic Energy Authority.
The Gas Council.
Department of Health and Social Security.
Medical Defence Union.
Medical Protection Society.

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