FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2026] CSIH 6
PD651/24

Lord President
Lady Wise
Lord Ericht

OPINION OF THE COURT

delivered by LORD PENTLAND, the LORD PRESIDENT

in the reclaiming motion

by

BARBARA MacVICAR or BUTT AND OTHERS

Pursuers and Respondents

against

ROBERT NIMMO

Defender and Reclaimer

Pursuers and Respondents: I Mackay KC, Singer (sol adv); Thompsons Scotland LLP
Defender and Reclaimer: N Mackenzie KC; Clyde & Co (Scotland) LLP

28 January 2026

Introduction

[1] As the late Mr Andrew Hajducki QC observed in his valuable work on *Civil Jury Trials* (3rd ed. 2017, para 2.12), since the abolition of the separate jurisdictions of the jury, consistorial and admiralty courts by the Court of Session Act 1830 and their transfer to the Supreme Courts of Scotland, jury trials have been part of the ordinary administration of civil justice by the Court of Session. The current position is governed by sections 9 and 11 of the Court of Session Act 1988. The effect of these provisions is that certain specified types of

action, if they are remitted to probation, shall be tried by jury (section 11). Such actions include an action of damages for personal injuries, of which the present case is an example. The generality of this rule is qualified by section 9. This provides *inter alia* that the Lord Ordinary may allow a proof in any action enumerated in section 11 if the parties to the action consent to this course or if special cause is shown.

[2] While the popularity of jury trials in civil litigation has fluctuated over the years, influenced by how successive generations of judges have interpreted the meaning of the elusive phrase "special cause", there can be no doubt that it remains today an important feature of our civil procedure in personal injury cases.

[3] In this reclaiming motion (appeal) the reclaimer challenges the Lord Ordinary's decision to allow a jury trial. He does not rely on there being special cause in the traditional sense but argues that the effect of section 22(4) of the Prescription and Limitation (Scotland) Act 1973 is to preclude a jury trial in the present proceedings. The appeal concerns the correct interpretation of that provision in the context of claims brought after the death of an injured person by his relatives.

The alleged facts

[4] The following account of the pertinent facts is drawn from the averments in the pursuers' pleadings. These, of course, have not been the subject of any evidence. For ease of understanding, we shall refer to the respondents as the pursuers and to the reclaimer as the defender.

[5] The defender previously carried on business under the name of D & W Nimmo. The pursuers aver that Mr Edward Samuel Butt was employed as a joiner by D & W Nimmo from about 1977 until about 1979. He carried out renovation work at Abbey National

premises in or around Glasgow. In the course of his employment Mr Butt was exposed to asbestos dust and fibres when materials containing asbestos, such as ceiling tiles and Asbestolux sheeting, had to be cut and fitted. The atmosphere in which Mr Butt worked was impregnated with asbestos dust and fibres. Mr Butt breathed in large quantities of the dust and fibres, which lodged in and around his lungs.

[6] Many years later, in about December 2020, Mr Butt started to develop chest pain. Medical investigation established that he had developed pleural plaques and pleural mesothelioma. He died from the effects of the mesothelioma on 28 November 2021 at the age of 68.

[7] The pursuers seek damages for the defender's alleged negligence and breach of statutory duty by allowing the deceased to be exposed in the course of his employment to harmful asbestos dust and fibres in consequence of which he developed the fatal disease.

[8] The first pursuer sues as her late husband's executrix for damages for his pain and suffering before his death and in respect of his loss of life expectancy of around 19 years. She claims under section 8 of the Administration of Justice Act 1982 for the care provided to Mr Butt by the family during his illness. In her capacity as executrix the first pursuer also sues for the cost of the funeral.

[9] Separately the first pursuer sues in her own right for damages for loss of support and non-patrimonial loss under sections 4(3)(a) and (b) of the Damages (Scotland) Act 2011 and for loss of personal services which her late husband would have provided to her had he not died prematurely (section 9 of the 1982 Act and section 6 of the 2011 Act). The other pursuers seek damages under section 4(3)(b) of the 2011 Act for loss of Mr Butt's companionship, counselling and guidance.

The statutory framework

[10] The short point in the reclaiming motion is one of statutory interpretation. To set the scene it is necessary to summarise briefly some of the provisions of the 1973 Act.

[11] Section 17 applies to actions in respect of personal injuries not resulting in death. Section 17(1) provides that the section applies to an action of damages for personal injuries other than an action to which section 18 applies. Section 18 concerns actions where death has resulted from personal injuries.

[12] Section 17(2)(a) creates a three-year limitation period. It runs from the date on which the injuries were sustained or in the case of a continuing act or omission from the date the act or omission ceased. Section 17(2)(b) provides for a relaxation of the normal three-year rule in circumstances where it was reasonable for the pursuer to have become aware at a later stage of the seriousness of his injuries and that they were attributable to the defender's breach of duty.

[13] Section 18(2)(a) creates a three-year limitation period for a claim brought following death: an action must be brought within three years of the date of death. This is relaxed by section 18(2)(b) for cases in which criteria similar to those specified in section 17(2)(b) are satisfied. In short, the three-year period can be extended to the date on which it would have been reasonably practicable for the pursuer in the action to have become aware of two facts. These facts are (i) that the deceased's injuries were attributable to an act or omission and (ii) 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.

[14] Section 22 of the 1973 Act makes provision for the interpretation of Part II and contains certain supplementary provisions. Section 22(4) contains the pivotal provision for the purposes of the appeal. It is in the following terms:

> "(4) An action which would not be entertained but for the said subsection (2)(b) shall not be tried by jury."

The defender's argument

[15] The defender argued that Mr Butt's right of action accrued by virtue of section 17(2)(b) if the 1973 Act. His right of action was the indispensable foundation for the pursuers' right of action (*McKay* v *Scottish Airways* 1948 SC 254). Had he chosen to bring proceedings before his death, Mr Butt would have had to rely on the time-bar relaxation provisions contained in section 17(2)(b) because of the lapse in time between his exposure to asbestos and the development of mesothelioma many years later. In these circumstances, the reference to "the said subsection (2)(b)" in section 22(4) could only refer to section 17(2)(b). The Lord Ordinary had misdirected himself by holding that it was the contentious issue of time-bar which the drafters of section 22(4) had sought to exclude from consideration by a jury. The correct position was that the purpose of the provision was to provide a safeguard for defenders by regarding the relaxation of the three-year limitation period as a "special cause" which made the action appropriate for proof as opposed to trial by jury. The Lord Ordinary adopted an absurd interpretation of the limitation provisions in sections 17, 18 and 22(4). The pursuers ought to have no greater rights than the deceased.

Analysis and decision

[16] The policy underlying section 22(4) can be traced back to the recommendations made in the *Report of the Committee on Limitation of Actions in Cases of Personal Injury* chaired by Mr Justice Edmund Davies, which reported in 1962 (Cmnd 1829, September 1962). The committee's membership included the late W R Grieve QC of the Faculty of Advocates (later

the Honourable Lord Grieve). The committee recommended that the normal three-year limitation period should be relaxed in cases where the claimant could not have discovered the existence of his injury or its cause at a point in time which would have allowed him to bring proceedings timeously. In paragraph 33 the committee observed that relaxation in proper cases of the three-year rule in favour of claimants must impose an additional burden on defendants. They proposed certain safeguards against abuse. In this connection the committee stated the following:

> "We are, however, conscious of the fact that those who have no training in the evaluation of evidence might not be so ready to discriminate between stale and fresh recollections. In Scotland trial by jury is still the normal practice in civil actions in respect of personal injuries. We are of the opinion that there, where a pursuer is seeking to take advantage of a relaxation of the three-year rule, that fact should be regarded as 'special cause' making the case appropriate for proof before a judge as opposed to trial before a jury." (para 33)

[17] This recommendation was enacted in section 13(1) of the Limitation Act 1963. It was re-enacted in section 22(6) of the Prescription and Limitation (Scotland) Act 1973.

[18] In its report on *Prescription and the Limitation of Actions, Report on Personal Injuries Actions and Private International Law Questions* (Scot. Law Com. No.74, 1983) the Scottish Law Commission recommended changes to the 1973 Act with the aim of simplifying the law and eradicating a number of obvious defects. Appendix A to the report contained a draft Bill with explanatory notes. The Bill remodelled the law by creating the provisions now to be found in sections 17 and 18 of the 1973 Act. Clause 22(4) as set out in the draft Bill provided that an action which would not be entertained but for subsection(2)(b) "of the said section 17 or 18" shall not be tried by jury. The explanatory note stated that the proposed subsection preserved the operation of section 22(6) of the 1973 Act. It is clear that the Commission's intention was that the policy recommended by the Edmund Davies Committee and subsequently adopted by the legislature should not be changed. In cases where claimants (whether they be the injured

person or his relatives) relied on a relaxation of the normal limitation period under the applicable statutory provisions, trial should be by a judge and not a jury.

[19] For reasons which were not explained to the court at the hearing on the summar roll, the version of the provision enacted by Parliament in the Prescription and Limitation (Scotland) Act 1984 shortened the Commission's proposed language to "but for the said subsection(2)(b)". There is no reason to suppose that Parliament intended to do anything other than give full effect to the Commission's recommendation, which made clear that the intention was to continue the existing policy of excluding from jury trial consideration of issues arising under section 17(2)(b) in a claim by an injured person or under section 18(2)(b) in a claim following the death of an injured person.

[20] The key point is that in the present case no issue under either of those provisions arises. This is not a case where the pursuers' action can only be entertained because of section 17(2)(b) or section 18(2)(b). The pursuers do not seek to take advantage of a relaxation of the three-year rule. They have brought their proceedings timeously, within three years of the deceased's death, in accordance with section 18(2)(a).

[21] The line of argument put forward on behalf of the defender has been advanced in two cases in the Outer House. In *Mitchell* v *Advocate General for Scotland* [2015] CSOH 2; 2015 SLT 92 the Lord Ordinary held that the natural construction of section 22 was that the words "the said subsection (2)(b)" refer to section 17(2)(b) in a case brought by an injured person under section 17 and to section 18(2)(b) in a case brought by the relatives of a deceased person under section 18. The reference in subsection (4) to "the said subsection (2)(b)" had to be read as a reference to "whichever subsection (2)(b) is applicable". If the intention of Parliament had been to exclude from jury trial a claim under section 18 which did not depend upon the application of section 18(2)(b), but where a claim by the deceased

would have required to rely upon section 17(2)(b), one would have expected subsection (4) to make this clear, for example by referring to "the said subsections (2)(b)" in the plural.

[22] In *McLean* v *Fairfield Shipbuilding Ltd* [2019] CSOH 33; 2019 SLT 476 a different Lord Ordinary reached the same conclusion. Claims brought by executors only arose on the deceased's death, at which time his claim transmitted to them. Their rights existed whether or not the deceased raised an action during his lifetime (section 10(1)(a) of the Damages (Scotland) Act 2011). They were therefore in a different position to the deceased. Their position was also different in that their right to claim did not expire at the same time as that of the deceased himself since the executors were given three years from the date of his death. The pursuers suing as relatives had separate claims to those advanced by the executors and their right also arose upon the death of the deceased.

[23] In the present case the Lord Ordinary took the same view as was taken in *Mitchell* and *McLean*. Time-bar was not a live issue. The pursuers did not need to rely on section 18(2)(b) to postpone the start of the limitation period. The purpose of section 22(4) was to exclude the issue of time-bar from a jury.

[24] We agree with the views expressed by the Lord Ordinary in the present case and with the approach taken to the same effect in *Mitchell* and *McLean*. We would add that we derive no assistance from the case of *McKay* v *Scottish Airways* 1948 SC 254. That case concerned the effect of a renunciation by an airline passenger in his ticketed conditions of carriage of all claims for compensation or injury for himself, his representatives and dependents. The court held that the renunciation *ab ante* had the effect of barring any claim by the passenger's relatives for his death in an accident when the aircraft crashed into a hillside in mist. In dismissing the action as irrelevant on the procedure roll, the Lord Ordinary (Lord Mackintosh), whose opinion was upheld by the First Division, observed (p. 258) that the relatives' claims

were independent and did not derive from the deceased's claim. At the same time, they were not wholly and in every sense independent of the deceased's right of action. Both rights depended on the same wrong and the fact that the deceased suffered an actionable wrong was the indispensable foundation of any right vested in the relatives. There is nothing in these observations which assists the defender in the present case. It is equally true that the pursuers' rights of action depend on the same wrong as would have been the foundation of any action that Mr Butt could have brought. To that extent the pursuers' claims may be said to have their foundation in the deceased's right of action. This is nothing to the point, however.

[25] The real point to note for present purposes is that section 18 of the 1973 Act governs all actions brought following death. It applies to claims by executors and by relatives. If there were any doubt as to the applicability of the section to executors' claims this is dispelled by subsection (3) which refers to the position where the pursuer is a relative of the deceased and has been under legal disability for a period. The provision would not specify relatives of the deceased as one category of potential pursuers unless there could be claims falling under section 18 which are not brought by a relative, such as where the pursuer is an executor of the deceased's estate.

[26] It follows that the present action is exclusively governed so far as limitation is concerned by the provisions contained in section 18 of the 1973 Act. The action has been brought timeously, within the period of three years of the deceased's death, as required by section 18(2)(a). That being so, the only sensible way in which to interpret the words "but for the said subsection (2)(b)" in section 22(4) in the circumstances of the present case is to hold that they refer to section 18(2)(b) and not to section 17(2)(b). The present action is one which the court can competently entertain without recourse to section 18(2)(b). Accordingly, there is no statutory exclusion of the pursuers' right to jury trial.

[27] Contrary to the defender's argument, there is nothing absurd about this. Parliament has taken the view over the years since 1963 that where there are issues in play concerning the extension of the three-year limitation period, such as those contained in section 17(2)(b) or section 18(2)(b), it is desirable for those issues to be addressed by a judge rather than a jury.

[28] There are no such issues in the present case. The words "but for the said subsection (2)(b)" in section 22(4) of the 1973 Act can only be sensibly interpreted as referring to section 17(2)(b) in an action brought by an injured person and to section 18(2)(b) in an action brought following the death of an injured person.

[29] For these reasons, we shall refuse the reclaiming motion and adhere to the Lord Ordinary's interlocutor of 22 April 2025 in which he *inter alia* allowed issues (i.e. a jury trial). Since the subsumption on which a jury trial is conducted is that all questions of relevancy have been disposed of and that the trial is to proceed on the basis of the pleadings, which are looked at as conclusive of relevancy, the averments in answer 6 after the general denial must be refused probation; we shall so order (*Moore* v *Stephen & Sons* 1954 SC 331, 334).

[30] We would add that some unnecessary difficulty arose at the summar roll hearing because of the statement made in the pursuers' note of argument that Mr Butt had raised and settled an action in his lifetime. At a late stage during the address to the court by the defender's counsel, senior counsel for the pursuers informed the court that this statement was incorrect. He described it as an error, for which he took responsibility as senior counsel and apologised. No such action had in fact been raised, far less settled. The court takes the opportunity to emphasise that it is important for all factual statements in notes of argument to be carefully checked to ensure that they are accurate.