

Loss, Knowledge, and Prescription: Some Problems in Scots Law

David Johnston*

I. PRESCRIPTION GENERALLY.....	107
II. LATENT DAMAGE AND DISCOVERABILITY	108
III. LATENT DAMAGE AND DISCOVERABILITY IN SCOTLAND.....	109
IV. LOSS IN SCOTLAND.....	114
V. CONCLUDING COMMENTS.....	116

Reinhard Zimmermann has made remarkable contributions to many areas of legal history and comparative law. His exploration of the Roman foundations of the civilian tradition has been extraordinarily influential in many jurisdictions.¹ Not the least of his areas of interest is the law of prescription, where his research has taken him to many different jurisdictions and analysis of many thorny problems.² He has a particular interest in mixed legal systems,³ and is a frequent visitor to some of those jurisdictions, including Scotland. That is the reason for the choice of topic for this brief Article. Its main focus is on problems which have recently arisen in the Scots law of prescription, but it can at least be hoped that they may interest those faced with similar issues in other legal systems.

I. PRESCRIPTION GENERALLY

Perhaps the most surprising feature of the institution of extinctive prescription in modern civil systems is that it owes nothing to classical Roman law. In classical Roman law there was not even a specific term for what we call “prescription”; *praescriptio* referred generally to a part of the

* © 2022 David Johnston, Faculty of Advocates, Edinburgh.

1. R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civil Law Tradition* (Cape Town, 1990).

2. F. Peters and R. Zimmermann, *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts: Verjährungsfristen* (Cologne, 1981); R. Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription* (Cambridge, 2002); R. Zimmermann and J. Kleinschmidt, ‘Prescription: general framework and special problems concerning damages claims’, in H. Koziol and B. Steininger (eds), *European Tort Law 2007* (2008), 26-78 (see esp. section D on latent damage, the issue mainly discussed in the present Article).

3. R. Zimmermann, D. Visser & K. Reid (eds), *Mixed Systems in Comparative Perspective* (Oxford, 2004).

formula granted in formulary procedure. The foundations of the civilian tradition in this instance go back only to the general thirty-year prescription introduced in the fifth century AD by a constitution of Theodosius II.⁴ In earlier periods there appear to have been rules of prescription that applied piecemeal in specific contexts, but we are poorly informed about them. For example, our main source of knowledge about the *annalis exceptio* applicable to Italic contracts is a constitution of AD 530 by which Justinian abolished it. The opening lines are worth quoting:

Such great mountains of disputes have arisen over the annual prescription applicable to Italic contracts that it is difficult to list them and impossible to explain them. First, the defence is surrounded by much technicality and difficulty and many things must concur for it to apply. Second, the period has been interpreted so broadly that it can extend to 10 years, while others have taken the view that it ought not to extend beyond five. Even in our times the variation in the views expressed by judges has had the effect that the defence has scarcely been effective in practice.⁵

While it is difficult to understand how this defence was capable of giving rise to such a variation in interpretation, and we have almost no other material with which to interpret it,⁶ the quotation raises themes that remain current in the law of prescription today. The first is the desirability yet difficulty of avoiding excessive technicality. The second is the need for certainty and predictability.

II. LATENT DAMAGE AND DISCOVERABILITY

In modern systems one of the most acute problems arises from the issue of (so-called) discoverability, that is the extent to which the claimant's lack of knowledge may defer the start of a prescriptive period. The issue may arise in cases of latent disease. It also arises in relation to latent defects in buildings and may arise more generally in cases of latent economic harm. The Roman sources provide no assistance with analysis of this question.⁷

As Reinhard Zimmermann observed in 2002, the notion that the prescriptive regime should take account of the claimant's knowledge was

4. C. Th. 4.14.1 (AD 424).

5. C. 7.40.1 pr -1a.

6. O. Lenel, 'Zur exceptio annalis Italici contractus', *SZ* 27 (1906) 71, 81 suggests that the text may have used an expression such as *per multos annos*.

7. Time generally started to run from when a claimant had *experiundi potestas*, without regard to his or her state of knowledge; for a brief account with further references, D. Johnston, 'Limitation of actions: the curious case of classical Roman law', in T. Harris (ed), *Studies in Canon Law and Common Law in Honor of R. H. Helmholz* (Berkeley, 2015), 1-14.

at that time gaining ground.⁸ It has continued to do so.⁹ Here are examples from selected jurisdictions. Reference to the claimant's state of knowledge was introduced into English law by the Latent Damage Act 1986. A three-year limitation period runs from the date on which the claimant had knowledge of (a) the material facts about the damage; (b) that the damage was attributable in whole or part to an act or omission alleged to constitute negligence; and (c) the identity of the defendant.¹⁰ In South Africa the Prescription Act 68 of 1969 provides that a debt shall not be due "until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises."¹¹ In Germany the regular prescriptive period of three years runs from the end of the year in which the cause of action accrued, but if the claimant does not know of it (and it cannot be said that he would have known unless he had been grossly negligent) a thirty-year prescriptive period applies, running from the date of the act, breach of duty, or other event that caused the damage.¹² In the Netherlands an "objective" prescriptive period of twenty years runs from the date on which the event which caused the damage occurred, and a "subjective" period of five years runs from the day after the claimant became aware of the damage and the identity of the person liable; the courts have made it clear that this does not mean that the claimant must know how the damage was caused.¹³

III. LATENT DAMAGE AND DISCOVERABILITY IN SCOTLAND

In Scotland, Zimmermann noted that the legislation "applies a discoverability test to latent damage and personal injuries."¹⁴ That was indeed the common understanding of the relevant statutory provision at the time. The ordinary rule in relation to claims for damages flowing from a defendant's tort/delict or breach of contract is that time starts to run on the date "when the loss, injury or damage occurred."¹⁵ Where the claimant "was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred," the starting

8. Zimmermann, *Comparative Foundations* (above), 92-95.

9. See e.g. the comparative survey in I. Gilead and B. Askeland, eds, *Prescription in Tort Law: Analytical and Comparative Perspectives* (Cambridge, 2020).

10. Limitation Act 1980 s 14A.

11. Section 12 of the 1969 Act.

12. BGB § 199(1) and (3).

13. Art 3:310(1) BW.

14. Zimmermann, *Comparative Foundations* (above), 93.

15. Prescription and Limitation (Scotland) Act 1973 s 11(1). The Act refers to the wrongful act as an "act, neglect or default."

date is instead the date when the creditor first became, or could with reasonable diligence have become, aware of that.¹⁶

It is immediately obvious that the drafting is narrower in scope than the provisions made in the other jurisdictions referred to above. It is evident that the starting date for prescription is not postponed until the claimant is aware of the identity of the defendant. What is less clear is whether it is postponed until the claimant knows that it was a wrongful act or omission which caused the loss. That depends on precisely what is meant by “loss, injury or damage caused as aforesaid.”

In practice, for years the Scottish courts proceeded on the basis that these words did involve awareness of a wrongful act or omission. That changed in 2014, when the Supreme Court decided a case of damage to neighboring property arising from an explosion at a factory.¹⁷ The claimant did not know what had caused the explosion or who was to blame for it. It took a lengthy public inquiry to establish that some years later. Nonetheless, the Supreme Court decided that the claimant could not rely on the discoverability provision: properly interpreted, it referred to knowledge of loss and nothing more. Here the claimant was aware as a matter of fact that it had sustained loss. It became aware of that loss on the date the explosion occurred. The date of the loss and the date of knowledge were therefore the same. The decision seems somewhat harsh to the claimant, but it can certainly be justified as a matter of statutory construction, on the grounds that the expression loss “caused as aforesaid” simply refers back to loss caused by an act, neglect, or default, but does not say that the claimant needs to be aware of the act, neglect, or default. Equally, the consequences of the explosion can hardly be described as latent damage, which may be thought to mitigate any impression of unfairness.

In cases that have followed since 2014, however, it is very difficult to avoid the conclusion that there is unfairness to the claimant. The leading case is *Gordon’s Trustees v. Campbell Riddell Breeze Paterson*,¹⁸ a case of economic loss. The claimants were landlords who wished to recover vacant possession of farmland and develop it. They instructed their solicitors to serve notice on the tenants. The notices were defective; the tenants did not vacate the land; and the landlords sued their solicitors for (among other things) the lost development value and the legal expenses that they had incurred in trying to have the validity of the notices upheld.

16. Section 11(3).

17. *David T. Morrison & Co. Ltd. v. ICL Plastics Ltd.* 2014 SC (UKSC) 222.

18. [2017] UKSC 75.

The Supreme Court held that the landlords had sustained loss on the date on which the tenants ought to have but had not vacated the land. And it held that the date of the landlords' knowledge was the same: on that date they knew that the tenants had not vacated the land.

It may be thought that on these particular facts there was no substantial unfairness in this case, since the landlords were aware of loss on the date it occurred. But wider concerns raised by this case arise from some general observations which the court made about when loss occurs and when a claimant knows of its occurrence:¹⁹

[19] . . . Thus if, as a result of a breach of contract, a person purchases defective goods, incurs expenditure or fails to regain possession of his property when he or she wished to do so, the s 11(1) clock starts when the person acquires the goods, the expenditure is incurred or when the person fails to obtain vacant possession of the property. . . . [21] . . . S 11(3) does not postpone the start of the prescriptive period until a creditor of an obligation is aware actually or constructively that he or she has suffered a detriment . . . It is sufficient that a creditor is aware that he or she has not obtained something which the creditor had sought or that he or she has incurred expenditure.

The final sentence from this quotation has been used to support the reasoning about the scope of a claimant's knowledge in a number of cases since. It will be enough to mention two: in the first, a local authority entered into a contract for construction of a housing development that was built on land above former mine workings.²⁰ Tenants of the houses fell ill owing to gas emanating from the mine workings. On the advice of consulting engineers, the development had been constructed without any gas membrane. It was found to be inherently defective, the construction expenditure was wasted, and the whole development had to be demolished. The judge held that the council did not know that anything had gone wrong until a date within the prescription period but, applying *Gordon's Trustees*, that that did not matter, because the council was aware that it was incurring expenditure on the sums spent on construction of the development. That was one of the heads of loss claimed. The judge held that objectively the council was therefore aware of the loss that it subsequently sought to recover. The same approach was taken in a second case,²¹ in which the claimant builder built part of a housing development on land that it did not own, relying on architect's plans that were

19. See §§ 19 and 21 of the judgment.

20. *Midlothian Council v. Blyth & Blyth* [2019] CSOH 29.

21. *WPH Developments Ltd v. Young & Gault LLP* [2021] CSIH 39.

inaccurate. The builder sued the architect for the loss. Here too the court decided that prescription started to run from the date on which the builder incurred the wasted construction expenditure.

These decisions both proceed on the basis set out in the quotation from *Gordon's Trustees*, that is, that a claimant knows of loss because it knows it has incurred expenditure. Three points arise.

First, the words quoted above (“a creditor is aware that he or she has not obtained something which the creditor had sought or that he or she has incurred expenditure”) are not the words used in the legislation. They are a gloss on it. Do they mean the same as the words the legislation does use? It appears that they do not. The legislation is concerned with “the loss, injury or damage” that the claimant has sustained.²² It is evident that a workable system of prescription requires to identify a single date on which loss occurred. That is all the more important in a system such as Scots law in which there is a rule that all loss flowing from the same wrongful act must be recovered in a single litigation.²³ The fact that the legislation uses the definite article in the expression “the loss, injury or damage” fits with this. But incurring expenditure does not appear to be the same as incurring “the loss”:²⁴ on the facts of *Gordon's Trustees*, the court identified the loss as the landlords’ failure to recover vacant possession and also mentioned that they had sustained loss in the shape of legal expenses incurred in an attempt to enforce the tenants’ removal from the land.²⁵ On these facts, “the loss” was surely the failure to recover vacant possession. The legal expenses were a head of loss recoverable as part of the total claim.

That view can be confirmed by reference to a well-known case with rather similar facts, *Dunlop v. McGowans*, in which solicitors failed to serve a notice adequate to terminate a tenancy on one of the contractual term dates.²⁶ The House of Lords held that “the loss, injury and damage flowing from the respondents’ negligent omission occurred at Whitsunday 1971 when the appellant, but for that omission, would have obtained vacant possession of the premises. A quantification of the loss was capable of being made at that date”²⁷ The court specifically rejected the

22. See Section 11(1), referred to above.

23. See e.g. *Stevenson v. Pontifex & Wood* (1887) 15 R. 125.

24. Nor does it appear that not obtaining something which the creditor had sought amounts to “the loss”, but the example is insufficiently developed in the judgment for this to be clear one way or the other.

25. See § 24 of the judgment.

26. 1980 SC (HL) 73.

27. *Id.* at 81.

proposition that a different date applied to each of the separate items of the loss claimed.²⁸

Second, the same reasoning applies to the other cases mentioned above, which treat construction expenditure as “the loss” and awareness of that expenditure as awareness of that loss. In short: they appear to conflate “the loss” (construction of buildings with an inherent defect) with heads of loss that are recoverable as part of the claimant’s total claim. If “loss” is understood not as referring to individual heads of loss but to “the loss” as a whole that flows from a defendant’s wrong, this problem appears to be resolvable.

Third, the Scottish Parliament has now enacted the Prescription (Scotland) Act 2018, which seeks to address this issue, among other problems thrown up the current law of prescription. The 2018 Act followed work in this area by the Scottish Law Commission, which considered the approaches taken in various jurisdictions (such as England and Wales, France, and Germany) as well as the formulation set out in the *Draft Common Frame of Reference*.²⁹ The 2018 Act introduces a new test of what a claimant must know before time starts to run: “(a) that loss, injury or damage has occurred, (b) that the loss, injury or damage was caused by a person’s act or omission, and (c) the identity of that person.”³⁰

This legislative change should resolve many of the difficulties mentioned above. For example, in the case of the factory explosion, the claimant did not know that the loss was caused by an act or omission. Even if it could be said that in circumstances as dramatic as the explosion of a building the claimant should be deemed to know that it was caused by an act or omission (*res ipsa loquitur*), it would still be likely that until a time appreciably later than the occurrence of the explosion the claimant would not know the identity of the person whose act or omission caused it. Accordingly, at least (c) and possibly also (b) in the new test would be satisfied. In the council’s case, the judge concluded that the council did not know that anything had gone wrong until a date within the prescriptive period, so (b) would be satisfied. The same applies to the builder’s case against the architect. *Gordon’s Trustees* is a more difficult case. The 2018 Act states that it does not matter “whether the creditor is aware that the act

28. *Id.*, at 80-81.

29. Discussion Paper on *Prescription* (Scot Law Com no 160, 2016), ch 4.

30. Prescription (Scotland) Act 2018 § 5(5), inserting a new § 11(3A) into the 1973 Act. This comes into force on June 1, 2022 but does not have any effect in relation to any obligations that have prescribed before that date.

or omission that caused the loss, injury or damage is actionable in law.”³¹ Accordingly, the claimant need not know that the act or omission was negligent. But he or she must know that the act or omission caused the loss. That would be a matter for evidence. If a tenant does not vacate a property following service of a notice, it does not appear to follow that his failure to do so was caused by the act or omission of the solicitor. Some tenants may simply choose to take their chances and see if, following the necessary legal proceedings, the landlords are able successfully to evict them. Although this is a less clear case and cases of this kind are likely to be sensitive to the evidence, here too it may be that the claimant can satisfy (b) and/or (c).

It is clear that the rather narrow drafting of the Scottish discoverability provision is partly responsible for the judgments referred to, in which (paradoxically for a discoverability provision) knowledge of expenditure that gives no indication that there is anything wrong with the construction work has the effect of triggering the start of the prescriptive period. The difficulties mentioned above have not arisen in other jurisdictions because, typically, the knowledge test includes knowledge of the identity of the debtor or defendant as well as knowledge of facts going beyond the bare occurrence of loss. For example, the *DCFR* provides: “The running of the period of prescription is suspended as long as the creditor does not know of, and could not reasonably be expected to know of: (a) the identity of the debtor; or (b) the facts giving rise to the right including, in the case of a right to damages, the type of damage.”³² Nonetheless, the problems discussed above appear to go wider, and to extend to the meaning of “loss.”

IV. LOSS IN SCOTLAND

There is clearly more than one option for a legal system to select in identifying when prescription starts to run when loss occurs as a result of a breach of contract or tort/delict. The relevant date might be (a) the date on which there is a risk that loss will occur, or (b) the date on which it becomes clear that that risk will definitely materialize, or (c) the later date on which the loss actually does materialize. For example: where a building has defective foundations, there is clearly a risk from the outset that the

31. § 5(5), inserting a new s 11(3B) into the 1973 Act.

32. *Draft Common Frame of Reference* III.-7:301; see the Full Edition at 1165-66 for a survey of the various European jurisdictions.

building will fail; at a certain point it may become certain that the building will fail; yet it may not do so for some time after that.

Most European systems do not regard the mere presence of risk as sufficient, even if it will definitely materialize, since they do not regard risk as loss.³³ Scots law generally appears to take the same view of the meaning of “loss”: that it is only loss when it has occurred. A clear example is provided by a case already mentioned, *Dunlop v. McGowans*. The House of Lords held that the landlord’s loss occurred on the date on which he was unable to recover possession of his property.³⁴ The landlord clearly sustained actual loss on that date.

Some more recent cases have muddied the waters. In one case concerned with a claimed breach of contract by a bank, which led its customer to suffer loss as a result of liquidity problems, the issue was when the customer’s loss had arisen.³⁵ The actual decision, that the customer sustained loss immediately on the withdrawal of his banking facilities, is unexceptionable. But the analysis is blurred by other comments made by the judges in the case.

Take the following: “. . . where loss is inevitable, as a matter of law, in almost all cases, loss will already have occurred. It is, put simply, quantifiable future loss. This is illustrated by *Dunlop v. McGowans*, where loss would have been calculable from the point at which the solicitors had failed to serve a notice to quit. It is clear also from *Beard v. Beveridge Herd & Sandilands WS*.”³⁶ But this is not what the case of *Dunlop v. McGowans* decided: as already noted, it held that prescription ran from when the landlord sustained actual loss. That was when he was unable to recover possession (i.e. the date on which the notice was due to take effect). *Dunlop* provides no basis for saying that loss that would inevitably occur in the future is “loss” for purposes of prescription. Nor does the case of *Beard*: it held that there was actual loss at the date when a contract with a defective rent review clause was concluded.³⁷ That was not “quantifiable future loss” or loss that was inevitable: it was simply loss.

In the same case one of the judges thought it helpful to examine the meaning of the word *damnum*³⁸ as well as the concept of *damnum infectum*

33. For a summary, see Gilead and Askeland (above), 36-41.

34. *Dunlop*, above, at 79 and 81.

35. *Kennedy v. Royal Bank of Scotland plc* 2019 SC 168.

36. *Kennedy* at § 20.

37. 1990 SLT 609.

38. It is a curiosity of Scots law that the courts persist in referring to the statutory expression “loss, injury or damage” as *damnum* and “act, neglect or default” as *injuria*, in spite of the fact that neither Latin word appears in the legislation. This appears to go back at least to *Dunlop v.*

in Roman law.³⁹ The remedy for *damnum infectum* enabled the proprietor of a property threatened by the precarious state of a neighboring property to obtain an order for security against the contingency that he suffered loss if the neighboring property collapsed. It is not obvious what relevance this could have to the date on which a claimant sustains loss as a result of breach of contract. More specifically, given that the remedy for *damnum infectum* in Roman law was by definition available before loss had occurred, it clearly cannot assist with the exercise of identifying when loss flows from a defendant's conduct amounting to a tort/delict or breach of contract. In short: this passage is unhelpful and liable to mislead because it obscures the correct analysis of loss as something which has occurred.

V. CONCLUDING COMMENTS

In summary: the analysis of prescription of latent damages claims in Scots law would be assisted by two things. Both relate to clarity about the meaning of loss. That is crucial in this context.

First: while, as mentioned already, there are options that different legal systems may exercise differently in relation to the meaning of loss, for consistency with the leading decided cases it would be desirable that it be recognized that loss occurs only when it is certain, not when it is only in prospect, a risk or a possibility, however serious.

Second: greater analytical clarity is required in identifying the loss that is relevant. Here what is required is an appreciation that “the loss” of which a claimant must become aware for prescription to begin running refers not to individual heads of loss but to “the loss” as a whole, which flows from a defendant's wrong. That loss will be made up of a number of different elements; for example, in the case of buildings that have to be demolished following discovery of a latent defect, it is likely to include the costs of site investigation, demolition, and expenses that may be incurred in rehousing tenants whose occupation has to be terminated. All of these are heads of loss and all occur at different times. That is why what is required is, as explained in *Dunlop v. McGowans*, to focus on “the loss” and not on the individual items of loss.

More generally, since these are difficult issues, they benefit from any historical or comparative assistance that can be brought to bear: in short, precisely the sort of analysis that we associate with the work of Reinhard

McGowans 1979 SC 22, 31. It is difficult to see how this usage assists in clarity of thought or reasoning.

39. *Kennedy* at §§ 40-42.

Zimmermann. While some of the issues raised here arise from peculiarities of the drafting of the Scottish legislation, others occur in other legal systems, notably the need to focus clearly on the concept of loss and the date of its occurrence. David Daube brought that issue clearly into focus in Roman law in putting to rest the notion that *damnum* referred to physical damage as opposed to loss suffered by the claimant.⁴⁰ The value of the comparative method is also particularly clear in issues of this kind. In Scotland, it is to be hoped that the very recent legislative amendments, which were inspired by an examination of the approaches taken in other jurisdictions and the lessons that can be learned from them, will succeed in resolving the most challenging problems with which the courts have recently had to grapple.

40. D. Daube, 'On the use of the term *damnum*', in *Studi Solazzi* (Naples, 1948), 93-156.