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**ON THE EXTINGUISHING PRESCRIPTION OF PERSONAL INJURY CLAIMS IN
SOUTH AFRICA**

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Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this minor dissertation conforms to those regulations.

Caitlin Le Roith

13 February 2023

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*ON THE EXTINGTIVE PRESCRIPTION OF PERSONAL INJURY
CLAIMS IN SOUTH AFRICA*

I INTRODUCTION

‘[W]hat is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?’¹

This question was posed by Oliver Wendell Holmes, then Justice of the Massachusetts Supreme Judicial Court, during his well-known address entitled *The Path of the Law*, which he delivered at the dedication to a new hall at Boston University’s School of Law on the 8th of January 1897.² The deprivation of rights that Holmes is referring to is the one which occurs as a consequence of what is known in our legal system as the law of extinctive prescription³ — the set of legislatively and judicially-created rules that regulate the terminative impact of the passage of time on certain rights,⁴ claims, actions or, to use the language of the South African Prescription Act, ‘debts’.⁵ In broad terms, extinctive prescription operates to prevent a person from enforcing their claim, if the legal proceedings aimed at its enforcement were instituted after a particular period of time had passed. In the South African prescription regime, should action be instituted

¹ Oliver Wendell Holmes ‘The path of the law’ (1897) 10 *Harvard Law Review* 457 at 476.

² The speech was later published in the *Harvard Law Review* (ibid) and occupied the third position in the list of the most-cited law review articles compiled in Fred R. Shapiro and Michelle Pearse ‘The most-cited law review articles of all time’ (2012) 110 (8) *Michigan Law Review* 1483 at 1489.

³ Legal systems that were influenced by the Romanistic legal tradition, like South Africa, refer to this area of law as the law of ‘extinctive prescription’, while in other jurisdictions, like the United Kingdom, it is called the law of the ‘limitation of actions’. Alternative labels have been proposed, for example, by Reinhard Zimmermann. See Reinhard Zimmermann *Comparative Foundations of a European Law of Set-Off and Prescription* (2009) at 69–71 and 75 and Max Loubser *Extinctive Prescription* 2 ed (2019) at 1 and 19 for a compelling argument that a more fitting title would be ‘liberative prescription’ because the prescription rules effectively *liberate* the duty-bearer from their obligation to perform.

⁴ Tyler T. Ochoa and Andrew Wistrich ‘The puzzling purposes of statutes of limitation’ (1997) 28 *Pacific Law Journal* 453 at 454.

⁵ Chapter 11 of the Prescription Act 68 of 1969 (Hereinafter referred to as ‘The Prescription Act’).

following the lapse of the applicable prescription period, it is the defendant⁶ to that action who is granted the power to raise prescription at the stage of pleadings and to rely on it as a type of ‘procedural defense’ to that action.⁷ The pernicious consequences that this mechanism has for valid and well-substantiated claims, which are in the process of being enforced, should cause us to not take the call for adequate justification lightly.

In this dissertation, and with Holmes’ question as inspiration, I take a closer look at how South African law regulates the prescription of a particular category of claims, namely, claims for personal injury — a subset of delictual claims that involve the infliction of harm to the victim’s person — against the backdrop of the regime’s dominant justifications. The provisions of the Prescription Act state that a civil claim or ‘debt’ may be extinguished if the holder thereof does not initiate its enforcement by way of legal proceedings within the prescription period that applies to it.⁸ Depending on the type of claim, the prescription periods provided for in the Act range from three years to thirty years,⁹ the latter being the longest

⁶ Regarding the terminology I use in this dissertation, ‘defendant’ should be understood to refer to the ‘debtor’ under the Prescription Act, the person against whom the claim lies. So, while the Prescription Act uses the labels ‘creditor’ and ‘debtor’, I will also use ‘plaintiffs’ and ‘defendants’; and ‘victims’ and ‘wrongdoers’, depending on the context (in particular, what stage of the process I am discussing).

⁷ On one account in the commentary, the operation of extinctive prescription, under the Prescription Act, gives rise to a ‘positive substantive right or defense, with a correlative negative effect on the creditor’s right.’ See Loubser op cit note 3 at 9. The construction will be set out more fully in Part II(c)(iv) below.

⁸ Chapter III governs the extinctive prescription of ‘debts’. While ‘debt’ is not defined in the Act, it has commonly been taken to denote the duty component of the legal relationship created by the law of obligations, with the corresponding right constituting an ‘asset’. See: Loubser op cit note 3 at 2; *Oertel en andere NNO v Direkteur van Plaaslike Bestuur en andere* 1983 (1) SA 354 (A) at 370A-C.

⁹ Section 11 of the Prescription Act sets out the prescription periods for each type of debt. A thirty-year period applies to debts secured by a mortgage bond, judgment debts, debts arising from taxation, and certain debts owed to the state (section 11(a)). A period of fifteen years applies to a debt arising out of money loaned or land sold or leased by the state (section 11(b)). A six-year prescription period is applicable to debts arising from bills of exchange, notarial contracts or other negotiable instruments (section 11(c)). Both section 11(b) and (c) provide that should the debt in question fall into a category in section 11(a), which attracts a longer prescription period, then the longer period will apply. The shortest prescription period of three years applies to ‘any other debt’, which does not fall into the other categories.

prescription period and the one which was provided for in the rule from which our law of prescription originates: the Roman *praescriptio longi temporis*.¹⁰ So, despite initially attracting a thirty-year prescription period under the common law, certain claims, like those arising from personal injury,¹¹ are subject to the shortest prescription period of three years.¹² This is a significant development in the rules as they existed at common law and is generally considered to be a positive one. Shorter prescription periods, some commentators argue, are more suitable for ‘times in which history appears to have “accelerated” in an unprecedented manner’.¹³

Another noteworthy and (mostly) welcomed development in these rules is through the introduction of what is called a ‘knowledge requirement’ or ‘discoverability criterion’, which is aimed at ensuring that extinctive prescription does not run against those who are unaware of certain facts about their claim or have not yet discovered the cause of action upon which that claim is based.¹⁴ In the Prescription Act, this takes the form of the enquiry in terms of section 12(3) into when the prescription period will be deemed to have commenced. The general rule is that prescription begins the moment the ‘debt is due.’¹⁵ However, there are two sets of circumstances where the commencement will be delayed. The first is where the debtor ‘wilfully prevents the creditor from coming to know of the existence of the debt,’¹⁶ causing the onset of the prescription period to be delayed until the creditor becomes so aware. The second set of circumstances relate to what has become known in our legal system as ‘the knowledge requirement’.¹⁷ In this regard, section

¹⁰ For an overview of the Roman-Dutch law, see L. E. Krause ‘The history and nature of acquisitive prescription and of limitation of actions in Roman-Dutch law’ (1923) 40 *SALJ* 26.

¹¹ It is well-established that delictual claims are not covered by any of the categories listed in section 11(a) – (c) and therefore fall within the scope of “any other debt” in section 11(d) of the Prescription Act. See Loubser op cit note 3 at 116.

¹² Section 11(d) of the Prescription Act.

¹³ Reinhard Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) at 770; see also N.H. Andrews ‘Reform of limitation of actions: The quest for sound policy’ (1998) 57 *The Cambridge Law Journal* 589 and Ochoa and Wistrich op cit note 4.

¹⁴ Zimmermann *Comparative Foundations* op cit note 3 at 92.

¹⁵ Section 12(1) of the Prescription Act.

¹⁶ Section 12(2) of the Prescription Act.

¹⁷ Loubser op cit note 3 at 168; Zimmermann *Comparative Foundations* op cit note 3 at 92-5.

12(3) provides that the debt will not be deemed to be due (and the running of the prescription period will therefore not commence) ‘until the creditor has *knowledge of the identity of the debtor* and of *the facts from which the debt arises*’¹⁸ and that they will be deemed to have this knowledge if they ‘could have acquired it by exercising *reasonable care*.’¹⁹

While Holmes’ question has received some attention by courts and legal scholars over the years, the law of extinctive prescription – despite being widely regarded as a regime ‘of enormous practical importance’²⁰ – is not frequently subjected to rigorous theoretical analysis.²¹ Max Loubser, one of the few contributors to the literature on the South African law in this regard, attributes this lack of engagement to prescription being ‘superficially and incorrectly perceived as a technical and theoretically unrewarding area of statute law.’²² Nevertheless, concerns about the severity of the consequences of extinctive prescription, its potential for abuse by defendants and for causing injustice to plaintiffs seeking to vindicate their rights in court, and its possible implications for constitutional rights and values, are often raised by judges, legal scholars and law reform organizations.²³ The plaintiffs which are most commonly highlighted as the focus of these concerns are those which are economically vulnerable, lack access to resources, and have been shafted by a system that deprives them of the necessary legal and institutional literacy required to seek advice, representation and ultimately assert their rights in court.

¹⁸ Section 12(3) of the Prescription Act [my emphasis]. This amounts to ‘actual knowledge’ of the debtor’s identity and the facts giving rise to the debt. See *Macleod v Kweyiya* 2013 (6) SA 1 (SCA) para 9.

¹⁹ Section 12(3) of the Prescription Act [my emphasis]. This is what is referred to as ‘constructive knowledge’ in terms of this section. See *Macleod* supra para 9.

²⁰ Zimmermann *Comparative Foundations* op cit note 3 at 65. See also Ochoa and Wistrich op cit note 4 at 454; and Loubser op cit note 3 at 1.

²¹ Ibid; see also: Holmes op cit note 1 at 476.

²² Loubser op cit note 3 at 1.

²³ For example, in the South African Law Reform Commission’s Revised Discussion Paper entitled ‘Harmonisation of Existing Laws Providing For Different Prescription Periods’ (2 December 2017).

(a) *Roadmap*

This dissertation has five parts. In this part, I clarify some of the concepts and terminology that I use throughout, address the question of why I have chosen to focus on personal injury claims and introduce the case of Mr. C,²⁴ a personal injury claimant, whose experiences mirror that of many others in this country and highlight this regime's potential for injustice in the context of such claims. Before we can assess the justifications for subjecting personal injury to prescription periods and for the manner in which this process takes place in the South African context, it is important to set out the nature and particular operation of the rules regulating such claims in our law. This is the focus of Part II, in which I examine the features of extinctive prescription under the Prescription Act, against its historical backdrop, and develop an account of its character and function. This account focuses on three aspects: (i) the consequences of the running of prescription, namely, that it grants a defendant a broad, discretionary legal power over the plaintiff's ability to enforce their claim;²⁵ (ii) the three-year prescription period applicable to personal injury claims;²⁶ and (iii) the rules governing the commencement date of the prescription period and, in particular, what has become known as 'the knowledge requirement'.²⁷

It is at this point that we are better-placed to consider the reasons offered in support of such a regime, which broadly aims to respond to the perceived need to address 'the obfuscating power of time'.²⁸ Taking a closer look at the dominant justifications for extinctive prescription is the subject of Part III, which sets out the most frequently-mentioned policies and purposes that this regime is directed

²⁴ The 'case of Mr. C' is a slightly altered version of the facts of *Coboza v MEC for Health, Western Cape* (12082/2016) WC ('*Coboza I*') and *MEC for Health, Western Cape v M C* (1087/2019) [2020] ZASCA 165 (10 December 2020) ('*Coboza II*').

²⁵ In this account, I draw on the work of Loubser op cit note 3 and John Gardner's framework of rights that he sets up in *From Personal Life to Private Law* (2018) and *Torts and Other Wrongs* (2019).

²⁶ Section 10(1) read with section 11(d) of the Prescription Act.

²⁷ Section 12 of the Prescription Act; the 'knowledge requirement' is contained in section 12(3). ***

²⁸ Zimmermann *The Law of Obligations* op cit note 5 at 768 citing Bernhard Windscheid & Theodor Kipp *Lehrbuch des Pandektenrechts* 9 ed (1906) § 105.

at serving. These include: (i) avoiding the litigation of what are referred to as ‘stale claims’; (ii) encouraging diligence on the part of plaintiffs and the swift enforcement of claims; and (iii) promoting certainty and repose for defendants. Many of the dominant justifications draw on considerations of fairness and justice, particularly when highlighting the possible consequences that litigating and adjudicating claims many years after they arose has on the defendants to those claims. For example, mention is often made of the important protection that extinctive prescription offers to defendants who may be confronted with difficulties of proof owing to a lengthy delay in the institution of litigation;²⁹ or those who may have reasonably relied on the appearance created by the plaintiff’s ‘voluntary inaction’ in enforcing their claim, that they no longer intended to do so.³⁰ Aside from the potential injustice to the defendant to a ‘stale claim’, a tendency displayed in many of the exercises in justifying this regime is an acceptance that the lapse of time has in a sense polluted the claim, giving it some inherent unjust quality. This view is reflected in statements to the effect that claims which lie dormant for a long period of time ‘have more cruelty than justice in them.’³¹

On the strength of these justifications, the extinctive prescription regime has been hailed as ‘one of the most important and beneficial legal institutions’³² and is said to ‘[exemplify] the tension between certainty and justice ... a feature of any developed legal system.’³³ Upon closer inspection, however, the justifications provided for extinctive prescription reveal themselves to be inadequate and rather misleading. A critique of the dominant justifications for extinctive prescription is the subject of Part IV, which focuses specifically on whether they are able to account for the three aspects of the extinctive prescription rules that are discussed

²⁹ For example, see Zimmermann *The Law of Obligations* op cit note 13 at 768; Zimmermann *Comparative Foundations* op cit note 3 at 63; Andrews op cit note 13 at 594; Ochoa and Wistrich op cit note 4 at 471-2.

³⁰ Loubser op cit note 3 at 9.

³¹ *R.B. Policies at Lloyd’s v Butler* [1950] 1 KB 76 at 82 quoting Best CJ in *A’Court v. Cross (a)* (1825) 3 Bing 329 at 332.

³² Zimmermann *The Law of Obligations* op cit note 5 at 768 referring to Friedrich Carl von Savigny *System des heutigen römischen Rechts* vol. V (1840 sqq.) at 272.

³³ Loubser op cit note 3 at 4.

in Part II. In the final substantive part, Part V, I revert to the original question: what is the justification for depriving a personal injury victim of their claim as a consequence of the lapse of three years? I provide a possible answer, which avoids relying on abstract (and undefined) values like ‘justice’ and ‘certainty’, and is one which is able to account for the nature and operation of the South African law in this regard. Part V also positions this account of extinctive prescription against the myriad of legal, moral and constitutional reasons that would support allowing well-founded personal injury claims, even ones which are instituted some time after they arose, to proceed.

In short, I suggest that the rules governing the extinctive prescription of claims for personal injury — which are peculiar in that (i) they are subject to the very short prescription period of three years and (ii) there is an increased likelihood, owing to the nature of these claims, that the person who has a claim is unaware of that fact for many years after it arises — serve to provide defendants with the ability to control the extent of their liability, to determine whether the adjudication of the claim against them takes place and, ultimately, to decide whether they will endure the potentially substantial financial implications that arise should that claim be enforced. The South African law regulating the extinctive prescription of personal injury claims, on the account that I propose in this dissertation, has become less about ‘protecting defendants from very late claims’,³⁴ and more about empowering defendants to thwart what would otherwise be well-founded claims, which have been brought by plaintiffs after the prescription period has lapsed. Often, these plaintiffs, through no fault of their own, did not appreciate the full extent of their legal powers or know that they had a claim at all for many years after it arose. It is the experiences of this category of plaintiffs that reveal the limitations of the accepted justifications for extinctive prescription and should cause us to revisit Holmes’ question, well over a century later.

³⁴ Michael A. Jones *Limitation Periods in Personal Injury Actions* (1995) at 1 (1.01).

(b) A note on concepts and terminology

Before we begin, it is important to make some conceptual and terminological distinctions and clarifications, to avoid any confusion, as many of the terms used in this discussion have multiple meanings. These include the distinction between extinctive prescription and acquisitive prescription and a clarification of what I mean when I talk about ‘rights’, ‘duties’, ‘claims’ and ‘debts’.

(i) Extinctive prescription and acquisitive prescription

Most jurisdictions recognise two forms of prescription, acquisitive prescription and extinctive prescription, which are treated as conceptually and operationally distinct.³⁵ In a more general sense, ‘prescription’ is taken to refer to the ‘process by which legal rights are acquired, weakened or lost as a result of persistent action or inaction over a period of time.’³⁶ Acquisitive prescription, on the one hand, is understood to involve the *acquisition* of certain rights after the lapse of a period of time in which certain conditions persist. In this regard, ownership rights will be acquired by a person who possesses a thing ‘openly and as if he were the owner thereof for an uninterrupted period’ of thirty years.³⁷ Similarly, a servitude may be acquired or extinguished based on whether it been exercised for a period of thirty years.³⁸ Extinctive prescription, on the other hand, is thought to bring about the termination of rights.

The two forms of prescription also differ in terms of the categories of rights that they implicate. Staying true to its common law roots, the South African

³⁵ The Prescription Act is organised in this manner, with each form dealt with in a separate chapter. Chapter I contains the requirements for the acquisition of ownership by prescription and Chapter II regulates the acquisition of servitudes.

³⁶ Dale Hutchison and François du Bois ‘Contracts in general’ in François du Bois (ed) *Wille’s Principles of South African Law* 9 ed (2007) 733–887 at 851.

³⁷ Section 1 of the Prescription Act.

³⁸ In this regard, a servitude will be acquired where a person openly and as if they were entitled to do so, ‘exercised the rights and powers which a person who has a right to such servitude is entitled to exercise’ (section 6 of the Prescription Act), whereas a servitude will be extinguished where a person has failed to exercise those rights for the duration of the prescription period (section 7).

prescription regime regulates the prescription of real rights,³⁹ limited real rights⁴⁰ and ‘debts’. The nature of the impact that the regime is understood to have on these rights differs between the two forms, and this is often said to be the basis for the distinction between them, as their respective titles suggest. Although drawing a distinction between the two forms on these lines has the potential to mislead on both a practical and theoretical level,⁴¹ and represents a departure from the nature of the rules that existed at common law, the historical progression of the law of prescription in all jurisdictions, including our own, demonstrates a clear tendency towards structuring the regime in this manner. For this reason, and to avoid confusion, my discussion will conform with this structure. However, while the ordinary meaning of ‘prescription’ denotes both forms, in this dissertation I use ‘prescription’ to refer only to extinctive prescription. Should the context require, I will refer to both forms as ‘prescription, in general’.

(ii) Rights, claims and debts

The language of the Prescription Act suggests that what is lost following the running of the prescription period is a ‘debt’.⁴² Elsewhere, it is described as a

³⁹ Chapter I of the Prescription Act 68 of 1969. See section 1 which provides that a person who possesses a thing ‘openly and as if he were the owner thereof for an uninterrupted period of 30 years’ will acquire ownership rights in respect of that thing.

⁴⁰ Sections 6 and 7 of the Prescription Act deal with the acquisitive and extinctive prescription of servitudes.

⁴¹ I use the language of the conventional categorisation of acquisitive prescription and extinctive prescription for the reader’s ease of reference and to conform with the terminology employed by the Prescription Act, as the law currently in force in South Africa. It should not be taken as support for the view that organising prescription regimes in this manner is logical or useful, but this is not integral to the central arguments made in this dissertation. The account of the nature of extinctive prescription in South African law that I put forward here removes this ground for distinction, as it frames this process as one that results in something being acquired by the person who the claim lies against (something that resembles a defence), as opposed to something in the hands of the person with the right to claim being lost or terminated. This will be discussed in greater detail in Part II.

⁴² Section 10(1) of the Prescription Act.

‘claim’ or an ‘asset’⁴³ or an ‘action’.⁴⁴ And it is not uncommon for extinctive prescription to be referred to as a mechanism that leads to the loss of a ‘right’ in the hands of a plaintiff.⁴⁵ The temptation to use the language of ‘rights’ quite loosely in the context of both forms of prescription is understandable, particularly if one’s goal is to emphasize the drastic nature of the effect that both forms have on a person’s legal position – be it as a party to a transaction with another party, in relation to a piece of land, or as the holder or user of a servitude. However, using the terminology of ‘rights’ in the context of extinctive prescription under the Prescription Act has the potential to generate confusion about the precise consequences of these rules. When referring to the acquisitive prescription of rights of ownership and servitudes, the label ‘rights’ seems more appropriate, as an entirely new legal relationship is created between the person acquiring the full set of entitlements that an owner or servitude-holder would ordinarily have and the object of those entitlements. In the context of civil claims or ‘debts’, this temptation may lead one astray.

Ultimately, this concern arises because of the way in which the concept of a ‘right’ attracts various different constructions, particularly when it comes to the object of extinctive prescription. A lot of energy has been spent trying to discern what it is that is being extinguished – whether it is the substantive, underlying, personal right of a creditor that the debt seeks to vindicate;⁴⁶ or whether it is the procedural right of action or the right to bring an action.⁴⁷ The framework of rights that John Gardner constructs, in his work on the law of torts and features of private law

⁴³ In a looser sense, Zimmermann endorses these labels when he describes extinctive prescription as a measure that ‘effectively amounts to an act of expropriation: a claim is an asset within the property of the creditor which largely loses its value if it can no longer be pursued in court.’ Zimmermann *Comparative Foundations* op cit note 3 at 63.

⁴⁴ For example, in legal systems where prescription rules bear the label of the law of the ‘limitation of actions’, this view is prevalent.

⁴⁵ See Loubser op cit note 3 at 13-14, where he describes the inseparability of the plaintiff’s ‘right of process’ and their ‘substantive right which the process is about’. Similarly, in ‘The Path of the Law’ Holmes laments the deprivation of a person’s ‘rights’ as a consequence of the lapse of time. Holmes op cit note 1 at 476.

⁴⁶ Loubser op cite note 3 at 9.

⁴⁷ Ibid.

more generally, serves to disaggregate the various components of a private law ‘right’. This framework can assist us in disambiguating the concept of a ‘right’ and is useful when seeking to understand the nature and effect of extinctive prescription.⁴⁸ In the context of a claim for personal injury, the first understanding of ‘right’ is as the victim’s ‘primary right’ not to be harmed by the culpable and wrongful conduct of the wrongdoer in the first place. Once that primary right is violated, the second understanding of ‘right’ is the victim’s ‘secondary right’ to have that violation repaired.⁴⁹ The third understanding of ‘right’ that emerges from Gardner’s framework is, then, the victim’s ‘tertiary right’ to bring an action to enforce the secondary right of repair against the wrongdoer, or to hold them to their duty of repair.⁵⁰ In short, this tertiary right – also referred to as the ‘power to sue’ – is the legal power to whether the wrongdoer’s duty of repair ‘is concretised and enforced through the courts, with a consequent duty on the courts to assist, when that power is validly exercised through the issue of proceedings.’⁵¹

The alternative account of extinctive prescription that I develop draws on this framework,⁵² but for the purposes of terminological clarity, I will avoid using the term ‘right’ in a more general sense, as the object of extinctive prescription. It is only when developing my account of the nature and operation of the extinctive prescription, I will employ the label of ‘rights’, but I will be clear about which of the three understandings of ‘right’ I am referring to. It is also simpler to retain, as

⁴⁸ Gardner *From Personal Life* op cit note 3; Gardner *Torts* op cit note 3; and Larissa Katz & Matthew A. Shapiro ‘The role of plaintiffs in private law institutions’ (unpublished draft of October 1, 2021) *Private Law and Practical Reason: Essays on John Gardner's Private Law Theory* (Haris Psarras & Sandy Steel eds., Oxford University Press, 2022 Forthcoming) [Rutgers Law School Research Paper](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3956085) Accessed: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3956085 at 1.

⁴⁹ In the personal injury context, this is often referred to as the right to receive compensation or payment of reparative damages.

⁵⁰ Gardner *From Personal Life* op cit note 3 at 207-209. This is the correlative duty of the plaintiff’s secondary right of repair in respect of the violation of their primary right. On this logic, the defendant’s ‘primary duty’ would be the duty to not violate the plaintiff’s primary right in the first place.

⁵¹ Gardner *Torts and Other Wrongs* op cit note 3 at 85-6. This understanding of ‘right’ is adopted when the phrases ‘right of action’; or ‘right to bring a claim’; or ‘right to sue’ are used.

⁵² In Part II(c)(v), I begin laying the groundwork for the account and it is fleshed out more fully in Part V.

far as possible, the language of the Prescription Act. As such, I will for the most part refer to the object of extinctive prescription as a ‘claim’ or ‘debt’.

(c) Why personal injury claims?

It is evident from a mere cursory glance over the provisions of the Prescription Act that claims for personal injury are treated differently from rights of ownership, servitudes and other civil claims. When it comes to the length of the prescription period, section 11(a) subjects debts which are secured by a mortgage bond, judgment debts, debts arising from taxation, and certain debts owed to the state to a thirty-year period. Section 11(b) provides that a period of fifteen years applies to a debt arising out of money loaned or land sold or leased by the state. In terms of section 11(c), a six-year prescription period is applicable to debts arising from bills of exchange, notarial contracts or other.⁵³ The shortest prescription period of three years applies to ‘any other debt’, which does not fall into the other categories.⁵⁴ These include debts arising from the commission of a delict or a contractual relationship.⁵⁵

In addition to attracting the shortest prescription period in many jurisdictions,⁵⁶ personal injury ‘cases have tended to raise particular problems of their own, for which special provisions has had to be made...[which] explains why the law has been amended in significant respects’⁵⁷ over the years. One such amendment is to the flexibility of the criteria to determine when the prescription period begins running, which present particular difficulties to personal injury claimants.

The problems that arise when it comes to personal injury claims have therefore not gone unnoticed. While it may surprise some to find out that there is so much

⁵³ Sections 11(b) and (c) both state that should the claim in question also fall into one of the categories listed in section 11(a), which attracts a longer prescription period, then the longer period will apply.

⁵⁴ Section 11(d) of the Prescription Act.

⁵⁵ Loubser op cit note 3 at 116.

⁵⁶ See Zimmermann *Comparative Foundations* op cit note 3.

⁵⁷ Stephen Todd *Limitation Periods in Personal Injury Claims* (1982) at 6.

law on this subject, there is enough to fill entire books.⁵⁸ Across jurisdictions, the sheer ‘volume of caselaw reflects...[the regime’s] importance to personal injury litigation’.⁵⁹ The amendments to the laws that have taken place to respond to the challenges these claims present have unfortunately created problems of their own and ‘this too may have contributed to the volume of litigation.’⁶⁰ In the South African context, the high number of cases, a significant portion of which made their way to our highest courts, suggest that our legal system is not immune to the challenges presented by personal injury claims to a regime that – according to the courts, the vast majority of legal scholars and commentators, and the lawmakers themselves – purports to ensure the smooth and efficient operation of the legal system in which it exists.⁶¹

In addition to the challenges that personal injury claims pose when it comes to the aims and objects of extinctive prescription, the situation that many victims of personal injury find themselves in means that their ability to exercise their right of access to the court and to obtain redress for the harm suffered is substantially qualified, as it depends on that victim’s access to resources and level of legal literacy. The prevailing interpretation of the Prescription Act, section 12(3) to be precise, intensifies these challenges. To appreciate this point, it is useful to consider the case of Mr. C.

(d) The case of Mr. C

Consider the following scenario.⁶² On the 5th of May 1998, Mr C was admitted at Somerset Hospital, a public hospital, for a procedure to drain a rectal abscess which had developed, had become septic and was causing him significant pain. In

⁵⁸ Jones op cit note 34, preface.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ See, for example, Loubser op cit note 3 at 23 – 24; Zimmermann *Comparative Foundations* op cit note 3 at 63; Chhatrapati Singh ‘The concept of time in law: Basis of laws of limitation and prescription’ (1990) 32 *Journal of the Indian Law Institute* 328 at 328; *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 11; *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) para 2.

⁶² This set of facts is loosely based on the case of *Coboza I and II* supra note 62.

order to perform the draining procedure, the doctors and staff at Somerset hospital administered a spinal anaesthetic, which involved an injection in the lumbar region.⁶³ While the draining procedure took place without complications, it wasn't long after it that Mr C began experiencing pain in his lower back. He went to his local clinic, the Michael Mapongwane Day Hospital in Khayelitsha, a few days after the surgery, and told them about the pain in his back. He was given medication for pain relief and ointment to clean the wound at the site of the operation. Unfortunately, the pain persisted and he also began experiencing difficulty walking. Once again, Mr C went to the Michael Mapongwane Day hospital and was, once again, given pain relief medication and ointment. He returned complaining of the same symptoms a week later, and was then referred to Tygerberg Hospital, also a public hospital, for an x-ray and a computerized tomography (CT) scan. Following the scan, the medical staff at Tygerberg hospital told Mr C that 'the problem lay with the spinal anaesthetic' and gave him a date to return for further treatment.

For five years following the procedure, he received treatment at Tygerberg Hospital and the Michael Mapongwane Day Hospital, for managing his pain and improving his ability to walk. Throughout this time, he was reassured by both the doctors, nurses and other hospital staff that his 'condition was improving' and was told that his treatment and rehabilitation was aimed, ultimately, at remedying his difficulties with walking. Unfortunately, despite the multiple medical interventions that took place between 1998 and 2003, Mr C's condition continued to worsen and he developed problems with his urination. On the 10th of September 2003, a second scan was conducted at Tygerberg Hospital and Mr C was informed that, in his words, his "spinal cord was not functioning properly" and that "they need to insert a pipe" in his back "to alleviate the urination". On the 17th of November 2003, a cystoperitoneal shunt was introduced, a tube which he was told would "drain the water that had accumulated" on his spinal cord. Unfortunately, Mr C's condition did not improve and he was left without the ability to walk, move

⁶³ Lower back region of the spine.

his legs, or feel anything below his stomach. He was discharged from Tygerberg hospital three days after the operation in a wheelchair and with irreversible and progressive sensory and motor paraplegia. For ten years following the last operation, Mr C attended his local day hospital, on a monthly basis, to collect his medicine.

Throughout this time, while Mr C believed the hospital staff at Tygerberg hospital that 'the problem lay with the spinal anaesthetic', he never considered that the hospital may be at fault for his condition, or that they had 'done anything wrong', let alone the possible availability of a claim in law against the hospital staff or their employer, in this case, the Minister of Health. Mr C was first alerted to the possibility that the hospital was to blame for his condition on two occasions in 2013, ten years following the last operation in 2003 (and fifteen years following the initial surgery in 1998, when the spinal anaesthetic was administered), both of which occurred when he was walking through Khayelitsha Mall. The first occasion involved a conversation that he had with some people that he knew from his community that happened to also be at the mall. They asked him what had happened to him that led him to being in a wheelchair and, after he explained what had happened at the various hospitals, they raised the possibility of wrongdoing on the part of the hospital and of there being 'something that you can do about that'. This was reinforced by the second occasion, when Mr C was once again walking through Khayelitsha Mall and heard a radio advertisement broadcasted over Radio Zibonele / Radio 98.2 advertising the services of the personal injury law firm, JC & Associates. Originally broadcast in isiXhosa, the advertisement read like one that you would expect from a personal injury law firm:

Have you been seriously injured in a motor vehicle accident or have you or your child suffered injuries as a result of the fault of a doctor or hospital? Let our specialist personal injury lawyers assist you to claim monetary compensation. Phone JC & Associates on (021) 432 1234 for further information. That is (021) 432 1234. We are waiting for your call.

Hearing this, with his prior conversation with the people at Khayelitsha Mall in mind, prompted Mr C to call the offices of JC & Associates and to arrange a time to meet with one of the attorneys there. At his first appointment, on the 2nd of February 2014, Mr C explained what had taken place at the various provincial hospitals between 1998 and 2003 and the manner by which his condition progressively deteriorated. It was at this consultation that Mr C first became aware that he may be entitled to claim damages against the MEC for Health of the Western Cape as a result of the conduct of the employees of the hospitals at which he underwent surgical procedures and received treatment. Now appointed as Mr C's attorney, JC & Associates dispatched a letter via registered post in terms of section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act No 40 of 2002 to the Director-General of the Department of Health. The action for the payment of those damages was instituted by way of summons, which was served on the 8th of July 2014, almost two decades after the spinal anesthetic was administered. In response, the MEC for Health raised a special plea of prescription, arguing that the three-year period applicable to Mr. C's claim began running, at the very least, in November 2003 and therefore became prescribed, at the latest, in November 2006. When it came to the merits of Mr. C's claim, his continued treatment at the various hospitals meant that his medical records had been preserved and that the evidence he needed to prove his claim was available and intact. Faced with this reality, the MEC for Health conceded the merits of Mr. C's claim and indicated that they were amenable to settling the quantum of damages around the amount Mr. C had claimed in the summons. On the point of prescription, however, the MEC was determined to persist and it was on that point alone that the two parties went to trial.

Versions of this scenario are found throughout the case law dealing with the extinctive prescription of personal injury claims. The thread that ties many of these cases together is the lack of knowledge on the part of a victim of personal injury of the legal significance of what has happened to them, essentially because they, through no fault of their own, simply do not know about the law of delict (an area of law that remains unknown for many unless they attend law school or a

sizable claim piques the interest of the media). In *Mtokonya*,⁶⁴ it was a conversation with a neighbour, who happened to be an attorney, that first alerted Mr. Mtokonya to the possibility of holding the police liable for arresting and detaining him in the circumstances that they did.⁶⁵ In *Shange*,⁶⁶ it was a conversation that the plaintiff, a fifteen-year-old rural learner who had been severely injured in his eye after the Deputy-Principal of his school had hit him, had with his mother's friend. After hearing about what had happened, she suggested 'that the Deputy-Principal's conduct was wrongful...[and] that he should lay a complaint with the Public Protector'.⁶⁷ In response to that complaint, an advocate at the Public Protector's office said that he 'should seek the help of a private lawyer...[and] should bring a civil claim against the Department of Education'.⁶⁸ The extent of a claimant's appreciation of the legal significance of the facts that gave rise to the claim varies between cases, and it is usually the case that once the vital bit of information is acquired, not much time passes until action is instituted.

When it comes to the rules regulating the extinctive prescription of personal injury claims, such an appreciation is not required for the prescription period to begin running and, once it does begin running, it only gives a potential claimant three years to become aware of their ability to claim, approach an attorney in order to enforce that claim, gather the evidence needed to prove it, and institute action for its enforcement (in summons which are not rendered excipiable owing to their failure to plead a cause of action with sufficient specificity). The severity of the impact that prescription has on meritorious and well-founded claims and on the people in the process of enforcing them should not be underestimated. Victims of personal injury, in particular, are often rendered physically, psychologically and economically vulnerable as a result of their injury. The socio-economic pressures that the majority of South Africans continue to struggle under are further

⁶⁴ *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC).

⁶⁵ *Ibid* para 2-3.

⁶⁶ *MEC for Education, KwaZulu-Natal v Shange* 2012 (5) SA 313 (SCA).

⁶⁷ *Ibid* para 8.

⁶⁸ *Ibid* para 9.

compounded by the added financial burden of personal injury. This burden is substantially alleviated when victims of personal injury obtain compensation from whomever the law recognizes as responsible for that injury. However persuasive it may be, I am not highlighting the need to compensate victims of wrongdoing to justify imposing liability on wrongdoers to pay damages for the injuries they cause, but to emphasize the gravity of the consequences that thwarting the pursuit of a personal injury claim has on the person pursuing it. It is with this appreciation in mind that I set out to unpack the rules regulating the prescription of these claims and their justification.

II THE RULES REGULATING THE EXTINGTIVE PRESCRIPTION OF PERSONAL INJURY CLAIMS

‘The expiry of the limitation period is thus a Draconian sanction against a dilatory plaintiff, yet the reasons for delay by plaintiffs in issuing proceedings are manifold. Some are undoubtedly blameworthy, others blameless, in that they may not be aware that they are entitled to bring a claim.’⁶⁹

The provisions of the Prescription Act have received a fair amount of our courts’ time and attention, particularly in cases involving claims for personal injury claims and the interpretation of ‘the knowledge requirement’ in section 12(3). As such, a sizable collection of case law dealing with the prescription of these kinds of claims has accumulated over the years, since the first prescription regime was enforced in South Africa during the period of Dutch settler-colonialism.⁷⁰ In this part, I take a closer look at the manner by which the Prescription Act regulates the extinctive prescription of personal injury claims. I do so by looking at the provisions of the Act itself, the interpretation and application of those provisions by our courts, and the various accounts of the nature and operation of prescription that have been offered thus far. This is done with the historical background of the South African prescription regime in mind.

My discussion of the extinctive prescription of personal injury claims focuses on three aspects of this process: (i) the consequences of extinctive prescription for the party with the right to claim, and the party against whom the claim lies, namely, that it grants the latter a broad, discretionary legal power over the ability of the former to enforce their claim;⁷¹ (ii) the three-year prescription period that applies

⁶⁹ Jones op cit note 34 at 1 (1.01).

⁷⁰ By 1652, a thirty-year prescription period that applied to both ‘actions in rem and actions in personam’ (actions for the enforcement of real rights and actions for the enforcement of personal rights) was an entrenched part of the Roman Dutch common law.

⁷¹ In this account, I draw on the work of Loubser and Gardner.

to personal injury claims;⁷² and (iii) the manner in which the commencement of the running of prescription in respect of a claim is determined, in particular, what has become known as ‘the knowledge requirement’.⁷³ While prescription regimes are becoming increasingly complex, they remain capable of being analysed in terms of what Zimmermann refers to as their ‘principal components’.⁷⁴ The aspects that I focus on overlap in many respects with Zimmermann’s ‘principal components’, however, they are less inclusive. Firstly, every prescription rule stipulates the length of the prescription period. Second, prescription rules set out the conditions that must be present for the running of the prescription period to begin, or to be taken to have begun. The third and final element, which has been the primary focus of much of the theorizing about the precise nature of prescription rules,⁷⁵ is that all prescription rules provide for a specific effect that the passage of the applicable prescription period is to have on whatever it applies to.

(a) Extinctive prescription under the Prescription Act

The Prescription Act provides that a ‘debt *shall be extinguished* by prescription’⁷⁶ after the lapse of the prescription period applicable to that debt. Falling into the category of ‘any other debt’ in section 11(d), personal injury claims attract a prescription period of three years,⁷⁷ which begins to run the moment ‘the *debt is due*’.⁷⁸ This is most commonly understood to refer to the moment that the debt becomes ‘owing and already payable’⁷⁹ or ‘immediately claimable’⁸⁰ by a creditor.

⁷² Section 10(1) read with section 11(d) of the Prescription Act.

⁷³ Section 12 of the Prescription Act.

⁷⁴ Zimmermann *Comparative Foundations* op cit note 3 at 76. Zimmermann’s list includes five components: the length of the prescription period; the commencement of the prescription period; the circumstances under which the prescription period is suspended or begins to run afresh; and whether the parties can alter the prescription rules by agreement.

⁷⁵ See, for example, Loubser op cit note 3 at 9.

⁷⁶ Section 10(1) of the Prescription Act [my emphasis].

⁷⁷ Section 11(d).

⁷⁸ Section 12(1) [my emphasis].

⁷⁹ *Lagerwey v Rich and Others* 1973 (4) SA 340 (T) at 345F.

⁸⁰ *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532H - I.

Put differently, the prescriptive clock begins ticking, at least as a general rule, ‘when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.’⁸¹ However, this is subject to two qualifications. First, the debt will not be deemed to be due ‘until the creditor has *knowledge of the identity of the debtor* and of *the facts from which the debt arises*’⁸² and this knowledge will be deemed to be present if that creditor ‘could have acquired it by exercising *reasonable care*.’⁸³ Second, the onset of the prescription period will be delayed if the debtor, by way of willful conduct, prevents the creditor coming to know of the existence of the debt, and will only commence once the plaintiff becomes aware of the debt’s existence.⁸⁴

A creditor can interrupt the running of a prescription period that has commenced, thereby preventing their ‘debt’ from becoming extinguished, by serving ‘process’ on the debtor in which they claim payment of the debt.⁸⁵ Included in the Act’s definition of ‘process’ is ‘any document whereby legal proceedings are commenced.’⁸⁶ As personal injury claims are only enforceable by way of action proceedings, interrupting the prescription of these claims requires the holders thereof to affect proper service of a summons⁸⁷ on the person/s or institution/s against whom the claims lie. The upshot of these rules in the Prescription Act is that claims for personal are extinguished by prescription if the plaintiff fails to serve summons on the defendant within three years from the date that the debt that claim seeks to enforce is determined to be due. The terminative impact of extinctive prescription, however, is not an automatic process, despite the way it is described. Should a creditor fail to institute action timeously, the debtor is

⁸¹ *Truter and another v Deyssel* 2006 (4) SA 168 (SCA) para 16 (*Truter II*).

⁸² Section 12(3) [my emphasis].

⁸³ Section 12(3).

⁸⁴ Section 12(2).

⁸⁵ Section 15(1) of the Prescription Act.

⁸⁶ Section 15(6) of the Prescription Act.

⁸⁷ Which complies with the requirements set out under Uniform Rules 17 and 18 of the Uniform Rules of Court in the High Court 2009: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa. GN R315 (GG 19834) of 12 March 1999 (as amended).

empowered to raise prescription, by way of special plea, and if proven, to rely on it as a basis to have the claim dismissed.⁸⁸

Zondo J, writing for the majority of the Constitutional Court in *Links*,⁸⁹ described the project of section 12 of the Prescription Act in the following terms:

The provisions...seek to strike a fair balance between, on the one hand, the need for a cutoff point beyond which a person who has a claim to pursue against another may not do so after the lapse of a certain period of time if he or she has failed to act diligently, and, on the other, the need to ensure fairness in those cases in which a rigid application of prescription legislation would result in injustice.⁹⁰

Thus, as with most exercises in legal interpretation in the constitutional era, questions of fairness, justice and equity arise throughout the process. Given the injunction placed on the courts by section 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation, the exercise of interpretation is inevitably a value-laden one. Whether the prevailing interpretations of the provisions of the Prescription Act regulating the prescription of personal injury comply with this directive and whether they are capable of striking the balance that Zondo J refers to remains to be seen. But before looking at the rules themselves, it is useful to briefly sketch out the historical origins and development of South African law of prescription.

(b) The historical development of the South African law of prescription

Rules which regulate the impact of time on the creation, termination or enforcement of rights, claims or actions have featured in legal systems for

⁸⁸ The court is not permitted to raise the issue of prescription *mero motu*. See section 17(1) of the Prescription Act.

⁸⁹ *Links v Department of Health, Northern Cape* 2016 (4) SA 414 (CC).

⁹⁰ *Ibid* para 26.

millennia. There is evidence that the principles underpinning these rules were recognised in the laws of the Athenians, Romans and Hindus, and, as such, the law of prescription is considered to be ‘the most ancient temporal aspect of law.’⁹¹ As well-established components of both English law and Roman Dutch law, the many instances of European imperialism and settler-colonialism saw the imposition of prescription rules in societies across the globe. Although they have undergone quite significant development over the years, the prescription rules (along with substantial portions of the legal systems in which they were contained) were retained in these societies post-liberation. South Africa is no exception.

The South African law of prescription has its roots in Roman Dutch law, the system of laws that arrived with the Dutch settlers in the early 17th century and was imposed in what was then referred to as the Cape Colony, the settlement that sat at the heart of the Dutch colonial establishment. The law that was applied in the Cape Colony was the law of the County of Holland,⁹² which had classical Roman law, as it was set out in Justinian’s Code, as one of its primary sources. The prescription regime that was received in South Africa formed part of the common law, but was later replaced by statute, first in certain provinces and then later across what was then referred to as the Union of South Africa.⁹³ At common law, a uniform prescription period of thirty years was applied to all actions, both *in rem* and *in personam*.

Prior to the establishment of a single and unified prescription regime by the first national prescription legislation, the Prescription Act 18 of 1943,⁹⁴ the laws differed across the provinces, with some being based in the common law and others

⁹¹ Singh op cit note 61 at 335; Zimmermann *The Law of Obligations* op cit note 13 at 769 – 770.

⁹² Although each of the provinces in the Dutch Republic (formally the Republic of the United Netherlands) had its own political institutions, courts and legal systems, the term “Roman-Dutch law” is used as a descriptor for the law of the United (Northern) Netherlands, the federation of provinces formed by the Union of Utrecht of 1579. Reinhard Zimmermann ‘Roman-Dutch jurisprudence and its contribution to European private law’ (1992) 66 *Tulane Law Review* 1685 at 1687.

⁹³ Loubser op cit note 3; Zimmermann (ibid).

⁹⁴ Hereinafter referred to as the 1943 Act.

regulated by statute. Of these statutes, it was the Transvaal Act 26 of 1908 that served as the model for the 1943 Act.⁹⁵ The 1943 Act governed the law of prescription in South Africa until it was eventually repealed on the 1st of December 1970 by the enactment of the current Prescription Act.

(i) The main developments to prescription rules

In the millennia following the first (recorded) applications of prescription rules, they have undergone a number of developments. The most significant of these developments is the tendency towards greater differentiation, usually in the form of subjecting different types of claims to prescription periods of varying lengths, depending on the legal basis or nature of the claim.⁹⁶ There is also a tendency towards greater flexibility in the determination of when the prescription period begins to run, usually with reference to some principle of ‘discoverability’. The development of the South African prescription regime closely followed these trends and has become highly differentiated as a result.

Our prescription regime is therefore neatly compartmentalized into the two forms: with acquisitive prescription regulating the acquisition of ownership⁹⁷ and servitudes⁹⁸ and extinctive prescription regulating the termination of servitudes⁹⁹ and ‘debts’.¹⁰⁰ The Act differentiates between these objects of prescription in three ways: (i) in the rules establishing the length of the applicable prescription period;¹⁰¹ (ii) in the conditions which are to persist in order for the running of the prescription period to affect the right to which it applies;¹⁰² and (iii) in the rules

⁹⁵ Loubser op cit note 3 at 5.

⁹⁶ Zimmermann *Comparative Foundations* op cit note 3 at 82.

⁹⁷ Chapter I of the Prescription Act.

⁹⁸ Section 6.

⁹⁹ Section 7.

¹⁰⁰ Chapter III of the Prescription Act.

¹⁰¹ Ownership rights (section 1) and servitudes (section 6) are acquired following the lapse of 30 years; servitudes are extinguished by prescription after 30 years (section 7) and debts are extinguished following the lapse of the prescription period that applies to that debt (section 10(1)).

¹⁰² The condition that all prescription rules have in common is that the rights-holder has failed to enforce their right for the duration of the prescription period. However, further differentiation has

which determine the date on which the applicable prescription period commences.¹⁰³ There is further variation within the rules regulating the extinctive prescription of debts, with prescription periods ranging from three years to thirty years,¹⁰⁴ depending on the type of debt in question.¹⁰⁵ This degree of differentiation is surprising when one regards the position under the common law, which established one set of rules with a uniform thirty year prescription period applying to real actions and personal actions. It becomes less surprising if one is persuaded by the argument that:

Whatever its merits in the (also not-so-tranquil) circumstances of the 5th century, a prescription period of 30 years is totally unsuitable for times in which history appears to have “accelerated” in an entirely unprecedented manner...[and] completely frustrates the aims sought to be achieved with periods of prescription.¹⁰⁶

(ii) Prescription under Roman law

Seemingly sheltered from these unique pressures of modern life, classical Roman law did not generally¹⁰⁷ subject actions to time limits or prescription periods.¹⁰⁸ This changed in 424 AD when Emperor Theodosius II, who ruled over the Eastern

taken place regarding the rules of suspension, postponement and interruption of prescription (see sections 2, 3, 4, 13, 14 and 15 of the Prescription Act) and in the additional conditions which are required in respect of ownership rights and servitudes (as set out in sections 1, 6 and 7).

¹⁰³ The Prescription Act is silent on when acquisitive prescription commences, but we can assume that it is triggered once the necessary conditions are present, i.e. the moment a person begins possessing the object of another person’s ownership right or exercising the rights and powers of a servitude-holder in an open manner and as if they were entitled to do so (sections 1 and 6 of the Prescription Act). The position is similar in respect of the extinction of servitudes by prescription, which commences the moment the servitude-holder fails to exercise it (section 7). Section 12 of the Act, which contains the rules regulating the commencement of the extinctive prescription period applicable to debts is slightly more complex and will be discussed in more detail in Part II(f) below.

¹⁰⁴ Section 11 of the Prescription Act.

¹⁰⁵ Loubser op cit note 3 at 90; Zimmermann *Comparative Foundations* op cit note 3 at 82.

¹⁰⁶ Zimmermann *The Law of Obligations* op cit note 13 at 770.

¹⁰⁷ Some exceptions existed in relation to praetorian penal actions, the *actio quanti minoris* and the *actio redhibitoria*. See Zimmermann *The Law of Obligations* op cit note 13 at 770.

¹⁰⁸ Loubser op cit note 3 at 4.

half of the Roman Empire, issued an edict imposing a thirty year time limitation on the completion of certain actions.¹⁰⁹ This rule was codified in the Theodosian Code,¹¹⁰ which later became one of the primary sources of the civil law in Justinian's Code, which completed in 534 AD. The rule as contained in Book VII of the *Codex* is almost identical to its original formulation, the relevant parts of which provide as follows:

The right to bring special actions in rem, or general personal actions, *cannot be extended beyond the term of thirty years*. When *any property or right* is claimed...the prescription of thirty years *can be pleaded against* the plaintiff...[T]herefore, where actions have not been brought within thirty years *from the time in which this could be done*, they cannot longer be prosecuted (sic)...We decree that, after this period has elapsed, no one shall have the power to proceed, even if he should attempt to excuse himself by professing *ignorance of the law*.¹¹¹

There are a few features of the position under Roman law that stand out. Firstly, the completion of the prescription period in respect of an action results in the defendant to be given the power to plead prescription against the claim it seeks to enforce. Second, a uniform period of thirty years applied to *all* actions. Third, the thirty year period begins to run from the moment that it was possible for the plaintiff to institute action. Ignorance of the law, which includes ignorance of the existence of the prescription rule itself, does not provide a plaintiff with an excuse when faced with a plea of prescription.¹¹² The position under the earlier

¹⁰⁹ *The Theodosian Code*, Book IV, Title 14 (1) [4 – 14 – 1] (Clyde Pharr Translation) at 95. The rule, often referred to as the *praescriptio longi temporis*, provides (as translated) that the actions to which it applies “shall not be extended beyond the space of thirty years” which indicates that it relates to both the institution and completion of those actions.

¹¹⁰ The Theodosian Code was a summarized compilation of the laws and decrees issued by the Emperors of Rome from 313 AD until 438 AD. See C. Dickerman Williams ‘Introduction’ (1952) in Clyde Pharr (translator) *Theodosian Code and Novels, and the Sirmondian Constitutions* at xvii.

¹¹¹ *The Code of Justinian* Book VII, Title 39 (3) [7 – 39 – 3] (S.P. Scott Translation) (1932) at 49 [my emphasis].

¹¹² The significance of this will become evident during the discussion of section 12(3) of the Prescription Act and the manner in which it has been interpreted and applied by the courts.

Theodosian Code was substantially the same,¹¹³ but the general principle that ignorance of the law was irrelevant to the question of prescription was subject to one important qualification. If a plaintiff failed to institute action within the requisite time frame as they held a ‘confident belief in the perpetuity’ of their claim, the Code permitted an extension of the thirty-year prescription period in limited circumstances.¹¹⁴

(iii) Prescription in Roman-Dutch law

Roman-Dutch authors generally followed the law as it was set out in Justinian’s codification, but differed how they described the effect of the lapse of the prescription period, shedding some light on the various theories of prescription that may have been operative at the time.¹¹⁵ For example, De Groot describes the lapse of the prescription period as causing the *debt itself* to be discharged in its entirety.¹¹⁶ Van der Linden, on the other hand, refers to prescription having the effect of *extinguishing an obligation*.¹¹⁷ In Gane’s translation, Voet describes the effect of prescription as removing the *capacity to do something* after a lapse of time

¹¹³ *The Theodosian Code* 4, 14, 7 provides that after the expiration of the thirty-year period ‘no person shall thereafter have the right to institute an action, even though he should attempt to defend himself on the ground of ignorance of the law’; this is pursuant to the provision in (1, 1, 2 – page 11 of the translated version) which states that it is not permitted that any person be ‘ignorant of or to pretend ignorance of the provisions of the Code.

¹¹⁴ *The Theodosian Code* 4, 14, 5 and 4, 14, 6. First, where the thirty-year period had elapsed prior to the enactment of the prescription law, ‘an extension of a period of ten years, in addition to the time that had elapsed’ is granted. Based on the wording of 4, 14, 5, of the Code (as translated), it is unclear whether this means a period of forty years or a period of ten years is added, calculated from the date of the law’s enactment, however, determining this issue is not essential for the purposes of the argument advanced in this paper. Second, where there are less than ten of the thirty years remaining following the date of the enactment of the prescription law, the plaintiff is granted an extension of the number of years that, when added to the time remaining, equals ten years from the date of law’s enactment. Thus, plaintiffs who have ten or more years of their thirty-year prescription period remaining following the enactment of the law cannot rely on ignorance of the law in order to be granted an extension and ‘must be content with [their] own period of time’ (4,14,6).

¹¹⁵ Loubser op cit note 3 at 5.

¹¹⁶ ‘de schuld werd ghehouden voor ghequeten’ in Hugo De Groot *Inleidinge Tot De Hollandsche Rechts-Geleerdheid* (1910) 3 46 1.

¹¹⁷ ‘verjaring doet ook de verbintenissen zoodanig vergaan’ in Joannes van der Linden *Regtsgeleerd Practicaal en Koopmans Handboek* (1806) 118 8.

or *forbidding something to be done* within a particular time.¹¹⁸ According to Loubser, the ‘predominant view among [these authors] seemed to be that prescription had a strong effect; extinguishing the obligation itself and not only the remedy.’¹¹⁹ It is around this question – whether the effect of the prescription rule is a ‘strong’ or ‘weak’ one – that has been the focus of the vast majority of theoretical analysis of extinctive prescription.¹²⁰

It was the “uneasy compromise” between the so-called ‘strong’ and ‘weak’ forms of prescription found in the two-tier system of the 1943 Act¹²¹ that spurred one of de Wet’s criticisms of the old prescription regime, which are set out in a memorandum he was requested to prepare by the South African Law Reform Commission. Included in his suggestions for ways in which the law of prescription could be reformed is the proposal that a system of prescription with a ‘strong’ effect be adopted, whereby the ‘debt’ itself would be extinguished in its entirety following the lapse of the prescription period. By in large, the current Prescription Act mirrors the legislative scheme that was envisaged in de Wet’s memorandum,¹²² signalling its commitment to the so-called ‘strong’ form of prescription by employing the appropriate terminology, namely: that ‘a debt *shall be extinguished by prescription*’.¹²³

The wording of the legislation aside, the question as to the particular impact that the passage of the prescription period has on the rights, powers or obligations of the parties, or on their ability to enforce or claim performance of them, is far from settled. The most persuasive theoretical account of this aspect of the South African

¹¹⁸ Johannes Voet and Johannes van der Linden *The Selective Voet being the Commentary on the Pandects* (Gane’s translation 1956) 44 3 5.

¹¹⁹ Loubser op cit note 3 at 5. The same conclusion was reached by J C de Wet see de Wet ‘Memorandum’ in *Opuscula Miscellanea* (1979) at 104.

¹²⁰ Loubser op cit note 3.

¹²¹ Which subjected the *enforceability* of a right to a shorter prescription period, but still retained a longer prescription period of thirty years when it came to the *extinction* of the right in its entirety. See sections 3(1) and (5) of the 1943 Act; see discussion in Loubser op cite note 3 at 7; de Wet op cit note 119 at 108.

¹²² Loubser op cit note 3 at 7-8.

¹²³ Section 10(1) of the Prescription Act.

prescription regime was put forward by Loubser. In short, it is that the operation of prescription ‘affords the debtor a right to refuse performance as a substantive defence while the debt still subsists and can still be discharged’.¹²⁴ It is to this debate that I now turn, as it forms part of the first aspect of prescription rules that I focus on, namely, the consequence of the lapse of the prescription period for the parties to a claim.

(c) The consequences of extinctive prescription for the parties to a claim

The focus of much of the scholarship on the law of extinctive prescription is on the question of what impact the passage of the prescription period has on the underlying ‘right’, action or claim. The existing theoretical accounts of the nature and effect of extinctive prescription display a ‘tendency to attempt to fit extinctive prescription into some established legal niche in order to explain what it is and why it has the effect it does.’¹²⁵ In his 1967 memorandum, de Wet mentioned the lack of consensus in the commentary on extinctive prescription regarding what exactly becomes extinguished following the lapse of the prescription period – i.e. whether it is the legal action to enforce the claim, the right or claim itself, or the correlative obligation or ‘debt’. Thus, varied descriptions of the particular consequences of extinctive prescription have emerged, which have predominantly turned on whether the regime is classified as embodying either a ‘weak’ or ‘strong’ form of prescription.¹²⁶

What the mainstream commentary terms ‘strong prescription’ is a regime that has the effect of extinguishing the right, claim, obligation, or debt¹²⁷ in its entirety.¹²⁸

¹²⁴ Loubser op cit note 3 at 16.

¹²⁵ Loubser op cit note 3 at 9.

¹²⁶ de Wet *OM* op cit note 119 at 103. “Daar bestaan nie eenstemmigheid oor wat nou juis verjaar nie – die aksie, die vorderingsreg, die regsorder, die “Anspruch”, die verbintenis of die skuld nie, en die gevolge van verjaring verskil weer na mate dit die een of die ander van bogenoemde dinge is wat verjaar.”

¹²⁷ de Wet refers to the ‘verbintenis’ – which encompasses both sides of the legal tie that binds two parties – the right on the one side and the obligation, or debt, on the other.

¹²⁸ Loubser op cit note 3; de Wet op cit note 119 at 103 (“geheel-en-al uitgewis word”).

A form of ‘weak prescription’, on the other hand, is found in regimes in which the underlying obligation is significantly weakened – in that it is rendered incapable of being enforced through legal proceedings – but is nevertheless still preserved in certain respects.¹²⁹ As will soon become clear, the distinction between ‘strong’ and ‘weak’ prescription is neither as simple, nor as useful, as it purports to be. Nevertheless, developing a sound theoretical account for the nature and effect of extinctive prescription is vital when trying to understand the purpose of the regime. The theories that have been offered thus far overlap in many respects, and engage some of the rationales for the regime and the policies it is said to advance.¹³⁰ Loubser organizes his discussion of the existing theories based on the established legal niches that they invoke and it is this the approach that I adopt here.

Broadly, there are four theoretical accounts for the nature and effect of extinctive prescription. The first account views extinctive prescription as a form of waiver or estoppel, aimed at protecting a debtor’s reasonable reliance on the apparent abandonment of the claim by the creditor. The second account is that the lapse of the prescription period creates a rebuttable presumption that the debt was discharged.¹³¹ The third account bears similarities to the ‘weak’ form of prescription discussed above and characterizes extinctive prescription as a procedural denial of the plaintiff’s right of action or ability to enforce their claim in court.¹³² Finally, the fourth account, and the one which Loubser endorses as the most appropriate in the context of the South African Prescription Act, is that

¹²⁹ For example, following the lapse of the prescription period, a ‘debt’ in the South African Prescription Act is preserved to some degree in that (i) despite having been ‘extinguished’, the debtor can still make valid payment of the debt (section 10(3)); (ii) prescription does not occur by operation of law and the court cannot raise it *mero motu*, but it must be raised by a party to the proceedings (section 17(1)); and (iii) in cases involving reciprocal debts arising from a contract, the prescription of one will be delayed until the prescription of the other (section 13(2)). See Loubser op cit note 3 at 16-17.

¹³⁰ Loubser op cit note 3 at 9.

¹³¹ In the sense that it had been fulfilled (paid by the debtor).

¹³² Loubser op cit note 3 at 11-14.

‘extinctive prescription confers upon the debtor a positive substantive right or defense, with a correlative negative effect on the creditor’s right.’¹³³

(i) Extinctive prescription as a form of waiver or estoppel

The first theoretical account for the nature of extinctive prescription is linked in many respects to one of the dominant justifications for the regime – that prescription is a mechanism aimed at protecting a debtor’s reasonable reliance on the appearance created by the creditor’s delay in enforcing their claim, leading them to conclude that the creditor no longer intends to do so.¹³⁴ In terms of this justification for the regime, prescription serves to give effect to the apparent state of affairs, evidenced solely by the fact that the creditor has failed to institute action before the lapse of the prescription period, in an effort to ‘protect reasonable expectations...[in accordance with] practical legal considerations, the need for legal certainty and common consent.’¹³⁵ This account, therefore, finds its normative footing in the apparent need to protect debtors who reasonably rely on the perception, created by the creditor’s voluntary inaction in bringing legal proceedings, that the creditor has abandoned their claim.

It is not surprising, therefore, that the theorists who take this view have sought their doctrinal counterparts in the laws relating to waiver and estoppel. In *National Union of Metalworkers of South Africa v Intervolve (Pty) Ltd and Others*,¹³⁶ Cameron J defined waiver as ‘the legal act of abandoning a right on which one is otherwise entitled to rely.’¹³⁷ To establish a waiver, the person alleging it must show that the right-holder ‘with full knowledge [of that right]..., decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.’¹³⁸ Estoppel, on the other hand, operates to prevent a

¹³³ Loubser op cit note 3 at 9.

¹³⁴ Loubser op cit note 3 at 9 and see the authorities cited therein. This dominant justification will be discussed in greater detail in Parts III and IV.

¹³⁵ Ibid.

¹³⁶ 2015 (2) BCLR 182 (CC).

¹³⁷ Ibid para 60.

¹³⁸ *Laws v Rutherford* 1924 AD 261 at 263.

person who has made a representation to another from denying the truth of that representation, if the person to whom the representation was made relied on the truth thereof and acted detrimentally as a result.¹³⁹ This account of extinctive prescription draws on the legal constructs of both waiver and estoppel to ground its theory of the nature and effect of the law in this regard. From the perspective of waiver, the creditor's voluntary inaction in enforcing their claim is taken as an abandonment (or waiver) of their right to enforce that claim, with the result that they are unable to exercise that right. From the perspective of estoppel, it is the reasonable reliance of the debtor on the appearance that the creditor abandoned their claim, which is to their detriment (presumably because they do not adequately prepare to eventually meet the claim), that is protected when the creditor is prevented (or estopped) from eventually asserting their right to claim in court when they seek to enforce it. On this view, extinctive prescription provides defendants with a remedy or defense, similar to those under waiver or estoppel, once the prescription period has lapsed.

The normative foundations of this account, which assume voluntariness on the part of the creditor in failing to act to enforce their claim and reasonable reliance on the part of the debtor that the claim is no longer forthcoming, give rise to some problems when trying to understanding our law of extinctive prescription. This account does find some expression in the rules governing the commencement of the prescription period¹⁴⁰ and the suspension of that period in certain circumstances where the creditor is unable, as a result of legal or physical constraints, to institute proceedings to enforce their claim.¹⁴¹ In these instances, the circumstances of the creditor are such that they preclude the classification of their inaction as 'voluntary', so prescription therefore does not run. It is important to recognize, however, that circumstances do exist in which the creditor's delay in instituting action cannot be described as 'voluntary', but which fall outside of those

¹³⁹ *Intervalve* supra note 136 para 65.

¹⁴⁰ Section 12 of the Prescription Act

¹⁴¹ These circumstances are set out in section 13 of the Prescription Act and they include where the creditor is a minor or a person under curatorship; where they are prevented by superior force from instituting action; and where they are outside of South Africa.

envisioned in section 12(2),¹⁴² section 12(3)¹⁴³ and section 13.¹⁴⁴ The clearest example of this is the one that I have briefly mentioned, but will discuss in greater depth below. It is where the creditor lacks knowledge of their ability to bring a claim in law against the debtor or the existence of the claim itself, and for that reason, has failed to launch legal proceedings for its enforcement. In situations like this – which will invariably arise more frequently in contexts where people are not aware of their legal rights and do not have access to sources of information about these rights and the possible remedies available to them – it can hardly be said that the creditor’s inaction in enforcing the very rights or pursuing the very remedies that they have no knowledge of was ‘voluntary’.

The second normative feature of this account — that extinctive prescription serves to protect the debtor’s *reasonable reliance* on the appearance created by the creditor’s inaction that they are no longer interested in pursuing their claim — is reflected in the provisions of section 12(2), which serves to delay the commencement of the prescription period if the debtor ‘willfully prevents the creditor from coming to know of the existence of the debt.’¹⁴⁵ A debtor who has willfully prevented a creditor from acquiring knowledge of the existence of the debt cannot simultaneously be found to have reasonably relied on that creditor’s inaction as evidence that they no longer seek to enforce that debt. One could construe the other provisions operating to delay or suspend the running of the prescription period in the same manner, however, that would presuppose a great deal of knowledge on the part of the debtor of certain facts about the creditor.¹⁴⁶ The central issue with this account is that the prescription rules themselves do not make any effort to positively establish reasonable reliance on the part of the

¹⁴² Where the delay is a result of the debtor willfully preventing the creditor from acquiring knowledge of the existence of the debt.

¹⁴³ Where the delay is owing to the creditor’s ignorance of the debtor’s identity and the facts giving rise to the debt and their inability to acquire knowledge of these facts through the exercise of reasonable care.

¹⁴⁴ Where the delay is caused by a recognised legal or physical constraint.

¹⁴⁵ Section 12(2) of the Prescription Act.

¹⁴⁶ For example, the extent of their knowledge about the debt; their age or mental capacity; their location within or outside of the country; etc....

defendant, it is merely assumed. In this way, the rule does not differentiate between defendants who have reasonably relied on the creditor's inaction, and those who have not.¹⁴⁷ More than this, as Loubser points out, while the idea that a debtor should be protected where they reasonably expect that a creditor won't enforce their claim may stand as a statement of legal policy, it does not adequately explain or account for the manner by which extinctive prescription operates.¹⁴⁸

(ii) Extinctive prescription as an irrebuttable presumption of law

The second account of extinctive prescription is that it operates to create an irrebuttable presumption that the debt has been discharged, in the sense that the obligation to pay the debt has been validly performed, or that it has been abandoned or extinguished.¹⁴⁹ Thus, while the debt may not have in fact been discharged, abandoned or extinguished, it is presumed to have been once the prescription period has lapsed. An irrebuttable presumption, according to Loubser, is 'a legal fiction and a contrived way of describing a rule of substantive law'.¹⁵⁰ His principal criticisms of this account are that it fails to meaningfully distinguish between 'strong' and 'weak' prescription¹⁵¹ and that it runs into conflict with rules allowing a debtor to validly discharge the debt following the lapse of the prescription period applicable to it.¹⁵² For these reasons, Loubser concludes that characterizing the regime as one creating an irrebuttable presumption of law is an 'inaccurate oversimplification....[which] does not define the legal nature and effect of extinctive prescription accurately.'¹⁵³

¹⁴⁷ As Loubser puts it (op cit note 3 at 9), the account 'does not quite satisfactorily explain why a debtor who purposely does not pay a debt, or who is unaware of any prescription period, or who is not prejudiced by assuming that the creditor will no longer require performance, should be protected; nor why a debtor who has in fact paid, but prefers to rely on prescription rather than proving payment, should be able to do so.'

¹⁴⁸ Loubser op cit note 3 at 10.

¹⁴⁹ Loubser op cite note 3 at 10. See also: David M Walker *The Law of Prescription and Limitation of Actions in Scotland* 3 ed (1981) at 1 and 5.

¹⁵⁰ Ibid.

¹⁵¹ Ibid at 10-11.

¹⁵² As is the case in section 10(3) of the Prescription Act.

¹⁵³ Loubser op cit note 3 at 11.

There is also a deeper conceptual difficulty that arises when one considers that an irrebuttable presumption of law is a legal conclusion that is automatically drawn by a court upon the proof of certain facts. In terms of the scheme that the Prescription Act sets up, a defendant to an action instituted after the lapse of the prescription period can *elect* to raise prescription, and that the court (and, therefore, ‘the law’) may not take notice of the fact that the plaintiff instituted action following the prescription period and raise prescription *mero motu*.¹⁵⁴ This is one of the central features of irrebuttable presumptions of law, they are not raised, but are simply made in the course of deciding a dispute. Furthermore, in practice, the defendant also has to do a lot more than merely raise the fact that the plaintiff has brought their claim after the applicable prescription period, calculated from when the claim arose. They are required to positively establish and prove the due date of the debt, which includes showing what facts the plaintiff knew or ought to have known at the date that they allege prescription began to run.¹⁵⁵ In *Coboza II*,¹⁵⁶ the SCA declined to uphold the plea of prescription on the basis that the defendant failed to lead sufficient evidence pertaining to these facts, with the result that ‘prescription had been raised in the air’.¹⁵⁷

(iii) Extinctive prescription as a procedural mechanism to deny the plaintiff’s action

The third account of extinctive prescription is that it is a procedural rule that operates to deny the plaintiff’s ability to enforce their claim. It bears similarities to the concept of ‘limitation of actions’ in other jurisdictions,¹⁵⁸ the forms of statutory time limitation periods found in South African law,¹⁵⁹ and the ‘weak’ form of prescription described above. On this approach, while the passage of the

¹⁵⁴ Section 17(1) of the Prescription Act.

¹⁵⁵ It is well established that the onus is on the defendant to prove their plea of prescription. See, in this regard, *Gericke v Sack* [2020] ZASCA 165 at 825H; *Macleod* supra note 18 para 10; and, more recently, *Jugwanth v Mobile Telephone Networks (Pty) Ltd* [2021] 4 All SA 346 (SCA) para 6.

¹⁵⁶ *Coboza II* supra note 62.

¹⁵⁷ *Ibid* para 13.

¹⁵⁸ The English legal system being the most frequently-cited example.

¹⁵⁹ See, for example, the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002.

prescriptive period causes the plaintiff to lose their right of action, the underlying claim remains intact.¹⁶⁰ It retains some explanatory value, therefore, in systems where the debt can still be validly discharged even after prescription has occurred and where a plea of prescription can still be raised even if the underlying debt has been paid.¹⁶¹ Loubser points out that this account assumes that an acceptable criterion of distinction exists between substantive private law, on the one hand, and procedural law, on the other.¹⁶²

While substantive law is understood as relating to the content of legal rights and duties, procedural law is perceived to be concerned with the process by which these rights are enforced.¹⁶³ On this approach, the substantive law of delict determines the nature and scope of the rights that accrue to the victim of a delict, whereas procedural law requires that such rights be enforced by way of action proceedings. Loubser's criticism of this distinction is that it runs into some conceptual difficulties is when one has regard to how 'action' is understood in the South African law of obligations. While an 'action' is merely one of the legal processes by which a substantive right can be enforced, Loubser considers a 'cause of action' or 'right of action' as a substantive right capable of enforcement as opposed to a right of process.¹⁶⁴ He concludes that there is conceptually 'no separate 'right of process' divorced from the substantive right which the process is about, and consequently there can be no denial of a right of action which leaves the underlying substantive cause of action intact.'¹⁶⁵ Therefore, on his reasoning, extinctive prescription cannot be said to merely effect a right to bring an action in the procedural sense 'because the right to enforce by legal process is an integral part of a substantive right'.¹⁶⁶

¹⁶⁰ Loubser op cit note 3 at 9.

¹⁶¹ As is the case in our law, with section 10(3) regarding debts which are discharged following the lapse of the prescription period as having been validly discharged.

¹⁶² Loubser op cit note 3 at 12.

¹⁶³ Ibid.

¹⁶⁴ For a more detailed discussion of the distinction between 'cause of action' and 'right of action', see *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 825F-G.

¹⁶⁵ Loubser op cit note 3 at 13.

¹⁶⁶ Ibid at 14.

(iv) Extinctive prescription as granting a substantive, positive right to a defendant

The final account is described by Loubser as ‘logically unassailable and useful’¹⁶⁷ when seeking to understand the South African law of prescription. This account views extinctive prescription as causing a debtor to acquire a positive, substantive right or defence, which, when enforced, has a correlative negative effect on the creditor’s right.¹⁶⁸ Two options have been given as to the impact that invoking this right or defence has on the debtor’s obligation. The first is that the obligation is voidable at the instance of the debtor, similar to a right of rescission flowing from a contractual misrepresentation. This possibility runs into some logical difficulties, however, in systems where extinctive prescription can be raised even if proper performance has already taken place or will still take place. In such systems, ours being one, exercising the right acquired following the lapse of the prescription period does not, in reality, render the obligation itself void (as it can still be validly discharged).¹⁶⁹

The second possibility is that what is conferred is a ‘substantive right or defence’ entitling the debtor to refuse to perform when called upon to make performance, for instance, when it is ordered to pay reparative damages.¹⁷⁰ This leaves room for the underlying debt to remain intact and be validly discharged; it accurately locates control over whether a claim is subjected to the rules of prescription exclusively in the hands of the debtor (as opposed to the court or ‘the law’ itself, like the other accounts appear to do); and it is consistent with the view of prescription as a matter of substantive, as opposed to procedural, law.¹⁷¹ This account also finds footing in the provisions of the Prescription Act. In particular, in the provisions enabling a debtor to validly pay the debt even after the lapse of the prescription period¹⁷² and those providing that only a party may raise

¹⁶⁷ Ibid at 16.

¹⁶⁸ Ibid at 14.

¹⁶⁹ Ibid at 15.

¹⁷⁰ Ibid.

¹⁷¹ Ibid at 15-16.

¹⁷² Section 10(3).

prescription and that a court may not take notice of it *mero motu*.¹⁷³ While I accept the relative strength of this account of the nature and operation of extinctive prescription, I propose a slightly developed version.

(v) An alternative account of extinctive prescription

The alternative account of extinctive prescription that I propose in this dissertation takes Loubser's account as its starting point, that is, that extinctive prescription in terms of the Prescription Act operates to confer upon a defendant a 'positive substantive right or defence'¹⁷⁴ entitling them 'to refuse performance'¹⁷⁵ following the institution of proceedings. Loubser's account stands out from those of other scholars writing on the topic as it is one of the few that recognises the *acquisitive* character of the consequences that this form of prescription produces, by granting something to a defendant, as opposed to terminating or *extinguishing* something that is in the hands of the plaintiff.¹⁷⁶ That being said, mention is made of the 'correlative negative effect on the creditor's right'¹⁷⁷ that the defendant's exercise of their right to refuse performance has.

The question of what it is that a plaintiff, the victim of the delict, *loses* once the prescription period has run its course is one that scholars writing on extinctive prescription have evidently paid quite a bit of attention to. If one takes the language of the Prescription Act face value, one would think that what is lost following the running of the prescription period is a 'debt'.¹⁷⁸ Elsewhere, it has

¹⁷³ Section 17(1).

¹⁷⁴ Loubser op cit note 3 at 9.

¹⁷⁵ Ibid at 16.

¹⁷⁶ Zimmermann's preference for the label "liberative" prescription to describe the regime displays a similar appreciation for the manner in which extinctive prescription operates to empower a defendant to release themselves from the obligation to perform, rather than to abolish something that is possessed by a plaintiff.

¹⁷⁷ Loubser op cit note 3 at 9.

¹⁷⁸ Section 10(1).

been described as a ‘claim’ or an ‘asset’,¹⁷⁹ and an ‘action’.¹⁸⁰ And it is not uncommon for extinctive prescription to be referred to as a mechanism that leads to the loss of a substantive ‘right’ in the hands of a plaintiff.¹⁸¹ These characterisations are all unified by the notion that the consequence of the running of the prescription period is that the plaintiff is dispossessed of something substantive.

What these characterisations fail to account for, however, are the ways in which the underlying ‘debt’, ‘claim’ or ‘right’ is kept alive following the lapse of the prescription period. For example, in the law’s recognition of the defendant’s performance of their obligation, or payment of their debt, as valid, even if that defendant raises a plea of prescription in relation to it.¹⁸² Another way in which the underlying claim is preserved regardless of the fact that the prescription period has run its course is by virtue of the requirements for prescription to be raised. You will recall that prescription does not take place by operation of law and a court may not take notice of prescription *mero motu* – the defendant to the action is the only party who is empowered to raise prescription.¹⁸³ In this way, a claim that has theoretically prescribed may still be enforced. Finally, in the case of reciprocal contractual debts, section 13(2) prevents the prescription of one before the other, thereby conserving the one which would otherwise have prescribed but for its reciprocal nature.

¹⁷⁹ In a looser sense, Zimmermann endorses these labels when he describes extinctive prescription as a measure that ‘effectively amounts to an act of expropriation: a claim is an asset within the property of the creditor which largely loses its value if it can no longer be pursued in court.’ Zimmermann *Comparative Foundations* op cit note 3 at 63.

¹⁸⁰ This term is prevalent in legal systems where prescription rules bear the label of the law of the ‘limitation of actions’.

¹⁸¹ See Loubser op cit note 3 at 13-14 where he describes the inseparability of the plaintiff’s ‘right of process’ and their ‘substantive right which the process is about’. Similarly, in ‘The Path of the Law’ Holmes laments the deprivation of a person’s ‘rights’ as a consequence of the lapse of time. Holmes op cit note 1 at 476.

¹⁸² Section 10(3) of the Prescription Act. Loubser points out this difficulty (op cit note 3 at 16-17).

¹⁸³ Section 17(1) of the Prescription Act.

Loubser's account of extinctive prescription as giving rise to a substantive right or defence on the part of a defendant, which operates to negate a plaintiff's 'right', avoids some of these difficulties. In his discussion of the distinction that is often drawn between the substantive right that a plaintiff seeks to enforce by way of legal proceedings and their right to bring those proceedings for its enforcement, Loubser comes to the conclusion that, conceptually, there is 'no separate "right of process" divorced from the substantive right which the process is about, and consequently there can be no denial of a right of action which leaves the underlying substantive cause of action intact.'¹⁸⁴ From this perspective, once the plaintiff is stripped of their 'right of action', they lose an 'integral part' of their substantive right.¹⁸⁵ There is (unsurprisingly) an ongoing debate between scholars writing in private law theory regarding the meaning and precise content of a private law 'right', and whether the entitlement a right-holder has to assert or vindicate it is an 'incident', 'component' or 'necessary entailment'¹⁸⁶ of that right. While Loubser does not clarify what precisely he means by 'right', his view of the inseparability of the procedural and substantive rights of the plaintiff is some indication of which side of the debate he falls.

For the purposes of developing this alternative account of extinctive prescription, it is important to properly appreciate the nature and extent of what *exactly* is being conferred upon a defendant following the lapse of the prescription period. To this end, I suggest that we take a closer look at the question of what it is that is being *taken away* from the plaintiff as a result of the operation of prescription. It is at this point that Gardner's work on the distinction between the primary, secondary and tertiary rights become relevant.

¹⁸⁴ Loubser op cit note 3 at 13.

¹⁸⁵ Ibid at 14.

¹⁸⁶ Katz & Shapiro op cit note 48 at 1.

(vi) The plaintiff's tertiary right or power to sue

According to what is referred to as “the conventional view” as to why the victim of a delict enjoys a power to sue their wrongdoer and to pursue a claim against them by way of civil litigation, the fact that they are the party who suffered the wrong is grounds to give them, and only them, that power.¹⁸⁷ The characterisation of the power to sue as a ‘component’ or ‘necessary entailment’ of all private law rights was one of the grounds upon which Gardner criticised this view.¹⁸⁸ Instead, Gardner preferred the classification of the power to sue as one of the ‘normative incidents’ of a private law right, which ‘ultimately need to be explained, and need to be broken apart for the purposes of explanation.’¹⁸⁹ What the conventional view served to do, according to Gardner, was to ‘short-circuit this process of explanation by bundling everything together under the heading of a right.’¹⁹⁰ Thus, Gardner’s approach to rights was driven by this imperative – to ‘disaggregate the bundle of normative relations that goes under the heading “private law right”’.¹⁹¹ I will discuss set out Gardner’s framework of rights, once again, with reference to the rights that accrue to the victim of a delict.

First, there is the victim’s *primary right* not to be harmed by the culpable and wrongful conduct of the wrongdoer in the first place. However, once the delict occurs, and that primary right is violated, a *secondary right* to repair that violation arises. In the context of a delict, this is most often referred to as the right to receive compensation or to the payment of reparative damages. Finally, there is what Gardner refers to as the ‘tertiary right’ to bring an action to enforce the secondary right of repair against the wrongdoer, or to hold them to their duty of repair.¹⁹² This tertiary right — the plaintiff’s power to sue — is described as broad and ‘radically discretionary’¹⁹³ in nature. Gardner characterises it as ‘a largely

¹⁸⁷ Ibid.

¹⁸⁸ Gardner *From Personal Life* op cit note 25 at 204.

¹⁸⁹ Ibid at 55.

¹⁹⁰ Ibid.

¹⁹¹ Katz & Shapiro op cit note 48 at 3.

¹⁹² Gardner *From Personal Life* op cit note 25 at 207-209.

¹⁹³ Ibid at 201.

undirected legal power for the person wronged to determine whether [the wrongdoer's legal duty to repair] is concretised and enforced through the courts, with a consequent duty on the courts to assist, when that power is validly exercised through the issue of proceedings.¹⁹⁴ Elsewhere, he refers to this tertiary right as consisting of 'the extensive legal powers of the person who claims to have been wronged (the plaintiff) to *initiate, maintain, and terminate court proceedings* against the person whom she claims to have wronged her (the defendant).'¹⁹⁵ This is regarded as a special feature of private law – that is, the allocation of 'the most extensive legal powers to determine the powers of the court...[to] the very person who claims to have been wronged...who stands to profit personally, whether financially or otherwise, from the outcome of the proceedings...[and who] is *meant* to profit personally if her claim succeeds.'¹⁹⁶

There is (again, unsurprisingly) some debate as to whether the notion that granting victims of wrongs the power to seek and obtain compensation from their wrongdoer is more than just a special feature of private law, but is its *central* feature. The latter view – adopted by so-called 'civil recourse' theorists¹⁹⁷ – has received increasing support in recent years.¹⁹⁸ It is well beyond the scope of my present enquiry to engage with the merits of the various perspectives in this debate, let alone come to a conclusion regarding which is more persuasive. However, regardless of the side of the debate on which one ultimately falls, there seems to be broad consensus among its participants that (i) a victim's power to sue occupies a special place in the structure of the law of delict and of private law as a whole; and (ii) that there are important and valuable reasons for the victim themselves to be the one that possesses that power, as opposed to any other person, official or institution.

¹⁹⁴ Gardner *Torts and Other Wrongs* op cit note 25 at 85-86.

¹⁹⁵ Gardner *From Personal Life* op cit note 25 at 199-200 (my emphasis).

¹⁹⁶ *Ibid* at 200.

¹⁹⁷ The most notable being Goldberg and Zipursky. See John C.P. Goldberg & Benjamin C. Zipursky *Recognizing Wrongs* (2020).

¹⁹⁸ Ori J Herstein 'How tort law empowers' (2015) 65 *The University of Toronto Law Journal* 99 at 99.

It is precisely this power that extinctive prescription impacts. By granting the defendant the ability to prevent the plaintiff from continuing with their claim, the law effectively makes the plaintiff's power to sue conditional upon this new power in the hands of the defendant. It is not insignificant that what a defendant acquires following the lapse of the prescriptive period is almost a mirror-image of the plaintiff's power to sue. They share two similar features. First, both powers are completely discretionary. The defendant has an election regarding whether to raise a plea of prescription, satisfy the claim, or both, and the plaintiff has a choice regarding whether or not to bring legal proceedings for the enforcement of the claim in the first place.¹⁹⁹ Second, both are powers over the courts, the public authority. While the plaintiff's power to sue has the effect of conscripting the assistance of the courts in the enforcement of their claim, the defendant's power operates to releasing the courts from their duty to assist the plaintiff. Understanding extinctive prescription in this way — as a regime that operates to empower a defendant to have the final say over the fate of the claim against them — can help us a step closer to uncovering the motivations behind it.

Aside from enabling us to better appreciate the nature and significance of this power, this alternative account also relates more directly to the manner in which it operates in practice. Owing to the fact that prescription is raised by a defendant in the form of a special plea to the plaintiff's claim and is dealt with as a point *in limine*, before the merits of the plaintiff's claim are even considered by a court, describing the right as one 'to refuse performance'²⁰⁰ appears to suggest that the duty to render performance (in the form of an order for the payment of reparative damages in the context of personal injury claims) has already been established at the time that they enforce their right to refuse to render it (i.e. at the moment that prescription is raised). In practice, a special plea — which is 'a legal objection to

¹⁹⁹ In a sense, the plaintiff's power is not as far-reaching as the defendant's, as they are only able to exercise it within a particular period of time, owing to the law of prescription. Defendants, on the other hand, may raise prescription at any stage of the proceedings (section 17(2) of the Prescription Act).

²⁰⁰ Loubser op cit note 3 at 16.

some aspect of the plaintiff's claim'²⁰¹ which is 'directed at an underlying legal problem in the plaintiff's case, rather than at the merits of the case'²⁰² — is considered prior to and independently of the merits of the case. Special pleas of prescription, being special pleas of abatement, which, if successful, are fatal to the claim, are decided *in limine* (i.e., they are decided before the court considers the merits of the claim). Its status as a special plea means that the person who is empowered to raise prescription has an election regarding whether or not they in fact raise it.²⁰³ All of these features of a plea of prescription are appropriately accommodated by alternative account.

The consequences that the rules of extinctive prescription have for the plaintiff's power to sue are significant – they effectively strip the plaintiff of most of its components (while plaintiffs are still able to institute proceedings, they are deprived of their powers to proceed with them and, if successful to obtain judgment in their favour) and assign control over those components to the defendant. In sum, this alternative account proposes that extinctive prescription be understood as a mechanism by which the defendant to an action is granted a power over the plaintiff's tertiary right or power to sue, and is thereby given the final say over the force and continued existence of that power. When the defendant is granted this power over the plaintiff's right to claim depends on the length of the prescription period and when it is taken to have commenced. This brings us to the second aspect of the law regulating the extinctive prescription of personal injury claims that I highlight: the three year prescription period.

(d) The length of the prescription period

In line with the trends in foreign jurisdictions (although arguably ahead of its time in many respects),²⁰⁴ the Prescription Act establishes varying periods of

²⁰¹ Steve Pete et al *Civil Procedure A Practical Guide* 3 ed (2017) at 234.

²⁰² *Ibid.*

²⁰³ Loubser op cit note 3 at 14. This accords with section 17 of the Prescription Act.

²⁰⁴ Zimmermann *Comparative Foundations* op cit note 3.

prescription, with the shortest prescription period of three years applying to those debts – such as debts arising from a contract or a delict – which do not fall into the categories listed in section 11(a) – (c).²⁰⁵ A noticeable feature of the rules regulating the length of the prescription periods is that for certain types of rights and certain categories of debts, the historical thirty year prescription period found in the common law was retained. However, for others, like the rights that accrue to the victim of personal injury, the original thirty-year period has been progressively whittled down to a mere three years. The drastic reduction in the length of the prescription period that these claims are subjected to – from thirty years to three years – is probably the most striking difference between the current rules and their Roman-Dutch predecessors. In cases where it takes more than three years for a plaintiff to institute the legal proceedings to enforce their claim following the date on which it arose, the date that the court determines the clock to have begun ticking becomes crucial to the survival of that claim. It is the third aspect of the rules regulating the extinctive prescription that has received the vast majority of our courts’ attention. The outcome of that attention, that is, the interpretation of section 12 of the Prescription Act, is crucial to my enquiry into the justifications for this regime. It is to this element that I now turn.

(e) The commencement of the prescription period

Using the (somewhat dramatic) phraseology of Cameron J in *Trinity Asset Management*,²⁰⁶ determining the date that ‘prescription started its deadly trudge’²⁰⁷ has frequently been the subject of often protracted and costly litigation. In light of how answering this question is dispositive of the eventual success or failure of the plaintiff’s claim, it is unsurprising that the bulk of the argumentation from both of the parties to cases involving the prescription of personal injury claims is focused on the enquiry under section 12(3). You will recall that the

²⁰⁵ See fn 10 above (in Introduction).

²⁰⁶ *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited* 2018 (1) SA 94 (CC).

²⁰⁷ *Ibid* para 94.

section provides for four possible commencement dates for the prescription period. First, the period may start running the moment the debt is ‘due’, that is, the moment ‘there is a debt immediately claimable...[or] in respect of which the debtor is under an obligation to perform immediately.’²⁰⁸ According to the Supreme Court of Appeal in *Truter II*²⁰⁹ a delictual debt becomes ‘due’ once the ‘creditor acquires a complete cause of action...that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place.’²¹⁰

However, that the material facts underpinning the debt were all present at a particular date is not dispositive of the question as to when that debt becomes ‘due’ for the purposes of the Prescription Act. The second and third possible commencement dates relate to the extent of the creditor’s knowledge – actual and constructive, respectively – of certain facts pertaining to the debt. Therefore, the prescription period could either begin running the moment the creditor acquires actual knowledge of (i) the identity of their debtor, and (ii) the facts from which the debt arises (the second possible commencement date), or from the moment the creditor can be deemed to have that knowledge owing to their ability to acquire it by exercising reasonable care (the third possible commencement date).²¹¹ A significant amount of judicial attention has been given to the proper interpretation and application of this provision, and it is this that will occupy the bulk of my discussion of the third aspect of the rules under consideration.

²⁰⁸ *Deloitte Haskins* supra note 80 at 532H - I.

²⁰⁹ *Truter II* supra note 81.

²¹⁰ Ibid para 16. This formulation originates in the judgment of Maasdorp JA in *McKenzie v Farmer’s Co-operative Meat Industries Ltd* 1922 AD 16 which relied on the definition of ‘cause of action’ in the English case of *Cook v Gill* L.R. 8 C.P. 107 as ‘every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court.’ The SCA in *McKenzie* drew a distinction, which was met with approval by Watermeyer J in the later case of *Abrahamse and Sons v SA Railways and Harbours* 1933 CPD 626 at 57, between the *facta probanda* (the material facts to be proved) and the *facta probantia* (the evidence that must be led in order to prove those facts), with the former constituting the material facts making up a cause of action.

²¹¹ Section 12(3) of the Prescription Act.

Before doing so, it is important to mention the fourth possible commencement date provided for by the Prescription Act. According to section 12(2), the running of the prescription period will be delayed if the debtor ‘willfully prevents the creditor from coming to know of the existence of the debt’ and will not commence until the creditor becomes so aware. The section does not require proof of fraud on the part of a debtor and it is enough to show that they conveyed information to the creditor in a purposeful and deliberate manner and that the information conveyed prevented the creditor from acquiring knowledge of the debt’s existence.²¹² Thus, a creditor’s lack of knowledge of the existence of their claim *is* relevant to determining the commencement when they were prevented from acquiring it by willful conduct on the part of the debtor. However, in terms of the prevailing interpretation of section 12(3), this is the only instance where the creditor’s knowledge of the existence of a claim or a legal remedy, or, put differently, knowledge of their *ability to bring a claim in law* against the debtor, has a bearing on when the prescription period applicable to that claim begins to run.

In terms of section 12(3), the running of the prescription period will begin once the creditor has knowledge, or is deemed to have knowledge, of two things: first, the identity of the debtor, and second, the facts giving rise to the debt. As to the first, according to Diemont JA in *Gericke v Sack*²¹³ the creditor will have knowledge of the debtor’s ‘identity’ once they are in possession of ‘sufficient information for the process-server to be able to identify the debtor by name and address.’²¹⁴

As to the second type of knowledge required, the dominant approach to interpreting this part of section 12(3) has been to resort to the distinction between ‘factual conclusions’ and ‘legal conclusions’, leading to a finding that it is sufficient for the triggering of the prescription period that a creditor to possess knowledge of the material *facts* underlying the claim. However, where a creditor lacks of knowledge of the legal significance of those facts, or, in the frequently quoted

²¹² *Jacobs v Adonis* 1996 (4) SA 246 (C) at 249F – 251B.

²¹³ *Gericke* supra note 155.

²¹⁴ *Ibid* at 830A-B.

words of Grosskopf JA in *Van Staden v Fourie*,²¹⁵ where a creditor has not yet discovered ‘die volle omvang van sy regte’,²¹⁶ the commencement of the prescription period will not be delayed. The current understanding of the extent of knowledge that is required in the second category – or, put differently, the prevailing judicial conception of the bounds of what constitutes ‘the facts from which the debt arises’ which, if known or reasonably capable of becoming known by the creditor, are sufficient for the court to deem the debt as having become due for the purposes of section 12(3) – is the product of a long history of interpretation and application of the provision by our courts in cases in which a special plea of prescription was raised. It is useful to set out an abridged version of that chronology here.

One of the most frequently-cited cases in this regard is that of *Truter II*,²¹⁷ in which the SCA was tasked with determining whether possession of an expert opinion stating that a conclusion of negligence can be drawn from a specific set of facts constitutes a ‘fact’ for the purposes of section 12(3). In coming to its finding, the court in *Truter II*²¹⁸ relied on the above passage from *Van Staden* and Loubser’s definition of a cause of action as ‘the combination of facts that are material for the plaintiff to prove in order to succeed with his action...[which] must enable a court to arrive at certain legal conclusions’.²¹⁹ After adopting this definition, the court reasoned that an expert opinion relating to a legal conclusion is ‘not itself a *fact*, but rather *evidence*...[and] the presence or absence of negligence is not a fact; it is a conclusion of law to be drawn by the court in all the circumstances of the specific case.’²²⁰ The court then concluded that, properly understood, section 12(3) requires knowledge of the material facts upon which the debt is based, and not the legal

²¹⁵ 1989 (3) SA 200 (A)

²¹⁶ *Ibid* at 216C – E (direct translation: ‘the full extent of his rights’)

²¹⁷ *Truter II* *supra* note 81.

²¹⁸ *Ibid* para 16 – 17.

²¹⁹ Loubser *op cit* note 3 at 80; see also *Evins* *supra* note 164 at 838H – 839A.

²²⁰ *Truter II* *supra* note 81 para 20.

conclusions to be drawn from those facts or an expert opinion supporting those conclusions, for the prescription period to begin running.²²¹

In *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng*,²²² the court was called upon to determine whether the commencement of the prescription period applicable to a claim arising from an invalid sale is delayed until judgment is handed down confirming the invalidity of that sale. In finding that it is not, Leach AJA reaffirmed the position: it may be that the creditor ‘had not appreciated the legal consequences which flowed from the facts, but [their] failure to do so does not delay the date prescription commenced to run.’²²³ In *Claasen v Bester*,²²⁴ the SCA once again stated that its previous decisions ‘make it abundantly clear that knowledge of legal conclusions is *not required* before prescription begins to run’, adding that there is ‘no reason to distinguish delictual claims from others.’²²⁵

When the Constitutional Court in *Links v Department of Health, Northern Province*²²⁶ encountered the question as to what facts a plaintiff was required to have knowledge of before prescription can be said to run, it considered the above cases and found that in cases ‘involving professional negligence, the party relying on prescription must at least show that the plaintiff was in possession of sufficient facts *to cause them on reasonable grounds to think that the injuries were due to the fault of the medical staff*.’²²⁷ It then added that a plaintiff cannot be said to have knowledge of the facts from which the debt arises until ‘there are reasonable

²²¹ This was cited with approval in *Minister of Finance and Other v Gore NO 2007 (1) SA 111 (SCA)* para 17, where the court restated its position on the interpretation of section 12(3) – that prescription commences once the creditor has the minimum facts necessary to institute action, and is not postponed until they become aware of the full extent of their rights or until they are in possession of evidence to ‘comfortably’ prove their claim.

²²² 2009 (3) SA 577 (SCA).

²²³ *Ibid* para 37.

²²⁴ 2012 (2) SA 404 (SCA).

²²⁵ *Ibid* para 15.

²²⁶ 2016 (4) SA 414 (CC).

²²⁷ *Ibid* para 42.

grounds for suspecting fault so as to cause the plaintiff to seek further advice'²²⁸ or until they 'had knowledge of facts that would have led him to think that possibly there had been negligence.'²²⁹

This finding in *Links* echoes a similar sentiment to the judgment in the earlier case of *Drennan Maud & Partners v Pennington Town Board*,²³⁰ in which a plea of prescription in respect of a debt arising from a breach of contract was dismissed on the basis that the appellant (defendant in the court *a quo*) had failed to establish that the respondent (the plaintiff in the court *a quo*) possessed the requisite knowledge of the facts giving rise to the debt, or was reasonably capable of acquiring that knowledge, at the date it alleged the debt became due. According to the court, per Olivier JA, the appellant needed to show when the respondent became aware or should be deemed to have become aware that the appellant 'had committed a design fault'²³¹ in breach of its obligations under the contract. In clarifying what is meant by 'reasonable care' in section 12(3), the court noted that the section 'requires diligence not only in the ascertainment of the facts underlying the debt, but also in relation to the *evaluation and significance* of those facts.'²³² While the findings in *Links* and *Drennan Maud* do not provide clear authority for the proposition that prescription will not run against a claimant who may have knowledge of the material facts upon which their claim is based, but does not know that, taken together, these facts form the basis of a claim that is enforceable in a court, they do highlight the importance of a creditor possessing sufficient facts to ground an appreciation that something wrong, in a legal sense, has taken place before prescription commences.

However, any hope that the law will eventually come to protect claimants who were delayed in instituting action owing to them lacking knowledge of the existence of a legal remedy or of their prospects of being able to successfully prove

²²⁸ Ibid.

²²⁹ Ibid para 46.

²³⁰ 1998 (3) SA 200 (SCA).

²³¹ Ibid at 205E-F.

²³² Ibid at 209F-G.

their claim was quickly and authoritatively dispelled a few years later by the Constitutional Court in *Mtokonya v Minister of Police*.²³³ The origins of the case lay in an action for damages arising from the wrongful arrest and detention of the applicant by members of the South African Police Service that occurred on 27 September 2010. In response to the institution of the action more than three years later, in April 2014, the respondent raised a special plea of prescription. The applicant claimed that he did not know, prior to a conversation in 2013 with his neighbour who is an attorney, that the conduct of the SAPS was wrongful and actionable and that he could sue them as a result.²³⁴ The court *a quo* upheld the respondent's special plea on the basis that such knowledge did not fall within the scope of section 12(3), as it pertains to conclusions of law and not of fact. The judge *a quo* referred to the string of cases referred to above – including *Claasen, Van Staden, Truter II* and *Gore*.²³⁵

After being unsuccessful in his applications for leave to appeal in both the High Court and the SCA, the applicant appealed to the Constitutional Court in the form of a special case in terms of rule 33(1) of the Uniform Rules of Court.²³⁶ As such, the parties submitted an agreed statement in terms of rule 33, which recorded the applicant's contentions that he was not aware of the wrongfulness of the conduct by the SAPS and of the possibility of bringing a claim against the respondent.²³⁷ The majority, per Zondo J, dismissed the applicant's case, holding that knowledge 'that the conduct of the debtor is wrongful and actionable is knowledge of a legal conclusion and is not knowledge of a fact'²³⁸ and, for that reason, falls outside of section 12(3).

The minority judgment, penned by Jafta J, reached a different conclusion. Relying on the interpretation of 'debt is due' in section 12(1) in *List v Jungers*²³⁹ as the

²³³ *Mtokonya* supra note 64.

²³⁴ *Ibid* para 2 – 3.

²³⁵ *Ibid* para 7.

²³⁶ *Ibid* para 2.

²³⁷ This agreed statement is reproduced Supra para 3. These contentions appear in point 6.

²³⁸ *Mtokonya* supra note 64 para 45.

²³⁹ 1979 (3) SA 106 (A).

moment the debt becomes recoverable, Jafta J places importance on the distinction between the debt arising and it becoming due and recoverable. To say that a debt is owing and recoverable, Jafta J reasons, requires one to presuppose that the creditor is both aware of the existence of the debt and their ability to enforce its payment.²⁴⁰ On his reading of section 12, Jafta J cautions that holding a debt to be ‘recoverable’ when the creditor thereof has no knowledge of its existence would undermine the purpose of the section and would not be in line with section 39(2) of the Constitution as it would ‘frustrate the enjoyment of the rights guaranteed by section 34 in circumstances where it was impossible for the creditor to institute legal proceedings’.²⁴¹ Jafta J’s reasoning is appealing in many respects, particularly when one considers that one of the primary purposes attributed to extinctive prescription is that it is aimed at discouraging negligent inaction on the part of creditors in bringing their claim.

The lingering question then becomes whether it is possible for a creditor to negligently fail to do something that they do not know they are able to do, and do not know the consequences of failing to do it (i.e. the consequence of their claim prescribing). A creditor who is not aware of the existence of the debt or that it is subject to prescription can hardly be said to have acted negligently when they, for those reasons, do not institute action for its enforcement.²⁴² This is just one of the challenges that the law of extinctive prescription, as it has been interpreted by our courts, poses for the dominant justifications for the regime. It is now time to consider those justifications.

²⁴⁰ *Mtokonya* supra note 64 para 134.

²⁴¹ *Ibid* para 135.

²⁴² This point will be fleshed out in more detail in Parts III and IV when the dominant justifications for extinctive prescription are evaluated.

III THE DOMINANT JUSTIFICATIONS FOR THE LAW OF EXTINGTIVE PRESCRIPTION

No branch of the law has more of practical or historical value than the subject of limitations.²⁴³

When it comes to the dominant justifications for extinctive prescription, there is, surprisingly, little debate. Most of the literature and case law on the subject raise one, or a combination of ‘the well accepted policies underlying statutes of limitations...[that] the barring of actions by the effluxion of time has been said to encourage and secure diligence in litigation, to protect defendants from stale claims when the evidence which may have answered them has perished and to give peace of mind to defendants after the lapse of a given period.’²⁴⁴ Elsewhere, it is framed more generally and abstractly. For example, in the idea that the law of extinctive prescription serves to provide a vital counterbalance to the ‘obfuscating power of time’.²⁴⁵ What the judicial and academic commentary on extinctive prescription is that some effort has been made to come to a suitable justification for the existence of such a regime, but most of the dominant justifications have become accepted as trite articulations of this regime’s worth. As such, there is a need to critically revisit them.

In one of the most comprehensive discussions of the policies offered both in support of and against having a law of extinctive prescription,²⁴⁶ Ochoa and Wistrich begin by identifying some of the limitations of the judicial accounts of the purposes that laws of prescription are aimed at serving. Firstly, the authors note that while there is some consensus regarding what these purposes are, their choice of emphasis differs quite significantly, which, they suggest, is partially determined by the

²⁴³ Edward J. Hill *Common Law Jurisdiction and Practice, according to Statutes and Decisions in the State of Illinois, from the Earliest Period to 1872* (1872) at 529.

²⁴⁴ Todd op cit note 57 at 6.

²⁴⁵ Zimmermann *The Law of Obligations* op cit note 3 at 768 citing Bernhard Windscheid & Theodor Kipp *Lehrbuch des Pandektenrechts* 9 ed (1906) § 105.

²⁴⁶ As the authors are writing in the context of the United States, they refer to it as ‘limitation of actions’. See: Ochoa and Wistrich op cit note 4.

outcome that the particular court intends to reach.²⁴⁷ Given the consequences for the person seeking to enforce their claim when that outcome is one in which their claim is found to have prescribed, depriving them of their ability to proceed with its litigation, it is unsurprising that courts who reach this outcome feel the need to justify why they have done so (or, more precisely, why there are good reasons for them doing so).

The second limitation that Ochoa and Wistrich identify with regard to the judicial accounts of the purposes of extinctive prescription is that they tend to be underinclusive, as they fail to acknowledge additional policies that may be either promoted or hindered by the operation of the regime.²⁴⁸ This has led to a relatively restricted and superficial view of the value of extinctive prescription, which has gained traction to the point of being trite and is rarely supplemented or interrogated. The South African judicial accounts display this tendency and seldom go beyond the classic triad of justifications — that is, that prescription serves to avoid the litigation of stale claims; to discourage negligent inaction; and to promote certainty and repose in legal and social affairs. Third, the authors note that these accounts frequently use terms that are vague and do not have a settled meaning.²⁴⁹ The final limitation that the authors raise is that the judicial accounts are seldom grounded in any substantive analysis of the role that extinctive prescription does or should play in the legal system in which it exists.²⁵⁰ In light of this, the authors seek to set out a more thorough and balanced exposition of the various policies that are said to be impacted by this regime, both those that justify its continued presence and those that do not.

²⁴⁷ Ochoa and Wistrich op cit note 4 at 457. For example, in the South African context, cases where the interpretation of section 12(3) leads to a result that the prescription period is deemed to have commenced at an earlier date, with the consequence that the plaintiff's claim has prescribed, emphasis is normally placed on the role of section 12(3) in promoting diligence on the part of the plaintiff and the need for certainty. See *Mdevide* supra note 61 and *Mtokonya* supra note 64.

²⁴⁸ Ochoa and Wistrich op cit note 4 at 458.

²⁴⁹ For example, when extinctive prescription is said to prevent the litigation of 'stale claims' and to discourage 'negligent inaction'. The meanings of these terms will be discussed later.

²⁵⁰ Ochoa and Wistrich op cit note 4 at 459.

My discussion of the justifications that have been offered in support of the law of extinctive prescription will draw quite heavily on Ochoa and Wistrich's analysis, but it will be structured slightly differently and will include commentary from other jurisdictions and statements made by our courts. I will focus on the three most frequently mentioned purposes – namely, that extinctive prescription serves to promote fairness and certainty for defendants, to encourage diligence on the part of plaintiffs and to ensure that litigation occurs when the evidence is still reasonably fresh²⁵¹ – but will briefly mention those that are not commonly encountered. What becomes clear from the literature is that most of the attempts to justify extinctive prescription follow a teleological approach – the focus is on what *end* this regime is intended to further and, if that end is assumed to be a desirable or valuable one, then the regime finds its justification. In addition, there is a tendency in the commentary to talk about the law of extinctive prescription as though it bears some inherently beneficial quality that positions it as a vital counterbalance to an injustice. The assumed injustice is found in, for example, the notion that delayed or 'stale' claims are, in and of themselves, unjust;²⁵² or that there is some valuable, what Ochoa and Wistrich refer to as 'cultural', norm in society which is violated by negligent inaction by a plaintiff in bringing their claim.²⁵³

(a) Avoiding the litigation of 'stale claims'

The purpose that is most frequently raised in the context of justifying extinctive prescription is that it prevents the litigation (and adjudication) of what are commonly referred to as 'stale claims'.²⁵⁴ While the precise features of a claim that

²⁵¹ Kent Roach 'Reforming statutes of limitations' (2001) 50 *University of New Brunswick Law Journal* 25 at 25.

²⁵² See, for example, Zimmermann *The Law of Obligations* op cit note 13 at 768.

²⁵³ See, for example, the discussion in Ochoa and Wistrich op cit note 4 at 488-492.

²⁵⁴ Loubser op cit note 3 at 22-23; Ochoa and Wistrich op cit note 4 at 471; Zimmermann *Comparative Foundations* op cit note 3 at 64; Zimmermann *Law of Obligations* op cit note 13 at 768; Christine M. Benson 'Statutes of Limitations in Tort: Who Do They Limit?' (1988) 71 *Marquette Law Review* 769; Andrews op cit note 13 at 594; David Crump 'Statutes of Limitation: The Underlying Policies' (2016) 54 *University of Louisville Law Review* 437 at 440-444; 'Developments in the Law: Statutes of Limitations' (1950) 63 *Harvard Law Review* 1177; 'The

would render it ‘stale’ have not been expressly delineated, for a claim to be regarded as such (insofar as the rules of prescription are concerned) it is sufficient that the applicable period of time has passed between the occurrence of the events giving rise to that claim and its eventual enforcement.²⁵⁵ Owing to time’s so-called ‘obfuscating power’,²⁵⁶ such claims are presumed to have deteriorated in quality or to possess certain pathologies that pose a threat to the fairness, efficiency or standard of their adjudication. In particular, mention is often made of the risk that the evidence required for their fair and efficient adjudication will have deteriorated or disappeared and that the witnesses’ memories will have faded owing to the passage of time.²⁵⁷ The importance of this purpose, according to what I call ‘the first putative justification’ of extinctive prescription, is grounded in the need to protect (i) the interests of potential defendants in defending claims brought against them; and (ii) the public interest in the fair and efficient administration of justice (coupled with the more abstract “interests of justice”).

(i) The interest in defending a claim

One of the reasons why the adjudication of ‘stale claims’ ought to be avoided, according to the logic of the first putative justification, is that doing so may prejudice to the defendant to that claim. The possibility that the evidence which has deteriorated or has been destroyed, or the witnesses who have disappeared or whose recollections of the events have faded, were necessary to prove the facts grounding a defence to the claim, creates the risk that the person against whom a ‘stale claim’ is brought may be unfairly limited, by virtue of these pathologies, in their ability to defend it.²⁵⁸ In the words of Mlonzi AJ in *Truter I*, extinctive prescription’s ‘justification lies in... the *equitable phenomenon to protect the*

Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits’ (1983) 96 *Harvard Law Review* 1683 at 1694; SALRC report op cit note 23 at 10; see also: *Mohlomi* supra note 61 para 11; *Khalapa v Commissioner of Police and Another* [2000] LSHC 143 para 5.

²⁵⁵ Ochoa and Wistrich op cit note 4 at 458.

²⁵⁶ Zimmermann *The Law of Obligations* op cit note 13 at 768.

²⁵⁷ Loubser op cit note 3 at 23-24; Zimmermann *Law of Obligations* op cit note 13 at 768; Zimmermann op cit note 92 at 63; *Mohlomi* supra note 61 para 11; *Mdeyide* supra note 61 para 8.

²⁵⁸ Zimmermann *Law of Obligations* op cit note 13 at 768

potential defendant against antiquated claims.’²⁵⁹ Safeguarding the interests of a person against whom a claim is brought in having access to the evidence required to defend themselves against it, whether it is in the form of documentation or witness testimony, sits at the heart of this justification.

In short, because the effluxion of time has the potential to deprive a defendant of ‘proof of the circumstances that thwart the plaintiff’s claim’²⁶⁰ making it ‘unreasonably difficult for [them]... to answer the claims against them’,²⁶¹ there is a good reason to provide them with a remedy to avoid having to do so. It is the *unfairness* of the position that ‘stale claims’ are presumed to place these defendants in, in the process of their adjudication, that gives this ground for extinctive prescription rules its moral force. Thus, the perception is borne that avoiding unfairness to defendants is ‘one of the most powerful policies’²⁶² in support of laws of prescription, and that the normative underpinnings of these laws are sourced in the values of fairness and equity.²⁶³

(ii) The public interest and the “interests of justice”

The second reason given for why ‘stale claims’ ought to be avoided or limited in our courts relates to interests beyond those of the parties to the case. The (admittedly ever elusive) ‘public interest’ and ‘interests of justice’ are also said to be furthered by the operation of extinctive prescription rules in respect of claims which have gone ‘stale’. These interests are implicated by virtue of the influence that the quality and availability of evidence has on the fair, proper and efficient adjudication of claims. These concerns are borne out of the recognition that the courts are vital public institutions and that there is a common interest, shared by all of the members of the legal system in which these courts exist, in ensuring that

²⁵⁹ *Truter I* supra note 81 para 61.

²⁶⁰ Zimmermann *Law of Obligations* op cit note 13 at 768.

²⁶¹ Ochoa and Wistrich op cit note 4 at 483.

²⁶² *Ibid.*

²⁶³ Loubser op cit note 3 at 23; Ochoa and Wistrich op cit note 4; Zimmermann *Law of Obligations* op cit note 13 at 768.

they are able to perform their functions, including the administration of justice, not only effectively, but with integrity. At the very least, the perception that courts are merely ‘haphazard guessers about facts... [and that their decisions are] no more accurate than tossing a coin’²⁶⁴ poses a threat to their legitimacy in a society which is committed to the ideal of the rule of law.²⁶⁵ On this logic, the law of extinctive prescription serves the public interest by ‘[enhancing] the legitimacy of the legal system by promoting the *appearance of rational decisionmaking*.’²⁶⁶

In addition to the interest in preserving the courts’ legitimacy, to the extent that it depends on the perception that they engage in rational and fair adjudicative processes based on fresh evidence, the public has an interest in legal disputes being resolved quickly, in minimizing the costs of litigation, particularly those which are borne by the courts themselves (i.e., the public),²⁶⁷ and in ensuring that the courts are furthering the attainment and administration of justice. The concept of ‘justice’ comes up frequently in general propositions about claims which have gone ‘stale’. For example, the assertion that ‘long dormant claims, as a rule, “have more cruelty than justice in them”’²⁶⁸ points to some inherent unjust quality of such claims.

Another context in which the concept of justice arises is in the implications that ‘stale claims’ have on the ‘interests of justice’. In *Mohlomi*,²⁶⁹ Didcott J summed up the justification for avoiding subjecting both potential defendants and the court system to such claims as follows:

‘Inordinate delays in litigating damage the *interests of justice*... it [is not] always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of

²⁶⁴ Ochoa and Wistrich op cit note 4 at 481.

²⁶⁵ See Michael S Moore ‘The Semantics of Judging’ (1981) 54 *California Law Review* 151.

²⁶⁶ Ochoa and Wistrich op cit note 4 at 481.

²⁶⁷ Ibid at 470.

²⁶⁸ Zimmermann *The Law of Obligations* op cit note 13 at 768.

²⁶⁹ Supra note 61.

ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared.²⁷⁰

Again, mention is made of the pathologies that are frequently associated with claims that are instituted many years after the events giving rise to them occurred, suggesting that these pathologies, and the difficulties of proof that are presumed to give rise to, are the central concern of the first putative justification. The pernicious effects of these difficulties for the parties to the case (with particular focus on the defendant), the court tasked with its adjudication, the interests of the public more broadly and the just and fair adjudicative system are offered as the primary reasons to avoid the litigation of ‘stale’ claims. Significantly, it is not only the possibility of justice being done in the adjudicative process that is challenged by difficulties of proof, but it is also the public’s *perception* that justice is being done – expressed in the phrase ‘Justice must satisfy *the appearance of justice*.’²⁷¹

(b) Encouraging diligence and the prompt enforcement of claims

In addition to ‘the equitable phenomenon’ to safeguard potential defendants against the difficulties of proof that arise in ‘stale claims’, Mlonzi AJ mentions a second ground of justification for extinctive prescription:

‘Prescription of action is founded exclusively upon the inaction or continuous impassive attitude of the possessor of the right (*juge silentium, dinturuum silentium, jugis taciturnitus*) ... [and its] justification lies in the negligence perpetrated [by] the person having the right to institute a claim...’²⁷²

When it comes to the source of the blameworthiness of the person seeking to enforce their claim, Mlonzi AJ describes it as being ‘not in neglecting to ensure

²⁷⁰ Ibid para 11.

²⁷¹ *Offutt v. United States*, 348 U.S. 11 (1954) at 14

²⁷² *Deysel v Truter* 2005 (5) SA 598 (C) para 61 (*Truter I*).

that the ingredients of the right of action exist, but in failing to make use of that right of action after its coming into existence.²⁷³ Discouraging what is commonly referred to as ‘negligent inaction’ on the part of a person bringing the claim and promoting the diligent and swift enforcement of these claims in the courts is what I call ‘the second putative justification’ for extinctive prescription.²⁷⁴

The prevention of ‘negligent inaction’ is often cited in our courts as one of the central purposes of extinctive prescription, frequently when describing the objects of section 12(3) of the Prescription Act.²⁷⁵ You will recall that section 12(3) regulates the determination of the deemed “due date” of the claim, which, in terms of section 12(1), is the date that the prescription period begins to run in respect of that claim.²⁷⁶ In sum, it provides that the claim will not be deemed to be ‘due’, and the clock will therefore not start ticking, until the person with the right to bring the claim has knowledge of the identity of the person against whom the claim must be brought and the facts from which the claim arose. The subsection further provides that this knowledge will be deemed to be possessed by the person with the right to claim, if they ‘could have acquired it by exercising reasonable care.’²⁷⁷ In *Brand v Williams*,²⁷⁸ Scott AJ described this subsection’s ‘underlying object’ as being ‘to ensure that it is negligent rather than innocent inaction that is penalized.’²⁷⁹

From this, it appears that, once the person with a right to institute a claim actually possesses, or through reasonable care could acquire, knowledge of (i) the person that claim lies against and (ii) the facts from which it arose, their continued inaction in not instituting legal proceedings to enforce that claim, for the length of

²⁷³ Ibid para 62.

²⁷⁴ Ibid para 61; *Mtokonya* supra note 64 para 145; Ochoa and Wistrich op cit note 4 at 488; Loubser op cit note 3 at 9.

²⁷⁵ See, for example, *Macleod* supra note 18 para 13 and 15; *Mtokonya* supra note 64 para 145; *Van Zijl v Hoogenhout* [2004] 4 All SA 427 (SCA) para 19; *Truter I* supra note 272 para 61.

²⁷⁶ Section 12(1).

²⁷⁷ Section 12(3).

²⁷⁸ 1988 (3) SA 908 (C).

²⁷⁹ Ibid at 913C-D.

the prescription period, is what is considered ‘negligent’. In our law, it is from this date that the person with the right to claim is expected to start taking steps towards enforcing it and will be regarded as having ‘failed to act diligently’²⁸⁰ if the eventual enforcement of that claim only takes place after the prescription period had lapsed. In this way, the law provides a strong reason for those who have a claim to act quickly to institute the necessary legal proceedings for its enforcement and, while they are only expected to do so once they are in possession of sufficient information about that claim, extinctive prescription seeks to ensure that they do not wait too long after they have this information or could reasonably have acquired it.

The question then becomes: what is the reason for preventing ‘negligent inaction’? Why is encouraging diligence an important goal? One possibility that has been offered is that there are certain ‘psychological, cultural and moral imperatives’ furthered by a regime that does so, such as a ‘deeply ingrained notion that people should act promptly.’²⁸¹ Another possibility is that incentivizing diligence in bringing a claim also serves to incentivize the swift enforcement of the substantive law that applies to that claim,²⁸² avoids any concerns regarding the retrospective application of contemporary standards.²⁸³ This goal is not unfamiliar to our legal system, with the notion that it is unfair to judge past behaviour by present standards of conduct finding expression in other areas of law.²⁸⁴ There is also a reason that is shared with the first putative justification – that encouraging diligence works towards ‘ensuring that cases are litigated while the evidence is reasonably fresh.’²⁸⁵

The interconnectedness of the dominant justifications for extinctive prescription, in their sharing of reasons to support the regime, is most evident in respect of the

²⁸⁰ *Links* op cit note 89 para 26.

²⁸¹ Ochoa and Wistrich op cit note 4 at 489.

²⁸² *Ibid* at 492.

²⁸³ *Ibid* at 493.

²⁸⁴ For example, in the principle of non-retroactivity in the realm of criminal law.

²⁸⁵ Roach op cit note 251 at 25.

second putative justification. Some commentators have argued that the policy of encouraging diligence is actually just a means of achieving the other policies.²⁸⁶ Others have made the stronger claim that the *only* legitimate justification for requiring diligence on the part of a person with a right to claim is that it is an instrument to further these other policies, as '[u]nless the indolence of the plaintiff has somehow threatened the quality of the evidence available at trial or intruded upon a potential defendant's repose, no purpose, other than generally punishing the slothful, is served by barring the claim.'²⁸⁷ With this in mind, it is useful to set out what I call the 'third putative justification', which is that extinctive prescription serves to protect certainty and peace of mind, on the part of the person against whom the claim lies, the legal system and the public more broadly.

(c) Promoting certainty and repose by protecting the settled expectations

Another justification that is frequently given for extinctive prescription regimes is that they contribute to meeting the 'need for certainty and stability in social and legal affairs'.²⁸⁸ The attainment of legal certainty is often referred to as being the regime's primary goal,²⁸⁹ in particular, achieving 'legal certainty and finality in the relationship between a debtor and creditor',²⁹⁰ in accordance with 'practical legal considerations, the need for certainty and common consent'.²⁹¹ In addition to promoting certainty, mention is often made of the role that prescription regimes play to 'promote repose'.²⁹² Responding to the potential for ambiguity in what precisely is meant by 'certainty' and 'repose', Ochoa and Wistrich identify four

²⁸⁶ Ochoa and Wistrich op cit note 4 at 488-489. Given the emphasis on the need for certainty and the minimization of the deterioration of evidence by our courts, it appears that these policies are given some importance over the need to encourage diligence (which is often only mentioned in the context of discussing the fairness of section 12(3) vis-à-vis the plaintiff, as opposed to the rationale for the regime as a whole).

²⁸⁷ Michael D Green 'The Paradox of Statutes of Limitation in Toxic Substances Litigation' (1988) 76 *California Law Review* 965 at 981.

²⁸⁸ *Mdeyide* supra note 61 para 8.

²⁸⁹ Loubser op cit note 3 at 25.

²⁹⁰ *Ibid* at 4.

²⁹¹ *Ibid* at 9.

²⁹² Ochoa and Wistrich op cit note 13 at 460.

related policies that these terms encompass: (i) allowing peace of mind; (ii) avoiding the disruption of settled expectations; (iii) reducing uncertainty about the future; and (iv) reducing the cost of measures taken to minimise the risk of untimely claims.²⁹³ Although there is significant overlap, each of these will be discussed separately.

(i) Peace of mind

One understanding of ‘repose’ is that it denotes the ‘peace of mind’ of the person against whom the claim lies, which is disrupted by the institution of the claim against them – as they are called upon to defend it and, if they are unsuccessful, to satisfy it. The financial implications of a claim being successfully enforced against a person are significant, and can be life-altering, requiring a substantial reordering of a person’s assets and affairs, if they are even able to meet the claim. The underlying rationale for placing a time bar on the period of time that may pass between the events giving rise to a claim and its enforcement, from this perspective, is that it is unfair to subject someone to an indefinite threat of being sued. It has been compared with ‘the principle in our law with regard to *res judicata*...., that there must be finality and the party defending must not be unduly vexed.’²⁹⁴

(ii) Settled expectations and the (new) status quo

Another understanding is that ‘certainty’ or ‘repose’ relate to the parties’ and the public’s expectations which have arisen, and then settled, following the passage of time and in relation to the new *status quo* between the parties. The expectations that arise on the part of the person possessing the thing as owner, the original owner who has not been in possession for quite some time, and the broader public (which presumably has been engaging with the possessor as owner), are one source of the ‘certainty and stability in social and legal affairs’ that prescription regimes

²⁹³ Ibid.

²⁹⁴ *Truter I* supra note 272 para 61.

seek to guard. In the context of the extinctive prescription of claims, the expectation which arises on the part of the person against whom a claim lies, once a particular length of time has passed, is that no claim is going to be brought them. From the perspective of the public, the fact that no claim has been brought against that person (which is often a juristic person) also generates certain expectations that none are forthcoming. Once these expectations have settled, on the logic of this justification, they ought not to be disrupted.

This understanding of the purpose of extinctive prescription is linked in many respects to what is referred to as the ‘reasonable reliance theory’ as to the nature and effect of extinctive prescription.²⁹⁵ The idea being that there is a need to protect reasonable reliance on the part of the person against whom a claim may be brought, in circumstances where they interpreted the delay in enforcing that claim as an indication that there was no longer an intention to do so, and were reasonable in doing so.²⁹⁶

(iii) Uncertainty about the future

What becomes clear from the previous discussion is that it is not only the interests of potential defendants that are said to be targeted for protection by extinctive prescription regimes, but also the interests of the public more broadly. For example, a public interest in not discouraging ‘even culpable defendants from allocating their resources optimally for long periods of time’²⁹⁷ has been identified in some jurisdictions. Additionally, there is an interest in ‘avoiding the disrupting effect that unsettled claims have on commercial intercourse’²⁹⁸ and in the prompt resolution of disputes ‘in order that commercial and other activities can continue unencumbered by the threat of litigation.’²⁹⁹ In many respects, these are merely

²⁹⁵ Which was discussed in Part II(c)(i) above.

²⁹⁶ Zimmermann *Comparative Foundations* op cit note 3 at 63.

²⁹⁷ Richard A Epstein ‘Past and Future: The Temporal Dimension in the Law of Property’ (1986) 64 *Washington University Law Quarterly* 667 at 672.

²⁹⁸ ‘Developments in the Law: Statutes of Limitations’ (1950) 63 *Harvard Law Review* 1177 op cit note 254 at 1185.

²⁹⁹ *Elkins v. Derby* 12 Cal.3d 410, 417 n.4.

extensions of the “settled expectations” rationale described above. The central idea that underpins the various understandings of ‘certainty’ and ‘repose’, when it comes to society more broadly, is that because of the economic interdependence of individuals in modern society, there is a social interest in the economic stability of persons and firms.³⁰⁰ Ochoa and Wistrich make this argument with reference to the example of a corporation that produces drug with harmful effects that only materialise much later, which is then bankrupted by the resulting liability to compensate the victims of that harm. The authors draw attention to the wide range of parties that are likely to be implicated by this corporation’s bankruptcy – investors, employees, creditors, partnering firms and consumers.³⁰¹ It is not difficult to imagine why the law would seek to avoid such an eventuality by giving these parties some sense of predictability as to when the threat of liability will cease.

(d) Reducing the overall volume of litigation in the courts

One of the lesser-raised purposes of extinctive prescription is that it serves to reduce the volume of litigation in the courts. Similar to the reason for avoiding the litigation and adjudication of ‘stale claims’, the financial burden that funding the judiciary places on the public purse means that there is a shared interest in reducing their costs as much as possible, which lowering the overall number of cases that courts hear would achieve.³⁰² There is another strain on the public coffers that bears mentioning in this regard – claims litigated against the State, which are entirely publicly-funded, both in the State’s defence and payment of those claims. The public has an interest, therefore, at least from the perspective of the cost borne by it, in reducing the extent of the State’s civil liability and the number of claims it is asked to meet.

³⁰⁰ Ochoa and Wistrich op cit note 13 at 467.

³⁰¹ Ibid at 467.

³⁰² Ibid at 495.

When it comes to very short prescription periods being applied to certain types of claims, Ochoa and Wistrich suggest that this may indicate a desire to discourage these types of claims from being filed,³⁰³ and therefore being litigated. On this reasoning, establishing a three-year prescription period for delictual debts and a thirty-year period for debts secured by a mortgage bond, the prescription regime distinguishes between these two classes of claimants and indicates a stronger preference to reduce the number of claims to enforce debts which are not secured by a mortgage bond over those that are. In 1905, the California Legislature amended the prescription period applicable to claims for wrongful death and personal injury from two years to one year. This move coincided the large increase in the number of these types of claims as a result of the Industrial Revolution and the mechanization of industry.³⁰⁴ In respect of the longer, thirty-year prescription period, Zimmermann notes a general recognition that the ‘ever-increasing ‘acceleration of history’ has rendered this period entirely unsuitable to modern circumstances.’³⁰⁵

When one looks at the manner in which the length of the prescription period applicable to delictual debts has shortened over time, while others have remained the same or have shortened only slightly, alongside the manner in which the net of delictual liability has grown, particularly in the constitutional era, this view seems more persuasive. In short, this justification for extinctive prescription – to reduce the overall number of claims filed, litigated and enforced, and to reduce the number of certain claims or claims against certain defendants to a greater extent than others – seems grounded in commercial and economic considerations, particularly the financial well-being of these defendants and the public more generally.

³⁰³ Ibid at 499.

³⁰⁴ Ibid at 499.

³⁰⁵ Zimmermann *Comparative Foundations* op cit note 3 at 86.

(e) Concluding thoughts on the dominant justifications

What emerges from the discussion above is that the overarching aims of extinctive prescription are commonly said to be one or more of the following: (i) that it seeks to prevent the litigation of ‘stale claims’; (ii) that it discourages negligent inaction on the part of prospective plaintiffs; and (iii) that it seeks to provide some measure of certainty and finality for the parties to a case (but particularly for defendants) and the public more generally. In *Mohlomi*, after briefly discussing the regime’s dominant justifications, Didcott J confidently concludes that rules of extinctive prescription ‘thus serve a purpose to which no exception in principle can cogently be taken’.³⁰⁶ Part IV sets out reasons why this may be too strong a claim.

³⁰⁶ *Mohlomi* supra note 61 para 11.

IV A CRITIQUE OF THE DOMINANT JUSTIFICATIONS

In this part, I set out a critique of the dominant justifications and will discuss each one separately.

(a) The first justification: avoiding the litigation of 'stale claims'

To justify laws of prescription and limitation on the ground that they offer a mechanism to prevent 'stale claims' from being litigated requires, at the very least, a settled definition of what renders a claim 'stale' and some evidence that the rules themselves are capable of providing a mechanism to avoid these claims. The features of 'stale claims' that have been articulated certainly do take us closer to a definition, the most common ones being an unavailability of evidence, evidence of a poor quality, and witnesses who have disappeared or whose memories have faded. The need to prevent the litigation of claims possessing these pathologies arises where the evidence which has deteriorated or has been destroyed or where the witnesses who are unavailable or who have murky recollections of the events giving rise to the claim, are integral to proving key facts about the claim, its merits or possible defences. The potential prejudice to defendants, who may be unable to defend a claim because of these pathologies, and the potential threat to the fair and efficient administration of justice, which adjudicating a claim without all of the relevant evidence poses, are some of the core reasons to avoid claims which are in this sense 'stale'. The reasons to avoid the litigation of claims possessing these pathologies are unobjectionable, however, the question becomes whether the law of extinctive prescription is actually capable of meeting this need.

You will recall from the discussion in part II above that the "freshness" of a claim – that is, the quality and availability of the evidence underpinning the claim itself or the defendant's defense and the ability of the relevant witnesses to recall key facts about the claim – is not taken into account when determining whether that claim has prescribed. Under the Prescription Act, any and all attempts to enforce a debt after the lapse of the applicable prescription period can be thwarted by a

defendant successfully raising a special plea of prescription. All that is required when it comes to establishing that a debt has prescribed is proof, on a balance of probabilities, that the relevant prescription period had run its course by the time the plaintiff brought the claim. The court will never (and may never) look into the merits of the claim itself when determining whether or not it has been extinguished by prescription, this includes whether the evidence required to prove or disprove that claim is available and of the quality required for its fair and proper adjudication. In short, there is no mechanism within our law of prescription that, even on the face of it, is aimed at ensuring claims with these features do not make it to the adjudication stage. The contribution that the law makes to avoid this eventuality is reduced even further when it comes to personal injury claims, which are subject to a three-year prescription period, a period that is so short that the likelihood of these pathologies arising, by virtue of the passage of time alone, is very low. When it comes to documentary evidence, modern record-keeping and electronic storage facilities provide another guard against this possibility. Furthermore, the ubiquity of recording mechanisms, such as security cameras and closed-circuit television (CCTV) systems, means that in many instances the recollection of witnesses is not required.

This is the first weakness of this justification when one considers it in light of the rules governing the extinctive prescription of personal injury claims in South Africa. In short, these rules do not operate in a way that is capable of providing the sort of filtering mechanism that is required to prevent ‘stale’ claims, in the sense described above, from being adjudicated. As part II sets out, all that is required for a claim to be found to have prescribed is that the defendant to the action for the enforcement of the claim raises and successfully proves, on a balance of probabilities, that the action was instituted after the lapse of the prescription period. This, in turn, requires them to prove when the prescription period commenced to run — either the date that ‘everything [had] happened which would entitle the [plaintiff] to institute action and to pursue ... [their] claim’;³⁰⁷ the date

³⁰⁷ *Truter II* supra note 81 para 16.

that the plaintiff had actual knowledge of the identity of the debtor and the facts giving rise to the debt; or the date that they could have acquired that knowledge by exercising reasonable care.³⁰⁸ When the claim is based on personal injury, the minimum length of time that needs to have passed between the latest of these dates and the eventual institution of legal proceedings, for that claim to have prescribed, is three years.

If we are to accept the first justification at face value, we are thus required to make a number of assumptions about personal injury claims which are brought after the prescription period has passed. Firstly, we are to assume that it is more likely than not that these claims possess the pathologies or difficulties of proof mentioned above. Second, we are to accept that these pathologies disproportionately impact the defendant to the claim and the public more generally. However, on the assumption that the plaintiff has not spent the time between the claim arising and its eventual enforcement collecting and storing evidence, gathering and recording witness testimony, the risk of not having sufficient evidence to prove their claim is one faced by *both* parties. The likelihood that either of them will experience these difficulties (as a result of a delay in the commencement of litigation) is not influenced by whether they are a plaintiff or defendant. Rather, of the factors that are within their control,³⁰⁹ the probability that the evidence required by a party will be lost, have deteriorated or be destroyed by the time legal proceedings have commenced often depends upon whether that party took the necessary steps to preserve or record such evidence in the intervening period. Taking such steps, in turn, requires that the party knows of the potential claim, anticipates the commencement of legal proceedings and possesses the necessary foresight to ensure the evidence that they would need to support their case would be available at the time of trial.

³⁰⁸ Section 12(3) of the Prescription Act.

³⁰⁹ For example, there is a practice in most public hospitals to keep records for at least five years; acts of weather (acts of “god”); witnesses may die at any point; etc....

This reveals another limitation with this justification. By characterizing the law of extinctive prescription as a mechanism to ensure fairness to defendants who may be prejudiced by having to defend a ‘stale claim’, this line of justification requires us to assume that the plaintiff possessed the necessary knowledge and foresight to take steps to preserve the evidence to prove their claim until they decide to enforce it and that the defendant did not. However, this would have us accept the notion that it is more likely for the victim of personal injury to know that they have a potential claim against the wrongdoer, than it is for the wrongdoer to know that there is a possible claim against them. If we do, there may be a sound basis, underpinned by some norm of fairness or equity,³¹⁰ for providing a defendant with this ‘convenient all-round protection against the claims of a [plaintiff] who has *shown little interest* in pursuing them.’³¹¹ Whether there are grounds to accept these assumptions about the plaintiff is, of course, an empirical question, and the answer is likely to differ between cases.

In the rules of prescription themselves, the only place that the extent of a plaintiff’s knowledge vis-à-vis their potential claim features is in the context of determining the commencement date of the prescription period.³¹² Additionally, and significantly in my opinion, whether the plaintiff had knowledge of the existence of the claim itself (which would be required for them to take steps to preserve evidence and to eventually institute legal proceedings) is explicitly excluded from the enquiry.³¹³ Therefore, it is only certain pieces of knowledge (actually or reasonably) possessed by the plaintiff in the period between the claim arising and its eventual enforcement that are taken into account and only for the purposes of determining when the prescription period commences. Whether those pieces of knowledge would, by themselves, lead that plaintiff to take the necessary steps to ensure that the evidence they will need to eventually prove their claim in court is preserved is a question that is left unanswered, but which our prescription

³¹⁰ In *Truter I*, Mlonzi AJ referred to extinctive prescription as an ‘*equitable phenomenon* to protect the potential defendant against antiquated claims’ (supra note 272 para 61).

³¹¹ Zimmermann *Law of Obligations* op cit note 13 at 768 [my emphasis].

³¹² For example, in section 12(3) of the Prescription Act.

³¹³ See the discussion of *Mtokonya* supra note 64 and the line cases interpreting section 12(3) above.

regime assumes to be answered in the affirmative. In this way, making this assumption about plaintiffs underpins the characterization of extinctive prescription as an ‘equitable phenomenon’ that is aimed at protecting defendants against stale claims, as the first justification does.³¹⁴ Without making that assumption, the normative foundations of this justification, which ground it in norms of equity and fairness, begin to weaken.

When it comes to the public interest in the fair, proper and efficient adjudication of claims and the administration of justice, which will be impacted by key evidence being left out of the process by virtue of it no longer being available, similar assumptions are made.³¹⁵ The key one being that claims which have been instituted after the lapse of the prescription period will possess the pathologies outlined above. If the public either makes this assumption or becomes aware of these pathologies, should they arise, the adjudication of claims many years after they arose could lead to an erosion of the courts’ institutional legitimacy. Of course, this also depends on whether the public has made its acceptance of the courts’ legitimacy conditional upon them adjudicating cases only when they have access to all of the relevant evidence and to evidence that is in its freshest state (which is hardly ever the case). While this may be so, there are persuasive arguments relating to the role that other factors play in maintaining the courts’ legitimacy in the eyes of the public.³¹⁶

³¹⁴ See for example *Truter I* supra note 272 para 61.

³¹⁵ The assumptions made about the plaintiff — that is, that they possessed the necessary foresight and planning to take steps to preserve evidence in the period between the claim arising and its eventual enforcement — performs a function for the first reason to avoid ‘stale claims’, namely, to provide equitable protection to the defendant, but is not relevant in the context of the second reason, which relates to the public interest and the interests of justice.

³¹⁶ For example, in the context of judicial review, Theunis Roux writes that in a society where law is seen to be autonomous from politics, by which he means a society in which people believe that legal reasoning is able to constrain the influence of judges’ personal preferences on their decision-making, ‘perceived adherence to the set of [legal] reasoning methods that has come to be associated with this claim [i.e., the claim that law is autonomous from politics] has the power to legitimate a judicial decision.’ Theunis Roux *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis* (2018) at 56.

The impact that the adjudication of ‘stale claims’ has on the efficiency and cost-effectiveness of the work of the courts, which has a significant impact on the public purse, is another reason given in support of the regime. The assumption underpinning this is that claims which are instituted after some years have passed, which may be tainted by a lack of evidence or unavailability of witnesses, are more costly than those which are instituted ‘in time’. Both types of claims are at risk of having their enforcement hindered by issues relating to access to evidence. Furthermore, one cannot ignore the significant financial burden placed on the courts by virtue of the existence of the law of extinctive prescription itself. The sheer number of cases involving defendants raising special pleas of prescription against otherwise meritorious claims – which have made their way to our highest courts and have led to the merits of the claims only being considered many, many years following the occurrence of the events giving rise to them and the institution of the legal proceedings for their enforcement – serves as quite a good indication of the scale of the burden that this law places on our court system. By way of an illustration,³¹⁷ if one looks at sample of fourteen judgments involving the adjudication of a special plea of prescription in respect of a delictual claim, decided between 1977 and 2020, the number of years between the service of summons instituting the action and the eventual judgment range between one and seven years, with an average of four-and-a-half years. Furthermore, the vast majority of these cases ended up with final judgment being delivered by either the Constitutional Court or the Supreme Court of Appeal. As such, it becomes difficult to see how a law that has generated such a significant amount of litigation can be justified on the basis of alleviating the financial pressure placed on our courts.

When it comes to the interests of justice, this justification does not provide a definition of what the public’s idea of ‘justice’ is, let alone whether or not it dictates that a time limit be placed on the enforcement of claims. If we make the abovementioned assumptions, establishing the nexus between the consequences of the law of extinctive prescription for both plaintiffs and defendants and the

³¹⁷ See Table 1 below (under ‘VIII Tables’).

‘interests of justice’ might be a simpler task. It is not difficult to imagine that a moral norm exists that would provide a reason to provide a defendant with some protection against a claim brought by a plaintiff many years after it arose, where that plaintiff has managed to preserve the necessary evidence to prove their claim and where the defendant has not.

When we turn our attention to the extinctive prescription rule that I am focusing on, which establishes a three-year prescription period in respect of delictual debts, the strength of this justification is tested further. It would be more difficult to establish an empirical basis for any of the above assumptions in the context of such a short prescription period, as opposed to a much longer one (like the original thirty-year period). Furthermore, under the Prescription Act, the plaintiff is presumed to have knowledge of the existence of the claim for the prescription period to begin to run, even where there is proof that they did not have such knowledge.³¹⁸ As such, there is nothing in the South African prescription regime that seeks to establish any of the key components of the first justification. Extinctive prescription applies to claims which are ‘stale’ and those which are not; to claims in respect of which sufficient evidence exists and those which are tainted by difficulties of proof; to claims where the plaintiff is in a better position in respect of the available evidence and to those which the defendant has the upper hand. If the law of extinctive prescription is to be justified on the basis that it prevents the enforcement of stale claims it should, at the very least, be aimed at doing so. And that should be clear from the nature of the legal rules themselves and the manner in which they operate.

(b) The second justification: encouraging diligence

Similar assumptions are made in the context of the second purpose that extinctive prescription regimes are said to serve, but they are formulated and operate slightly differently. The law of extinctive prescription is often said to be aimed at

³¹⁸ As was the case in *Mtokonya* (supra note 64).

promoting diligence and preventing ‘negligent inaction’ on the part of plaintiffs. By regarding the plaintiff’s failure institute the legal proceedings for the enforcement of their claim as necessarily being the result of ‘negligent inaction’ or the failure to act diligently, the assumption is made that a plaintiff who is in possession of the ‘minimum facts necessary to institute action’ is also aware that they are in fact able to institute action and that they know what steps they need to take in order to do so. In short, to justify the law of extinctive prescription on the basis that it prevents ‘negligent inaction’ on the part of plaintiffs, the law itself should go some way towards actually doing so. When we take a closer look, it becomes clearer that it does not.

Ochoa and Wistrich identify three policies that fall within this strand of justification. First, extinctive prescription is said to encourage plaintiffs to diligently pursue the enforcement of their claims.³¹⁹ Second, it serves to incentivize the prompt enforcement of the substantive law.³²⁰ Finally, it operates as a mechanism to avoid the retrospective application of contemporary standards.³²¹ I will focus on the first policy, as it is one that has dominated much of the commentary on this area of law, and will not add much to the discussion and critique of the second and third by Ochoa and Wistrich.³²² As to the first reason, they acknowledge that while encouraging the swift enforcement of a claim may have a deterrent function in respect of future wrongdoing, but note that similar concerns arise when one extinguishes an otherwise valid claim and that quantifying the net effect of these competing interests would be an impossible task.³²³ In a sense, then, this policy becomes a double-edged sword when it is used to perform the justificatory work in support of extinctive prescription.

As to the second policy, it is underpinned by the notion that it is unfair to judge past behaviour by present standards of conduct, which does find some expression

³¹⁹ Ochoa and Wistrich op cit note 4 at 488.

³²⁰ Ibid at 492.

³²¹ Ibid at 493.

³²² Ibid at 492-495.

³²³ Ibid at 493.

in other areas of our law.³²⁴ As Ochoa and Wistrich correctly point out, however, it is not necessarily so that the retroactive application of contemporary standards will operate to disadvantage or prejudice the defendant, it may even be to their benefit.³²⁵ Turning our attention to South Africa, it is difficult to see how this policy could be served by our law of extinctive prescription, which establishes prescription periods of varying length, contains no enquiry into whether the standards had changed between the date the debt became due and the date it was eventually enforced (or the potential unfairness that may result), and allows a defendant to validly satisfy the debt if they choose to do so, thereby recognizing the validity of the underlying claim itself, regardless of when it was enforced. In this way, our law of extinctive prescription (and, arguably, our legal system as a whole) does not seem to take issue with the retroactive application of contemporary standards when it comes to personal rights. Given the manner in which the development of the common law and the doctrine of precedent operates, this should come as no surprise.

The first and frequently mentioned policy is that extinctive prescription serves to promote diligence on the part of plaintiffs in instituting action to enforce their claims.³²⁶ In our law, the prevention of ‘negligent inaction’ is the more commonly used phrase, particularly when referring to the purpose of section 12(3) of the Prescription Act.³²⁷

The question remains whether it is accurate to characterise a creditor’s delay in enforcing their claim as negligent when their knowledge of the claim is limited to the facts upon which it is based and the party who may be responsible for it, or where they could have acquired that knowledge, but had no reason to? A creditor’s continued inaction in enforcing their claim can only be *negligent*, if we are to adopt a definition of negligence that is already recognized in our law, if they had

³²⁴ Like those which limit the retroactivity of laws.

³²⁵ Ochoa and Wistrich op cit note 4 at 495.

³²⁶ Ibid at 488.

³²⁷ See, for example, *Macleod* supra note 18 paras 13 and 15; *Mtokonya* supra note 64 para 145; *Van Zijl* supra note 275 para 19; *Truter I* supra note 272 para 61.

reasonable foresight that adverse consequences would materialise as a result of that inaction. It is this aspect which renders the inaction *negligent* or blameworthy in some way. When a creditor is assumed to possess knowledge of the facts giving rise to their claim, access to the evidence to prove those facts, an appreciation of the legal significance of those facts – that, taken together, the facts serve to ground a claim which is enforceable in a court of law – and an awareness of the consequences of failing to timeously enforce that claim (for example, the possibility of it prescribing), then their failure to do so can more accurately be described as the result of *negligent* inaction. In short, ‘a plaintiff cannot be encouraged to sue by the fear of becoming statute barred if he is ignorant of the fact that he has a cause of action.’³²⁸

Another limitation of this justification is that, on its own, it does little by way of providing a reason for *why* ensuring the timeous institution of legal proceedings is important or desirable – all it tells us is that the law of extinctive prescription seeks to encourage a creditor to do so. The question therefore becomes: what interests and objectives are implicated by a delay between the occurrence of the facts giving rise to a claim and the eventual enforcement of that claim in court? The first justification provides part of the answer – the interest/s in ‘ensuring that cases are litigated while the evidence is reasonably fresh.’³²⁹ The third – the ‘need for certainty and stability in social and legal affairs’³³⁰ – provides another. There is judicial support for the claim that the policy of encouraging diligence is actually just a means of achieving these other policies.³³¹ As for the ‘deeply ingrained notion that people should act promptly,’³³² I am not persuaded that pointing to popular sayings like “the early bird catches the worm” signifies a widely held belief that

³²⁸ Todd op cit note 57 at 6.

³²⁹ Roach op cit note 251 at 25.

³³⁰ *Mdeyide* supra note 61 para 8.

³³¹ Ochoa and Wistrich op cit note 4 at 488-489. Given the emphasis on the need for certainty and the minimization of the deterioration of evidence by our courts, it appears that these policies are given some importance over the need to encourage diligence (which is often only mentioned in the context of discussing the fairness of section 12(3) vis-à-vis the plaintiff, as opposed to the rationale for the regime as a whole).

³³² Ochoa and Wistrich op cit note 4 at 489.

birds who sleep in should starve. I would think (I would hope) that some value is also placed on the interests of correcting wrongdoing, holding people responsible for their wrongful conduct and compensating victims of that conduct. In light of the willingness of our courts to expand the scope of liability in the interests of justice and the strong indications from all corners of our society that there is no temporal limit on accountability and responsibility for wrongdoing, there does not seem to be a general endorsement of a “you snooze, you lose” mentality.

(c) The third justification: promoting certainty and ‘peace of mind’

When one has regard to the third dominant justification, ‘the actual degree of prejudice to a defendant caused by a delay before an action is started may vary widely from case to case; and the “peace of mind” argument is not convincing if an insurance company is standing behind the defendant, as it nearly always is in personal injury claims.’³³³ In the case of prescription rules that contain an element of court discretion, these are justified on the basis that ‘Parliament has decided that uncertain justice is preferable to certain injustice or, in other words, that certainty can be bought at too high a price.’³³⁴

(i) Peace of mind

Underpinning the first aspect of this justification is the proposition that it is unfair to subject someone to an indefinite threat of being sued. Because of this, there is a need to protect their ‘peace of mind’ in certain circumstances. We do see some evidence of norms like this in modern societies – for example, they can be found in the concept of amnesty and in certain religious teachings.³³⁵ However, there is also ample evidence of competing norms – for example, in calls for reparations for slavery and colonialism and for the prosecution of persons who have committed war crimes and crimes against humanity. Given the widespread criticism of

³³³ Todd op cit note 57 at 7

³³⁴ Ibid.

³³⁵ Ochoa and Wistrich op cit note 4 at 461.

amnesty mechanisms and the message that it sends – i.e., that a wrongdoer could be allowed to evade responsibility, regardless of the feelings and preferences of their victims – it is doubtful whether a moral norm in favour of alleviating wrongdoers of their corrective obligations, in order to protect their peace of mind, is one which is widely shared. This, then, is one of the many assumptions that the third policy justification makes: namely, that defendants to claims which were instituted long after they arose have a protectable interest in having their peace of mind respected.

Embedded in this assumption are several others, as a potential defendant will only have an interest in their peace of mind being protected if they are aware of the existence of the claim; are able to assess the merits of that claim; are of the belief that it is likely that the claim will be enforced; and are anticipating an adverse outcome.³³⁶ It is important to bear these in mind when assessing how much weight should be attached to this purpose, as many defendants may not even be aware of the threat of litigation until after it is eventually brought. Finally, even if there is such a protectable interest across all classes of defendants (those who are aware of the claim and anticipate it being brought and those who are not), there are limits to the extent to which extinctive prescription can offer such protection.

First, extinctive prescription does not prevent the institution of the action by way of legal proceedings, only the plaintiff's ability to successfully claim by way of these proceedings. It may (and probably does) discourage certain plaintiffs from bringing the claim after the lapse of the prescription period, however, in systems with a flexible commencement date, there is the possibility that an attorney will find some room to make the argument for a later date and see prospects of success in that regard. As Ochoa and Wistrich rightly observe, the ability of a prescription regime to effectively deter plaintiffs from bringing claims after the prescription period has passed depends on how strictly it is enforced and the flexibility of its provisions.³³⁷ The second limitation is that a defendant will never achieve full

³³⁶ Ibid at 461.

³³⁷ Ibid at 463.

peace of mind until all of the possible claims arising from the initial event are barred, which may take decades, particularly if there are minors or persons under curatorship involved.³³⁸ Finally, when one considers an extinctive prescription regime that establishes varying prescription periods for different types of claims, like our own, the question then becomes why certain defendants will have their ‘peace of mind’ disrupted after fifteen years, while others require only three years?

(ii) Settled expectations and the (new) status quo

Similar concerns arise when looking at the second aspect of repose, which involves respecting the expectations that have arisen following the passage of time and the new *status quo* that has formed. This is based on the assumption that the parties implicated are aware of this changed status quo, have accepted it, relied upon it and arranged their affairs accordingly.³³⁹ As the reasoning goes, a person who is in possession of something like an “asset” (being the awareness that the creditor is not enforcing their claim) for a long period of time and manages their affairs in the belief that they will continue to possess it, they should be allowed to retain possession of it.³⁴⁰ While it might make sense when that “asset” is the object of a real right that this person has possessed openly and as if owner for thirty years, the difficulty with this line of reasoning in the context of extinctive prescription is that it presupposes that the debtor is aware of the claim and anticipates it being enforced. As was the case with the first aspect under this justification – protecting the defendant’s peace of mind – these questions are left untested by the rules themselves. In practice, therefore, the law of extinctive prescription does not differentiate between defendants whose expectations became settled and those whose did not. In addition, given that prescription cannot be raised ‘in the air’, it seems inaccurate to characterize whatever it is that arises once the clock starts ticking as an ‘asset’ that a potential defendant is able to possess and enjoy. Finally,

³³⁸ See, for example, section 13 of the Prescription Act.

³³⁹ Ochoa and Wistrich op cit note 4 at 464.

³⁴⁰ Ibid.

there seems to be no reason why certain debtors are deemed to have settled expectations after, say, three years and others after thirty years.

(iii) Uncertainty about the future

The concept of ‘certainty’ features in most discussions of the purpose of extinctive prescription and is situated as one of the principal objects of the regime. The main point of critique in respect of this aspect of the third dominant justification is that the interest in certainty must, of course, must be weighed against the interests of victims in receiving that compensation.³⁴¹ They must also be evaluated in light of the defendant’s own responsibility to take steps to prevent the harm from occurring in the first place, and to incur the associated costs of doing so. Finally, if there is a shared public interest in not disturbing commercial activities with the threat of litigation, then wouldn’t that reasoning apply to calls to limit the scope of delictual liability in general? I would think not. It would be impossible to determine whether the law of extinctive prescription is actually able to provide this type of commercial certainty. Moreover, given the inherent instability of the late modern capitalist system – which is frequently, suddenly and without warning sees jobs being placed at risk, production costs increasing, changes in the supply of and demand for goods, and disruptions in supply chains, all due to factors outside of a firm’s control – it is doubtful whether a domestic law that places a time bar on civil claims has much of an impact. Finally, as Ochoa and Wistrich correctly point out, there is widespread use of third-party liability insurance.³⁴² This means that the portion of a firm’s expenses dedicated for this purpose is set and they have greater certainty in respect of their financial position. The reduction of the costs associated with mitigating this uncertainty is the final aspect of repose that Ochoa and Wistrich discuss. They conclude that the effect of extinctive prescription rules on these costs is likely marginal, particularly in comparison to the impact of substantive rules of liability.³⁴³

³⁴¹ Ibid at 468.

³⁴² Ibid.

³⁴³ Ibid at 470.

When we turn our attention to the South African law, once again, certain features are left unexplained. Given that the defendant has an election regarding whether to raise prescription or not and, regardless of whether they do so successfully, can choose to still pay the debt – it is clear that the power to decide which interests are ultimately being protected is vested solely in the defendant. Whether or not the public is in fact being served by whatever they eventually decide, unfortunately, would be nearly impossible to determine. However, from the overview of the existing justifications thus far, it appears that protecting the defendant's interests in being able to decide whether or not the plaintiff is able to successfully enforce their claim sits at the heart of the law of extinctive prescription.

(d) Reducing the overall volume of litigation in the courts

When it comes to reducing the overall volume of litigation in the courts, there is a shared interest in reducing the costs of the courts as much as possible, as these costs are borne by the public.³⁴⁴ However, there is also a shared interest in the proper administration of justice (as was set out in more detail above), in the correction of wrongdoing and in holding those responsible for wrongdoing accountable. Ochoa and Wistrich also point out that the reduction in the overall quantity of litigation produced by an extinctive prescription regime is likely to be small, with a minimal net saving of judicial resources.³⁴⁵ When one has regard to the volume of litigation that has arisen out of pleas of prescription being raised in our courts, this conclusion seems even more likely.

(e) Concluding thoughts on the dominant justifications

From the discussion above, it appears that the overarching aim of extinctive prescription is to address and offer protection for the interests and concerns of

³⁴⁴ Ibid at 495.

³⁴⁵ Ibid at 496.

potential defendants and that there are grounds for exception to be taken. In sum, the justifications that are most frequently raised for the law of extinctive prescription – (i) that it seeks to prevent the litigation of ‘stale claims’; (ii) that it discourages negligent inaction on the part of prospective plaintiffs; and (iii) that it seeks to provide some measure of certainty and finality both in the legal relationship between the parties to a case, but particularly for prospective defendants, and for the public at large – are not only inadequate, but are also slightly misleading. They place reliance on vague concepts, on values that are supposedly deeply ingrained in society, and on assumptions that they make no attempt to recognize, let alone defend. More importantly, they fail to explain certain features of the manner in which the extinctive prescription rules themselves operate. This leaves the dominant justifications suspended in the realm of theory, without any explanatory value for what is occurring in reality. Where there is some hope for an explanation is in the less-frequently mentioned possible justifications – namely, (i) to protect the interests of defendants in having certainty and control over their financial position and the manner in which it is impacted by the threat of liability; and (ii) to serve as a liability-constraining mechanism, by reducing the number of cases for the enforcement of certain types of claims. In the next part, I hope to construct a useful explanation for the rules governing the extinctive prescription of personal injury claims, and to determine whether that explanation suffices as a justification for the regime.

V IN SEARCH OF A JUSTIFICATION: PERSONAL INJURY, THE THREE-YEAR PRESCRIPTION PERIOD & THE POWER TO SUE

‘[I]f one really wishes to know how justice is administered in a country, one does not question the policemen, the lawyers, the judges, or the protected members of the middle class. One goes to the unprotected – those, precisely, who need the law’s protection most! – and listens to their testimony...[A]sk the wretched how they fare in the halls of justice, and then you will know, not whether or not the country is just, but whether or not it has any love for justice, or any concept of it.’³⁴⁶

It is often said that the law of extinctive prescription is aimed at ‘[d]oing justice to both plaintiffs and defendants...[which] can be an almost impossible task.’³⁴⁷ Despite the various judicial and legislative developments that prescription and limitation regimes all over the world have undergone over the years — which, for the most part, were done in response to changing social, economic and political dynamics and demands and, therefore, changing conceptions of what justice between the parties requires — some argue that ‘this tension has not been satisfactorily resolved.’³⁴⁸ My review of the dominant justifications of the law of extinctive prescription sought to highlight some aspects of this tension, and the capacity of these justifications to resolve it, at least in the context of the South African prescription regime. If one looks at the the academic and judicial commentary on the central objectives of prescription regimes and the value of these objectives, the dominant justifications appear trite. As Parts II, III and IV aim to show, there are reasons to rethink these justifications, particularly when one considers the manner in which the Prescription Act regulates the prescription of personal injury claims in South Africa. I focus on three aspects of this process: (i) the consequences that extinctive prescription has for the party with the right to claim and for the party against whom the claim lies; (ii) the three year

³⁴⁶ James Baldwin *No Name in the Street* (1972) at 176-177.

³⁴⁷ Jones op cit note 34 at 1 (1.01).

³⁴⁸ Ibid.

prescription period that applies to personal injury claims; and (iii) the manner in which the commencement of the running of prescription is determined. These aspects, together with the various unsupported assumptions that the dominant justifications appear to rely on, give us reason to question the persuasiveness of these justifications when it comes to the law as it applies to personal injury claims. Put differently, many of the reasons that the regime's putative justifications give for its existence and importance appear to fall short when one considers the prescription rules themselves.

There are however some insights that we can draw from the dominant justifications, in our quest to explain the rules that as they exist our legal system. Firstly, the notion that the defendant's sense of certainty and repose should be protected is reflected in the broad and discretionary power that the Prescription Act vests in a defendant to put a stop to the legal proceedings and avoid having to meet the claim being brought against them. If they have been prejudiced as a result of evidence disappearing or being destroyed, this mechanism provides them with some protection against being faced with a claim that they are unable to defend. Second, the suggestion that extinctive prescription operates to reduce the overall number of claims filed and adjudicated upon by a court may explain why different types of claims are treated differently by being subjected to a shorter prescription period.³⁴⁹ However, it does not explain why it is the defendant that has the sole discretion to decide whether these claims are ultimately heard, nor why personal injury claims attract a period of three years.

What is absent from the justifications, however, is an appreciation of just how significant and far-reaching the power that the defendant acquires is. This power enables them to prevent the court from considering the merits of the plaintiff's claim and from ever granting an order for the enforcement of that claim against them. Ultimately, they are empowered to release themselves from liability, thereby preserving the status quo, at least for them, when it comes to their

³⁴⁹ Ochoa and Wistrich op cit note 4.

financial position. Furthermore, the defendant is able to exercise this power and simultaneously make payment of the debt, which reaffirms their almost complete control over the extent of their liability. What my account of the extinctive prescription of personal injury claims shares with the existing justifications is the emphasis they place on the defendant's sense of certainty and peace of mind. What my account adds to the literature on the topic is that extinctive prescription operates in a more direct sense to affirm the defendant's autonomy and control over their affairs, their financial well-being and their certainty in the continuation of the status quo.

In this final substantive part, Part IV, I develop the alternative account of extinctive prescription that I proposed in Part II(v) above. The alternative account draws on some insights from its dominant rationales, is grounded in the features of the particular power that is granted to defendants, and which is able to explain the aspects of the rules regulating the extinctive prescription of personal injury claims that I have focused on. I then consider whether the law, on this account, is justified, in light of competing considerations in the South African context. These concerns arise by virtue of certain provisions of the Constitution,³⁵⁰ the conflicting position in indigenous customary law, and the moral considerations around corrective justice and repairing wrongdoing some years after it occurs.³⁵¹ In addition, there are reasons to doubt the fairness of these rules for victims of personal injury, who may be deprived of their ability to claim either before, or not long after, they have discovered its existence. Given the widespread lack of access to resources, education and legal literacy, it is not unsurprising that many claimants only find out, by chance, many years later, that they are able to call upon the courts to enforce a claim against whoever has wronged them and ought to be liable to correct that wrong. This is why considering the case of Mr C, as a hypothetical illustration of the circumstances that many claimants find themselves in, is useful. This part ends by considering the resolution of the case

³⁵⁰ Section 34 (the right of access to courts) and section 12(2) (right to bodily and psychological integrity).

³⁵¹ In this regard, I focus on Gardner's thesis about corrective justice.

upon which this scenario is based and briefly discusses recent developments that give reason for both optimism and discouragement in the future of the rules regulating the extinctive prescription of personal injury claims in South Africa.

(a) Developing the alternative account of extinctive prescription

Any justification for extinctive prescription must account for the manner in which it functions. One of the chief limitations of the dominant justifications is that they do not adequately explain why this particular type of power is granted to certain defendants in the circumstances in which it is granted and why it operates in the way it does against plaintiffs who are unaware of their ability to claim. In the context of personal injury claims (and others that are subject to such a short prescription period), the dominant justifications do not offer a satisfactory explanation as to why this particular class of defendants is offered this type of protection or why this particular class of plaintiffs have less time to act than others. More specifically, and as Parts III and IV aimed to illustrate, the predominant justifications fail to account for certain aspects of the extinctive prescription regime. For example, why is it the defendant and not, say, the court that is able to raise prescription? Why are the 'staleness' of the claim and the reasonableness of the debtor's reliance on the plaintiff's failure to enforce their claim not factors in the assessment? Why is the defendant is able to raise prescription and still validly discharge the debt? Why does the plaintiff's lack of knowledge of the existence of the claim itself has no bearing on the running of the prescription period, if we are to accept the justification that extinctive prescription seeks to discourage *negligent* (as opposed to innocent) inaction? Finally, why are different types of claims are subject to prescription periods of such drastically differing lengths?

If we understand the South African extinctive prescription regime, the alternative account proposes, as one which operates to grant the defendant a broad, discretionary power which they can raise unilaterally; which they acquire regardless of their knowledge of the existence of the claim or of their reliance,

reasonable or otherwise, on the plaintiff's delay in enforcing it; and which they can successfully rely on to avoid participating in the legal proceedings, but nevertheless may validly discharge the debt if they so wish; the interests that lie at the heart of this power begin to crystallise. Litigation is costly, time-consuming and risky, particularly for defendants. This is in addition to the financial impact of holding those defendants liable. Furthermore, if we look at the manner in which the rules regulating the extinctive prescription of delictual claims in particular have developed over the course of history, the importance of the regime for a specific class of interests – interests which have seen increased dominance in the late modern era, mainly as a result of the emergence of a politically and economically powerful capitalist class and the pervasion of neoliberal thought in the centres of decision-making, which include both the legislatures and the courts. The focus on the increased pace of legal, social and economic interactions in recent times and the need to allow these interactions to thrive, is a feature of this thinking.

There is a tendency to focus on the unique demands and pressures of modern life, particularly its pace, in the course of justifying shorter prescription periods for delictual claims. It is considered 'a truism to say that the pace of life has significantly increased over the last 20 years or so, and with it the pace at which the law, particularly litigation, is practiced.'³⁵² Similar concerns are raised when the bounds of delictual liability expand, as they have in recent history. The law of delict is said to have been 'subjected to the most intense theoretical and practical attacks in its long history.'³⁵³ The expansion of civil liability, according to one tort scholar, has illuminated the 'creaking joint[s] of our arthritic tort system.'³⁵⁴ The relationship between the expansion of delictual liability and industrialization is well-documented.³⁵⁵ According to one tort scholar,

³⁵² Jones op cit note 34, preface.

³⁵³ Zimmermann *Law of Obligations* op cit note 13 at 903.

³⁵⁴ Ibid.

³⁵⁵ Ibid at 903 – 904.

‘the toll on life, limb and property exacted by today’s industrial operations, methods of transport, and many other activities benignly associated with the “modern way of life” has reached proportions so staggering that the economic cost of accidents represents a constant and mounting drain on the community’s human and material resources, calculable as a significant fraction of the GDP.’³⁵⁶

When negligence emerged as a ‘separated basis of tort liability in its own right’³⁵⁷ in English law, leading to a substantial expansion of the bounds of civil liability for wrongs, the shift is said to have ‘broadly coincided with the Industrial Revolution and was undoubtedly stimulated by the advent of machinery, urbanization and the faster traffic along the turnpike and railway.’³⁵⁸ During periods of industrialization and modernization, ‘[u]ntold new sources of risk and losses made their appearance and confronted the law with problems it was unable to solve by recourse to its inherited, archaic tort remedies.’³⁵⁹ The expansion of delictual liability to respond to these problems has been met with attempts to reign in the floodgates, so to speak. It is possible that the extinctive prescription of personal injury claims, which have come to be subject to very short prescription periods, can be understood as one such mechanism.

The concerns about longer prescription periods or no prescription periods at all often revolve around the potential of the looming threat of liability to inhibit economic activity, the interactions and exchanges between the various productive forces in a society. What mainstream economic theory tells us is that the wellbeing of an economy requires an economic system that allows for these interactions and exchanges to take place as freely and voluntarily as possible, without external intervention or regulation which might place a burden on the ability of firms to

³⁵⁶ John G Fleming *The Law of Torts* (1977) at 1.

³⁵⁷ *Ibid* at 93. See also Zimmermann *Law of Obligations* op cit note 13 at 910 – 911.

³⁵⁸ *Ibid*.

³⁵⁹ *Ibid*.

survive, compete and grow.³⁶⁰ The looming threat of liability and costly litigation can present such a burden. What mainstream economic theory (conveniently) leaves out, but what historical experience teaches us, is that an economic system which protects the interests of persons and firms in having absolute control over the resources that are required to meet the needs of the rest of society, and the ultimate say over how those resources are utilised and distributed, leads to an accumulation and concentration of wealth and power in the hands of that small, privileged group.

Those that are most threatened by delictual liability in the late modern era are private firms and the state, in large part due to the (ever-expanding) doctrine of vicarious liability.³⁶¹ One example of the law's response to the interests of these types of defendants was when, in 1905, the California Legislature (in an effort to protect the interests of factory owners) amended the prescription period applicable to claims for wrongful death and personal injury from two years to one year in response to the large increase in the number of these types of claims as a result of the Industrial Revolution and the mechanization of industry.³⁶² In respect of the longer, thirty-year prescription period, Zimmermann notes a general recognition that the 'ever-increasing 'acceleration of history' has rendered this period entirely unsuitable to modern circumstances.'³⁶³ It effectively constitutes an 'exemption from prescription'³⁶⁴

When one looks at the manner in which the length of the prescription period applicable to delictual debts has shortened over time, while others have remained the same or have shortened only slightly, alongside the manner in which the net

³⁶⁰ For a discussion of risk and the law of delict in capitalist societies, see Richard L. Abel 'A Socialist Approach to Risk' (1982) 41 *Maryland Law Review* 695.

³⁶¹ For example, in the recent case of *Stallion Security (Pty) Limited v Van Staden* (526/2018) [2019] ZASCA 127 in which a private security guard was found to have been acting in the course and scope of his employment merely because he used a key that his employer provided to him, in order to rob one of the people working in the building his employer provided security for, after hours, while he was on sick leave.

³⁶² Ochoa and Wistrich op cit note 3 at 499.

³⁶³ Zimmermann *Comparative Foundations* op cit note 3 at 86.

³⁶⁴ *Ibid.*

of delictual liability has widened, particularly in the constitutional era, the notion that the law regulating the extinctive prescription of delictual debts looks the way that it does because of the potential consequences that increased liability may have on a particular class of debtors, those that are frequently held liable for personal injury, appears slightly more persuasive. On this account, the interests that extinctive prescription gives effect to, by granting a broad, discretionary power to a defendant, is that defendant's interests in having control over the extent of their liability and, ultimately, their financial well-being.

The component that is frequently discussed as the site where flexibility (for the benefit of the plaintiff) is introduced is in the rules regulating the commencement date of the prescription period – referred to by Zimmermann as the 'discoverability criterion'.³⁶⁵ In the South African Prescription Act, this is embodied in section 12(3). As we have seen, the prevailing interpretation of this section in our court does little to decrease the potential for unfairness to plaintiffs who were not aware of the existence of their claim.³⁶⁶ Plaintiffs who, as a result of forces far beyond their control – but forces which are well within the control of those who are entrusted with the important tasks of managing the allocation of educational resources (including those geared towards enhancing legal literacy and increasing peoples' general awareness of their rights and powers) and ensuring the accessibility of legal services – have the vitally important power to sue that was granted to them by the legal system taken away from them, in a sense, before they even knew that they had it.

So, when it comes to justifying the rules regulating the extinctive prescription of delictual debts, some attempt should be made to show how, on balance, the justifications in favour of granting a defendant the power over the plaintiff's power to sue outweigh those justifying leaving that power in the plaintiff's hands, specifically when they are in the process of enforcing them, and allowing the (1) evidentiary difficulties, (2) witness memories, (3) any changes in the boni mores of

³⁶⁵ Ibid at 92.

³⁶⁶ See: *Mtokonya* supra note 64 and the discussion thereof in Part II(e).

society (to name a few of the predominant justifications), as well as any possible prejudice to the defendant, to be dealt with either prior to or during the process of litigating the claim itself, on a case by case basis. Simply put, there are other mechanisms available that are more desirable, appropriate, and less intrusive than the granting of a power to the defendant to terminate the plaintiff's claim, purely because they failed to institute it within three years from when it was deemed to have arisen. Either the law is grossly inadequate for the purposes of achieving what supposedly justifies its existence, or its existence was motivated by something else entirely.

This alternative account of extinctive prescription offers an explanation for why the defendant is granted a unilateral, broad, discretionary power; why they are able to raise it and still validly discharge the debt; why the defendant wilfully preventing the plaintiff from coming to know of the existence of the debt is sufficient to delay the running of the prescription period, but the plaintiff not having such knowledge owing to their ignorance of their rights is irrelevant;³⁶⁷ why the plaintiffs and defendants to different types of claims are treated differently with differentiated prescription periods; and why there has been a trend towards shorter prescription periods in relation to personal rights. Furthermore, by understanding this power in relation to the plaintiff's power to sue, its significance and extensiveness can be better appreciated. It forces us to weigh the justifications for granting the defendant ultimate control over the plaintiff's power to sue against those for keeping it in the hands of the plaintiff, or some other authority (like a court).

Furthermore, given the relationship between the power to sue and the rights it operates to vindicate, where exercising the former necessarily promotes the latter, it is tempting to also position the power to sue as a crucial mechanism by which the broader goals and policies of the various branches of private law may be realized. Ensuring that the plaintiff is able to exercise the power to initiate court

³⁶⁷ Section 12, read with *Mtokonya* supra note 64.

proceedings freely and voluntarily and, when they do, that their power to maintain and, if necessary, to terminate those proceedings is crucial not only for the institutional reasons Gardner sets out, but also for the purposes of, say, providing civil recourse to the victims of wrongs,³⁶⁸ protecting that victim's right to corrective justice,³⁶⁹ or potentially deterring future wrongful conduct.³⁷⁰

(b) Other legal and constitutional considerations

It is worthwhile to set out some considerations which may be relevant in our assessment of whether extinctive prescription, on the above account, can be justified.

The first arise from the provisions of our Constitution. In terms of section 34, 'everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court.'³⁷¹ While, on the face of it, extinctive prescription strikes at the heart of this right, and it is arguable that the prevailing interpretation of section 12(3) does not give it adequate protect, it appears that the question of constitutionality has all but been settled. In *Mdeyide*³⁷² the Court was called upon to determine the constitutionality of section 23(1) of the Road Accident Fund Act 56 of 1996, which imposes a time limit on RAF claims that operates in a similar manner to the Prescription Act. Before deciding that the impugned provision is not inconsistent with section 34 of the Constitution, the Court, per Van Der Westhuizen J, emphasized 'the vital role time limits play in bringing certainty and stability to social and legal affairs, and maintaining the quality of adjudication.'³⁷³ This passage has been frequently cited in later judgments in the course of defending the respective judges' interpretation of section 12(3), particularly when the outcome is one which is not favourable to

³⁶⁸ Herstein op cit note 198 at 99-100.

³⁶⁹ Gardner *Torts and Other Wrongs* op cit note 25 at 46-8.

³⁷⁰ Ibid at 27-29.

³⁷¹ Section 34 of the Constitution.

³⁷² Supra note 61.

³⁷³ Ibid para 8.

the plaintiff.³⁷⁴ It is unlikely, therefore, given the judgments in *Mdeyide* and in *Mtokonya*, that a constitutionality challenge based on the section 34 right of access to courts would be successful.

In *Mtokonya*, Jafta J described the ‘constitutional dichotomy’ that arises when:

‘...members of the Service, contrary to their obligations, unlawfully arrest and detain people, and assault them while in their custody. And when a civil action is pursued by the victims, the Minister of Police invokes an apartheid-era statute in an attempt to avoid responsibility and liability for the breach of not only the guaranteed rights but also the obligations imposed by the Constitution. This was done in circumstances where the Minister was not compelled to raise prescription.’³⁷⁵

Another consideration that should not be overlooked is that the concept of prescription is unknown to African customary law³⁷⁶ and while ‘a debt may get mouldy,... it never decays.’³⁷⁷ Mogobe Ramose writes that the ubuntu understanding of justice ‘as the restoration of equilibrium’ is that the ‘law as a continually lived experience cannot reach a point of finality.’³⁷⁸ On this understanding, the passage of time is not capable of changing the truth or undoing something that has happened in the past and, therefore, a ‘debt or feud is never extinguished until the equilibrium has been restored, even if several generations elapse.’³⁷⁹ When it comes to placing a time limit on claims or debts, ‘to the African there is nothing so incomprehensible or unjust in our system of law as the Statute of Limitations’.³⁸⁰

³⁷⁴ See, for example, *Mtokonya* supra note 64 para 84.

³⁷⁵ *Mtokonya* supra note 64 para 91.

³⁷⁶ Ntebo L Morudu and Charles Maimela ‘The indigenisation of customary law: Creating an indigenous legal pluralism within the South African dispensation: possible or not?’ (2021) *De Jure Law Journal* 54.

³⁷⁷ Chinua Achebe *No Longer at Ease* (1960) at 74, 88. Ibo proverb/saying.

³⁷⁸ Mogobe B Ramose ‘An African perspective on justice and race’ (2001) *Polylog* 1 at 7.

³⁷⁹ *Ibid.*

³⁸⁰ *Ibid.*

(c) *Returning to the case of Mr C*

In the case that the scenario involving Mr C is based on, *Coboza I* and *II*, the plaintiff, Mr Coboza, alleged that prescription only commenced to run from the date of his first consultation with his attorney, as it was only then that he was made ‘aware of the fact that *he is entitled to claim for damages as against the MEC for Health... for the injuries that he sustained at the hands of the doctors and the staff*³⁸¹ at the various hospitals that he was treated at. In response, the MEC for Health argued that it was not necessary for a plaintiff to have knowledge of their ability to claim ‘pursuant to negligent conduct on the part of the medical staff’³⁸² for the purposes of section 12(3), and that prescription, at the very latest, began running after the plaintiff’s final operation, which occurred more than a decade before summons was instituted.³⁸³ The MEC relied quite heavily on the plaintiff’s concession that he was told by the hospital staff during 1998 that ‘the problem lay with the spinal anaesthetic’ and that ‘there was water on his spinal cord’.³⁸⁴ In the High Court, Baartman J was not persuaded and dismissed the MEC’s special plea of prescription on the basis that there were no grounds to suggest that the plaintiff either knew or had reasonable grounds to suspect that the negligent administration of the spinal anaesthetic was the cause of the water on his spine.³⁸⁵

On appeal, the SCA found that the court *a quo* erred by requiring knowledge of negligence on the part of a creditor in order for prescription to commence and reaffirmed the prevailing interpretation of section 12(3) as it appears in *Truter II*³⁸⁶ and *Mtokonya*.³⁸⁷ However, they dismissed the MEC’s special plea on different grounds entirely. The Court, per Van der Merwe JA, dismissed the plea of prescription on the basis that the MEC failed to lead evidence to show which facts the plaintiff knew or reasonably ought to have known at the date it alleges

³⁸¹ *Coboza I* supra note 62 para 4.

³⁸² *Ibid* para 13.

³⁸³ *Coboza II* supra note 62 para 3.

³⁸⁴ *Ibid* para 4.

³⁸⁵ *Coboza I* supra note 62 para 16.

³⁸⁶ *Truter II* supra note 81 paras 17, 20.

³⁸⁷ *Mtokonya* supra note 64 paras 44-45, 50-51.

that prescription began running. The consequence of this is that ‘prescription has been raised in the air, without reference to the relevant primary facts upon which the [plaintiff’s] claim was founded. Because these facts were not pleaded, it could...not be determined when the [plaintiff] knew the primary facts or should reasonably have known them.’³⁸⁸ Thus, while it is well established that the defendant bears the onus to prove prescription,³⁸⁹ there are cases in which they nevertheless raise it in the air. For Mr Coboza, it was for this reason that he was able to proceed with his claim.

In *Mtokonya*, the court was faced with a similar situation, yet the outcome it reached was radically different. As Jafta J notes in his judgment, the defendant did not make any contentions in support of the assertion that the plaintiff’s claim had prescribed, as there were no facts in the agreed statement of facts that the parties submitted ‘which support the finding that the applicant had knowledge of the identity of the debtor and the material facts giving rise to the debt.’³⁹⁰ In contrast, Zondo J, for the majority, saw this differently. The learned Justice stated that while ‘no elaboration was given on the [defendant’s] contention that the [plaintiff’s] claim had prescribed... elaboration was provided on the [plaintiff’s] contention that his claim had not prescribed.’³⁹¹ Thus, according to the majority, if the court upheld the plaintiff’s submissions in the agreed statement of facts, it would have to find that the plaintiff’s claim did not prescribe. If, however, it rejected these submissions, ‘it would have to hold that his claim had prescribed and, thus, uphold the [defendant’s] special plea’.³⁹²

What *was* included in the agreed statement of facts (meaning both parties are taken to concede these facts) is that the plaintiff ‘did not know that... the conduct of the Police...was wrongful and actionable...[and that] he could sue the police.’³⁹³

³⁸⁸ *Coboza II* supra note 62 para 13.

³⁸⁹ *Gericke* supra note 155 at 825H.

³⁹⁰ *Mtokonya* supra note 64 para 103.

³⁹¹ *Ibid* para 19.

³⁹² *Ibid*.

³⁹³ *Ibid* para 3.

For the majority, per Zondo J, this was immaterial to the running of prescription in terms of section 12(3). Firstly, the Court found that the section ‘does not require the creditor to have knowledge of any right to sue the debtor....[or] of legal conclusions that may be drawn from “the facts from which the debt arises”.’³⁹⁴ Second, when it came to the plaintiff’s lack of knowledge that the conduct of the defendant was ‘wrongful and actionable’ the Court interpreted this to be ‘knowledge of a legal conclusion and... not knowledge of a fact’³⁹⁵ in terms of this section. As such, the plaintiff’s contentions failed to provide the Court with a basis to conclude that his claim had not prescribed.

Although the purpose of statements of agreed facts is to avoid leading evidence, and this may be the point of distinction between the two cases, it is possible that the outcomes of both cases, in this respect, could have gone in the other direction. This brief look at these two cases, not only gives us some sense of closure in respect of the case behind the hypothetical scenario of Mr C, it illustrates the uncertain position that many claimants may still find themselves in, when pleas of prescription are raised in the air, and their inability to prove that their claim had *not* prescribed becomes the basis upon which a court finds that it has. That being said, there is hope that courts will take the onus placed on defendants seriously, and require that they do more than merely raise it, often opportunistically, to avoid liability. Even if the purpose of the law is to allow them to do just that.

³⁹⁴ Ibid para 36.

³⁹⁵ Ibid para 45.

VI CONCLUSION

If we are to take the power of victims of personal injury to approach a court to seek and obtain redress for the violation of their rights seriously, then we ought to rigorously interrogate the manner in which extinctive prescription restricts this power. In addition to promoting the constitutional right of access to courts,³⁹⁶ there are important moral and policy considerations in favour of ensuring that victims of wrongdoing are able to obtain redress by, for example, bringing a civil claim against their wrongdoer for the payment of reparative damages. The allocation of ‘the most extensive legal powers to determine the powers of the court...[to] the very person who claims to have been wronged...who stands to profit personally, whether financially or otherwise, from the outcome of the proceedings... [and who] is *meant* to profit personally if her claim succeeds’,³⁹⁷ according to Gardner, is one of private law’s “special features”.

It appears that upon a closer inspection of the rules regulating the extinctive prescription of personal injury claims, the manner in which they function causes problems when it comes to the strength of the dominant justifications offered for the regime. In this dissertation, I set out a critical overview of these justifications, and highlighted these limitations. The purpose of my exploration of the rules regulating the extinctive prescription of personal injury claim was (i) to construct an appropriate and useful account of the nature and operation of those rules and (ii) to evaluate the dominant justifications for extinctive prescription, with this account in mind. Ultimately, extinctive prescription operates to empower a defendant to decide whether the claim brought against them is able to proceed through the adjudicative process and ultimately be enforced. It does so by granting a defendant a broad, discretionary power to stop the legal proceedings in their tracks, preventing the court from considering the merits of the plaintiff’s claim and avoiding liability in respect of that claim.

³⁹⁶ Section 34 of the Constitution.

³⁹⁷ Gardner *From Personal Life* op cit note 25 at 200.

These rules effectively redistribute the decision-making power regarding the fate of the plaintiff's claim from the hands of the court to the exclusive domain of these defendants. The strength and moral force of whatever justification is put forward in support of this rule hinges on whether it can stand up against the myriad of reasons in favour of enforcing meritorious and well-founded claims, regardless of when they are brought. The need for an adequate justification becomes even clearer when looking at the specific manner in which the rules regulating the extinctive prescription of personal injury claims operate in South Africa, where there is a stark lack of access to legal resources, quality education and the type of information required to institute action. A claimant's ability to enforce their claim depends on whether they appreciate the legal significance of what occurred when the wrong was committed and are able obtain the requisite information for the purposes of issuing summons within the stipulated timeframe. The consequences that extinctive prescription rules have for plaintiffs who, by reason of their socio-economic circumstances, are unable to timeously enforce their claims reveals the potential for injustice that these rules create.

Responding to the suggestion that knowledge of the 'facts from which the debt arises' in terms of section 12(3) includes knowledge that the conduct which gave rise to the debt is 'wrongful and actionable in law',³⁹⁸ Zondo J, for the majority in *Mtokonya*, found that such a construction 'would render our law of prescription so ineffective that it may as well be abolished.'³⁹⁹ If this meaning were to be adopted, the learned Justice reasoned, then 'prescription would, for all intents and purposes, *not run against people who have no legal training at all*',⁴⁰⁰ including people who are not formally educated, 'professionals in non-legal professions', and even 'trained lawyers if the field concerned happens to be a branch of law with which they are not familiar.'⁴⁰¹ Such a construction of the section 12(3) knowledge requirement, Zondo J continued, would mean that the 'percentage of people in the South African population against whom prescription would not run...would be

³⁹⁸ *Mtokonya* supra note 64 para 63.

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid* [my emphasis].

⁴⁰¹ *Ibid* [my emphasis].

unacceptably high.' The construction that Zondo J seemed to, at least rhetorically, be willing to accept is one in which a creditor must have 'a reasonable suspicion that the conduct is or may be wrongful and actionable in law,'⁴⁰² as opposed to outright certainty of this fact. At the end of the day, which of these constructions is adopted, matters little to a person who is unaware of the existence of their ability to bring a claim against whoever has wronged them and whose may only acquire that knowledge by chance.

The unfortunate reality is that meritorious and well-substantiated claims will continue to be brought, and will continue to have their enforcement thwarted by way of pleas of prescription. When it is the State bringing that plea, it becomes a much harder pill to swallow, particularly in light of the stark lack of access to the courts and to justice in South Africa. Jafta J expresses his disappointment with this state of affairs in the following passage in his minority judgment in *Mtokonya*:

'It is remarkable that a Minister of a democratic government would invoke an apartheid-era legislation to undermine the Constitution, And to do so in circumstances where he agreed in writing in the statement of agreed facts that the claimant had no knowledge of the existence of the claim.'⁴⁰³

It is indeed remarkable that in the Constitutional dispensation we are still grappling with a piece of legislation that has the potential to produce such unfairness to plaintiffs who, through no fault of their own, are unaware of their ability to claim, and then are summarily dispossessed of that power once they eventually exercise it. This dissertation aimed to raise the consciousness, even if it is only slightly, about the pernicious consequences that rules of extinctive prescription have for personal injury claimants in South Africa and the desperate need to rethink a regime that has for so long been treated as self-evidently valuable.

⁴⁰² Ibid. This is similar in many respects to the interpretation of the section in *Links* (supra note 89 para 42), which is confined to cases involving professional negligence.

⁴⁰³ *Mtokonya* supra note 64 para 91.

VII BIBLIOGRAPHY

Primary Sources

Constitution

Constitution of the Republic of South Africa, 1996

Statutes

Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.

Prescription Act 68 of 1969.

Prescription Act 18 1943.

Road Accident Fund Act 56 of 1996.

Rules of Court

Uniform Rules of Court in the High Court 2009: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa. GN R315 (GG 19834) of 12 March 1999.

Cases

South African:

Abrahamse and Sons v SA Railways and Harbours 1933 CPD 626.

Claasen v Bester 2012 (2) SA 404 (SCA).

Coboza v MEC for Health, Western Cape (WCC) unreported case no 12082/2016 (29 March 2019).

Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd 1991 (1) SA 525 (A).

Deysel v Truter 2005 (5) SA 598 (C).

Drennan Maud & Partners v Pennington Town Board 1998 (3) SA 200 (SCA).

Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A).

Gericke v Sack 1978 (1) SA 821 (A).

Jacobs v Adonis 1996 (4) SA 246 (C).

Jugwanth v Mobile Telephone Networks (Pty) Ltd [2021] 4 All SA 346 (SCA).

Laws v Rutherford 1924 AD 261.

Lagerwey v Rich and Others 1973 (4) SA 340 (T).

Links v Department of Health, Northern Cape 2016 (4) SA 414 (CC).

List v Jungers 1979 (3) SA 106 (A).

Macleod v Kweyiya 2013 (6) SA 1 (SCA).

McKenzie v Farmer's Co-operative Meat Industries Ltd 1922 AD 16.

MEC for Education, KwaZulu-Natal v Shange 2012 (5) SA 313 (SCA).

MEC for Health, Western Cape v M C (1087/2019) [2020] ZASCA 165 (10 December 2020).

Minister of Finance and Other v Gore NO 2007 (1) SA 111 (SCA).

Mohlomi v Minister of Defence 1997 (1) SA 124 (CC)

Mtokonya v Minister of Police 2018 (5) SA 22 (CC).

National Union of Metalworkers of South Africa v Intervolve (Pty) Ltd and Others 2015 (2) BCLR 182 (CC).

Oertel en andere NNO v Direkteur van Plaaslike Bestuur en andere 1983 (1) SA 354 (A).

Road Accident Fund and Another v Mdeyide 2011 (2) SA 26 (CC).

Stallion Security (Pty) Limited v Van Staden (526/2018) [2019] ZASCA 127.

Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited 2018 (1) SA 94 (CC).

Truter and Another v Deysel 2006 (4) SA 168 (SCA).

Van Staden v Fourie 1989 (3) SA 200 (A).

Van Zijl v Hoogenhout [2004] 4 All SA 427 (SCA).

Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng 2009 (3) SA 577 (SCA).

Foreign:

A'Court v. Cross (a) (1825) 3 Bing 329.

Cook v Gill L.R. 8 C.P. 107.

Elkins v. Derby 12 Cal.3d 410.

Khalapa v Commissioner of Police and Another [2000] LSHC 143.

Offutt v. United States, 348 U.S. 11 (1954).

R.B. Policies at Lloyd's v Butler [1950] 1 KB 76.

Secondary Sources

Articles

Abel, Richard L 'A socialist approach to risk' (1982) 41 *Maryland LR* 695.

Achebe, Chinua *No Longer at Ease* (1960) Heinemann Publishers (Pty) Limited, Johannesburg.

Andrews, N H 'Reform of limitations of actions: The quest for sound policy' (1998) 57 *Cambridge LJ* 589.

Benson, Christine M 'Statutes of limitations in Tort: Who do they limit?' (1988) 71 *Marquette Law Review* 769.

Cane, Peter 'The anatomy of private law theory: A 25th anniversary essay' (2005) 25 *Oxford Journal of Legal Studies* 203.

Crump, David 'Statutes of limitation: The underlying policies' (2016) 54 *University of Louisville Law Review* 437.

Duxbury, Neil 'Acquisitive prescription and fundamental rights' (2016) 66 *University of Toronto LJ* 472.

Epstein, Richard A 'Past and future: The temporal dimension in the law of property' (1986) 64 *Washington University Law Quarterly* 667.

Fleming, John G 'Is there a future for tort' (1984) 44 *Louisiana LR* 1193.

Gardener, John 'Torts and other wrongs' (2011) 39 *Florida State University LR* 43.

Green, Michael D 'The paradox of statutes of limitation in toxic substances litigation' (1988) 76 *California LR* 965.

Herstein, Ori J 'How tort law empowers' (2015) 65 *University of Toronto LJ* 99.

Hohfeld, Wesley N 'Some fundamental legal conceptions as applied in judicial reasoning' (1913) 23 *Yale LJ* 16.

Holmes, Oliver W 'The path of the law' (1897) 10 *Harvard LR* 457.

Johnson, Jeffery L 'Explanation, human nature and tort theory' (2006) 4 *Georgetown Journal of Law & Public Policy* 333.

Katz, Larissa M & Shapiro, Matthew A 'The role of plaintiffs in private law institutions' (October 2021). *Private Law and Practical Reason: Essays on John Gardner's Private Law Theory* (Haris Psarras & Sandy Steel eds., Oxford University Press, 2022 Forthcoming), Rutgers Law School Research Paper, available at SSRN: <https://ssrn.com/abstract=3956085>.

Krause, L E 'The history and nature of acquisitive prescription and of limitation of actions in Roman-Dutch law' (1923) 40 *SALJ* 26.

Lytton, Timothy D 'Responsibility for human suffering: Awareness, participation, and the frontier of tort law' (1993) 78 *Cornell LR* 470.

Moore, Michael S 'The semantics of judging' (1981) 54 *California LR* 151.

Morudu, Ntebo L and Maimela, Charles 'The indigenisation of customary law: Creating an indigenous legal pluralism within the South African dispensation: possible or not?' (2021) *De Jure Law Journal* 54.

N.A. 'Developments in the Law: Statutes of Limitations' (1950) 63 *Harvard Law Review* 1177.

N.A. 'The fairness and constitutionality of statutes of limitations for toxic tort suits' (1983) 96 *Harvard Law Review* 1683.

Nörr, Dieter 'Time and the acquisition of ownership in the law of the Roman Empire' (1968) 3 *Irish Jurist* 352.

Ntebo L Morudu and Charles Maimela 'The indigenisation of customary law: Creating an indigenous legal pluralism within the South African dispensation: possible or not?' (2021) *De Jure Law Journal* 54.

Ocho, Tyler T & Wistrich, Andrew J 'The puzzling purposes of statutes of limitation' (1997) 28 *Pacific LJ* 453.

Opala, Marian P 'Praescriptio Temporis and its relation to prescriptive easements in the Anglo-American Law' (1971) 7 *Tulsa LJ* 107.

Ramose, Mogobe B 'An African perspective on justice and race' (2001) *Polylog*.

Roach, Kent 'Reforming statutes of limitations' (2001) 50 *University of New Brunswick LJ* 25.

Shapiro, Fred R & Pearse, Michelle 'The most-cited law review articles of all time' (2012) 110 *Michigan Law Review* 1483.

Singh, Chhatrapati 'The concept of time in law: Basis of laws of limitation and prescription' (1990) 32 *Journal of the Indian Law Institute* 328.

Stapleton, Jane 'Tort, insurance and ideology' (1995) 58 *Modern LR* 820.

Werro, Franz 'Tort law at the beginning of the new millennium – A tribute to John G. Fleming's legacy' (2001) 49 *American Journal of Comparative Law* 147.

Williams, Jeremy S 'Limitation periods on personal injury claims' (1973) 48 *Notre Dame LR* 881.

Zimmermann, Reinhard 'Roman-Dutch jurisprudence and its contribution to European private law' (1992) 66 *Tulane Law Review* 1685.

Zipursky, Benjamin C 'Civil recourse, not corrective justice' (2003) 91 *Georgetown LJ* 695.

Books

Baldwin, James *No Name in the Street* (1972) Dial Press, USA.

De Wet, J C *Opuscula Miscellanea: Regsgeleerde Lesings en Adviese van J C de Wet* (1979) Butterworths, Durban.

Dickerman Williams, C 'Introduction' in Clyde Pharr (translator) *Theodosian Code and Novels and the Sirmondian Constitutions* (1952) Princeton University Press, New Jersey.

Hill, Edward J. *Common Law Jurisdiction and Practice, according to Statutes and Decisions in the State of Illinois, from the Earliest Period to 1872* (1872) E.B. Myers, Chicago.

Fleming, John G. *The Law of Torts* 5 ed (1977) Law Book Company, Sydney.

Gardner, John *From Personal Life to Private Law* (2018) Oxford University Press, USA.

Gardner, John *Torts and Other Wrongs* (2019) Oxford University Press, USA.

Goldberg, John CP & Zipursky, Benjamin C *Recognizing Wrongs* (2020) Harvard University Press, Cambridge, Massachusetts.

Grotius, Hugo *Inleidinge tot de Hollandsche Rechts-Geleerdheid: Met Aanteekeningen van Fockema 1910: 2 Volumes: Arnhem.*

Hutchison, Dale & Du Bois, François 'Contracts in general' in François du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) Juta, Cape Town.

Jones, Michael A. *Limitation Periods in Personal Injury Actions* (1995) Blackstone Press Limited, London.

Loubser, Max *Extinctive Prescription* 2 ed (2019) Juta, Cape Town.

Pete, S et al. *Civil Procedure A Practical Guide* 3 ed (2017) Oxford University Press, Southern Africa.

Roux, Theunis *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis* (2018) Cambridge University Press, United Kingdom.

Todd, Stephen *Limitation Periods in Personal Injury Claims* (1982) Sweet & Maxwell, London.

van der Linden, Johannes *Regtsgeleerd Practicaal en Koopmans Handboek* (1806) Amsterdam.

Vandall, Frank J *A History of Civil Litigation: Political and Economic Perspectives* (2011) Oxford University Press, USA.

Voet, Johannes & van der Linden, Johannes *The Selective Voet being the Commentary on the Pandects* (Percival Gane translator) (1956) Butterworths, Durban.

Walker, David M *The Law of Prescription and Limitation of Actions in Scotland* 3 ed (1981) W. Green, Edinburgh.

Windscheid, Bernhard & Kipp, Theodor *Lehrbuch des Pandektenrechts* 9 ed (1906) Rütten & Loening, Frankfurt.

Zimmermann, Reinhard *Comparative Foundations of a European Law of Set-Off and Prescription* (2002) Cambridge University Press, New York.

Zimmermann, Reinhard *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) Juta, Cape Town.

Reports

SALRC Revised Discussion Paper 'Harmonisation of Existing Laws Providing For Different Prescription Periods' (2 December 2017) 1.25.

VIII TABLES

Table 1: Cases involving a plea of prescription in respect of a delictual claim (1977 to 2020)

Case citation	Cause of action	Summons	Final judgment	Years between summons and final judgment
<i>Gericke v Sack</i> 1978 (1) SA 821 (A)	13 February 1971	14 February 1974	22 November 1977	3
<i>Brand v Williams</i> 1988 (3) SA 908 (C)	15 July 1982	21 October 1985	2 December 1987	2
<i>Jacobs v Adonis</i> 1996 (4) SA 246 (C)	27 August 1988	January 1995	9 May 1996	1
<i>Truter and Another v Deyssel</i> 2006 (4) SA 168 (SCA)	7 September 1993 (latest)	April 2000	17 March 2006	6
<i>Gunase v Anirudh</i> 2012 (2) SA 398 (SCA)	9 July 1992	21 October 2008	30 November 2011	7
<i>Road Accident Fund and Another v Mdeyide</i> 2011 (2) SA 26 (CC)	8 March 1999	27 February 2004	30 September 2010	6
<i>MEC for Education, KwaZulu-Natal v Shange</i> 2012 (5) SA 313 (SCA)	June 2003	3 December 2008	1 June 2012	4
<i>Macleod v Kweyiya</i> 2013 (6) SA 1 (SCA)	30 January 1988	8 April 2009	27 March 2013	4
<i>Links v Department of Health, Northern Cape</i> 2016 (4) SA 414 (CC)	August 2006	6 August 2009	30 March 2016	7

<i>Mtokonya v Minister of Police</i> 2018 (5) SA 22 (CC)	September 2010	April 2014	19 September 2017	3
<i>Loni v MEC for Health, Eastern Cape (Bhisho)</i> 2018 (3) SA 335 (CC)	Between August 1999 and 2001	20 June 2012	22 February 2018	6
<i>Kekana v Road Accident Fund</i> [2018] ZASCA 75	8 August 1996	2013	31 May 2018	5
<i>Kruger v National Director of Public Prosecutions</i> [2018] ZACC 13	October 2009	31 January 2013	9 April 2019	6
<i>MEC for Health, Western Cape v M C</i> [2020] ZASCA 165	Between May 1998 and September 2005	8 July 2016	10 December 2020	4