



THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA

Project No 36 – Part I

**Limitation And Notice Of Actions:  
Latent Disease And Injury**

**REPORT**

**OCTOBER 1982**

To: THE HON I G MEDCALF, QC, MLC  
**ATTORNEY GENERAL**

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972-1978*, I am pleased to present the Commission's report on limitation and notice of actions: latent disease and injury.

C W Ogilvie  
Chairman

8 October 1982

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972-1978*.

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## CHAPTER 1 - INTRODUCTION

### 1. THE COMMISSION'S TERMS OF REFERENCE

1.1 The Commission has been asked to examine and report on the law relating to the limitation and notice of civil actions, and incidental matters.<sup>1</sup> These terms of reference require the Commission to review the *Limitation Act 1935-1978*<sup>2</sup> and to examine the provisions in certain other statutes which impose limitation periods or notice of action requirements.<sup>3</sup> However, they do not require an examination of the limitation periods applicable to criminal proceedings.

1.2 In June 1982 the Government decided in principle that action should be taken to overcome problems<sup>4</sup> with the law relating to the limitation and notice of actions being experienced by persons who contract a disease or suffer an injury which remains latent<sup>5</sup> for a significant period of time. Following that decision, the Attorney General asked the Commission to submit a special report as a matter of urgency on this subject.<sup>6</sup> The terms of reference given to the Commission for this purpose were:

"To examine and report on the law relating to the limitation and notice of actions as it applies to civil actions brought by or in respect of persons who contract a disease or suffer an injury which remains latent for a significant period of time."

1.3 This report deals with the above terms of reference. It discusses the relevant law in Western Australia and the problems being experienced with it, and the solutions to these problems adopted in a number of comparable jurisdictions. Recommendations for reform are then made which are designed to overcome the limitation and notice problems being experienced in respect of latent disease and injury. These recommendations, however, are not specifically restricted in scope to actions brought in respect of latent disease and injury but

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<sup>1</sup> This area of law is described briefly in paras 1.7 to 1.9 below.

<sup>2</sup> Referred to in this report as "the *Limitation Act*". The relevant parts of the Act are reproduced in Appendix II.

<sup>3</sup> The Commission's original reference was limited to an examination of the *Limitation Act*. At the Commission's suggestion the Attorney General expanded the reference to its present form.

<sup>4</sup> These problems are outlined in paras 2.11 to 2.14, 2.20, 2.29, 2.30, 2.34 to 2.36 below.

<sup>5</sup> The concept of a disease or injury being latent is discussed, and the main latent diseases so far known in Western Australia are described, in paras 1.15 to 1.20 below.

<sup>6</sup> The Government's decision and its request for an urgent report from the Commission were announced in a press release dated 1 September 1982 issued by the Attorney General, the Hon I G Medcalf, QC, MLC.

apply to all cases of disease or injury.<sup>7</sup> To this extent, although within its principal terms of reference, they go beyond the terms of reference given to the Commission for the purpose of this special report. However, the Commission believes that its recommendations represent the preferred solution to the problems raised by latent disease and injury. It also believes that those cases cannot be dealt with separately and that it would be undesirable to do so. In this connection, it should be noted that one of the advantages of the Commission's approach is that it may well also solve problems which have arisen in recent cases involving the Motor Vehicle Insurance Trust,<sup>8</sup> and if implemented, would probably make separate amendments to the *Motor Vehicle (Third Party Insurance) Act 1943-1981*, as proposed by the Government,<sup>9</sup> unnecessary.

## 2. CONSULTATION

1.4 In preparing this report as a matter of urgency it has not been possible for the Commission to issue a working paper, as it normally does, discussing the issues raised by its terms of reference, proposing reforms and calling for comment. However, to secure as much public comment as possible on the subject the Commission, by an advertisement which appeared in *The West Australian* on 11 September 1982, called for submissions from members of the public. The Commission also wrote to a number of individuals and organisations with an interest or expertise therein, explaining that it had been asked to report urgently and inviting preliminary submissions.

In addition, the Commission subsequently distributed a draft of this report to those individuals and organisations for comment.

1.5 The Commission received ten preliminary submissions and seven comments on the draft report from individuals and organisations.<sup>10</sup> With one exception, the State Government Insurance Office, all of those who made preliminary submissions or commented on the report agreed that there was a need to reform the law relating to limitation periods in the case of persons who contract a disease or suffer injury which remains latent. There were, however,

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<sup>7</sup> However, a number of the criteria for use in determining whether the limitation period applies under the Commission's principal recommendation are specifically directed towards latent disease and injury.

<sup>8</sup> *Lattimer v Shafran* (unreported) Supreme Court of Western Australia Appeal No 350 of 1981: see also *Marinelli v Jankovic* (unreported) Supreme Court of Western Australia Appeal No 391 of 1981.

<sup>9</sup> "Government to amend third party Act", *The West Australian*, 14 September 1982.

<sup>10</sup> Appendix I contains a list of those who made preliminary submissions or commented on the report.

divergent views on the best means of reforming the law. Where appropriate these views are referred to in the report.

1.6 The Commission notes that because of the limited time allowed for comment on the draft report not all those persons and organisations wishing to comment have had an opportunity to do so. The urgency of the matter has, however, not permitted the Commission to delay the submission of this report until after receipt of those comments.

### **3. LIMITATION AND NOTICE OF ACTIONS**

1.7 The law relating to the limitation and notice of actions governs the time within which a plaintiff must commence legal proceedings if he wishes to enforce a right of action he has against a defendant and the notice, if any, he must give the defendant of his intention to do so.

1.8 As a result of various statutory provisions to this effect, a person wishing to enforce a right of action against another person must commence legal proceedings within the period of time, known as the "limitation period", applicable to his claim. If he does not do so and proceedings are commenced then, as a general rule, the defendant will be able successfully to resist the plaintiff's claim, regardless of its merits, on the ground that the limitation period has expired.<sup>11</sup> For limitation purposes, proceedings are commenced by the plaintiff issuing a writ, summons or other originating process against the defendant. As long as this is done within the appropriate limitation period it does not matter that the writ or summons is not served on the defendant or other steps taken in the action until after the expiration of that period.<sup>12</sup>

1.9 In addition to creating limitation periods, a number of statutes also require persons proposing to commence proceedings to notify the prospective defendant of their intention to do so and in some cases to give him details of their claim. With certain exceptions, failure to

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<sup>11</sup> The effect of the expiration of the limitation periods considered in this report is considered in more detail in paras 2.7 to 2.9 below.

<sup>12</sup> However, as a result of O 7 r 1(1) of the *Rules of the Supreme Court 1971-1982* (RSC), a writ is valid in the first instance only for a period of 12 months. Therefore, unless renewed in the manner specified in O 7 r 1(2), it must be served on the defendant within that period. These rules apply also to proceedings in the District Court: *District Court of Western Australia Act 1969-1981*, s 87. Summons issued by Local Courts must also be served within 12 months of issue unless the time for service is extended by a magistrate: *Local Court Rules 1961-1981*, O 6 r 29(1) and (2).

give the appropriate notice may also provide the defendant with a good defence to the plaintiff's claim.<sup>13</sup>

#### 4. THE REASONS FOR HAVING LIMITATION PERIODS

1.10 The reasons<sup>14</sup> for having limitation periods are -

- (a) to protect defendants from claims relating to incidents which occurred many years before and about which they, and their witnesses, may have little recollection and no longer have records;<sup>15</sup>
- (b) that it is in the public interest for disputes to be resolved as quickly as possible and as close in point of time to the events upon which they are based so that the recollections of witnesses are still clear;<sup>16</sup>
- (c) to enable a person to feel confident, after a certain period of time, that a potential dispute cannot then arise - to operate as an "act of peace";<sup>17</sup>
- (d) to enable a person to arrange his affairs on the basis that a claim can no longer be made against him after a certain time.

The relative importance of these reasons will in practice vary from case to case.

1.11 It is apparent from these reasons that as far as individual plaintiffs and defendants are concerned, the existence of a limitation period operates to the advantage of the defendant, by providing him with a complete defence, and to the prejudice of the plaintiff. In connection with personal injury claims especially, it has been argued that this is unfair and that there should be no limitation periods.<sup>18</sup> The proponents of this view argue that in personal injury

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<sup>13</sup> See generally paras 2.15 to 2.19 below.

<sup>14</sup> The first three reasons given in the text were also expressed in the report of the Committee on *Limitation of Actions in Cases of Personal Injury* (1962) Cmnd 1829, para 17 (the Edmund Davies Committee) and were adopted from that report by the Law Reform Committee in its Final Report on *Limitation of Actions* (1977) Cmnd 6923, para 1.7.

<sup>15</sup> *A'Court v Cross* (1825) 3 Bing 329, 332; *Jones v Bellgrove Properties Ltd* [1949] 2 KB 700, 704.

<sup>16</sup> This reason led to the 6 year limitation period in the *Limitation Act 1939* (UK) being reduced to 3 years by the *Law Reform (Limitation of Actions etc) Act 1954* (UK).

<sup>17</sup> *A'Court v Cross* (1825) 3 Bing 329, 332 per Best CJ; *R B Policies at Lloyd's v Butler* [1949] 2 All ER 226, 229.

<sup>18</sup> The Trade Union Congress in the United Kingdom so argued in its submission to the Law Reform Committee: see generally *Interim Report on Limitation of Actions: Personal Injury Claims* (1974) Cmnd 5630, para 26.

cases defendants would be sufficiently protected against stale claims by the plaintiffs' self interest in instituting and pursuing their claims as soon as possible.<sup>19</sup>

1.12 In view of the relatively narrow scope of the present review the Commission has decided not to consider, in this report, the general question of whether there should be a limitation period.<sup>20</sup> Consequently, the assumption made in this report that some form of limitation period is necessary in personal injury cases should not be understood as a final rejection, for all cases, of the proposition outlined in the previous paragraph.

## 5. LIMITATION OF ACTION AND CAUSE OF ACTION

1.13 Being able to bring an action in the courts, unimpeded by a limitation period, is not the same thing as having a good cause of action. Consequently, even after the limitation problems being experienced by persons suffering latent disease and injury have been solved, those persons will still only be able to recover damages in respect of their disease or injury if they can prove that this was attributable to a tort or other civil wrong committed by the person against whom their claim is brought.<sup>21</sup> In many cases, the longer the period of time between the act or omission relied upon as constituting a tort and the hearing of the action the more difficult this will be.

## 6. CLAIMS ARISING OUT OF DISEASE OR INJURY

1.14 Assuming that a person<sup>22</sup> who contracts a disease or suffers personal injury can establish that the disease or injury was attributable to a tort<sup>23</sup> committed by another person<sup>24</sup> the following claims for damages may be made -

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<sup>19</sup> Delay on the plaintiff's part will make it more difficult for him to discharge the burden he bears of proving that his injury was attributable to a tort committed by the defendant and will lengthen the time it takes for him to recover compensation.

<sup>20</sup> In its comment on the Commission's draft report, the Trades and Labor Council and the Federated Miscellaneous Workers' Union of Western Australia advocated that "...either the period of limitation be extended to 50 years or - more sensibly - be abolished".

<sup>21</sup> See, for example, *Joosten v Midalco Pty Ltd* (unreported) Supreme Court of Western Australia No 1052 of 1979. In this case, the plaintiff contracted pleural mesothelioma sometime after 1975 as a result of inhaling blue asbestos fibre whilst working in the defendant's office at Wittenoom between 1950 and 1953. Although it was held that her claim for damages was not barred by the *Limitation Act* nevertheless her claim failed because she was unable to prove that the defendant had been negligent towards her. An appeal against this decision was lodged but Mrs Joosten died before it was heard.

<sup>22</sup> Wherever possible in this report such a person will be referred to as "the plaintiff" regardless of whether, in the situation then under consideration, proceedings have been commenced.

- (a) the plaintiff could bring a personal injury claim against the defendant based on the tort;<sup>25</sup>
- (b) if the plaintiff died as a result of the tort an action for damages could be brought against the defendant for the benefit of the plaintiff's family;<sup>26</sup>
- (c) if the plaintiff died, whether or not as a result of the tort, the executor or administrator of his estate could bring or pursue his personal injury claim against the defendant for the benefit of the plaintiff's estate;<sup>27</sup>
- (d) if the defendant died before damages had been awarded against him the plaintiff could bring or pursue his personal injury claim against the defendant's estate.<sup>28</sup>

The limitation and notice of action provisions applicable to personal injury claims, survival actions against<sup>29</sup> the estate of a deceased person and fatal accident claims differ from each other. In addition, special limitation and notice of action provisions apply where the defendant is the Crown or a public official or authority. These provisions and their application to latent disease or injury are discussed in the next chapter.

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<sup>23</sup> In the vast majority of cases the tort involved is that of negligence or breach of statutory duty. It is also possible, though rare in practice, for a personal injury claim to be based on breach of contract: *Matthews v Kuwait Bechtel Corporation* [1959] 2 All ER 345. This possibility, however, will not be considered further in this report because in the kinds of cases under consideration, the law governing the limitation of actions operates less unfavourably in respect of claims based on tort than it does in respect of claims for breach of contract, with the result that in practice plaintiffs claim in tort and not contract. Separate consideration of tort and contract claims is also unnecessary because the reforms proposed in this report will apply to all claims brought in respect of disease and injury regardless of whether the claim is framed in contract or tort.

<sup>24</sup> Wherever possible in this report such a person will be referred to as "the defendant", regardless of whether, in the situation then under consideration, legal proceedings have been commenced.

<sup>25</sup> Such claims are referred to in this report as "personal injury claims".

<sup>26</sup> Such claims are referred to in this report as "fatal accident claims". In Western Australia they are brought under the *Fatal Accidents Act 1959-1973* (referred to in this report as "the *Fatal Accidents Act*". The relevant parts of the Act are reproduced in Appendix III). Such an action is brought by and in the name of the executor or administrator of the deceased's estate for the benefit of the latter's wife or husband, parent and/or child. The Act is discussed further in paras 2.31 to 2.36 below.

<sup>27</sup> Such claims are referred to in this report as "survival actions". In Western Australia they are brought under s 4 of the *Law Reform (Miscellaneous Provisions) Act 1941-1962*, (this Act is referred to herein as the *Law Reform (Miscellaneous Provisions) Act*. The relevant parts of the Act are reproduced in Appendix IV).

<sup>28</sup> Ibid.

<sup>29</sup> Survival actions brought by the estate of a deceased person are governed by the provisions of the *Limitation Act*. See generally, para 2.22 below.

## 7. LATENT DISEASE AND INJURY

1.15 The phrase "latent disease and injury" is used in this report to refer to diseases and injuries that do not become detectable or produce symptoms that would lead to their detection until a significant period of time (the "latency period") has elapsed after the occurrence of the event which caused them. The most notorious latent diseases in Western Australia are asbestosis, silicosis, mesothelioma and other cancers.<sup>30</sup> There are, however, other latent diseases and medical science is constantly discovering that a disease is attributable to something that affected the victim long before he experienced any symptoms of it.<sup>31</sup>

1.16 Asbestosis: Asbestosis, which is a form of pneumoconiosis, is the development of diffuse fibrous tissue in the lungs caused by the inhalation of asbestos dust. This leads to the gradual destruction of lung tissue which results in breathlessness and a feeling of perpetual tiredness. Death may result from heart failure or lung cancer.<sup>32</sup>

1.17 A characteristic of asbestosis is that it usually has a latency period of many years between initial exposure to asbestos and the manifestation of symptoms. Although the latency period will usually be affected by the degree of exposure, because asbestosis is a progressive and irreversible disease, once contracted it will continue to develop even though exposure may have ended. Because of its latency period, and because its symptoms are variable and may occur in other diseases, diagnosis of asbestosis is difficult before the onset of changes which can be detected by radiological means even for experts in the area.<sup>33</sup>

1.18 Mesothelioma; Mesothelioma is a malignant growth or cancer affecting the membrane of the lung surface or inner chest wall. Although there appear to be other causes of this disease, there is a significant association between it and exposure to asbestos, especially crocidolite.<sup>34</sup> Although in some recorded cases this exposure has been considerable, in others

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<sup>30</sup> The literature on these diseases is considerable. The principal references consulted by the Commission were: National Health and Medical Research Council, *Report on the Health Hazards of Asbestos* (1982) ("NH & MRC"); D Hunter, *The Diseases of Occupations* (6th ed 1976) ("Hunter") ; G A Peters and B J Peters, *Source Book on Asbestos Diseases and Medical, Legal and Engineering Aspects* ("Peters") ; Michales and Chissick, (ed) *Asbestos , Properties, Applications and Hazards* Vol I Chp 12 by W D Buchanan ("Buchanan"); Health and Safety Commission of Great Britain, *Asbestos : Final Report of the Advisory Committee* Vols 1 and 2 ("Simpson").

<sup>31</sup> The problems caused by such discoveries, as far as the law of limitation is concerned, were alluded to by Lord Evershed in *Cartledge and Others v E Jopling and Sons Ltd* [1963] 1 All ER 341, 345.

<sup>32</sup> NH & MRC, 20-21; Peters, B2; Buchanan, 403-404.

<sup>33</sup> Peters, B1; Buchanan, 403-404; Hunter, 999; Simpson, 49-50.

<sup>34</sup> NH & MRC, 22; Buchanan, 400.

it has taken the form of an association with asbestos mining or people involved in asbestos mining.<sup>35</sup> Mesothelioma has a long latency period, the interval between first exposure and the development of symptoms varying in the United Kingdom between 25 and 50 years with an average of 33 years.<sup>36</sup> There is no effective treatment for mesothelioma and death is likely to occur within one or two years of diagnosis.<sup>37</sup>

1.19 Other Cancers: A variety of cancers can be caused by exposure to carcinogenic substances during employment.<sup>38</sup> A number of these have long latency periods. For example, pulmonary carcinoma, the risk of which increases dramatically with exposure to airborne asbestos fibres, has a latency period of 15 to 35 years.<sup>39</sup> Likewise, cancer of the bladder resulting from employment in the manufacture of synthetic dyes usually has a latency period of approximately twelve years.<sup>40</sup>

1.20 Silicosis: Silicosis, like asbestosis is a form of pneumoconiosis. Silicosis may result from the inhalation and depositing in the lungs of silica in industries such as quarrying, mining and abrasive blasting, especially sand-blasting. The depositing of silica leads to the formation of fibrous tissue in the lungs and difficulty in breathing.<sup>41</sup> Death may result from heart failure.<sup>42</sup> It appears that the latency period may be from a few months to over 60 years. Commonly it is about 30 years.<sup>43</sup>

## 8. WORKERS' COMPENSATION

1.21 This report does not deal with actions brought under the *Workers' Compensation and Assistance Act 1981*, or its predecessor, and the Commission's recommendations are not intended to apply to such actions.<sup>44</sup> The Commission notes, however, that successful workers' compensation claims have been made by the victims of latent disease or injury where the

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<sup>35</sup> Buchanan, 400.

<sup>36</sup> Hunter, 1001. For example, the latency period of the mesothelioma suffered by the plaintiff in *Joosten v Midalco Pty Ltd* (unreported) Supreme Court of Western Australia No 1052 of 1979 was approximately 25 years.

<sup>37</sup> Peters, B7.

<sup>38</sup> See generally, Hunter 790-814. In its preliminary submission the Trades and Labor Council emphasised the latency period of cancers attributable to a victim's employment.

<sup>39</sup> Peters, B8.

<sup>40</sup> Hunter, 809.

<sup>41</sup> National Health and Medical Research Council, *Occupational Health Guide - Silica (Silicosis)*, 11; Hunter 943-944.

<sup>42</sup> Hunter, 942.

<sup>43</sup> Ibid.

<sup>44</sup> See also footnote 2 on page 70.

disease or injury arose out of or in the course of the victim's employment as defined in the Act.

## CHAPTER 2 - THE LAW IN WESTERN AUSTRALIA

### 1. INTRODUCTION

2.1 As far as claims brought by victims of disease or injury are concerned the most important statutory provision imposing a limitation period is section 38(1)(c) of the *Limitation Act*. However, special limitation and notice of action provisions exist in respect of fatal accident claims, survival actions and claims brought against the Crown and public and local authorities. These provisions are discussed below.

### 2. THE LIMITATION ACT

#### (a) Introduction

2.2 Section 38(1)(c) of the *Limitation Act* creates a limitation period of six years for all actions "founded on tort" by providing that such actions " ...shall and may be commenced..." within six years "...after the cause of such actions..." (sic). As most claims brought in respect of personal injury or disease are based on the tort of negligence or breach of statutory duty this provision will govern them unless one of the special limitation provisions is applicable. Section 38(1)(c) draws no distinctions between personal injury and disease claims and other claims based on tort.

#### (b) The operation of section 38(1)(c)

2.3 As far as personal injury claims are concerned the effect of section 38(1)(c) can be summarised as follows -

- (i) Actions must be commenced within six years of the plaintiff's cause of action accruing

2.4 It has been established that the limitation period begins to run from the date upon which the plaintiff's cause of action accrues.<sup>1</sup>

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<sup>1</sup> *Archer v Catton and Co Ltd* [1954] 1 All ER 896; *Cartledge and Others v E Jopling & Sons Ltd* [1963] 1 All ER 341. These cases authoritatively determined the meaning and effect of s 2(1)(a) of the *Limitation Act 1939* (UK) which was the equivalent in that Act to s 38(1)(c) of the *Limitation Act* (WA). They have been accepted as stating the law in Western Australia, although they appear to have been misinterpreted in *Joosten v Midalco Pty Ltd* (unreported) Supreme Court of Western Australia No 1052 of 1979, 18. A

Consequently, to avoid having his claim defeated by a defence of limitation, the plaintiff must commence proceedings within six years of that date by issuing a writ or summons against the defendant. However, as noted above,<sup>2</sup> the writ or summons need not be served, nor any other steps taken, within the limitation period as the time for doing so is governed not by the *Limitation Act* but by the rules of court.

(ii) The plaintiff's cause of action accrues as soon as he suffers appreciable injury

2.5 In cases of negligence and breach of statutory duty the plaintiff's cause of action accrues as soon as the defendant's wrongful act or omission causes him to suffer injury or contract disease beyond what can be regarded as negligible,<sup>3</sup> and not from when he becomes aware of his condition.<sup>4</sup> Once this has occurred, further injury or disease arising at a later date from the same wrongful act or omission on the part of the defendant does not give rise to a new cause of action.<sup>5</sup>

(iii) The legal burden of proof is on the defendant

2.6 When a defendant raises the statute of limitations as a defence, the initial onus is on the plaintiff to prove that his action was commenced within the limitation period. However, in

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cause of action accrues when a state of facts comes into existence which would enable a plaintiff to successfully bring an action against a defendant. When this happens in the case of the torts of negligence and breach of statutory duty is discussed in para 2.5 below.

<sup>2</sup> Para 1.8.

<sup>3</sup> *Cartledge and Others v E Jopling and Sons Ltd* [1963] 1 All ER 341, 343, 344, 345, 348-350.

<sup>4</sup> *Id.*, 343, 344, 346, 350-352. See also *Anns v London Borough of Merton* [1977] 2 All ER 492 esp 505 and 513-514 in which the same rule was said to apply also to a cause of action arising out of the negligent construction of a building. According to Lord Salmon, the plaintiff's cause of action accrues in such a case when damage is sustained as a result of the defendant's negligence; for instance, when the building begins to sink and cracks appear. Should such damage go undetected, this will not prevent the limitation period running from the date when the damage first occurred.

<sup>5</sup> *Cartledge and Others v E Jopling and Sons Ltd* [1963] 1 All ER 341, 343. However, this situation is different from one in which fresh damage happens as a result of a continuing tort for in such a case each fresh damage will give rise to a separate cause of action. For example, in *Clarkson v Modern Foundries Ltd* [1958] 1 All ER 33, the defendant's tortious conduct continued from 1940 to 1951 and as a result, at some time within that period, the plaintiff contracted pneumoconiosis through exposure to pathogenic dust. The medical evidence established that each year from 1940 to 1951 played its part in producing this disease. The plaintiff did not, however, commence proceedings until August 1955 so that only the period August 1949 to August 1951 was not outside of the 6 year limitation period then applicable in the United Kingdom. Nevertheless, although part of the plaintiff's injury was inflicted before August 1949 he was able to recover in full for his injury because the last 2 years he was exposed to the dust "made a material contribution to the severity of the disease which in all probability already existed". The plaintiff was entitled to recover in full because it was impossible to determine what part of his loss was attributable to his exposure to the dust prior to August 1949.

a personal injury case, if the plaintiff proves that the injury or disease in respect of which his claim is brought was first diagnosed less than six years before the date on which the action was commenced, the burden passes to the defendant to prove that in fact the injury was suffered, or disease was contracted, more than six years before that date.<sup>6</sup>

**(c) The effect of the limitation period expiring**

2.7 The expiration of the limitation period created by section 38(1)(c) does not extinguish the plaintiff's cause of action but merely provides the defendant with a defence to any claim brought in respect of it.<sup>7</sup> In most cases this difference will be irrelevant because the defendant will rely on the defence and this will just as effectively defeat the plaintiff's claim as if his cause of action had been extinguished. However the difference is important where, for example, before the expiration of the limitation period the defendant has represented to the plaintiff that liability is admitted and that it is therefore unnecessary for him to commence proceedings.<sup>8</sup> In such a case the defendant may be precluded from raising a defence of limitation after the expiration of the limitation period<sup>9</sup> but this can only assist the plaintiff if his cause of action was not extinguished thereby.<sup>10</sup>

2.8 If the limitation period has expired and the defendant wishes to rely on a defence of limitation he must specifically plead that he does so even though it is apparent on the face of the claim that the time for bringing it has expired.<sup>11</sup> Because expiration of the limitation

<sup>6</sup> *Cartledge and Others v E Jopling and Sons Ltd* [1963] 1 All ER 341, 352.

<sup>7</sup> *Dawkins v Penrhyn* [1874-80] All ER Rep 1668, 1670; *Rodriguez v Parker* [1966] 2 All ER 349, 363.

<sup>8</sup> This situation, in which the defendant induces the plaintiff not to commence proceedings, is to be distinguished from one where the defendant admits liability but does not agree to waive the *Limitation Act* if proceedings are commenced. In this connection it has been held that an admission of liability does not of itself amount to a waiver of the Act: *Hurst v Parker* (1817) 1 B and Ald 92; *Short v McCarthy* (1820) 3B and Ald 626. See generally the discussion by Kennedy J in *Lattimer v Shafran* (unreported) Supreme Court of Western Australia Appeal No 350 of 1981.

<sup>9</sup> *Marinelli v Jankovic* (unreported) Supreme Court of Western Australia Appeal No 391 of 1981.

<sup>10</sup> For example, under the *Fatal Accidents Act*, expiration of the limitation period extinguishes the plaintiff's cause of action: see para 2.32 below. The effect of this happening is that any claim for damages he brought in respect thereof would fail without the defendant needing to rely on the *Limitation Act*. Therefore, an opportunity for him to argue that the defendant is precluded for some reason from raising a defence of limitation would not arise. However, if the defendant and plaintiff agree that the latter is entitled to damages, or that the benefit of the *Limitation Act* is to be waived, and pursuant to this agreement the plaintiff does not commence proceedings in tort within the limitation period, he may nevertheless have a remedy for breach of contract if the defendant does not honour the agreement: see generally *Lade v Trill* (1842) 11 L J Ch 102; *Cohen v Snelling* [1943] 2 All ER 577; *Lattimer v Shafran* (unreported) Supreme Court of Western Australia Appeal No 350 of 1981.

<sup>11</sup> RSC, O 20 r 9(1).

period does not extinguish the plaintiff's cause of action, if the defendant does not raise a defence of limitation the court will then adjudicate the claim on its merits.<sup>12</sup>

2.9 Expiration of the limitation period does not prevent a court permitting the plaintiff to amend his writ so as to remove a defect in it and once amended the writ speaks from the date on which it was originally issued.<sup>13</sup> In addition, if the court thinks it just to do so it can allow an amendment to substitute a new party (where the writ originally named the wrong person and the error was not misleading or such as to cause reasonable doubt as to the identity of the party intending to sue or intended to be sued),<sup>14</sup> to alter the capacity in which a party sues (if the party could have sued in the proposed capacity when the writ was issued)<sup>15</sup> and to add or substitute a new cause of action (if the new cause of action arises out of the same facts or substantially the same facts).<sup>16</sup> However, leave will not otherwise be given to add a new defendant after the expiration of the limitation period<sup>17</sup> or to introduce a new cause of action which has become barred by the statute.<sup>18</sup>

#### (d) Postponement of the limitation period

2.10 Under the *Limitation Act* the limitation period does not begin to run against a plaintiff who is under eighteen years of age, or "insane", at the time the cause of action accrued until the plaintiff turns eighteen or becomes sane respectively.<sup>19</sup> Similarly, if the defendant is "beyond the seas"<sup>20</sup> when the plaintiff's cause of action accrues against him the limitation period will not begin to run until he returns.<sup>21</sup>

<sup>12</sup> *Rodriguez v R J Parker* [1966] 2 All ER 349.

<sup>13</sup> *Pontin v Wood* [1962] 1 All ER 294; *Mitchell v Harris Engineering Co Ltd* [1967] 2 All ER 682.

<sup>14</sup> RSC, O 21 r 5(2)(3); *Rodriguez v Parker* [1966] 2 All ER 349; *Mitchell v Harris Engineering Co Ltd* [1967] 2 All ER 682.

<sup>15</sup> RSC, O 21 r 5(2)(4).

<sup>16</sup> Id, O 21 r 5(2)(5).

<sup>17</sup> Id, O 21 r 5(3). *Liff v Peasley* [1980] 1 WLR 781; *Lucy v W T Henleys Telegraph Works Co Ltd* [1969] 3 All ER 456. The preferred reason for this rule is that as the action against the defendant would not commence until he was added as a party, he could rely on the statute as barring the plaintiff's claim. The alternative explanation is that if the addition were allowed it would relate back to the date of the original writ and deprive the person added of an accrued defence to the claim. As this would be unjust the addition is not permitted: see *Liff v Peasley* [1980] 1 WLR 781.

<sup>18</sup> RSC, O 21 r 5(5).

<sup>19</sup> *Limitation Act*, s 40, reproduced in Appendix II.

<sup>20</sup> As defined by s 42 of the *Limitation Act*, reproduced in Appendix II.

<sup>21</sup> *Limitation Act*, s 41, reproduced in Appendix II.

**(e) The need for reform**

2.11 As a result of the rule that a plaintiff's cause of action accrues as soon as he suffers appreciable injury, section 38(1)(c) of the *Limitation Act* operates most unfairly in cases of latent disease and injury. In such cases, because the limitation period begins to run as soon as the injury is suffered or disease is contracted, that period may well expire before the injury or disease is diagnosed.<sup>22</sup> Even where diagnosis occurs within the limitation period, if a substantial part of that period has elapsed it may be impossible, in practice, for the plaintiff to commence proceedings before it expires. In both cases, this will make it impossible for the plaintiff to recover damages from the defendant if he elects to rely on the defence of limitation available to him.<sup>23</sup>

2.12 The leading reported example of the injustice section 38(1)(c) can cause is *Cartledge v Others v E Jopling and Son Ltd.*<sup>24</sup> In that case, the defendant was sued for negligence and breach of statutory duty by a number of its former employees and the personal representatives of two others who had since died. It was established that all the employees had contracted the disease pneumoconiosis before October 1950 as a result of inhaling invisible and infinitesimal particles of fragmented silica and that the defendant had been in breach of duty in not taking proper steps to guard against this. However, the employees did not discover that they had contracted the disease until after 1950 and it was not until 1955 that all of them were certified to be suffering from it. Although it was not suggested that they had been dilatory or unreasonable in failing to do so, the employees did not commence proceedings against the defendant within six years of October 1950. As a result it was held that their causes of action were barred by the Act.

2.13 The decision in *Cartledge v Jopling* was arrived at with regret. The trial judge, the Court of Appeal<sup>25</sup> and the House of Lords were unanimously of the view that the result in the case was unjust and that in cases of latent diseases or injury the above rule could lead to grave

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<sup>22</sup> Mesothelioma may be exceptional in this respect as it has been suggested that appreciable injury does not occur until shortly before the disease becomes manifest. If this is correct, the plaintiff's cause of action would accrue only shortly before the disease would be observable by the plaintiff.

<sup>23</sup> According to the Ex-Wittenoom Residents Association in a preliminary submission to the Commission, several ex-residents who considered commencing actions were deterred from doing so by legal advice to the effect that section 38(1)(c) of the *Limitation Act* would defeat any personal injury claim they made. Several individuals who had worked in the Wittenoom asbestos industry made personal submissions to the Commission to this effect also

<sup>24</sup> [1963] 1 All ER 341.

<sup>25</sup> [1961] 3 All ER 482, esp 485.

injustice where the plaintiff's disease or injury did not become manifest until the limitation period had substantially or completely expired. Their Lordships all called for reform to reverse the effect of their decision. Lord Evershed, for example, expressed the hope:<sup>26</sup>

"...that in the interests of justice Parliament will take an early opportunity of making by way of some corresponding qualification [a qualification corresponding to section 26 of the Act which postponed the accrual of the cause of action in cases involving fraud or mistake] a further exception to the general formula in the case of wrongs of the kind here in question."

According to his Lordship: <sup>27</sup>

"In another generation science may, [by enabling doctors to determine, after symptoms have become apparent, the earliest point at which injury was suffered] if the present statute for limiting causes of action remains unamended, render justice unattainable for ordinary men in cases of this kind."

2.14 Comments such as these led to the enactment of the United Kingdom *Limitation Act 1963* which was designed to overcome this problem.

### **3. ACTIONS AGAINST PUBLIC AND LOCAL AUTHORITIES AND THE CROWN**

#### **(a) Public authorities**

2.15 Section 47A(1) of the *Limitation Act*<sup>28</sup> provides that no action shall be brought against any person (other than the Crown)<sup>29</sup> in respect of any act or omission done or omitted to be done in connection with the execution of any Act, public duty or authority unless -

- (i) the prospective plaintiff informs the prospective defendant in writing, as soon as possible after his cause of action arises, of the circumstances upon which the proposed action is based and his name and address and that of his solicitor, if any; and
- (ii) the action is commenced within one year of the cause of action accruing.

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<sup>26</sup> [1963] 1 All ER 341, 344.

<sup>27</sup> Id, 345.

<sup>28</sup> Reproduced in Appendix II.

<sup>29</sup> As to which see generally para 2.19 below.

2.16 It would appear that if these conditions are not met the prospective plaintiff's cause of action is extinguished.<sup>30</sup> However, there are two exceptions which allow a prospective plaintiff to bring an action notwithstanding that these conditions have not been complied with. The first is created by section 47A(2) which allows a prospective defendant to consent to an action being brought against him provided it is commenced within six years of the date on which the cause of action accrued. The second is created by section 47A(3) which empowers the court in which the action would be brought to grant the prospective plaintiff leave, subject to such conditions as it thinks fit, to bring his action at any time within six years of the date on which the cause of action accrued. Such leave can only be granted:

"Where the Court considers that the [prospective plaintiff's] failure to give the required notice or the delay in bringing the action, as the case may be, was occasioned by mistake or by any other reasonable cause or that the prospective defendant is not materially prejudiced in his defence or otherwise by the failure or delay ...[and] ...it thinks it is just to do so....".

**(b) Local government authorities**

22.17 Section 660(1) of the *Local Government Act 1960-1982*<sup>31</sup> provides that no action in respect of personal injury, based on tort, is maintainable against a municipality or a member, officer, servant of a council or municipality in that capacity unless -

- (i) the plaintiff's action is commenced within twelve months of his cause of action arising;
- (ii) at least 35 days before the action is commenced a notice in writing is served on the council stating particulars of the cause of action, the claim and the name and address of the prospective plaintiff;
- (iii) as soon as practicable after the cause of action arose a written notice is served on the council setting out, to the extent possible, certain particulars;

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<sup>30</sup> This conclusion would appear to follow from the interpretation placed on similar provisions in the *Fatal Accidents Act* (see *Maxwell v Murphy* (1957) 96 CLR 261, 268 and *Stevens v Motor Vehicle Insurance Trust* [1978] WAR 232, 234) and from the existence of s 47A(2) and the wording of s 47A(3) of the *Limitation Act*.

<sup>31</sup> Referred to in this report as the "*Local Government Act*". Section 660 of this Act is reproduced in Appendix VI.

- (iv) the person injured submits to a medical examination when required by the council; and
- (v) the plaintiff, when asked to do so, answers reasonable inquiries made by the council relating to his cause of action.

2.18 However, where any of the above requirements has not been complied with, upon application by the plaintiff, a judge may, at any time before the expiration of six years from the date on which the cause of action arose, grant the plaintiff leave to bring the action where he thinks it just to do so.<sup>32</sup>

**(c) The Crown**

2.19 Section 6(1) of the *Crown Suits Act 1947-1954*<sup>33</sup> provides that "...no right of action lies against the Crown..." unless two conditions, almost identical to those applicable to public authorities,<sup>34</sup> are fulfilled. Failure to fulfil these conditions will extinguish the prospective plaintiff's cause of action. However, there are two exceptions created by section 6(2) and (3) of the Act, identical in all material respects to those applicable to public authorities, which allow an action to be brought notwithstanding non-compliance with them.

**(d) The need for reform**

2.20 Section 47A of the *Limitation Act*, section 660 of the *Local Government Act* and section 6(1) of the *Crown Suits Act* all create limitation periods which run from the date on which the plaintiff's cause of action accrues. As a result, they are all capable of operating unfairly in cases of latent disease and injury for the reason discussed in paragraph 2.11 above. Although each Act permits the limitation period to be extended in certain cases, the maximum period that can be obtained is six years which is quite insufficient for diseases such as asbestosis and mesothelioma.<sup>35</sup>

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<sup>32</sup> *Local Government Act*, s 660(2).

<sup>33</sup> Referred to in this report as the "*Crown Suits Act*". Section 6 of this Act is reproduced as Appendix V.

<sup>34</sup> The differences are that in the case of the Crown (a) the notice must be given to the Crown Solicitor (rather than the prospective defendant - the Crown) and (b) the prospective plaintiff has at least three months to give notice of his proposed action (rather than being required to give notice as soon as possible).

<sup>35</sup> Described in paras 1.16 to 1.18 above.

#### **4. SURVIVAL ACTIONS: THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT**

##### **(a) Introduction**

2.21 Before the passage of this Act an action in tort, except an action concerning injury to property, lapsed on the death of the defendant or the plaintiff. Consequently, a personal injury claim could not be brought **by** the personal representatives of a deceased person, even in respect of a tort causing the deceased's death, nor could such a claim be brought **against** them in respect of a tort committed by the deceased. This rule was abolished by section 4(1) of the *Law Reform (Miscellaneous Provisions) Act*<sup>36</sup> which provides that (with certain exceptions irrelevant for present purposes) all causes of action subsisting against or vested in a deceased person survive against, or for the benefit of, his estate. This provision was modelled on legislation passed in the United Kingdom in 1934.

##### **(b) Actions brought by a deceased person's estate**

2.22 Unlike proceedings brought under the *Fatal Accidents Act*,<sup>37</sup> there are no special limitation periods applicable to actions brought by a personal representative on behalf of the estate of a deceased person.<sup>38</sup> Rather, they are governed by the general provisions of the *Limitation Act*. Consequently, a defence of limitation will be available to the defendant in such an action unless it is commenced within six years of the deceased's cause of action accruing. Where the deceased's cause of action accrued as a result of him contracting a latent disease or suffering a latent injury this can cause injustice because in such a case the limitation period may well have expired, or substantially expired, before he died and a survival action could be commenced. Thus, for example, the estate of a person who died of asbestosis contracted ten years before his death could, in an action brought in respect of his asbestosis, be met by a defence of limitation as the limitation period would have expired four years before the deceased's death. This would be so even though the deceased's asbestosis was not diagnosed until shortly before his death.

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<sup>36</sup> The relevant provisions of this Act are reproduced as Appendix IV.

<sup>37</sup> Discussed in paras 2.31 to 2.33 below.

<sup>38</sup> The amount recoverable in such actions is substantial. See generally *Fitch v Hyde-Cates* (1982) 39 ALR 581; *Gardiner v Bolton and Marinko* (unreported) Supreme Court of Western Australia No 1665 of 1981.

**(c) Actions brought against a deceased person's estate**

2.23 On the other hand, section 4(3) of the *Law Reform (Miscellaneous Provisions) Act* introduces certain special provisions in respect of claims brought **against** a deceased person's estate. These were introduced because it was felt that where it is the defendant who has died there is a need for greater urgency in disposing of outstanding claims in order to hasten the distribution of the estate. The effect of section 4(3) can be summarised as follows -

- (i) Proceedings pending against the deceased when he died are governed by the ordinary limitation periods applicable to tort actions. As a result, the deceased's estate can rely on any defence of limitation that would have been open to the deceased in his lifetime.<sup>39</sup>
- (ii) If the defendant died more than 12 months after the plaintiff's cause of action arose the plaintiff cannot then commence an action against the defendant's estate.
- (iii) If the deceased died within twelve months of the plaintiff's cause of action arising, the plaintiff must commence proceedings within six months of the deceased's personal representative taking out representation or twelve months of his death, whichever is the later.
- (iv) A judge of the Supreme Court may extend the time for commencing proceedings "as the justice of the case may require" under the proviso to section 4(3)(b).

2.24 The second rule stated above summarises the effect of the first limb of section 4(3)(b) which, insofar as it can operate so as to deprive a plaintiff of the normal six year limitation period without warning, is the most unsatisfactory aspect of the Act.<sup>40</sup> Thus, for example, if a defendant dies thirteen months after committing a tort the plaintiff, if he has not already commenced proceedings, could be met by a defence of limitation. This may happen even

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<sup>39</sup> *Law Reform (Miscellaneous Provisions) Act*, s 4(3)(a); *Airey v Airey* [1958] 2 All ER 571, 575.

<sup>40</sup> See also the report of the (UK) Law Commission on *Proceedings Against Estates*, (1969) Cmnd 4010, para 8.

though there are good reasons why proceedings have not been commenced and even though the plaintiff had been acting in the belief that he had nearly a further five years in which to do so. Fortunately, however, the potential this provision has for causing injustice is reduced by the presence in section 4(3)(b) of a judicial discretion to extend the time for commencing proceedings" . . . as the justice of the case may require. . .”.

2.25 The provision in the United Kingdom *Law Reform (Miscellaneous Provisions) Act 1934* equivalent to the first limb of section 4(3)(b) was removed from that Act in 1954.<sup>41</sup> However, one effect of this change appears to be that it is now possible to revive a tort action in the United Kingdom that was, because of the expiration of the normal limitation period, statute barred during the life of the defendant. This can happen because even though the defendant could have raised a defence of limitation to an action brought against him in his lifetime, after his death, provided an action is commenced against his personal representative within six months of the representative's appointment, no such defence can be raised as that six month period is now the only limitation period applicable to such actions.<sup>42</sup>

2.26 The third rule stated in the above summary is sometimes referred to as the "six months probate" rule and results from the second limb of section 4(3)(b). In *Airey v Airey*<sup>43</sup> it was held that the equivalent provision in the United Kingdom Act had constituted since the 1954 amendment<sup>44</sup> the sole limitation period applicable to proceedings instituted against a deceased person's estate in respect of a tort he had committed. As a result, this rule can cause injustice to plaintiffs, especially those whose cause of action relates to latent injury or disease. This is because where, for example, a tort committed by the deceased shortly before his death caused the plaintiff to contract a disease which remained latent for a long period of time, the plaintiff's cause of action may well become statute barred long before he becomes aware that he is suffering from the disease. His position is worse than it would have been had he been able to bring a personal injury claim because instead of a six year limitation period applying to his cause of action, a limitation period of as little as twelve months could apply.

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<sup>41</sup> *Law Reform (Limitation of Actions, etc) Act 1954*, s 4.

<sup>42</sup> *Airey v Airey* [1958] 2 All ER 59, 62. On appeal in this case the Court of Appeal declined to express an opinion on this matter: [1958] 2 All ER 571, 578.

<sup>43</sup> [1958] 2 All ER 571.

<sup>44</sup> Para 2.25 above.

2.27 On the other hand, the six months probate rule can revive actions barred by the *Limitation Act*. In *Airey v Airey*,<sup>45</sup> for example, the deceased was killed and the plaintiff injured in a motor car accident. More than six years after the accident (the time at which the plaintiff's cause of action accrued) the defendant took out letters of administration to the deceased's estate. Within six months of that date the plaintiff commenced proceedings. It was held that these proceedings were not governed by the limitation period prescribed by the *Limitation Act* but by the six months period prescribed by section 4(3)(b).

2.28 Although in *Airey* the plaintiff was able to proceed with a cause of action that had existed for over six years it was noted that the exclusion of the normal limitation period could not prejudice those interested in the estate of the deceased because it is open to them at any time to obtain a grant of probate or letters of administration and thus compel the plaintiff to commence proceedings within the ensuing six months on pain of its becoming statute barred.<sup>46</sup> Indeed, it was suggested that in most cases brought under the equivalent to the second limb of section 4(3)(b) the limitation period would be shorter than the normal period.

**(d) The need for reform**

2.29 As far as survival actions brought **by** a deceased person's estate are concerned, reform is needed to overcome the injustice described above in paragraph 2.22. As far as survival actions brought **against** a deceased person's estate are concerned, the aspect of the *Law Reform (Miscellaneous Provisions) Act* most in need of reform is the rule which *prima facie* prevents a plaintiff commencing proceedings against the estate where the deceased died more than twelve months after the plaintiff's cause of action arose.<sup>47</sup> As noted above,<sup>48</sup> because this rule caused hardship in the United Kingdom it was abolished in that country by section 4 of the *Law Reform (Limitation of Actions, etc) Act 1954*. In Western Australia the potential this rule has for causing injustice is reduced by the presence of a judicial discretion to extend the time for commencing proceedings. Nevertheless, the Commission still considers that it should be amended because -

\* a defence of limitation can arise without warning;

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<sup>45</sup> [1958] 2 All ER 571.

<sup>46</sup> *Id.*, 576. In Western Australia, however, the plaintiff's action could not become statute barred within twelve months of the deceased's death.

<sup>47</sup> Para 2.24 above.

<sup>48</sup> Para 2.25 above.

- \* where the normal six year limitation period has not expired it is discriminatory to require plaintiffs caught by this rule to obtain an extension of the time for commencing proceedings; and
- \* this area of law would be more simple if the limitation of action provisions applicable to claims brought against an estate were the same as those brought by an estate.<sup>49</sup>

2.30 The Act is also unsatisfactory because the third rule stated in the above summary<sup>50</sup> can in practice cause hardship and injustice. This is because -

- \* The six or twelve month limitation period may be too short where the deceased dies and his personal representative takes out representation soon after the plaintiff's cause of action accrues. In such a case, the limitation period may well expire before the plaintiff can commence proceedings. This is especially so in the case of latent disease or injury where the deceased may die long before the plaintiff's disease or injury has become manifest.
- \* In cases where the plaintiff knows nothing or little of the affairs of the defendant, the defendant may die and the limitation period expire before the plaintiff learns of the defendant's death.
- \* An unrestricted right to bring an action may be revived, long after that action has become barred by the expiration of the limitation period imposed by section 38(1)(c) of the *Limitation Act*, because the deceased's personal representative obtains a grant of probate or letters of administration in respect of this estate.

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<sup>49</sup> Para 2.22 above.

<sup>50</sup> The rule is discussed in para 2. 26.

## 5. FATAL ACCIDENT CLAIMS: THE FATAL ACCIDENTS ACT

### (a) Introduction

2.31 At common law no-one can recover damages in tort for the death of another.<sup>51</sup> However, this rule has been substantially modified by the *Fatal Accidents Act*<sup>52</sup> which allows the estate of a deceased plaintiff to bring an action for the benefit of members of his family against the person who caused his death where that person would have been liable to the deceased had the deceased not died.<sup>53</sup>

### (b) Section 7(1) of the Act

2.32 Section 7(1) of the *Fatal Accidents Act* provides that an action brought thereunder "...shall be commenced within twelve months after the death of the person in respect of whose death the cause of action arose". If it is not, the prospective plaintiff's cause of action is extinguished.<sup>54</sup> However, there are two exceptions, similar to those created by section 47A(2) and (3) of the *Limitation Act*, which allow a prospective plaintiff to bring an action more than twelve months after the date on which the plaintiff died provided proceedings<sup>55</sup> are commenced within six years of that date. The first exception is created by section 7(2)(b) of the Act which allows the prospective defendant to consent in writing to an action being brought against him. The second is created by section 7(2)(c) of the Act which empowers the court in which the action would be brought to grant the prospective plaintiff leave, subject to such conditions as it thinks fit, to bring the action:

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<sup>51</sup> *Baker v Bolton* (1808) 1 Camp 493; *Admiralty Commissioners v Steamship Amerika* [1916-1917] All ER Rep 177.

<sup>52</sup> The relevant provisions of this Act are reproduced as Appendix III.

<sup>53</sup> *Fatal Accidents Act*, ss 4 and 6. The members of the deceased's family for whose benefit an action can be brought are the deceased's wife (or husband), parent (defined in the Act to include parents who are related to the deceased only illegitimately or by adoption) and child (defined in the Act to include grandchildren, stepchildren and adopted and illegitimate children). In August 1982 Government announced its intention to broaden the list of persons in respect of whom a claim can be made to include former spouses, siblings who were dependent on the deceased and de facto spouses who had cohabited with the deceased for at least three years. These proposed changes to the Act are based on recommendations made by the Commission in its report on Project No 66 - *Fatal Accidents*.

<sup>54</sup> *Maxwell v Murphy* (1957) 96 CLR 261, 268; *Stevens v Motor Vehicle Insurance Trust* [1978] WAR 232, 234; *Kerr v Miller* (1981) 1 SR (WA) 244, 246.

<sup>55</sup> The proceedings themselves, and not merely an application under s 7(2)(c) for leave to bring them, must be brought within six years of the deceased's death: *Stevens v Motor Vehicle Insurance Trust* [1978] WAR 232.

"When the Court considers that the delay in bringing the action was occasioned by mistake or any other reasonable cause or that the prospective defendant is not materially prejudiced in his defence or otherwise by the delay...[and] it thinks it is just to do so...".

**(c) Section 10(2) of the Act**

2.33 This section provides that if the defendant dies before an action is commenced under the Act but within twelve months of the death of the deceased, a fatal accidents claim brought in respect of the latter's death may be brought against the defendant's estate. However, the action must be brought within six months of a grant of probate or letters of administration being obtained in respect of the defendant's estate.

**(d) The need for reform**

2.34 The requirement in section 7(1) of the Act that a fatal accident claim be commenced within twelve months of the deceased's death has the potential to cause injustice in cases of latent disease and injury where important matters concerning the deceased's death are unknown to his personal representatives or dependants until after the expiration of that period. *Lucy v W T Henleys Telegraph Works Co Ltd*<sup>56</sup> was such a case in the United Kingdom. There the deceased died as a result of bladder cancer caused by being exposed to a certain chemical in the course of his employment. However, he died in ignorance of facts on the basis of which the manufacturer could have been held liable for his death. His widow, the plaintiff, did not discover these facts for nearly another three years. Consequently, the plaintiff was unable to proceed against the manufacturer because her application to do so was brought more than twelve months after the deceased's death.<sup>57</sup>

2.35 Although the potential for injustice caused by section 7(1) is reduced by the exceptions to the twelve months requirement, the effectiveness of those exceptions is limited by the fact that they allow a plaintiff only another five years within which to commence proceedings. In cases of latent disease or injury even this period may have expired before important matters concerning the deceased's death or the estate's cause of action become known to his personal representative.

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<sup>56</sup> [1969] 3 All ER 456. This case was decided on the basis of a similar provision of the *Limitation Act 1963* (UK), s 3(4).

<sup>57</sup> The plaintiff's application was to join the manufacturer as a defendant to the action she had commenced against her husband's employer.

2.36 Section 10(2) of the Act is similar in effect to section 4(3)(b) of the *Law Reform (Miscellaneous Provisions) Act* and is open to the criticisms made of that provision in paragraph 2.30 above.

## CHAPTER 3 - STATEMENT AND EVALUATION OF THE LAW IN OTHER JURISDICTIONS

### 1. ENGLAND AND WALES

#### (a) Introduction

3.1 The limitation provisions applicable to actions brought in respect of personal injuries, disease or death in England and Wales are contained in sections 11, 12, 13, 14 and 33 of the *Limitation Act 1980* which repealed and replaced the whole of the *Limitation Act 1939* and the *Limitation Act 1975* and parts of the *Limitation Act 1963* and the *Limitation Amendment Act 1980*. The operation of these sections is discussed below. Much of this discussion relies upon judicial decisions interpreting them as they appeared in the *Limitation Act 1939* after their introduction into that Act by section 1 of the *Limitation Act 1975*.

#### (b) Actions brought in respect of personal injury or disease

##### (i) Background

3.2 The decision in *Cartledge and Others v E Jopling and Sons Ltd*<sup>1</sup> led to the appointment of the Edmund Davies Committee to report on whether there should be any change in the law relating to the limitation of personal injury claims. In its report,<sup>2</sup> submitted in 1962, the Committee recommended that an exception be created to the normal limitation period applicable to personal injury actions which would enable such actions to be commenced after the expiration of that period where the plaintiff had been unable to discover the existence of his injury and its cause within it.<sup>3</sup> The Committee recommended that in such a case the plaintiff should be able to commence proceedings within one year of the earliest date on which he could reasonably have been expected to discover the existence and cause of his injury.<sup>4</sup> This report was substantially implemented by the *Limitation Act 1963*. The scheme of this Act was to allow claims in respect of personal injuries to be brought,

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<sup>1</sup> [1963] 1 All ER 341, the case discussed in paras 2.12 and 2.13 above.

<sup>2</sup> Report of the Committee on *Limitation of Actions in Cases of Personal Injury* (1962) Cmnd 1829.

<sup>3</sup> Id, para 36.

<sup>4</sup> Id, para 34. The other principal recommendations of the Committee were (a) that a plaintiff who sought to commence proceedings after the expiration of the normal three year limitation period be required to first obtain leave to do so and, (b) that to obtain leave, a plaintiff be required to satisfy a judge that he had a good *prima facie* case and that he had been unable to discover the existence and cause of his injury within the normal limitation period: id, para 36.

notwithstanding that the limitation period had expired, where the plaintiff was unaware of important facts concerning the claim until towards the end of, or after the expiration of, that period. Similar provisions were made in respect of fatal accident claims and claims brought by or against the estate of a deceased person.

3.3 During its lifetime, the 1963 Act was frequently criticised for being obscure and poorly drafted, being described on one occasion as having " ...a strong claim to the distinction of being the worst drafted Act on the statute book"<sup>5</sup>. As a result of such criticisms, and of difficulties experienced with the 1963 Act, the Law Reform Committee was asked to give priority in its review of the law of limitation to cases of personal injury and death. In its Interim Report on *Limitation of Actions: In Personal Injury Claims*<sup>6</sup> the Committee recommended that -

- (i) the normal limitation period in personal injury cases should continue<sup>7</sup> to be three years;<sup>8</sup>
- (ii) the court should be given the power to override a defence of limitation where it is satisfied that it would be equitable to allow the plaintiff's action to proceed. In this connection the Committee recommended that the courts be under a duty, when exercising its discretion, to have regard to all the circumstances of the case and in particular to certain specified guidelines;<sup>9</sup>
- (iii) in personal injury claims, a defence of limitation not be available, even though the plaintiff's action was commenced more than three years after his cause of action accrued, where -

\* the proceedings were instituted by the plaintiff within three years of the date on which he first actually knew or could reasonably have

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<sup>5</sup> *Central Asbestos Co Ltd v Dodd* [1972] 2 All ER 1135, 1138 per Lord Reid. (1974) Cmnd 5630 (hereinafter the "Orr Committee interim report").

<sup>7</sup> The period was made three years by the *Law Reform (Limitation of Actions, etc) Act 1954*, s 2.

<sup>8</sup> Orr Committee interim report, paras 39 and 69(1). Now implemented by the *Limitation Act 1980*, s 11(4) and (5), discussed in paras 3.4 to 3.7 below.

<sup>9</sup> Orr Committee interim report, paras 56-58 and 69(4) and (5). Now implemented by the *Limitation Act 1980* s 33, discussed in paras 3.14 to 3.25 below.

ascertained<sup>10</sup> that he had suffered a significant injury and that this was attributable in whole or part to an act or omission of the defendant.<sup>11</sup>

In this connection the Committee recommended that a significant injury be regarded as one in respect of which the plaintiff would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment;<sup>12</sup>

or where,

\* the Court exercises its discretion to override a defence of limitation;<sup>13</sup>

(iv) the plaintiff's ignorance of the fact that he has, in law, a worthwhile cause of action should not postpone the running of the limitation period;<sup>14</sup>

(v) a plaintiff should not be required to obtain the leave of the court as a condition of suing outside the normal limitation period.<sup>15</sup>

These recommendations were largely implemented by sections 2A, 2B, 2C and 2D of the *Limitation Act 1975* which now appear as sections 11 to 14 and 33 of the *Limitation Act 1980*.

(ii) Section 11: The basic limitation period

3.4 The limitation period applicable to actions brought in respect of personal injury or disease is prescribed by section 11(4) as "...three years from -

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<sup>10</sup> The Committee was unable to reach a unanimous conclusion concerning whether a plaintiff should be regarded as having constructive knowledge of a fact not reasonably ascertainable without expert advice where he took reasonable steps to obtain such advice but nevertheless had not ascertained the fact; for example, where he received a faulty medical diagnosis. However, the Act provides that a plaintiff should not be regarded as having constructive knowledge in such a case: *Limitation Act 1980*, s 14(3).

<sup>11</sup> Orr Committee interim report, paras 55, 68 and 69(3). Now implemented, with some modification, by the *Limitation Act 1980*, ss 11(4) and 14(1), discussed in para 3.8 below.

<sup>12</sup> Orr Committee interim report, para 69(3)(d). Now implemented by the *Limitation Act 1980*, s 14(2), discussed in para 3.10 below.

<sup>13</sup> Orr Committee interim report, para 58 and 69(2)(b) and (4). Now implemented by the *Limitation Act 1980*, s 33, discussed in paras 3.14 to 3.25 below.

<sup>14</sup> Id, para 53. Now implemented by the *Limitation Act 1980*, s 14(1).

<sup>15</sup> Id, para 86.

- (a) the date on which the cause of action accrued; or
- (b) the date of knowledge (if later) of the person injured."

Thus, for example, in a case of latent disease or injury where the plaintiff's cause of action has accrued without his knowledge, the plaintiff will nevertheless have a period of three years after the disease or injury has become manifest within which to bring an action against the defendant.

3.5 Section 11(4) applies to any "...action for damages for negligence, nuisance or breach of duty..." brought in respect of personal injury or disease suffered or contracted by "...the plaintiff or any other person". Consequently, it applies not only to actions brought by plaintiffs in respect of their own injury or disease but also to actions by plaintiffs in respect of another person's injury or disease.

3.6 The Commission notes that section 11(4)(a), which preserves a limitation period running from the date on which a cause of action accrues, has been criticised as being probably unnecessary.<sup>16</sup>

Certainly it is not obvious on what occasions this provision will operate separately from section 11(4)(b). This is because when the date of accrual and date of knowledge are not contemporaneous the date of knowledge will be later than the date of accrual and delay the commencement of the limitation period and when they are contemporaneous both will simultaneously start the period running.

3.7 Section 11(3) provides that an action governed by section 11 "...shall not be brought after the expiration of the [limitation] period applicable in accordance with subsection (4) or (5) ...". Interpreted literally, this provision would extinguish, rather than merely bar, the plaintiff's cause of action once the limitation period prescribed by the section has expired. However, according to Lord Diplock in *Walkley v Precision Forgings Ltd*<sup>17</sup> "it is trite law" that it does not do this. According to his Lordship the provision merely provides the defendant with a "cast-iron defence" if he chooses to avail himself of it.

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<sup>16</sup> P J Davies, *Limitations Of The Law Of Limitations* (1982) 98 LQR 249, 253 (hereinafter referred to as "Davies").

<sup>17</sup> [1979] 2 All ER 548, 558.

- (iii) Section 14: Definition of date of knowledge for purposes of sections 11 and 12

3.8 A person's "date of knowledge" for purposes of sections 11 and 12 of the *Limitation Act 1980* is defined by section 14 of the Act. The basic definition is contained in section 14(1) which provides that:

"...references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts -

- (a) that the injury in question was significant; and
- (b) that that injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance, or breach of duty; and
- (c) the identity of the defendant; and
- (d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant."

3.9 The effect of this definition is that the limitation period prescribed by sections 11(4)(b), 11(5)(b), and 12(2)(b) will not start to run until the person referred to in those sections knows all the facts listed therein. Also its final limb resolves the dispute which divided the House of Lords in *Central Asbestos Co Ltd v Dodd*<sup>18</sup> by making it clear that the plaintiff's ignorance of the fact that he had a good cause of action would not postpone the running of the limitation period.

3.10 Section 14(2) defines "significant" for purposes of subsection (1)(a) above. According to Geoffrey Lane LJ in *McCafferty v Metropolitan Police District Receiver*,<sup>19</sup> this provision is directed at the nature of the injury as known to the plaintiff. The test it creates is partly subjective: would this plaintiff have considered the injury sufficiently serious?; and partly objective: would the plaintiff have been reasonable if he did not regard it as sufficiently serious? In other words:

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<sup>18</sup> [1972] 2 All ER 1135.

<sup>19</sup> [1977] 2 All ER 756, 775.

"Taking **that** plaintiff, with **that** plaintiff's intelligence, would he have been reasonable in considering the injury not sufficiently serious to justify instituting proceedings for damages?"

3.11 However, in this case, the Court of Appeal held that it was not permissible under the section to look into such problems as whether it would have been politic in the circumstances for the plaintiff to sue his employers for fear of losing his job. According to their Lordships, such considerations arise, if at all, under what is now section 33.

3.12 Section 14(3) fixes the plaintiff with constructive knowledge of matters that he might reasonably have been expected to acquire both from facts "observable or ascertainable by him" and from facts that would have been ascertainable by him by taking such appropriate expert advice as it was reasonable for him to seek. However, the final limb adopts what the Law Reform Committee in its report regarded as the liberal approach to constructive knowledge,<sup>20</sup> namely, that a plaintiff should not be regarded as having knowledge of a fact not reasonably ascertainable without expert advice where he took reasonable steps to obtain such advice but nevertheless did not ascertain the fact. Thus, for example, a plaintiff whose doctor failed to diagnose his illness would be entitled to sue within three years of first learning the correct diagnosis. This preserved the effect of section 7(5)(c) of the *Limitation Act 1963*.

3.13 Criticisms which may be levelled against section 14 are that -

- \* It will not assist a plaintiff who has incorrectly been advised by a solicitor that he has, in law, no cause of action in respect of an injury or disease<sup>21</sup> whereas it may assist a plaintiff whose solicitor fails to discover facts relating to a proposed claim when instructed to do so.<sup>22</sup> Such a distinction could be drawn regardless of the respective merits of the plaintiffs' cases.
- \* On the issue of whether reasonable steps have been taken to obtain advice it is not clear whether such matters as the plaintiff's fear of obtaining professional advice, his inability to pay an initial professional fee and his ignorance of where to seek advice are relevant. It is also not clear whether "appropriate

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<sup>20</sup> The Orr Committee interim report, paras 63-68. See footnote 2 p 34 above.

<sup>21</sup> This is a result of the final limb of s 14(1), the effect of which is that the limitation period will run even though the plaintiff does not know that, as a matter of law, he has a cause of action against the defendant: para 3.9 above.

<sup>22</sup> This is possible through the operation of the final limb of s 14(3): para 3.12 above.

expert advice" would require a person to consult a solicitor, for example, rather than a trade union official or officer.<sup>23</sup>

- \* As the final limb of the section is limited to facts ascertainable **only** with the help of an expert, it is unclear whether a person is fixed with constructive knowledge of a fact which an expert who was consulted ought to have but did not discover, where the fact was ascertainable without expert advice.
- \* Cases like *McCafferty v Metropolitan Police District Receiver*<sup>24</sup> show that in certain meritorious cases the section operates unfairly and that to cater for them it will always be necessary to provide for recourse to a judicial discretion to allow an action to be brought notwithstanding the expiration of the limitation period
- \* Doubts exist concerning the meaning and effect of section 14(2) insofar as it is "...arguable that as against a defendant who does not dispute liability and who has sufficient assets (or insurance cover) to satisfy an award of damages it is almost every cough or sprain that will be sufficiently serious to justify an action".<sup>25</sup>

(iv) Section 33: Judicial discretion to override a limitation period

3.14 Section 33 of the *Limitation Act 1980* is adopted from section 2D of the *Limitation Act 1939* which, when introduced by an amendment to that Act in 1975, created for the first time a general judicial discretion to override the limitation periods prescribed by the *Limitation Act*. It empowers the court hearing a case to direct that the limitation periods specified in

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<sup>23</sup> Davies, 254-255.

<sup>24</sup> [1977] 2 All ER 756. In this case the plaintiff, after working in the ballistics section of the defendant's laboratory for two years, was diagnosed to be suffering from a hearing defect caused by acoustic trauma. However, because he regarded the symptoms as merely an irritating nuisance the plaintiff did not take any legal action against the defendant. Although the plaintiff was not conscious of any change in his hearing between 1967 and 1973, in 1973 a routine audiogram showed signs of severe acoustic trauma (which proved to be only temporary) and as a result his employment was prematurely terminated in October 1973. In an action brought by the plaintiff it was held that the defendant had been negligent in not providing sufficient acoustic protection. On the question of limitation, the Court of Appeal held that the plaintiff did not come within section 2A of the *Limitation Act 1939* (section 11 of the *Limitation Act 1980*) because for more than three years before his action was commenced he had known that he had been injured. However, the Court held that it was equitable in the circumstances for the limitation period to be extended under section 2D(1) (now section 33(1)).

<sup>25</sup> Davies, 257.

sections 11 and 12 not apply to the plaintiff's action, thereby depriving a defendant of the defence he would otherwise have had that the action was barred by the Act.

3.15 The discretion given by section 33 has been held to be a wide and unfettered one and not restricted to exceptional cases only.<sup>26</sup> However, an action can be allowed to proceed even though the applicable limitation period has expired only where it:<sup>27</sup>

"...appears to the court that it would be equitable to [do so] having regard to the degree to which -

- (a) the provisions of section 11 or 12 of this Act prejudice the plaintiff or any person whom he represents, and
- (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents..."

The onus of proving that it would be equitable to allow an action to proceed under this section is on the plaintiff.<sup>28</sup> In this connection, it has been said that a delay in excess of five years raises a presumption of prejudice to the defendant which places a heavy burden on the plaintiff.<sup>29</sup>

3.16 The requirement that the provisions of section 11 or 12 of the Act prejudice the plaintiff, before the discretion can be exercised in his favour, has been the subject of several reported cases. In the leading case, *Walkley v Precision Forgings Ltd*,<sup>30</sup> it was held that where, within the limitation period, a plaintiff had started an action which had been discontinued or struck out for want of prosecution a court could not, except in exceptional circumstances,<sup>31</sup> override a defence of limitation under section 33 raised in respect of a second action brought to enforce the same cause of action.

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<sup>26</sup> *Firman v Ellis* [1978] 2 All ER 851; *Thompson v Brown* [1981] 1 WLR 744, 752; *Simpson v Norwest Holst Southern Ltd* [1980] 1 WLR 968, 975.

<sup>27</sup> *Limitation Act 1980*, s 33(1)(a) and (b).

<sup>28</sup> *Thompson v Brown* [1981] 1 WLR 744, 752.

<sup>29</sup> *Buck v English Electric Co Ltd* [1978] 1 All ER 271. In this case, the presumption of prejudice was rebutted by reason of the fact that the defendant had dealt with several claims similar to the plaintiff's during the period of delay and as a result had available to it cogent evidence with which to defend the claim. In these circumstances, it was not prejudiced by the delay.

<sup>30</sup> [1979] 2 All ER 548.

<sup>31</sup> An example suggested was where, by misrepresentation or other improper conduct, the defendant induced the plaintiff to discontinue the first action.

3.17 In this case, the plaintiff consulted solicitors who, on his behalf, issued and served a writ against the defendant within the applicable limitation period. However, after being advised by counsel that the plaintiff had no chance of success these solicitors ceased to act for him. After consulting a second and then a third firm of solicitors a second writ was issued and served on the defendant. However, by this time the limitation period had expired. The House of Lords held that section 33 could not be invoked by the plaintiff because subsection (1)(a) permits the court to allow an action to proceed, notwithstanding that the limitation period in section 11 has expired, only where the provisions of that section (or section 12) prejudice the plaintiff. According to their Lordships, as the plaintiff brought his first action within the limitation period, any prejudice he suffered because of not now being able to proceed against the defendant was as a result of his own inaction and not the operation of section 11.

3.18 The decision in *Walkley* was applied in *Chappell v Cooper*<sup>32</sup> where the plaintiff issued a writ against the defendant but did not serve it within the limitation period.<sup>33</sup> Nearly four years after the first writ was issued a second writ was issued and served on the defendant who pleaded the *Limitation Act*. The plaintiff argued that *Walkley* was distinguishable because in the present case the writ was never served and the first action could not therefore have been struck out for want of prosecution. This argument was rejected. According to Roskill LJ:<sup>34</sup>

"It seems to me plainly a decision on principle that if a plaintiff starts but then does not for any reason proceed with an action, whether it is because the plaintiff chooses not to serve or his solicitors fail to serve the writ timeously or because the action is subsequently struck out for want of prosecution, or because for good reason or bad the plaintiff or his solicitors give notice of discontinuance, it is not open to a plaintiff thereafter to seek to take advantage of the provisions of section 2D of the *Limitation Act 1939*, as amended, because, as their Lordships have laid down ...the cause of his prejudice is not the provisions of section 2A, that is to say, the existence of the primary limitation period, but is the act or omission of himself or his solicitors in acting or failing to act as he or they have done in relation to that action."

3.19 It is important to note that the plaintiff in *Chappell v Cooper* as well as issuing a second writ against the defendant also instructed his new solicitors to bring an action for

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<sup>32</sup> [1980] 1 WLR 958.

<sup>33</sup> The writ was extended after the expiration of the limitation period and served on the defendant. However, the defendant successfully applied for the service of the writ to be set aside and for the action to be dismissed. In *Player v Bruguere*, an appeal heard concurrently with *Chappell v Cooper*, it was held that as interpreted in *Walkley*, section 33 did not enable a court to depart from the general rule, stated in *Heaven v Road and Rail Wagons Ltd* [1965] 2 All ER 409, that a court will not renew a writ after the period allowed for service has expired if the effect of doing so will be to deprive the defendant of the benefit of a limitation period that has accrued.

<sup>34</sup> [1980] 1 WLR 958, 964.

negligence against his original solicitors. According to Ormrod LJ,<sup>35</sup> one result of *Walkley*, is that in such cases a contest will now take place between defendant's insurance company and solicitor's insurance company as they each endeavour to pass the burden of plaintiff's claims onto the other.

3.20 The decision in *Walkley* was also applied by the Court of Appeal in *Browes v Jones and Middleton*<sup>36</sup> to prevent the plaintiff obtaining relief under section 33 where his solicitors did not even **issue** a writ against the defendant within the limitation period, even though the plaintiff's injury was undoubtedly attributable to the negligence of the defendant's employee. That decision, however, was criticised by the House of Lords in *Thompson v Brown*.<sup>37</sup> In the latter case, because the plaintiff's solicitors lost their file relating to his claim, a writ was not issued until shortly after the expiration of the limitation period. The defendant, therefore, pleaded the *Limitation Act*. However, the House of Lords held unanimously that a direction could be made under section 33 permitting the plaintiff's claim to proceed.

3.21 The result of the cases interpreting section 33 can be summarised as follows -

- (a) If the plaintiff, personally or through a solicitor -
  - (i) issues a writ against the defendant but does not serve it within the period allowed for service, a court will not, after the expiration of the limitation period, exercise its discretion in favour of renewing the writ.<sup>38</sup>
  - (ii) issues a writ against the defendant but does not serve it within the period allowed for service, a court cannot, after the expiration of the limitation period, exercise its discretion under section 33 to allow a second action to proceed against a defendant who pleads the *Limitation Act* as a defence.<sup>39</sup>

<sup>35</sup> Id, 967. See also *Simpson v Norwest Holst Southern Ltd* [1980] 1 WLR 968,975.

<sup>36</sup> Unreported, 15 June 1979, transcript No 377 of 1979: see *Thompson v Brown* [1981] 1 WLR 744, 746-747.

<sup>37</sup> [1981] 1 WLR 744, 747.

<sup>38</sup> *Player v Bruguiere* [1980] 1 WLR 958, 965-967.

<sup>39</sup> *Walkley v Precision Forgings Ltd* [1979] 2 All ER 548; *Chappell v Cooper* [1980] 1 WLR 958; *Thompson v Brown* [1981] 1 WLR 744.

(iii) issues and serves a writ against the defendant but does not proceed within the limitation period the writ can be struck out for want of prosecution<sup>40</sup> and in such a case a court cannot exercise its discretion under section 33 to allow a second action to proceed against a defendant who pleads the *Limitation Act* as a defence.<sup>41</sup>

(b) However, -

(i) if the plaintiff's solicitors did not commence proceedings against the defendant within the limitation period, although instructed to do so, the court can exercise its discretion under section 33;<sup>42</sup> or

(ii) if the plaintiff did not instruct solicitors, or commence proceedings personally, within the limitation period the court can exercise its discretion under section 33.

3.22 The Commission is of the opinion that it is undesirable for there to be a different result in the cases listed under (a) above from those listed under (b) merely because in the former a writ was issued. The fact that a plaintiff has issued a writ does not make him any less deserving of the exercise of the judicial discretion in his favour than a plaintiff who has not done so. Indeed the reverse may be the case for at least it can be said of the former that he has taken some steps towards commencing his action and has not been totally remiss in this respect.

3.23 When considering whether to exercise its discretion in favour of allowing an action to proceed the court is required by section 33(3)(a) to (f) of the *Limitation Act* to:

"...have regard to all the circumstances of the case and in particular to -

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

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<sup>40</sup> *Walkley v Precision Forgings Ltd* [1979] 2 All ER 548, 550-558.

<sup>41</sup> *Id.*, 551,555 and 559.

<sup>42</sup> *Thompson v Brown* [1981] 1 WLR 744; *Simpson v Norwest Holst Southern Ltd* [1980] 1 WLR 968.

- (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 or (as the case may be) by section 12;
- (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
- (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
- (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
- (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

3.24 Paragraphs (a) and (b) of section 33(3) deal with matters which affect the extent to which the plaintiff and defendant will be prejudiced by the action being allowed to proceed or not. The delay referred to therein is delay after the expiration of the limitation period.<sup>43</sup> Paragraph (c) requires the court to have regard to the defendant's conduct since the cause of action arose. It has been suggested that the reference in this paragraph to response to reasonable requests by the plaintiff for information, whilst not imposing an obligation on the potential defendant to volunteer relevant information, recognises an obligation on him not to obstruct a potential plaintiff's efforts to obtain such information.<sup>44</sup> Further, reference to "the conduct of the defendant" includes the conduct of the defendant's solicitors and insurers by whom requests for information are dealt with. Paragraphs (e) and (f) deal with the conduct of the plaintiff and no doubt also his solicitors after he has consulted them. In this connection,

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<sup>43</sup> *Thompson v Brown* [1981] 1 WLR 744, 751.

<sup>44</sup> *Ibid.*

however, it has been suggested that if a plaintiff has acted promptly and reasonably it will not count against him that his solicitors were dilatory and did not issue a writ within the limitation period.<sup>45</sup>

3.25 In addition to those listed in section 33(3), circumstances which the courts have said are relevant considerations when exercising its discretion include the plaintiff's interest in his job, the insecurity of his tenure, his desire to preserve good relations with his employer<sup>46</sup> and whether, if no direction is made under section 33, the plaintiff would have a claim against his solicitor for the damages he would have recovered from the defendant.<sup>47</sup>

**(c) Survival actions**

3.26 Section 11(5) provides that where the person<sup>48</sup> injured has died within three years of his cause of action accruing or, if it is later, his date of knowledge, in an action for damages based on negligence, nuisance or breach of duty brought by<sup>49</sup> his personal representative, the limitation period shall be three years from the date of his death or, if it is later, the date of the personal representative's knowledge.<sup>50</sup> For the purposes of these provisions a person's "knowledge" is defined in section 14.<sup>51</sup> Under section 33 a court can order that this limitation period not apply to a survival action.

**(d) Fatal accident claims**

3.27 Section 12(2) provides that an action by or on behalf of dependants under the *Fatal Accidents Act 1976* must be brought within three years of the date of the deceased's death or, if it is later, the "date of knowledge", as defined in section 14,<sup>52</sup> of the person for whose

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<sup>45</sup> Id, 725. See also paras 3.20 and 3.21 above.

<sup>46</sup> *McCafferty v Metropolitan Police District Receiver* [1977] 2 All ER 756, 769 and 775.

<sup>47</sup> *Thompson v Brown* [1981] 1 WLR 744.

<sup>48</sup> This provision would appear not to apply to a case in which a plaintiff, other than the person injured, dies. Cf s 11(4), para 3.5 above.

<sup>49</sup> The special rules applicable to actions brought **against** the personal representative of a deceased person contained in s 1(3) of the *Law Reform (Miscellaneous Provisions) Act 1934* were abolished by s 1 of the *Proceedings Against Estates Act 1970* so that now the ordinary periods of limitation applicable to cases of personal injury or disease apply regardless of the fact of the defendant's death.

<sup>50</sup> Where, for example, the deceased had knowledge of the kind defined in the Act for nearly three years before his death, this provision will considerably lengthen the limitation period.

<sup>51</sup> Discussed in paras 3.8 to 3.13 above.

<sup>52</sup> Discussed in paras 3.8 to 3.13 above.

benefit the action is brought. However, under section 33 a court can order that this limitation period not apply to such an action.

3.28 According to section 13, if there is more than one person for whose benefit an action is brought under the *Fatal Accidents Act 1976* then the "date of knowledge" provision in section 11 is to be applied separately to each of them.

3.29 An action under the *Fatal Accidents Act 1976* cannot be brought if at the date of his death, the deceased could not have brought an action for damages himself in respect of the injury or disease from which he died.<sup>53</sup> Consequently, if the deceased's cause of action could have been defeated by reliance on the *Limitation Act*, an action under the *Fatal Accidents Act* will also be barred. In this connection, the *Limitation Act* provides that "...no account shall be taken of the possibility of [the time limit in section 11] being overridden under section 33 of this Act".<sup>54</sup>

## 2. NEW SOUTH WALES AND QUEENSLAND<sup>55</sup>

### (a) Personal injury claims

3.30 In New South Wales an action for damages brought in respect of personal injury or disease must be commenced within six years of the date on which the cause of action accrued.<sup>56</sup> In Queensland the period within which such an action must be brought is three years.<sup>57</sup>

3.31 However, in both States the court may order that the limitation period be extended where the plaintiff was unaware of "material facts of a decisive character", concerning his claim until towards the end of, or after the expiration of, that period.<sup>58</sup> The New South Wales

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<sup>53</sup> *Limitation Act 1980*, s 12(1).

<sup>54</sup> *Ibid.*

<sup>55</sup> The legislation in New South Wales, Queensland and Victoria (paras 3.44 and 3.45 below) is based on the *Limitation Act 1963* (UK). The relevant parts of this Act were repealed by the *Limitation Act 1975* (UK), s 4(5).

<sup>56</sup> *Limitation Act 1969-1979* (NSW), s 14(1)(b). This Act generally binds the Crown: *id.*, s 10.

<sup>57</sup> *Limitation of Actions Act 1974-1978* (Qld), s 11. This Act generally binds the Crown: *id.*, s 6.

<sup>58</sup> *Limitation Act 1969-1979* (NSW), s 58; *Limitation of Actions Act 1974-1978* (Qld), s 30. The relevant parts of both Acts are reproduced in Appendices VII and VIII, respectively. In both States the plaintiff may apply to have the limitation period extended either before or after proceedings have been commenced: *Grove v Bestobell Industries Pty Ltd* [1980] Qd R 12, 18.

Act provides that the court that would hear the action may order an extension if it appears to the court that:<sup>59</sup>

- "(a) any of the material facts of a decisive character relating to the cause of action was not within the means of knowledge of the applicant until a date after the commencement of the year preceding the expiration of the limitation period for the cause of action; and
- (b) there is evidence to establish the cause of action, apart from any defence founded on the expiration of a limitation period."

The limitation period may then be extended so that it expires at the end of one year after the date on which material facts of a decisive character relating to the cause of action were within the means of knowledge of the plaintiff. Both the New South Wales and Queensland legislation provide that a fact is not within the means of knowledge of the plaintiff at a particular time if -

- \* he does not, at that time, know the fact; and
- \* in so far as the fact is capable of being ascertained by him, he has, before that time, taken all reasonable steps to ascertain the fact.<sup>60</sup>

Consequently, it is not enough for the plaintiff to be merely ignorant of the fact. So far as (b) above is concerned, it is not necessary for evidence to be adduced at the time the application for the extension is made so long as it is clear that the evidence exists and can be adduced at the trial.<sup>61</sup>

3.32 The **material facts** relating to a cause of action include:<sup>62</sup>

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<sup>59</sup> *Limitation Act 1969-1979* (NSW), s 58(2). See also *Limitation of Actions Act 1974-1978* (Qld), s 31(2).

<sup>60</sup> *Limitation Act 1969-1979* (NSW), s 57(1)(e); *Limitation of Actions Act 1974-1978* (Qld), s 30(d). It has been held that this test is an objective test under which the court may have regard to the background and situation of the applicant: *Castlemaine Perkins Ltd v McPhee* [1979] Qd R 469, 473. In England a subjective test was used to determine what action or advice it was reasonable for the plaintiff to seek to determine material facts. The test was not, when would a reasonable person have taken action or advice, but when, having regard to all the circumstances, would it have been reasonable for the plaintiff to take it? Thus, for example, in *Newton v Cammell Laird and Co (Shipbuilders and Engineers) Ltd* [1969] 1 All ER 708, the deceased was not fixed with constructive knowledge of the material fact that his illness was due to his employer's negligence because he was so ill prior to his death that he could not be expected to have obtained the advice which would have led to him learning this.

<sup>61</sup> *Smith v Browne* [1974] VR 842; *Minoque v Bestobell Industries Pty Ltd* [1981] Qd R 356; *Martin v Abbott Australasia Pty Ltd* [1981] 2 NSWLR 430.

<sup>62</sup> *Limitation Act 1969-1979* (NSW), s 57(1)(b). See also *Limitation of Actions Act 1974-1978* (Qld), s 30(a).

- "(i) the fact of the occurrence of negligence nuisance or breach of duty on which the cause of action is founded;
- (ii) the identity of the person against whom the cause of action lies;
- (iii) the fact that the negligence nuisance or breach of duty causes personal injury;
- (iv) the nature and extent of the personal injury so caused; and
- (v) the extent to which the personal injury is caused by the negligence nuisance or breach of duty."

3.33 This provision and the similar provision in the now repealed United Kingdom *Limitation Act 1963* have received some consideration by the courts. The reference in (i) of the list of material facts to "negligence nuisance or breach of duty" does not refer to the legal concepts, but to the acts or omissions which the plaintiff must allege constitute the relevant cause of action.<sup>63</sup> The time therefore runs from the time the plaintiff knows of the acts or omissions constituting the cause of action and not from the date he becomes aware that he has a legal remedy. Ignorance of the law is not ignorance of a material fact.<sup>64</sup> Under (iv) above, injury refers to the physical injury and not the signs and symptoms of it. If an injury results in a plaintiff continuing to suffer pain for some time after the injury was caused the fact that the pain or other symptoms vary does not mean that there has been a change to the extent of the injury and that when such a change occurs an extension of time for instituting proceedings would be permissible.<sup>65</sup> The use of the term "extent" introduces a matter which is one of degree. If a plaintiff does not appreciate the degree of seriousness of an injury until some time after the injury was caused then its extent may not be known until that time.<sup>66</sup> The fact that an injury which was reasonably believed to be trifling and not worth claiming for was in fact far more serious than realised might be a material fact.<sup>67</sup> On the other hand, the fact that an injury turned out to be more serious than first thought might not be a material fact if the injury was sufficiently serious from the beginning to make it worthwhile to bring an action.<sup>68</sup> There is also doubt as to whether a mistaken belief that a claim was barred is a material fact.<sup>69</sup>

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<sup>63</sup> *Ford Excavations Pty Ltd v Do Carmo* [1981] 2 NSWLR 253, 259-262; *Ex parte Bolewski* [1981] Qd R 54, 59-60. *Harris v Gas & Fuel Corporation of Victoria* [1975] VR 619. But cf *Central Asbestos Co Ltd v Dodd* [1972] 2 All ER 1135, 1146-1147.

<sup>64</sup> *Harris v Gas & Fuel Corporation of Victoria* [1975] VR 619.

<sup>65</sup> *Hevey v Leonard* [1976] VR 624, 632.

<sup>66</sup> *Hammet v Connor* [1980] VR 538, 543.

<sup>67</sup> *Goodchild v Greatness Timber Co Ltd* [1968] 2 All ER 255, 257; *Knipe v British Railways Board* [1972] 1 All ER 673.

<sup>68</sup> *Goodchild v Greatness Timber Co Ltd* [1968] 2 All ER 255, 257.

<sup>69</sup> *Drinkwater v Joseph Lucas (Electrical) Ltd* [1970] 3 All ER 769, 773.

3.34 Material facts relating to a cause of action are of a **decisive character** if, but only if, a reasonable man, knowing those facts and having taken the appropriate advice<sup>70</sup> on those facts, would regard those facts as showing:<sup>71</sup>

- "(i) that the action on the cause of action would (apart from the effect of the expiration of a limitation period) have a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action on the cause of action; and
- (ii) that the person whose means of knowledge is in question ought, in his own interests, and taking his circumstances into account, to bring an action on the cause of action."

3.35 Consequently, the plaintiff's ignorance of material facts is excused only if a reasonable man knowing those facts and having taken appropriate advice on them would have concluded that a cause of action based on them had a reasonable prospect of success and of obtaining an award of damages sufficient to justify bringing the action.<sup>72</sup>

3.36 A limitation period may be extended whether or not it expired before the commencement of the Act or before an application is made under the Act in respect of the cause of action.<sup>73</sup>

#### **(b) Survival actions**

3.37 In New South Wales there are no special limitation periods applicable to actions brought by a personal representative on behalf of the estate of the deceased person or in respect of claims brought against a deceased defendant's estate. Actions founded on tort must therefore be brought within six years of the date on which the cause of action accrued. The provision discussed above for extending the limitation period also applies to claims **against** a

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<sup>70</sup> That is, advice of competent persons, qualified in their respective fields to advise on the medical, legal and other aspects of the facts, as the case may require: *Limitation Act 1969-1979* (NSW), s 57(1)(d); *Limitation of Actions Act 1974-1978* (Qld), s 30(c). In England a number of cases dealing with a similar provision of the *Limitation Act 1963* (UK) held that advice given by a trade union to one of its members about an injury he had suffered was "appropriate advice": *Pickles v National Coal Board (Intended Action)* [1968] 2 All ER 598; *Drinkwater v Joseph Lucas (Electrical) Ltd* [1970] 3 All ER 769.

<sup>71</sup> *Limitation Act 1969-1979* (NSW), s 57(1)(c); *Limitation of Actions Act 1974-1978* (Qld), s 30(b). This too is an objective test: *Ford Excavations Pty Ltd v Do Carmo* [1981] 2 NSWLR 253, 262.

<sup>72</sup> *Ford Excavations Pty Ltd v Do Carmo* [1981] 2 NSWLR 253, 262.

<sup>73</sup> *Limitation Act 1969-1979* (NSW), s 58(3); *Limitation of Actions Act 1974-1978* (Qld), s 31(3).

deceased defendant's estate.<sup>74</sup> A provision similar to that discussed above for extending a limitation period applies to actions for damages for personal injury where the action has survived on the death of a person for the benefit of his estate under section 2 of the New South Wales *Law Reform (Miscellaneous Provisions) Act 1944-1982*.<sup>75</sup>

**(c) Fatal accident claims**

3.38 Both New South Wales and Queensland have provisions which permit an action to be brought by a plaintiff's personal representative on behalf of designated relatives where his death was caused by a wrongful act, neglect or default.<sup>76</sup> In New South Wales such an action must be brought within six years of the date of death.<sup>77</sup> In Queensland the action must be commenced within three years of the date of death.<sup>78</sup> Under section 60 of the New South Wales *Limitation Act 1969-1979* the court may order, in respect of an action for damages arising out of the death of a person caused by a wrongful act, neglect or default, that the expiration as against the deceased of a limitation period for a cause of action by him has no effect in relation to the cause of action of the applicant. Conditions similar to those referred to in paragraph 3.31 above must be met before such an order can be made. Queensland does not have a similar special provision. However, the ordinary provision relating to extensions may apply to such actions.

**(d) Comments**

3.39 Although the legislation in New South Wales and Queensland has permitted some actions to be commenced which would otherwise have been statute-barred, it is still possible for a plaintiff to be barred from commencing an action. This can occur because it is necessary to establish that material facts of a decisive character were not known to the plaintiff. Thus, if

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<sup>74</sup> In Queensland, an action which has survived **against** the estate of a deceased person in respect of a cause of action in tort is not maintainable unless:

"(a) Proceedings against him in respect of that cause of action were pending at the date of his death; or  
(b) Proceedings are taken in respect thereof not later than six months after his personal representative took out representation": *Common Law Practice Act 1867-1978*, s 15D(3).

Section 31 of the *Limitation of Actions Act 1974-1978* (Qld) which permits a period of limitation in respect of damages for personal injury to be extended may also apply to such a claim against the estate of a deceased person.

<sup>75</sup> *Limitation Act 1969-1979* (NSW), s 59. See also *Limitation of Actions Act 1974-1978* (Qld), s 32.

<sup>76</sup> *Compensation to Relations Act 1897-1969* (NSW), ss 3 and 4; *Common Law Practice Act 1867-1978* (Qld), ss 12 and 13.

<sup>77</sup> *Limitation Act 1969-1979* (NSW), s 19.

<sup>78</sup> *Common Law Practice Act 1867-1978* (Qld), s 14.

a plaintiff knows the material facts but does not know that he has a cause of action, he can be barred from commencing an action.<sup>79</sup> This may have happened, for example, because the plaintiff believed that he could only seek worker's compensation in respect of his injury.

3.40 Even if the plaintiff knows all the material facts and that there is a basis for a cause of action, counsel might well advise against instituting an action because of difficulties in proving a particular fact. These difficulties might be overcome at a later date by the discovery of a witness previously unknown or untraceable.

3.41 The provision that material facts include the "extent of the personal injury" introduces a matter which is one of degree and which can lead to a finely balanced question in some cases.<sup>80</sup>

3.42 The approach adopted in New South Wales and Queensland also fails to take into account that the plaintiff may have had reasonable motives for not commencing an action before the limitation period expired. For example, in *Buck v English Electric Co Ltd*<sup>81</sup> a plaintiff suffering from pneumoconiosis did not institute proceedings because he was still employed and receiving income and a disability pension and did not want to "sponge". It was held that the action was statute barred.<sup>82</sup> In another case a plaintiff failed to commence proceedings within time because of a desire to preserve good relations with his employer.<sup>83</sup>

3.43 The legislation may also operate harshly in some cases because the test of whether or not the plaintiff has taken all reasonable steps to ascertain the facts is an objective one, though it appears that the court will have regard to the plaintiff's background and situation. The scope of this qualification, however, is not clear. Under the objective test it may, for example, be held that a plaintiff had not taken all reasonable steps to ascertain the facts even though he was so ill prior to his death that he could not be expected to have obtained advice which would have led him to learning that his illness was due to his employer's negligence.<sup>84</sup> The objective test might also lead to the exclusion of other factors peculiar to the plaintiff, for

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<sup>79</sup> Para 3.33 above.

<sup>80</sup> Ibid.

<sup>81</sup> [1978] 1 All ER 271.

<sup>82</sup> However, the court exercised its discretion and ruled that the action was not statute barred.

<sup>83</sup> *McCafferty v Metropolitan Police District Receiver* [1977] 2 All ER 756.

<sup>84</sup> A different result was achieved in the United Kingdom where the test was a subjective one: footnote 60 above.

example, that he was a migrant who spoke poor English,<sup>85</sup> that he was afraid of taking professional advice, that he might have difficulty in paying the professional fee or that he did not know whom to turn to for advice.<sup>86</sup>

### 3. VICTORIA

#### (a) Personal injury claims

3.44 In Victoria an action in respect of damages for personal injury must be brought within three years of the date on which the action accrued.<sup>87</sup> However, it is possible to obtain an extension of time for commencing actions involving claims for personal injury.<sup>88</sup> The conditions which must be satisfied before a court may extend the limitation period are similar to those in New South Wales. There are, however, two significant differences. First, while the Victorian legislation contains the concept of material facts it does not require that they be of a "decisive character".<sup>89</sup> It is necessary to show that any of the material facts relating to the cause of action was not known to the claimant<sup>90</sup> and would not have been known to the claimant if he had taken all reasonable steps in the circumstances of the case to ascertain the material facts until a date later than two years after the cause of action accrued or is claimed to have accrued.<sup>91</sup> In this connection it was argued in one case that an application could not be made until the ignorance relied upon had come to an end. However, the court held that although it was envisaged that a material fact may have become known to a claimant he does not have to prove that he knows it. What he must prove is a negative, namely, that a material fact was not known to him until a date later than two years after the cause of action accrued.<sup>92</sup>

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<sup>85</sup> Submissions received by the Commission suggest that this may be a particular problem in Western Australia.

<sup>86</sup> See generally Davies, 254-255.

<sup>87</sup> *Limitation of Actions Act 1958-1980* (Vic), s 5(6). This Act generally binds the Crown: id, s 32.

<sup>88</sup> *Limitation of Actions Act 1958-1980* (Vic), s 23A. This section is reproduced in Appendix IX. An application for an extension must be made by summons and a copy of the summons must be served on each person against whom the claimant claims to have the cause of action: id, s 23A (4). The application should be made to the court in which it is proposed to bring the action: *McManamny v Hadley* [1975] VR 705, 710.

<sup>89</sup> Para 3.34 above.

<sup>90</sup> That is, within the personal knowledge of the claimant and not his servants or agents or, in the case of a child, his parents: *Smith v Browne* [1974] VR 842, 845. The test is "an objective one to be applied to a person in the position of the plaintiff and with her background and understanding": *McManamny v Hadley* [1975] VR 705, 714.

<sup>91</sup> *Limitation of Actions Act 1958-1980* (Vic), s 23A(2)(a).

<sup>92</sup> *Gust v Ingram* [1977] VR 539, 545.

3.45 Secondly, the list of material facts in Victoria contains two factors not included in the New South Wales legislation, namely:<sup>93</sup>

- "(b) the nature of the wrongful act, neglect or default that constituted the negligence, nuisance or breach of duty;
- (c) the identity of the person whose wrongful act, neglect or default constituted the negligence, nuisance or breach of duty."

Part (c) makes express provision for a material fact which was only implicit under the United Kingdom *Limitation Act 1963*, namely, that the identity of the person whose act or omission caused the plaintiff's injury was a material fact.<sup>94</sup>

#### **(b) Survival actions**

3.46 In Victoria actions subsisting against or vested in a deceased person survive against or, as the case may be, for the benefit of his estate.<sup>95</sup> The normal limitation period, three years, applies to actions in respect of damages for personal injury brought by a personal representative on behalf of the estate of the deceased person. However, where a cause of action in tort survives against the estate of a deceased person no proceeding in respect of the cause of action may be maintained **against** the estate of the deceased person except proceedings:<sup>96</sup>

- "(a) that were commenced against the deceased before his death and were pending and not barred at the date of his death;
- (b) that are commenced against his personal representative after his death in the period within which those proceedings might have been commenced against him if he had lived; or
- (c) that were not barred at the date of his death and are commenced against his personal representative within six months after his personal representative takes out representation."

Unlike the New South Wales and Queensland legislation there is no specific provision relating to extending the time for commencing survival actions brought in respect of personal

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<sup>93</sup> *Limitation of Actions Act 1958-1980* (Vic), 23A(3).

<sup>94</sup> *Re Clark v Forbes Stuart (Thames Street) Ltd* [1964] 2 All ER 282.

<sup>95</sup> *Administration and Probate Act 1958-1981* (Vic), s 29(1).

<sup>96</sup> *Id.*, s 29(3). It is not clear whether the provision for extending the time for commencing survival actions applies notwithstanding this provision.

injury which survive the death of a person for the benefit of his estate. However, the provision for extending limitation periods in respect of actions for personal injuries referred to above may also apply to survival actions.

**(c) Fatal accident claims**

3.47 Victoria also has a provision which permits an action to be brought by a plaintiff's personal representative on behalf of designated relatives where his death was caused by a wrongful act, neglect or default.<sup>97</sup> Such an action must be commenced within three years of the plaintiff's death.<sup>98</sup> A court may grant an extension of time by a person claiming to have such a cause of action where it appears to the court that:<sup>99</sup>

- "(a) the death of the deceased person was caused by a wrongful act, neglect or default ;
- (b) the period within which the deceased person was entitled to bring an action in respect of the wrongful act, neglect or default expired before his death;
- (c) the deceased person did not bring such an action before the expiration of that period;
- (d) any of the material facts relating to the cause of action –
  - (i) was not known to the deceased person; and
  - (ii) would not have been known to the deceased person if he had taken all reasonable steps in the circumstances of the case to ascertain all the material facts -

before the period of one year immediately preceding his death; and
- (e) there is evidence to establish the cause of action apart from any defence founded on the expiration of the period within which (if death had not ensued) the deceased person would have been entitled to bring an action in respect of the wrongful act, neglect or default."

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<sup>97</sup> *Wrongs Act 1958-1981* (Vic), ss 16 and 17.

<sup>98</sup> *Id.*, s 20(1).

<sup>99</sup> *Id.*, s 20(2).

**(d) Comments**

3.48 As the legislation in Victoria is, like the legislation in New South Wales and Queensland, based on the need to show that material facts were not known to the plaintiff the comments made in paragraphs 3.39 to 3.43 above also apply to the Victorian legislation.

**4. SOUTH AUSTRALIA**

**(a) Personal injury claims**

3.49 In South Australia all actions in respect of damages for personal injuries to any person must be commenced within three years of the date on which the cause of action accrued.<sup>100</sup> There is, however, provision for obtaining an extension of time. Unlike the legislation in the other States it is not limited to actions for personal injuries.<sup>101</sup> The court may not extend a limitation of time unless it is satisfied:<sup>102</sup>

- "(i) that facts material to the plaintiff's case were not ascertained by him until some point of time occurring within twelve months before the expiration of the period of limitation or occurring after the expiration of that period and that the action was instituted within twelve months after the ascertainment of those facts by the plaintiff; or
- (ii) that the plaintiff's failure to institute the action within the period of the limitation resulted from representations or conduct of the defendant, or a person whom the plaintiff reasonably believed to be acting on behalf of the defendant, and was reasonable in view of those representations or that conduct and any other relevant circumstances,

and that in all the circumstances of the case it is just to grant the extension of time."

Part (i) departs from the approach adopted in New South Wales and Queensland in a number of important respects. First, the section does not specify what are material facts and there is no requirement that they should be decisive or such as would have had a determining influence in

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<sup>100</sup> *Limitation of Actions Act 1936-1975* (SA), s 36(1). The time limit for bringing proceedings against the Crown in tort is the same as that in the case of proceedings between subject and subject: *Crown Proceedings Act 1972-1977* (SA), s 11(1).

<sup>101</sup> *Limitation of Actions Act 1936-1975* (SA), s 48. This section is reproduced in Appendix X. See, for example, *Johnson v The State of South Australia* (1980) 26 SASR 1 in which a farmer recovered damages for loss suffered for negligent misrepresentations made by officers of the Department of Lands.

<sup>102</sup> *Limitation of Actions Act 1936-1975* (SA), s 48(3)(b). The same approach has been adopted in the Northern Territory: *Limitation Act 1981*, s 44.

the decision of a reasonable man to take proceedings. Secondly, the material facts are those relating to the plaintiff's case not to his cause of action. It includes any fact which is of such significance as to be able to influence the determination of the case.<sup>103</sup>

As in New South Wales and Queensland, what is important is the ascertainment<sup>104</sup> of fact, not the ascertainment of opinion. Thus, the receipt of advice from counsel that the plaintiff has a good cause of action is probably not a material fact.<sup>105</sup> Thirdly, the legislation does not require diligence on the part of the plaintiff in the ascertainment of the material facts in question.

3.50 Part (ii) is an additional ground for relief from the statutory bar which is not included in the States already discussed. Under this ground it is not necessary for the plaintiff to show that he had been advised not to institute or to delay in instituting proceedings. The discretion to extend the time for instituting proceedings may be exercised if the judge is satisfied that the conduct of the defendant caused the plaintiff to refrain from instituting proceedings within the period of limitation.<sup>106</sup>

3.51 Once satisfied as to either (i) or (ii) above, the judge must also be satisfied that in all the circumstances of the case it is just to grant the extension of time. This involves the consideration of a number of factors including -<sup>107</sup>

- (i) The prejudice, if any, to the defendant if the action is allowed to proceed notwithstanding the delay. There may be no real prejudice if the defendant had at all relevant times full information about the claim and had been prepared to recognise and settle it, if it could be settled on advantageous terms.<sup>108</sup>
- (ii) The length of the delay.

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<sup>103</sup> *Lovett v Le Gall* (1975) 10 SASR 479, 483.

<sup>104</sup> That is, ascertained by the plaintiff himself and not by his agents or representatives, such as his solicitor: *Lovett v Le Gall* (1975) 10 SASR 479.

<sup>105</sup> *Napolitano v Coyle* (1977) 15 SASR 559, 570.

<sup>106</sup> *Johnson v The State of South Australia* (1980) 26 SASR 1, 51-52. Quaere; whether any extension could be given on this ground in a case like *Lattimer v Shafran* (unreported) Supreme Court of Western Australia Appeal No 350 of 1981.

<sup>107</sup> *Mavra v Logan, Serdaridis and Pertl* (1980) 24 SASR 567, 571.

<sup>108</sup> *Napolitano v Coyle* (1977) 15 SASR 559, 572.

- (iii) The explanation for the delay. Although it is not essential to establish diligence on the part of the plaintiff in the ascertainment of material facts,<sup>109</sup> such diligence or the lack of it would be relevant to the exercise of the discretion.<sup>110</sup>
- (iv) The hardships which would be caused to the plaintiff if the action were dismissed.
- (v) Whether or not the plaintiff had a bona fide cause of action with a reasonable chance of success.<sup>111</sup>
- (vi) The conduct of the defendant.

3.52 The South Australian legislation has an interesting procedural provision. Where an extension of time is sought, the action may be instituted in the normal manner, but the process by which it is instituted must be endorsed with a statement to the effect that the plaintiff seeks an extension of time. The application may be determined by the court at any time before or after the close of pleadings.<sup>112</sup>

**(b) Survival actions**

3.53 Where a cause of action survives for the **benefit** of the estate of a deceased person,<sup>113</sup> the normal limitation period is extended for a period equal to the period between the death of the deceased and the grant of probate or letters of administration to the executor or administrator of his estate, or for a period of twelve months, whichever is the lesser.<sup>114</sup> Where an action in tort has survived **against** the estate of a deceased person no proceedings are maintainable in respect of such cause of action unless either:<sup>115</sup>

- "(a) proceedings against him in respect of that cause of action were pending at the date of his death; or

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<sup>109</sup> Para 3.31 above.

<sup>110</sup> *Lovett v Le Gall* (1975) 10 SASR 479, 483.

<sup>111</sup> *Mavra v Logan, Serdaridis and Pertl* (1980) 24 SASR 567, 580.

<sup>112</sup> *Limitation of Actions Act 1936-1975* (SA), s 48(4) and (5).

<sup>113</sup> *Survival of Causes of Action Act 1940* (SA), s 2.

<sup>114</sup> *Limitation of Actions Act 1936-1975* (SA), s 46a.

<sup>115</sup> *Survival of Causes of Action Act 1940* (SA), s 4.

- (b) the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his executor or administrator took out probate or letters of administration."

It is not clear whether the general power to extend periods of limitation applies to actions which survive for the benefit of the estate.

**(c) Fatal accident claims**

3.54 In South Australia, proceedings by the executor or administrator of a deceased person for the benefit of prescribed relatives of the deceased where the death was caused by a wrongful act, neglect or default must be commenced within three years after the death of the deceased person.<sup>116</sup> It may, however, be possible to obtain an extension of the period under the provision discussed above.

**(d) Comments**

3.55 As the South Australian legislation is also based on showing that facts material to the plaintiff's case were not ascertained by him until some time within twelve months before the expiration of the period of limitation, a number of the problems associated with the New South Wales and Queensland legislation<sup>117</sup> could also apply. It, however, avoids one area of difficulty with the legislation in those States because it is not necessary to show that the plaintiff had taken all reasonable steps to ascertain the material facts.<sup>118</sup>

3.56 As stated in paragraphs 3.53 and 3.54 above, it is not clear whether the general power to extend periods of limitation applies to survival actions for the benefit of the estate and to actions for the compensation of relatives. If it does not, it could lead to an unjust result where the plaintiff died in ignorance of material facts and his personal representative did not acquire knowledge of such facts until over twelve months or three years after his death, as the case may be. This is the kind of problem that arose in *Lucy v WT Henleys Telegraph Works Co Ltd*.<sup>119</sup>

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<sup>116</sup> *Wrongs Act 1936-1975 (SA)*, s 21.

<sup>117</sup> Paras 3.39 to 3.42 above.

<sup>118</sup> Para 3.43 above.

<sup>119</sup> Para 2.34 above.

## 5. TASMANIA

### (a) Personal injury claims

3.57 In Tasmania the limitation period in respect of actions for damages for negligence, nuisance or breach of duty in which damages are claimed is three years.<sup>120</sup> It is possible to apply for an extension of the limitation period for commencing such an action brought in respect of personal injury or disease but only for a period not exceeding six years from the date on which the cause of action accrued. A judge, after hearing persons likely to be affected by an application to extend the limitation period, may:<sup>121</sup>

"...if he thinks that in all the circumstances of the case it is just and reasonable so to do, extend the period limited for the bringing of the action for such period as he thinks necessary, but so that the period within which the action may be brought does not exceed a period of 6 years from the date on which the cause of action accrued."

The judge, therefore, has power to extend the limitation period from three years up to six years if he thinks that in all the circumstances of the case it is just and reasonable so to do. In considering whether or not it is just and reasonable to extend the limitation period the judge may take into account factors such as -<sup>122</sup>

- (i) Whether and to what extent the respondent suffered prejudices by the delay.<sup>123</sup>
- (ii) Whether the applicant had an arguable case.
- (iii) Whether there was a satisfactory explanation for the delay.

### (b) Survival actions

3.58 As in the other States, causes of action vested in a deceased person survive for the **benefit** of his estate.<sup>124</sup> The normal limitation period applies to such actions. However, it may

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<sup>120</sup> *Limitation Act 1974-1978* (Tas), s 5. This section is reproduced in Appendix XI. This limitation period applies to claims against the Crown: *Supreme Court Civil Procedure Act 1932-1979* (Tas), ss 72 and 64(1)(a)(ii).

<sup>121</sup> *Limitation Act 1974-1978* (Tas), s 5(3).

<sup>122</sup> *Knight v Smith* [1975] Tas SR 83, 90.

<sup>123</sup> See, for example, *In re Glynatsis; Glynatsis v Electrolytic Zinc Co of Australasia Ltd* [1971] Tas SR 1, 14.

be possible to extend the period for commencing such actions for a period of up to six years under the provision discussed above. There is also provision for an action subsisting against a deceased person to survive **against** his estate.<sup>125</sup> No such action is maintainable in respect of an action in tort unless:<sup>126</sup>

- "(a) proceedings against him in respect of that cause of action were pending at the date of his death; or
- (b) the cause of action arose not earlier than twelve months before the date of his death and proceedings are taken not later than six months, or such extended time as a judge may allow, after the date of the grant of probate of his will, or letters of administration, to his personal representative."

**(c) Fatal accident claims**

3.59 Like the other jurisdictions discussed above, Tasmania has provision for the executor or administrator of a deceased person to commence proceedings for the benefit of members of the family of the deceased person where the death was caused by a wrongful act, neglect or default.<sup>127</sup> Such an action must be commenced within three years from the date of death of the deceased person.<sup>128</sup> That period can, however, be extended under the provision discussed above.

**(d) Comments**

3.60 As the legislation in Tasmania is not based on the concept of material facts, the problems which arise in the other Australian jurisdictions do not arise. However, the discretion to extend the limitation period is somewhat limited because the limitation period may be extended for a period of only up to six years from the date on which the cause of action accrued.

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<sup>124</sup> *Administration and Probate Act 1935-1980* (Tas), s 27(1)(b).

<sup>125</sup> *Id.*, s 27(1)(a).

<sup>126</sup> *Id.*, s 27(5).

<sup>127</sup> *Fatal Accidents Act 1934-1974* (Tas), ss 4 and 5.

<sup>128</sup> *Limitation Act 1974-1978* (Tas), s 5(1) and (2).

## CHAPTER 4 - RECOMMENDATIONS FOR REFORM

### 1. INTRODUCTION

4.1 As discussed earlier in this report,<sup>1</sup> the Commission believes that the law relating to the limitation and notice of actions as it applies to latent injury and disease is in need of reform. In deciding how the law should be reformed, the Commission has considered the following alternatives which are discussed below -

- \* Provisions modelled on the *Limitation Act 1980* (UK)
- \* A long-stop approach
- \* A judicial discretion, either unfettered or exercisable in accordance with statutory criteria, to override a defence of limitation or extend the limitation period
- \* A provision that results in the limitation period not applying where in all the circumstances of the case, including specified criteria, it is just that it not apply.

For reasons which are explained in detail later in this chapter,<sup>2</sup> the Commission has concluded that the most desirable approach is to fix a six year limitation period for all personal injury actions (with certain exceptions)<sup>3</sup> but provide that this period not apply where a court determines that, in the circumstances, including specified criteria, it is just that it not apply. A summary of the Commission's recommendations appears below.

### 2. SUMMARY OF RECOMMENDATIONS

#### (a) Principal recommendations

4.2 The Commission recommends that legislation be enacted to provide that -

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<sup>1</sup> Paras 2.11 to 2.13 above.

<sup>2</sup> Paras 4.22 to 4.24 below.

<sup>3</sup> Discussed in para 4.54 below.

- (i) the limitation period for all personal injury actions be six years, (with certain exceptions)<sup>4</sup> but that this period not apply where the court determines that it is just that it not apply;<sup>5</sup>
- (ii) what is "just" is to be determined in the light of all the circumstances of the case, including -<sup>6</sup>
- \* the reasons why the plaintiff did not commence the action within the limitation period including, where applicable, that there was a significant period of time after the cause of action accrued during which the plaintiff neither knew nor ought reasonably to have known that he had suffered the injury giving rise to the cause of action;
  - \* the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received;
  - \* the extent to which the plaintiff acted promptly and reasonably once he knew that the act or omission or the alleged act or omission of the defendant might be capable at that time of giving rise to an action for damages;
  - \* the conduct of the defendant after the cause of action accrued relevant to the commencement of proceedings by the plaintiff;
  - \* the extent to which the defendant may be prejudiced in defending the action, other than by relying on a defence of limitation, if the limitation period does not apply;
  - \* alternative remedies available to the plaintiff if the limitation period applies;

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<sup>4</sup> Ibid.

<sup>5</sup> Para 4.22 below.

<sup>6</sup> Paras 4.25 to 4.32 below.

\* the duration of any disability of the plaintiff whether arising before or after the cause of action accrued;

(iii) in making a determination that the limitation period does not apply, the court may impose such conditions as it thinks fit.<sup>7</sup>

**(b) Other recommendations**

4.3 The Commission further recommends that -

(i) legislation implementing its principal recommendations should apply to a cause of action whether or not the limitation period for the action has expired before the amending legislation is enacted;<sup>8</sup>

(ii) the court be empowered to renew a writ after the limitation period has expired;<sup>9</sup>

(iii) the court be empowered to join a person as a defendant after the limitation period has expired;<sup>10</sup>

(iv) the court be empowered to permit a writ or pleadings to be amended so as to introduce a new cause of action for which the limitation period has expired since the writ was issued;<sup>11</sup>

(v) the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* be amended so as to enable a tortfeasor liable for damages to recover a contribution from any other tortfeasor who, at the time the cause of action arose, would have been liable in respect of the same damage;<sup>12</sup>

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<sup>7</sup> Para 4.34 below.

<sup>8</sup> Paras 4.36 to 4.42 below.

<sup>9</sup> Paras 4.46 to 4.47 below.

<sup>10</sup> Paras 4.48 and 4.49 below.

<sup>11</sup> Paras 4.50 and 4.51 below.

<sup>12</sup> Paras 4.52 and 4.53 below.

- (vi) the Limitation, Crown Suits and Local Government Acts be amended in so far as they relate to personal injury actions so as to provide, in accordance with the principal recommendations, that where it is just in the circumstances for the limitation and notice periods prescribed by those Acts not to apply, they not do so;
- (vii) the law of limitation as it applies to actions brought in respect of personal injury or disease, as reformed in accordance with the Commission's recommendations, apply to survival actions brought by the estates of deceased persons;<sup>13</sup>
- (viii) the *Law Reform (Miscellaneous Provisions) Act* be amended to enable actions to be brought, or continued, against the estate of a deceased tortfeasor in accordance with the principal recommendations;<sup>14</sup>
- (ix) the *Fatal Accidents Act* be amended to create a basic limitation period of six years from the date of death of the person in respect of whose death the cause of action arose and to provide, in accordance with the principal recommendations, that where it is just in the circumstances for this period not to apply, it not do so.<sup>15</sup>

### **3. OTHER ALTERNATIVES CONSIDERED BY THE COMMISSION**

#### **(a) United Kingdom Limitation Act 1980**

4.4 The first approach to reform the Commission considered is that adopted in the United Kingdom *Limitation Act 1980*. Briefly, this is to postpone the commencement of the limitation period until the plaintiff knows certain important facts about his cause of action and to confer a discretion upon the courts to override a defence of limitation where it is considered equitable to do so having regard to certain matters.<sup>16</sup>

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<sup>13</sup> Paras 4.55 and 4.56 below.

<sup>14</sup> Paras 4.57 to 4.60 below.

<sup>15</sup> Para 4.61 below.

<sup>16</sup> In a preliminary submission the Asbestos Diseases Society of WA and the Ex-Wittenoom Residents Association expressed support for this approach.

4.5 Initially the Commission was attracted to this approach because, as it represents the culmination of a number of studies and revisions of the United Kingdom *Limitation Act* all of which were designed to overcome the limitation of action problems experienced by persons who suffer latent injury or disease, it was thought likely to provide a model for reform suitable for adoption in Western Australia. However, an examination of the reported cases and articles<sup>17</sup> discussing the relevant parts of the Act shows that it does not do so because -

- \* the Act is complicated, confusing and uncertain in a number of respects;<sup>18</sup>
- \* the all important definition of knowledge provisions in section 14 of the Act are not operating satisfactorily;<sup>19</sup>
- \* the discretion given in section 33 to override the time limits imposed by sections 11 and 12 has been interpreted in a manner which draws technical distinctions which produce different results in equally deserving cases.<sup>20</sup>

These defects have prompted one member of the Court of Appeal to say.<sup>21</sup>

"I was foolish enough... to think that at a third attempt Parliament had succeeded in reforming this branch of the law. Now it is apparent that a fourth attempt will be necessary if the law on this topic is to be rationalised."

4.6 Further, any attempt to overcome the problems that have been identified with the United Kingdom approach is unlikely to succeed because of the difficulty of legislating in advance for all the situations that this approach must cover. This has been the experience in the United Kingdom with the changes to the law of limitations introduced in 1954,<sup>22</sup> 1963,<sup>23</sup> 1971,<sup>24</sup> 1975,<sup>25</sup> and 1980.<sup>26</sup>

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<sup>17</sup> For example, Davies; D M Morgan, *Fault in the System*, (1980) 130 NLJ 1002. R N S Saunders, *Overriding the Time Bar in Personal Injury Actions: An Unfettered Discretion?*, (1981) 131 NLJ 346; G Holgate, *The Time Limit in Personal Injury Claims*, (1981) 131 NLJ 1124.

<sup>18</sup> See generally, paras 3.6 and 3.7 above.

<sup>19</sup> Criticisms of these provisions are summarised in para 3.13 above.

<sup>20</sup> See, for example, the summary in paras 3.21 and 3.22 above.

<sup>21</sup> *Chappell v Cooper* [1980] 2 All ER 463,470 per Ormrod LJ.

<sup>22</sup> *Law Reform (Limitation of Actions, etc) Act 1954*.

<sup>23</sup> *Limitation Act 1963* (see generally, para 3.3 above).

<sup>24</sup> *Law Reform (Miscellaneous Provisions) Act 1971*.

<sup>25</sup> *Limitation Act 1975*.

<sup>26</sup> *Limitation Act 1980*.

According to Davies:<sup>27</sup>

"Any attempt to enshrine in fixed rules the competing claims of plaintiff and defendant seems doomed to less success than a system which allows a balance to be achieved in the light of the particular circumstances of the case."

**(b) The long-stop approach**

4.7 Another approach which the Commission has considered involves giving the court a wide discretion to override a defence of limitation but providing that the discretion cannot be exercised where the proceedings are commenced a considerable time after the cause of action accrued, for example, ten years. This approach has the advantage that "once the long-stop has been reached there is certainty and the defendant knows where he stands".<sup>28</sup> However, the long-stop period would be an arbitrary period and as was pointed out by the Orr Committee in its interim report:<sup>29</sup>

"...the long-stop period itself will either be too long to serve any very useful purpose in the majority of cases or too short to cover those cases with which we are particularly concerned, namely insidious diseases."

For example, to effectively cover latent diseases such as asbestosis and mesothelioma the long-stop period would need to be at least forty years.<sup>30</sup> Such a period, however, would be of little assistance to prospective defendants. For this reason the Commission rejected the long-stop approach.

**(c) A judicial discretion, either unfettered or exercisable in accordance with statutory criteria, to override a defence of limitation**

4.8 A third approach to reform which the Commission has considered is to retain the existing fixed limitation period but give the court a discretion, not limited by a long-stop, to override a defence of limitation in personal injury cases where the court considers it equitable

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<sup>27</sup> Davies, 277-278.

<sup>28</sup> The Orr Committee interim report, para 36.

<sup>29</sup> Para 37.

<sup>30</sup> The Trades and Labor Council in its preliminary submission and in its comments on the Commission's draft report said that the limitation period should be fifty years or abolished altogether.

to do so. Such a discretion could be completely unfettered<sup>31</sup> or could be framed so that the court must have regard to specific statutory criteria in the exercise of its discretion.<sup>32</sup>

4.9 There are a number of precedents in existing limitation statutes which make use of unfettered discretionary powers in limitation matters. These statutes usually provide that a court may exercise its discretion to extend a limitation period if it is just to do so. In Western Australia, for example, an unfettered discretion to extend a limitation period is found -

- \* in the *Supreme Court Act 1935-1982* which provides that the court or a judge may extend the two year period for commencing an action in cases of collisions between vessels "...to such extent and on such conditions as it or he thinks fit";<sup>33</sup>
- \* in the *Law Reform (Miscellaneous Provisions) Act* which provides that a judge may extend the time for instituting proceedings in respect of a cause of action in tort against the estate of a deceased person "as the justice of the case may require";<sup>34</sup>
- \* in the *Hire-Purchase Act 1959-1980* which provides that a court may extend the time for the commencement of proceedings "for such further period, and upon such conditions, as the court thinks fit";<sup>35</sup> and
- \* in the *Inheritance (Family and Dependants Provision) Act 1972* which provides that the court may grant leave to file an application if it "is satisfied that the justice of the case requires that the applicant be given leave to file out of time".<sup>36</sup>

4.10 Other statutes also confer discretionary powers to extend the limitation period but restrict the ambit of the court's discretion in various ways, such as by setting a maximum time

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<sup>31</sup> See, for example, *Law Reform (Miscellaneous Provisions) Act*, s 4(3)(b).

<sup>32</sup> Cf *Limitation Act 1980* (UK), s 33(3). For examples outside the limitations area, see *Family Law Act 1975-1977* (Cth), s 79(2) and (4); *Family Court Act 1975-1977* (WA), ss 28 and 30.

<sup>33</sup> S 29. The section, however, goes on to provide that the court "**shall**, if satisfied that there has not during [the two year period] been any reasonable opportunity of enforcing the claim, extend such period to an extent sufficient to give such reasonable opportunity". (emphasis added)

<sup>34</sup> S 4(3)(b).

<sup>35</sup> S 35.

<sup>36</sup> S 7(2)(b).

beyond which the discretion may not be exercised<sup>37</sup> or by specifying certain factors or criteria which govern the exercise of the discretion. In Western Australia, for example, under the *Local Government Act*, a judge may, "if he thinks it just to do so", extend the normal twelve month period for commencing an action against a local authority to six years, if he considers the failure to commence the action or give the required notice of action was "occasioned by mistake or by other reasonable cause or that the prospective defendant is not materially prejudiced in his defence or otherwise."<sup>38</sup> In England, section 33 of the *Limitation Act 1980* lists a number of criteria to be considered in evaluating whether it is equitable that the limitation period not apply.<sup>39</sup>

4.11 Generally speaking, law reform bodies have in the past not favoured the discretionary approach as a general solution to the problems of personal injury limitation periods. In England, for example, a judicial discretion was considered and rejected by the Law Revision Committee in 1936,<sup>40</sup> the Edmund Davies Committee in 1962,<sup>41</sup> the Law Commission in 1970<sup>42</sup> and the Orr Committee in 1974.<sup>43</sup> The latter Committee, however, did recognise a need for a "residual discretion " to allow judges to extend the time where in a consideration of all the circumstances, including the comparative hardships to the plaintiff and the defendant, it appears equitable to do so.<sup>44</sup>

4.12 There are a number of arguments both for and against vesting the court with a discretion to override a defence of limitation in personal injury cases. The arguments apply

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<sup>37</sup> See the discussion of the long-stop approach in para 4.7 above.

<sup>38</sup> S 660(2). See also, *Crown Suits Act*, s 6(3); *Limitation Act*, s 47A(3) which are discussed in paras 2.15 to 2.19 above. Other statutes with similar provisions include s 15(2) of the *Aerial Spraying Control Act 1966-1978* which provides that a judge may dispense with the required notice of claim and grant leave to bring an action where he considers that "the failure to give the required notice was occasioned by mistake or by any other reasonable cause or that the prospective defendant is not materially prejudiced in his defence or otherwise by the failure" and s 130(1) of the *Workers' Compensation and Assistance Act 1981*, which provides that "the failure to make a claim ...shall not be a bar to the maintenance of proceedings, if it is shown that the employer has not been prejudiced in his defence" or that the failure to take timely action "was occasioned by mistake, absence from the State, or other reasonable cause".

<sup>39</sup> See the discussion of this section in paras 3.14 to 3.25 above.

<sup>40</sup> Law Revision Committee Fifth Interim Report, *Statute of Limitations* (1936) Cmd 5334 (the "Law Revision Committee"); para 7.

<sup>41</sup> Paras 30 to 33. The Committee noted that legal witnesses were almost unanimously opposed to giving judges a discretion to extend the time. Law Commission, *Report on Limitation Act 1963* (1970 Report No 35) Cmnd 4532.

<sup>42</sup> Para 25.

<sup>43</sup> Orr Committee interim report, paras 34, 35.

<sup>44</sup> Orr Committee interim report, para 55. This recommendation is now reflected in s 33 of the *Limitation Act 1980* (UK), although the discretion in that section has been interpreted as a general rather than a residual discretion. See para 3.15 above. See also the Committee on the Limitation of Actions (the "Tucker Committee") (1949) Cmd 7440 which recommended a two year limitation period with a discretionary power to extend up to six years.

with varying degrees of force both to unfettered discretions and discretions exercisable in accordance with statutory criteria. Because these arguments have played an important role in the formulation of the Commission's principal recommendations,<sup>45</sup> they are discussed in some detail in the following paragraphs.

(i) Arguments against a judicial discretion to override a defence of limitation

\* Uncertainty

4.13 The objection most frequently voiced against conferring upon a court a discretion to override a defence of limitation is that judicial discretion generates too much uncertainty in the law.<sup>46</sup> As noted previously,<sup>47</sup> one of the main purposes of a statute of limitation is to allow persons to treat incidents as closed once a certain time has passed. When a judicial discretion exists to override a defence of limitation, one cannot say with the same certainty that a case is closed. In this regard, it is sometimes said that it would become difficult and expensive to insure against claims where the liability is essentially open-ended. Those who oppose the judicial discretion approach thus see certainty as a key consideration and believe that a fixed period serves to put an end to potential liability in a definite and reasonable way.<sup>48</sup>

4.14 It is also argued that because the judgments the courts must make in the exercise of an unfettered discretion are inherently subjective, there would be considerable uncertainty surrounding the exercise of the discretion.

\* Inconsistency

4.15 A related argument is that a discretionary approach leads to divergent approaches among judges in the exercise of that discretion.<sup>49</sup> This argument is grounded in the belief that a provision which grants or denies a remedy solely on the basis of an unfettered discretion creates an environment which may foster a sense of injustice among people who feel that they have not been treated in the same way as others in similar situations. This is so because a

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<sup>45</sup> Para 4.2 above.

<sup>46</sup> Law Revision Committee, para 7; Edmund Davies Committee, para 31; Orr Committee interim report, para 35.

<sup>47</sup> Para 1.10 above.

<sup>48</sup> See, for example, Ontario Law Reform Commission, *Report on Limitations of Actions* (1969), 115.

<sup>49</sup> Law Revision Committee, para 7; Edmund Davies Committee, para 31; Orr Committee interim report, para 34.

broad unfettered discretion calls for ad hoc determinations which, it is said, will be freely influenced by the predispositions of the particular judge exercising the discretion. This argument is of course not unique to the law of limitation but has its roots in ancient suspicions about judicial discretion generally.<sup>50</sup>

\* Excessive delays, litigation and appeals

4.16 A discretionary approach has also been opposed on the ground that it would undermine the effectiveness of a fixed limitation period as a means of encouraging plaintiffs not to sleep on their rights. Where the sanction is not certain, there may be a general slowing down of the process of proceeding with claims. It is further argued that the existence of a judicial discretion to override a defence of limitation would open the floodgates to numerous hopeless claims, that it would increase litigation and would generate appeals by persons who were unhappy with the exercise of the discretion in the first instance.

(ii) Arguments in favour of a judicial discretion to override a defence of limitation

\* Simplicity

4.17 One of the major advantages of the judicial discretion approach, recognised even by those who have rejected it,<sup>51</sup> is its simplicity. The English experience<sup>52</sup> demonstrates that the problems arising out of the law of limitation in respect of latent injury and disease do not readily lend themselves to a legislative resolution since it is impossible to account for every factual permutation in a statutory framework.

\* Flexibility

4.18 Those who favour judicial discretion regard flexibility rather than certainty as necessary in this area. A judicial discretion allows the judge to balance the numerous factors involved and the relative hardships to the plaintiff and the defendant to achieve a just result in

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<sup>50</sup> See, for example, Lord Camden C.J. in *Hindson v Kersey* in 1765; "The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends on constitution, temper and passion. In the best, it is very often caprice, in the worst it is every vice, folly and passion to which human nature is known". Quoted by Lord Keith of Kinkel, in "Judicial Discretion", (1981) 1 *CJQ* 22, 23.

<sup>51</sup> Orr Committee interim report, para 34.

<sup>52</sup> See generally paras 3.1 to 3.25 above.

the circumstances.<sup>53</sup> As Ormrod LJ put it in *Firman v Ellis*,<sup>54</sup> "uncertain justice is preferable to certain injustices." Moreover, where there are rigid rules, judges may be tempted to bend the facts of the case or the words of the statute to take care of hard cases. Indeed, the Orr Committee in its interim report found this to have been one of the problems with the 1963 *Limitation Act*.<sup>55</sup> The experience with that Act indicates that where courts attempt to bend a statute to achieve a just result, the law becomes complex and the certainty which was sought to be achieved is lost in any event.

\* Not unpredictable

4.19 It is also argued that consistency is not necessarily sacrificed when judges are asked to exercise a discretion. In *Firman v Ellis*, Lord Denning MR, defended the discretionary provision in the 1975 *Limitation Act*, noting that judicial discretion is a familiar element in much contemporary legislation and stating:<sup>56</sup>

"In all such cases the judges in making their decisions set a pattern from which the profession can forecast the likely result in any given set of circumstances [citation omitted]. So a sufficient degree of certainty is achieved; as much certainty as is possible consistently with justice."

Thus, although no one case will set a binding precedent or provide a litmus test to predict how, in future cases, a court will exercise its discretion to override a defence of limitation, it is argued that the various factors to be taken into account will be given reasoned judicial consideration and the discretion will be exercised in a principled fashion.<sup>57</sup>

\* No excessive delay, litigation and appeals

4.20 The argument that judicial discretion to override a defence of limitation will lead to excessive delay is countered by the argument that it remains in the person's best interest to pursue his claim expeditiously.<sup>58</sup> Judicial discretion is also defended against the accusation that it will encourage hopeless applications for extensions on the ground that unmeritorious or

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<sup>53</sup> Cf, Orr Committee interim report, para 56.

<sup>54</sup> [1978] 2 All ER 851, 865.

<sup>55</sup> Orr Committee interim report, para 67.

<sup>56</sup> [1978] 2 All ER 851, 860.

<sup>57</sup> See generally the discussion of judicial discretion in *Ward v James* [1965] 1 All ER 563, 570, per Lord Denning MR.

<sup>58</sup> Cf Davies, 276.

frivolous applications can be dealt with at an early stage and dismissed with costs. Moreover, it is suggested that there will not be many appeals given the narrow scope of review in such cases.<sup>59</sup>

(iii) The Commission's view

4.21 Having rejected the United Kingdom approach, the Commission was attracted by the simplicity and flexibility of giving the courts a discretion to override a defence of limitation where it is considered equitable to do so. However, upon reflection the Commission has formed the view that there is merit in the argument that an unfettered judicial discretion is undesirable in this area because of the uncertainty and inconsistency that would be involved in its exercise. While the Commission is persuaded that statutory criteria would greatly assist courts in the exercise of their discretion, it considers that it is desirable to reduce even further the opportunities for inconsistent results and uncertain application of the law. In formulating its recommendation by which the limitation period will not apply in appropriate cases, the Commission has therefore sought to preserve the virtues of flexibility and simplicity without the vices of uncertainty and inconsistency.

#### 4. PRINCIPAL RECOMMENDATIONS

(a) **That the limitation period for all personal injury actions be six years but that this period not apply where the court determines that it is just that it not apply**

4.22 The approach to reform adopted by the Commission is to recommend legislation which creates a six year limitation period for all personal injury claims (with certain exceptions)<sup>60</sup> but which provides that this period does not apply where it is just that it not apply.<sup>61</sup> Whether it is just in a particular case should depend on all the circumstances of that case, including specific criteria set out in the statute. Framed in this way, the Commission's recommendation places the emphasis on the broad principle of what is just in the circumstances, rather than on an exercise of judicial discretion. The recommendation as formulated

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<sup>59</sup> For a discussion of the scope of review, see *Klein v Domus Pty Ltd* (1963) 109 CLR 467, 473 per Dixon CJ.

<sup>60</sup> Discussed in para 4.54 below.

<sup>61</sup> The State Government Insurance Office in its comment on the Commission's draft report suggested in essence that this is, in practice, already the law in Western Australia.

is designed to reduce the uncertainty and inconsistency which is said to arise out of the exercise of judicial discretion.<sup>62</sup>

4.23 The Commission favours this approach because, like the discretionary approach, it avoids the complex legislative drafting which has attended all the English attempts at reform. As it does not require that all factors be set out and precisely defined in the statute, it is broad enough and flexible enough to accommodate the numerous different factual situations that arise in personal injury cases.<sup>63</sup> At the same time it requires the court in a particular case to look at all the facts and circumstances of that case to determine whether it is just that the limitation period not apply. The Commission believes that it is only by evaluating all the factors of the case that a just result can be achieved; the same result cannot be achieved with a fixed statutory provision extending the limitation period. The Commission's view in this regard is reinforced by the fact that the Orr Committee conceded, in its interim report, that it would need a residual discretionary power to take into account factors which were not adequately addressed under its fixed limitation formulation.<sup>64</sup>

4.24 The Commission also favours this approach because it lends a greater measure of certainty and consistency than an approach which relies purely on the discretion of the court. Under the Commission's recommendation the court must make a determination that the period does not apply by addressing itself to all the circumstances of the case, including specific statutory criteria. The Commission thus believes that this formulation lessens the likelihood that the personal pre-dispositions of individual judges will lead to divergent decisions with

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<sup>62</sup> One member of the Commission (Mr Ogilvie), although not objecting to the manner in which the recommendations have been formulated, considers that there is no difference between that manner and giving the court a discretion, exercisable in accordance with equivalent statutory guidelines, to determine that the limitation period shall not apply in a particular case.

<sup>63</sup> Consider the following examples -  
P suffers an injury in respect of which he has a worthwhile cause of action against the defendant. However, P does not know that he has suffered the injury: See for example, *Cartledge and Others v E Jopling and Sons Ltd* [1963] 1 All ER 341. P knows that he has suffered injury but does not know its nature and extent: See for example, *Knipe v British Railway Board* [1972] 1 All ER 673; *Goodchild v Greatness Timber Co Ltd* [1968] 2 All ER 255. P knows that he has suffered the injury but does not know that it was caused by the defendant's act or omission: See for example, *Drinkwater v Joseph Lucas (Electrical) Ltd* [1970] 3 All ER 769. P knows that he has suffered the injury and that it was caused by the defendant's act or omission, but he does not know that, as a result, he has a worthwhile cause of action against the defendant: See for example, *Central Asbestos Co Ltd v Dodd* [1972] 2 All ER 1135; *Harper and Others v National Coal Board* [1974] 2 All ER 441. P knows that the defendant has not taken proper care for his safety but not that he had suffered injury as a result: According to Lord Simon in *Central Asbestos Co Ltd v Dodd* [1972] 2 All ER 1135, 1154, this was the situation in *Cartledge and Others v E Jopling and Sons Ltd*. P knows that he has suffered injury and that he has a worthwhile cause of action but he does not know, or is mistaken as to, the identity of the defendant: See for example, *Re Clark v Forbes Stuart (Thomas Street), Ltd* [1964] 2 All ER 282.

<sup>64</sup> Orr Committee interim report, paras 55 and 56.

respect to the application of the limitation period. In this regard, it can be argued that the value of decisions as precedents will be enhanced and therefore it will be easier to predict whether or not the limitation period will apply in a given case. The Commission's recognises that its formulation broadens the scope of review on appeal since the test is not what the court of first instance considers just but what is just in the circumstances of the case.<sup>65</sup> Although a measure of uncertainty remains because of the breadth of the principle of what is just in the circumstances, the Commission considers that its approach will be no more unpredictable than the limitation law in respect of latent injury and disease in England over the past twenty years

**(b) Statutory criteria defining whether it is just that the limitation period not apply**

4.25 Under the Commission's recommendation discussed above,<sup>66</sup> the limitation period will not apply where it is just that it not apply. Whether it is just will be determined by the court by taking into account all the circumstances of the case, including a number of specific criteria defined in the statute. The Commission believes that these criteria are the linch-pin of its recommendation. They are the principles which will structure the court's consideration of the case and its determination of whether it is just that the limitation period not apply. In developing these criteria, the Commission has considered the factors listed in section 33 of the United Kingdom *Limitation Act 1980*<sup>67</sup> as well as factors which have been taken into account under limitation provisions in Australia.<sup>68</sup> The criteria recommended by the Commission are restated and discussed briefly in the following paragraphs.

- (i) The reasons why the plaintiff did not commence the action within the limitation period including, where applicable, that there was a significant period of time after the cause of action accrued during which the plaintiff neither knew nor ought reasonably to have known that he had suffered the injury giving rise to the cause of action

4.26 This criterion derives from section 33(3)(a) of the 1980 Act; however, the Commission has framed the criterion in different terms than that Act because it considers that the use of the concept of delay therein creates a number of difficulties.<sup>69</sup> For instance, the

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<sup>65</sup> Appellate courts are more willing to overrule a decision on a question of law than the exercise of a judicial discretion.

<sup>66</sup> Para 4.22 above.

<sup>67</sup> Referred to in paras 4.26 to 4.32 below as "the 1980 Act". This section is reproduced and discussed in paras 3.14 to 3.25 above.

<sup>68</sup> Paras 3.51 and 3.57 above.

<sup>69</sup> See *Thompson v Brown* [1981] 1 WLR 744, 751. Davies, 266.

plaintiff may not have delayed at all if he brings an action as soon as he discovers that he has been injured. Under the Commission's recommendation, this criterion encompasses the question of when the plaintiff discovered his injury and thus will be a critical factor in determining whether it is just that the limitation period apply in cases of latent disease. However, under the 1980 Act, the issue of the plaintiff's knowledge of his condition arises primarily under section 11 which provides in part that the limitation period for personal injury is three years from the "date of knowledge" of the person injured. The Commission considers that the reasons the plaintiff did not commence the action within the limitation period are of primary importance in determining whether it is just that the period not apply.

- (ii) The steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received

4.27 This criterion appears as section 33(3)(f) of the 1980 Act. It calls for a consideration of the steps the plaintiff took to obtain advice<sup>70</sup> and requires the court to take into account the fact that the plaintiff has received defective advice, either as to his medical condition or to the existence of a legal cause of action, in determining whether it is just that the limitation period not apply.<sup>71</sup>

- (iii) The extent to which the plaintiff acted promptly and reasonably once he knew that the act or omission or the alleged act or omission of the defendant might be capable at that time of giving rise to an action for damages

4.28 This criterion is based on section 33(3)(e) of the 1980 Act. It requires the court to consider how promptly the plaintiff acts after receiving advice that he has a worthwhile cause of action.

- (iv) The conduct of the defendant after the cause of action accrued relevant to the commencement of proceedings by the plaintiff

4.29 This criterion is based on section 33(3)(c) of the 1980 Act. It includes the extent to which the defendant has responded to reasonable requests for information made by the plaintiff for the purpose of ascertaining facts relevant to the plaintiff's case. The Commission considers it should also include conduct of the defendant which caused the plaintiff to refrain

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<sup>70</sup> *Thompson v Brown* [1981] 1 WLR 744.

<sup>71</sup> Cf the discussion of the "worthwhile cause of action" test in *Central Asbestos Co Ltd v Dodd* [1972] 2 All ER 1135.

from instituting proceedings within the period of limitation.<sup>72</sup> The conduct referred to extends to the conduct of the defendant's insurers and solicitors.<sup>73</sup>

- (v) The extent to which the defendant may be prejudiced in defending the action, other than by relying on a defence of limitation, if the limitation period does not apply

4.30 This criterion requires the court to evaluate the prejudice to the defendant in terms of his ability to meet the plaintiff's case, other than by relying on a defence of limitation, if the limitation period does not apply. It thus incorporates the factors relating to the effect of the passage of time on the cogency of the evidence which appear in section 33(3)(b) of the 1980 Act.

- (vi) Alternative remedies available to the plaintiff if the limitation period applies

4.31 This criterion requires the court to evaluate the prejudice to the plaintiff in terms of alternative remedies available to the plaintiff if the limitation period applies. In this regard, the Commission considers that the court should take into account the fact that the plaintiff may have a claim against his solicitor where it was because his solicitor was negligent in the conduct of his case that his action was not commenced within the limitation period. This fact is considered under section 33(1)(a) of the 1980 Act.<sup>74</sup>

- (vii) The duration of any disability of the plaintiff whether arising before or after the cause of action accrued

4.32 This criterion appears as section 33(3)(d) of the 1980 Act. As noted by Lord Diplock<sup>75</sup> the section reflects the fact that persons under disability are a class of persons that "equity has always been zealous to protect". Under the *Limitation Act*,<sup>76</sup> time does not run against a plaintiff who was under a disability at the time the cause of action accrued,<sup>77</sup> but no provision

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<sup>72</sup> See, for example, *Johnson v State of South Australia* (1980) 26 SASR 1, 51-52. See also *Lattimer v Shafran* (unreported) Supreme Court of Western Australia Appeal No 350 of 1981.

<sup>73</sup> *Thompson v Brown* [1981] 1 WLR 744, 751.

<sup>74</sup> *Id.*, 752.

<sup>75</sup> *Id.*, 751.

<sup>76</sup> *Limitation Act*, s 40.

<sup>77</sup> The Commission recommends that this also be the case in respect of the limitation period discussed in para 4.22.

is made for disability which arises after the cause of action accrued. This provision corrects that anomaly by requiring the court to take into account any supervening disability.<sup>78</sup>

**(c) The strength of the plaintiff's case**

4.33 The Commission has also considered whether the factors to be considered should include an additional criterion relating to the strength of the plaintiff's case. In Tasmania, for example, the courts have considered whether the plaintiff has "an arguable case"<sup>79</sup> in deciding whether to exercise their discretion to extend the limitation period. It is clearly desirable that the court give consideration to whether a case is groundless. Such a consideration arises from the general policy of the law to discourage litigation which can serve no useful purpose.<sup>80</sup> However, the disadvantage of such a criterion is that it may encourage extensive debate on the merits which will tend to turn a preliminary determination on the issue of the limitation defence into a trial on the merits. On balance, the Commission has concluded that the strength of the plaintiffs' case will inevitably be one of the circumstances that the judge will look at to determine whether it is just that the limitation period apply but that it should not be highlighted as a separate statutory criterion.

**(d) Power to impose conditions**

4.34 The Commission recommends that the court be empowered to impose conditions if it determines that the limitation period does not apply. A power to impose conditions is in fact a familiar element of many existing statutes which vest courts with discretions in limitation matters.<sup>81</sup> Such conditions might include time limits on the issue and service of the writ to minimise any further prejudice to the defendant.

**(e) The scope and effect of the Commission's recommendations**

4.35 As noted above, the Commission's recommendations apply to all cases of disease or personal injury. This has caused some concern to the Motor Vehicle Insurance Trust to whom a copy of the Commission's draft report was sent for comment. As a result, a member and an

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<sup>78</sup> In this regard, see the recommendation in the Orr Committee interim report, paras 89 to 96.

<sup>79</sup> *Knight v Smith* [1975] Tas SR 83, 90. See also, *Mavra v Logan, Serdaridis and Pertl*, (1980) 24 SASR 567, 580.

<sup>80</sup> *Re Walker* [1967] VR 890.

<sup>81</sup> See for example, *Limitation Act*, s 47A(3)(b).

officer of the Commission discussed the effect of implementing the Commission's recommendations with the Acting Manager of the Trust. According to him, the Trust is concerned that if the recommendations apply to actions arising out of motor vehicle accidents, it could be faced with a large number of stale accident claims.<sup>82</sup> The Commission believes that this fear is unfounded. This is because although implementation of the Commission's principal recommendation will allow a personal injury claim to be successfully brought after the expiration of the limitation period, this will only be possible, once a defence of limitation is raised, if the plaintiff is able to persuade the court that it is just in the circumstances for the limitation period not to apply. Thus, for example, having regard to the criteria proposed by the Commission,<sup>83</sup> if a motor vehicle accident victim suffers an injury of which he is aware and for reasons within his control does not commence his action for damages within the limitation period it is unlikely that he will be able to discharge this onus. Further, even where the delay was attributable to factors beyond the plaintiff's control, such as the negligence of his legal or medical advisors, the operation of criteria may still prevent him doing so. Finally, the Commission notes that the Trust is also protected by the special notice and commencement of action provisions contained in section 29 of the *Motor Vehicle (Third Party Insurance) Act 1943-1981*. For these reasons, the Commission believes that implementation of its recommendations will not unreasonably burden or inconvenience the Trust certainly no more than is necessary to prevent a defence of limitation defeating a deserving claim.

## 5. OTHER RECOMMENDATIONS

### (a) Transitional matters

4.36 An important question which must be addressed is whether the reforms recommended in this report should apply to causes of action which have already accrued or which are statute barred at the time they come into operation. In the absence of a clear indication to the contrary in the legislation, there is a presumption against giving retrospective operation to a statute which creates, abolishes or otherwise disturbs existing substantive rights or liabilities.<sup>84</sup> However, where a statute merely effects a change in procedure or the manner of enforcing

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<sup>82</sup> The Trust was also concerned about the effect on it of the reforms recommended by the Commission being made retrospective. It does not appear to the Commission, however, that the Trust's position is unique in this respect and the Commission notes that the Trust could benefit from the adoption of one of the alternatives discussed in paras 4.40 to 4.42 below.

<sup>83</sup> Especially criteria discussed in paras 4.26 to 4.28 above.

<sup>84</sup> *Maxwell v Murphy*, (1957) 96 CLR 261, 267, per Dixon CJ.

rights or liabilities, the presumption is that it applies to all actions whether commenced before or after the statute is passed.<sup>85</sup> Although these principles are easy to state, they have proved difficult to apply in practice, resting as they do on a sometimes elusive distinction between substance and procedure. Statutes of limitation, for example, are traditionally characterised as procedural but in reality often operate to impair or destroy substantive rights or liabilities. Thus, provisions in statutes of limitation which enable a person to enforce a cause of action which would otherwise be barred are usually not given retrospective effect in the absence of any indication to the contrary in the statute.<sup>86</sup>

4.37 Because of the difficulties in this area, it is usual for legislation affecting limitation periods to declare whether its provisions should be applied retrospectively. In **England**, for example, the 1963,<sup>87</sup> 1971<sup>88</sup> and 1975<sup>89</sup> Acts all expressly provided that the changes to the personal injury limitation period made by those Acts were to apply to causes of action which accrued before the Acts came into force, irrespective of whether the actions were already statute barred or whether proceedings had already been commenced. Similarly, changes made to the personal injury limitation periods in **New South Wales**<sup>90</sup> and **Queensland**<sup>91</sup> were also given retrospective effect by the legislation enacting those changes. In **Victoria**,<sup>92</sup> the section which provided for extending the period within which actions for personal injury may be brought was stated as applying to a cause of action which accrued before the commencement of the *Limitation of Actions (Personal Injuries) Act 1972*, although the Act did not expressly state that the section applied to actions which were barred at that time. In **Tasmania**,<sup>93</sup> however, when legislation was enacted to shorten the limitation period for personal injury claims and to provide for an extension up to a maximum of six years, the change was expressly made prospective only, while in **South Australia**, a statute enacting changes in the personal injury limitation period which was silent on the issue of retrospectivity, was construed as being prospective.<sup>94</sup>

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<sup>85</sup> Ibid.

<sup>86</sup> See, for example, *Maxwell v Murphy* (1957) 96 CLR 261; *Van Vliet v Griffiths* (1979) 20 SASR 524.

<sup>87</sup> *Limitation Act 1963* (UK), s 6(1). However, s 6(3) excluded from retrospective operation any claim which had proceeded to judgment by the date the Act came into force.

<sup>88</sup> *Law Reform (Miscellaneous Provisions) Act 1971* (UK), s 3, Sch 2.

<sup>89</sup> *Limitation Act 1975* (UK), s 3(1).

<sup>90</sup> *Limitation Act 1969-1979*, s 58(3).

<sup>91</sup> *Limitation of Actions Act 1974-1978*, s 31(3)(a), 32(4)(a).

<sup>92</sup> *Limitation of Actions Act 1958-1980*, s 23A(1).

<sup>93</sup> *Limitation of Actions Act 1965*, s 2(4).

<sup>94</sup> *Van Vliet v Griffiths* (1979) 20 SASR 524, construing the *Limitation of Actions Act Amendment Act 1972*.

4.38 The Commission recommends that legislation enacting the reforms recommended in this report apply retrospectively.<sup>95</sup> As discussed above,<sup>96</sup> the Commission is persuaded that in cases of latent injury and disease the existing law has operated unfairly in the past and that as a result, there are a number of cases in which the causes of action of victims of latent disease are statute barred. In order to remedy this unfairness and permit those persons to pursue their causes of action, legislation enacting the reforms recommended in this report must apply to an action, whether or not the action is statute barred at the time the legislation takes effect.<sup>97</sup> Thus, legislation enacting the Commission's recommendation will apply to causes of action which accrued before the legislation is passed, including actions pending at the time of enactment. The Commission, however, does not consider that its recommendations should apply retrospectively to actions in which judgment has been entered. The Commission is of the view that there would be very few cases in this category since most persons would have been deterred from bringing an action by legal advice that the action could be defeated by a defence of limitation. It also considers that any injustice which results in the few cases that may exist is outweighed in this instance by the strong public interest in preserving the finality of judgments entered. This recommendation is in accord with that of the Orr Committee in its interim report.<sup>98</sup> Finally, the Commission wishes to stress that its recommendations merely give a plaintiff an opportunity to present his case that the limitation period does not apply to his action. The court will make its determination upon consideration of all the circumstances of the case, including the relative hardships to the plaintiff and to the defendant. It should also be stressed that even if the court determines that the time limit does not apply, the plaintiff will only be able to recover damages if he can prove his injury or disease was attributable to acts or omissions of the defendant for which the defendant is liable.<sup>99</sup>

4.39 The Commission recognises, however, that its recommendation will expose a number of defendants or their insurers to a potential liability that did not previously exist. While this liability may not be sufficiently great in anyone case to cause hardship to the defendant or his insurer, the Commission appreciates that the cumulative effect of the retrospective application of its principal recommendations may do so. The Commission is unable to estimate the extent of this potential liability, either in respect of the number of plaintiffs or the amount of their claims. The Asbestos Diseases Society (WA) has stated that the potential number of claims

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<sup>95</sup> Alternatives to unqualified retrospectivity are discussed in paras 4.40 to 4.42 below.

<sup>96</sup> Para 2.11 above.

<sup>97</sup> For a recommendation to the same effect, see the Orr Committee interim report, para 146.

<sup>98</sup> Orr Committee interim report, paras 145 and 147.

<sup>99</sup> Para 1.13.

brought in respect of asbestos-related diseases is unknown but noted that an indication of the "minimum incidence" of the number of victims can be gained from epidemiological research by the University of Western Australia which has found that among male employees of Australian Blue Asbestos Pty Ltd at Wittenoom, there have been 220 cases of pneumoconiosis, 25 cases of mesothelioma and 22 deaths from lung cancer that can be attributed to asbestos exposure.<sup>100</sup> The Commission is also aware that the volume of asbestos-related claims in the United States has given rise to difficulties.<sup>101</sup> Therefore, in case it is considered that in the circumstances the principal recommendations proposed by the Commission should not be made retrospective in an unqualified form, the Commission outlines below two alternative ways in which the impact on defendants caused by retrospective application of the Commission's recommendations might be lessened.

4.40 One alternative is to limit the damages which may be awarded in retrospective cases.<sup>102</sup> For example, it could be provided that where the court determines that the limitation period does not apply to actions which would otherwise have been statute barred at the time the legislation is passed, the court only be able to award damages for pecuniary loss which has been incurred. This would enable a plaintiff to recover for loss of earning capacity,<sup>103</sup> medical, hospital and nursing expenses, and other related pecuniary loss<sup>104</sup> but not for non-pecuniary damage such as pain and suffering, loss of amenities or loss of expectation of life.

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<sup>100</sup> See Hobbs M S T, Woodward, Murphy B, Musk A W, and Elder J E, "The Incidence of Pneumoconiosis, Mesothelioma and other Respiratory Cancer in Men Engaged in Mining and Milling Crocidolite in Western Australia", February 1980, University of Western Australia. Another useful source of information is the voluntary asbestosis, mesothelioma and silicosis registers maintained by the Public Health Department. In 1981, there were 122 registered cases of asbestosis, 92 registered cases of mesothelioma and 86 registered cases of silicosis, of which 97 cases of asbestosis and 58 cases of mesothelioma are known to have been associated with crocidolite at Wittenoom: 1981 Report of the Commissioner of Public Health, Occupational Health Section.

<sup>101</sup> See, for example, "Asbestos Legal 'Tidal Wave' is Closing in", (April 1982) 68 *ABA Journal* 397; "Manville's Bold Maneuver" *Time Magazine* (6 September 1982), p 27 which describes steps taken by Manville Corporation to file for reorganisation under Chapter 11 of the US *Bankruptcy Act* in order to limit its liability in asbestos-related lawsuits.

<sup>102</sup> The Orr Committee in its interim report considered the desirability of empowering the court to limit damages as a condition of the exercise of its discretion to extend the limitation period. The Committee rejected this approach because the decision would be made on a case by case basis and it did not appear practicable to formulate principles on which the discretion could be exercised so as to ensure a measure of uniformity of practice which would do justice to the parties: Orr Committee interim report, para 58.

<sup>103</sup> Damages for loss of earning capacity include loss of future wages in the 'lost years' where a plaintiff's life expectancy has been curtailed. See *Fitch v Hyde-Cates* (1982) 39 ALR 581. These damages are also recoverable under the *Law Reform (Miscellaneous Provisions) Act*.

<sup>104</sup> Other pecuniary loss might include the costs of a full-time personal attendant or home help or travelling and accommodation expenses incurred in order to obtain medical treatment. See, for example, *Griffiths v Kerkemeyer* (1977) 15 ALR 387.

4.41 If this alternative were to be adopted, the Commission suggests that, as far as pecuniary loss already suffered is concerned, the court should be empowered to award a lump sum representing the total loss up to the time of judgment. However, as far as loss suffered thereafter is concerned, the Commission suggests that unless there are compelling reasons to the contrary in an individual case, the courts should be empowered only to order<sup>105</sup> that future expenses and lost income be compensated for as they are suffered.<sup>106</sup> This would enable a defendant, rather than having to find an additional lump sum after judgment in respect of these losses, to meet them as they arise, making appropriate adjustments to his private or business affairs.

4.42 The other alternative would be to allow damages to be calculated in the normal way for both pecuniary and non-pecuniary loss but to require the court to structure its award so that -

- \* the award made in respect of pecuniary loss already incurred is made payable in a lump sum upon judgment;
- \* the award made in respect of non-pecuniary loss and future pecuniary loss is made payable, not in a lump sum (unless the defendant so desires), but by instalments over a specified period.

The Commission notes that the power to make such an award is currently given to a court by section 16(4) of the *Motor Vehicle (Third Party Insurance) Act 1943-1981*. This alternative is more favourable to the plaintiff than the first alternative because he would get full compensation, albeit over a period of time. For this reason, it is preferred by the Commission. Nevertheless it has advantages for the defendant who is not required to pay a large lump sum at one time. Indeed, if the award is structured so that periodic payments are made by way of an annuity, there may be considerable savings to the defendant or his insurer.

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<sup>105</sup> For example, the order could be that accounts relating to medical and other expenses be directed to the defendant and that he pay the plaintiff lost wages on a fortnightly basis.

<sup>106</sup> Provision would need to be made for such an order to be varied where, for example, the plaintiff recovers from his injury or disease, the identity of a corporate defendant changes or the defendant becomes bankrupt or insolvent. The Commission envisages that the order would cease to operate upon the plaintiff's death.

**(b) Procedural matters**

4.43 There are a number of consequential procedural matters that would need to be dealt with if the Commission's principal recommendations are adopted. Some of these would require amendments to be made to the rules of the Supreme and Local Courts. These matters are discussed below.

(i) Procedure for dealing with a determination of the limitation issue

4.44 The Commission has considered whether or not a special procedure should be introduced for dealing with the determination of the issue whether or not the limitation period applies. The Commission has, however, concluded that the determination of this matter, should it arise, can be dealt with adequately within the existing court procedure. In the Supreme Court or the District Court, for example, a plaintiff should be able to commence proceedings in the normal manner with the issue of a writ.<sup>107</sup> When the defendant enters his pleadings he must plead specifically any relevant statute of limitation which he alleges makes any claim of the opposite party not maintainable.<sup>108</sup> If such a plea were entered the plaintiff could either leave the issue to be determined at the trial or take out a summons for directions.<sup>109</sup> On such a summons the court could order that the issue be tried separately from any other issue before, at or after the trial.<sup>110</sup>

4.45 If the defendant failed to plead any relevant statute of limitation when he entered his pleadings he could amend the pleadings once at any time before the pleadings are deemed to be closed to raise the issue.<sup>111</sup> The defendant may also amend his pleadings at any stage of the proceedings with the leave of the court on such terms as to costs or otherwise as may be just and in such manner as it may direct.<sup>112</sup>

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<sup>107</sup> Alternatively a plaintiff could make an application for a determination of the issue of whether or not the limitation period applies by means of an originating summons: RSC, O 58.

<sup>108</sup> RSC, O 20 r 9. These rules also apply to the District Court : *District Court of Western Australia Act 1969-1982*, s 87.

<sup>109</sup> Id, O 29 r 1.

<sup>110</sup> Id, O 32 r 4.

<sup>111</sup> Id, O 21 r 3.

<sup>112</sup> Id, O 21 r 5(1).

## (ii) Renewal of a writ

4.46 Under Order 7 of the *Rules of the Supreme Court 1971-1982* a writ of summons is valid for the purpose of service for twelve months beginning with the date of its issue. If the writ has not been served on the defendant within that period the court may extend the validity of the writ from time to time for such period, not exceeding twelve months at anyone time, as may be specified. It appears that the writ will not be renewed if the limitation period for the action has expired, unless there are exceptional circumstances.<sup>113</sup> There have, however, been cases in which renewal has been permitted notwithstanding the expiration of the limitation period. This approach rests on the premises that:<sup>114</sup>

"...once the writ is issued within the limitation period any defence based on the limitation statute has gone and that it is only service out of time under the rules of court that is in question. The real significance of the expiration of the limitation period lies in alerting the court that the case is likely to be one in which the delay occasioned by non-service may have resulted in prejudice to the defendant."

4.47 The Commission considers that the position should be clarified and in accordance with its principal recommendation in this report the Commission recommends that, in considering whether to renew a writ where the limitation period has expired, the court should have regard to the same factors which apply to the determination of whether or not the limitation period applies.<sup>115</sup>

## (iii) Joinder of a new party

4.48 Under Order 18 rule 6(1) of the *Rules of the Supreme Court 1971-1982* no action may be defeated by reason of the non-joinder of any party. At any stage of the proceedings the court may order that any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the action may be effectually determined be added as a party.<sup>116</sup> Where a person is to be added as a party that person does not become a party until the writ has been amended in relation to him and has

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<sup>113</sup> *Travis v Colonial Mutual Life Assurance Society Ltd* [1977] VR 249.

<sup>114</sup> NJ Williams, *Practice of the Supreme Court of Victoria* (2nd ed), 1127 para 8.1.5.

<sup>115</sup> Paras 4.25 to 4.32 above.

<sup>116</sup> RSC, O 18 r 6(2)(b).

been served on him.<sup>117</sup> It would appear that a person should not be joined after the expiry of the limitation period.<sup>118</sup>

4.49 Where it is desired to join a person as a defendant and the limitation period has expired, the Commission recommends that the court should only do so where it has determined that the limitation period does not apply in accordance with the principal recommendations in this report.<sup>119</sup>

(iv) Amendment of a writ or pleadings

4.50 The *Rules of the Supreme Court 1971-1982* permit a writ or the pleadings to be amended once at any time before the pleadings in the action are closed<sup>120</sup> or, with the leave of the court, at any stage of the proceedings.<sup>121</sup> Except in the circumstances referred to above,<sup>122</sup> a plaintiff will not be permitted to amend the writ or pleadings so as to introduce a new cause of action which has become statute barred since the writ was issued.<sup>123</sup>

4.51 A plaintiff who wishes to introduce a statute barred cause of action should be able to institute an interlocutory determination that the limitation period not apply in accordance with the principal recommendations in this report. The writ or the pleadings could then be amended either with or without leave.

(c) Contribution between tortfeasors

4.52 Under section 7(1)(c) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947*, a defendant liable in respect of damages suffered by any person as the result of a tort may recover contributions from any other defendant "who is or would if sued have been liable in respect of the same damage whether as a joint tortfeasor or otherwise". In *George Wimpey and Co Ltd v British Overseas Airways Corporation*<sup>124</sup> the view was expressed that time limitations which would have been available to the defendant in an action of tort by the injured party in respect of his injuries may enure for the benefit of that

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<sup>117</sup> Id, O 18, r 8(4)(a).

<sup>118</sup> *Liff v Peasley* [1980] 1 All ER 623.

<sup>119</sup> Para 4.2 above.

<sup>120</sup> RSC, O 21 rr 1(1) and 3(1).

<sup>121</sup> Id, O 21 r 5(1).

<sup>122</sup> Para 2.9 above.

<sup>123</sup> N J Williams, *Practice of the Supreme Court of Victoria* (2nd ed), 1428, para 28.1.13.

<sup>124</sup> [1955] AC 169.

defendant when sued by another defendant for contribution. However, in *Brambles Constructions Pty Ltd v Helmers*<sup>125</sup> it was held that the New South Wales equivalent of the provision referred to above should be read as if the words "at any time" were present after the words "if sued". The result is that:<sup>126</sup>

"...a tort-feasor who has come under an enforceable obligation to pay money for the damage caused by his tortious act may successfully recover contribution from another tort-feasor who..., not having been sued by the injured party, had he been sued, would have been found to have caused or contributed to the same damage by a tortious act. "

4.53 Nevertheless, the Commission considers that the matters should be clarified by an amendment to the above Act. In keeping with its principal recommendations, the Commission suggests that the words quoted above be replaced with the following words:<sup>127</sup>

"...who is, or would, if sued by the person by whom the damage was suffered at the time when the cause of action arose, have been liable in respect of the same damage whether as a joint tortfeasor or otherwise."

## **6. ACTIONS AGAINST PUBLIC AND LOCAL GOVERNMENT AUTHORITIES AND THE CROWN**

4.54 The Commission recommends that, at this stage,<sup>128</sup> the notice requirements and the limitation periods prescribed by the existing notice and limitation of action provisions applicable to public and local government authorities, and the Crown, be retained.<sup>129</sup> However, because these provisions are capable of operating unfairly in cases of latent disease and injury for the reasons discussed in paragraph 2.11 above, the Commission recommends that they be amended, in accordance with the recommendations made in paragraphs 4.22 to 4.32 above, so as to incorporate a provision that would extend the limitation period, or dispense with the notice requirement, where it is just that it not apply.

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<sup>125</sup> (1966) 114 CLR 213.

<sup>126</sup> Id, 219.

<sup>127</sup> See *Tortfeasors and Contributory Negligence Act 1954* (Tas), s 3(1)(c).

<sup>128</sup> This matter will be reconsidered in a later part of the Commission's general reference on the limitation and notice of actions. See generally, para 1.1 above.

<sup>129</sup> These are summarised in paras 2.15 to 2.19 above.

## 7. SURVIVAL ACTIONS

### (a) Actions brought by a deceased person's estate

4.55 As actions brought **by** deceased persons' estates are governed by the general provisions of the *Limitation Act*, implementation of the reforms recommended above will, unless a provision is made to the contrary, reform this area of law as well.<sup>130</sup> Thus, for example, in a case where the deceased died of a latent disease after the expiration of the limitation period applicable to a cause of action he had arising out of that disease, in a survival action brought by the deceased's estate based on that cause of action, the court would be able to determine that the limitation period not apply.

4.56 The Commission is of the view that the reforms it has recommended in respect of the *Limitation Act* should apply to survival actions brought by a deceased person's estate. As this will automatically happen if no provision to the contrary is made, the Commission recommends that no such provision be made.

### (b) Actions brought against a deceased person's estate

4.57 Actions brought **against** the estate of a deceased defendant are governed by the special rules contained in section 4(3) of the *Law Reform (Miscellaneous Provisions) Act*. Although the judicial discretion to extend the limitation period contained in section 4(3)(b) mitigates the injustice that these rules can cause, nevertheless the Commission believes that it would be desirable, in the interests of simplicity and consistency, for section 4(3) to be replaced by a provision which would enable actions to be brought, or continued, against the estate of a deceased defendant in accordance with the rules that will be applicable to cases of personal injury or disease generally once the Commission's other recommendations are implemented .

4.58 This recommendation is in accordance with the recommendations made on the same subject in the United Kingdom by the Law Commission and with the approach adopted in the *Limitation Act 1980*.<sup>131</sup> The effect of implementing it would be as follows -

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<sup>130</sup> The need for reform is discussed in para 2.22 above.

<sup>131</sup> Law Commission Report No 19, *Proceedings Against Estates* (1969) Cmnd 4010, para 16.

- (i) Proceedings pending against the defendant at the time of his death would remain subject to the limitation period applicable at the time of his death and which would have applied had he not died. Thus, for example, the defendant's estate would be able to rely on any defence of limitation that would have been open to the deceased in his lifetime. However, the limitation period would not apply where a court determines that, in all the circumstances, it is just that it not do so.<sup>132</sup>
- (ii) It would be possible to maintain proceedings against the estate of a deceased person in respect of a cause of action relating to personal injury or disease even though that cause of action arose more than twelve months before the death of the deceased. It would also be possible to maintain such proceedings more than six months after the deceased's personal representative took out his representation or twelve months after the deceased's death, whichever is the later. However, any action commenced against the estate of a deceased person in respect of a tort he had committed, would be governed by the normal six year limitation period and would become statute barred at the expiration thereof. However, the limitation period would not apply where a court determines that, in all the circumstances, it is just that it not do so.
- (iii) The commencement of the running of the limitation period would not in any case be dependent upon a grant of probate or letters of administration first being made in respect of the defendant's estate. Thus it would not be possible for the situation that arose in *Airey v Airey*<sup>133</sup> to occur in Western Australia.
- (iv) It would be necessary to enact provisions enabling a plaintiff to commence proceedings before a grant of probate or letters of administration has been made.<sup>134</sup> If no such provision were made a plaintiff could be prejudiced by the

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<sup>132</sup> Following the implementation of the recommendations made in paras 4.22 to 4.32 above.

<sup>133</sup> This case is discussed in para 2.26 above.

<sup>134</sup> A summary of this problem as it now exists in Western Australia and note describing how a similar problem in the United Kingdom was solved is contained in Appendix XIII.

defendant's representatives not obtaining, or being dilatory in obtaining, such a grant.<sup>135</sup>

4.59 It may be argued against this recommendation that hardship could be caused to the personal representatives or beneficiaries of the deceased's estate as a result of a successful claim being made long after the deceased's death and the distribution of his estate. Whilst it is correct to say that implementation of the Commission's recommendation will, in theory at least, reduce the protection available to personal representatives, the Commission does not regard this as a persuasive argument against its recommendation because -

- \* Late claims are possible even now through the operation of the judicial discretion contained in section 4(3)(b).
- \* In many cases, in practice, the deceased will have been insured in respect of the event which gives rise to the plaintiff's action so that no financial hardship will befall the deceased's personal representatives or the beneficiaries should the action succeed.
- \* It is possible for the personal representatives to gain protection against late claims by advertising for claims against the estate in the manner provided in section 63 of the *Trustees Act 1962-1978*.
- \* The personal representatives can ensure that claims of which they are aware are brought and prosecuted diligently by invoking the procedures created for this purpose by section 64 of the *Trustees Act 1962-1978*.

4.60 In keeping with its attitude to its principal recommendations the Commission is of the view that the recommendation in paragraphs 4.22 to 4.32 should be made retrospective. In this connection the Commission notes that, in contrast to the position of plaintiffs bringing ordinary actions in respect of personal injury or disease, adoption of the first alternative to unqualified retrospectivity would not operate to disadvantage the estate of a deceased person bringing a survival action. This is because it is already the position that the damages in such

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<sup>135</sup> For example, the limitation period could expire before a grant was obtained. However, in such a case, especially where the plaintiff was not at fault, it is likely that the limitation period would be held not to apply under the Commission's principal recommendations.

an action cannot include an amount for the deceased's pain or suffering or mental or bodily harm or for the curtailment of his expectation of life.<sup>136</sup> However, adoption of this alternative would be disadvantageous to plaintiffs who successfully take proceedings against the estate of a deceased person.

## 8. FATAL ACCIDENT CLAIMS

4.61 As the decision in *Lucy v WT Henleys Telegraph Works Co Ltd*<sup>137</sup> shows, the special limitation periods in the *Fatal Accidents Act* can produce an unfair result where facts relevant to the deceased's death are unknown to his personal representatives or dependants until after those periods have expired. Although, as explained above,<sup>138</sup> the potential these provisions have for causing injustice is less than is the case with the limitation provisions in the other Acts considered in this report, nevertheless the Commission is of the opinion that it is sufficient to warrant reform. In addition, the Commission considers that there is merit in the limitation provisions relating to claims arising out of personal injury, disease and death being the same wherever possible. Therefore, as there appear to the Commission to be no reasons why they should be different, the Commission recommends that the limitation provisions in the *Fatal Accidents Act* be repealed and replaced by provisions which -

- \* create a basic limitation period of six years from the date of death of the person in respect of whose death the cause of action arose;
- \* provide that the basic limitation period not apply where a court determines that, in all the circumstances, it is just that it not do so.

Implementing this recommendation would give potential plaintiffs an unqualified right to commence proceedings at any time within six years of the deceased's date of death and the appropriate court the power to determine that this period not apply where it is just that it not do so.

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<sup>136</sup> *Law Reform (Miscellaneous Provisions) Act*, s 4(2)(d).

<sup>137</sup> Para 2.34 above.

<sup>138</sup> Para 2.35 above.

(Signed) C W Ogilvie  
Chairman

H H Jackson  
Member

L L Proksch  
Member

J A Thomson  
Member

Daryl R Williams  
Member

8 October 1982

# **APPENDIX I**

## **PRELIMINARY SUBMISSIONS AND COMMENTATORS**

### **Preliminary submissions**

1. Asbestos Disease Society (WA)
2. M Baltoli, E D'Ascanio, A Discristofaro and O Pennetta
3. R Davies
4. Ex-Wittenoom Residents Association
5. C H Grocott
6. W D & H M Haeney and others
7. F Lutero
8. G Taylor
9. Trades and Labor Council of WA
10. Trades and Labor Council of WA (Compensation Department)

### **Comments on draft report**

1. Asbestos Disease Society (WA)
2. The Hon Sir Francis Burt, Chief Justice of Western Australia
3. C S R Limited
4. His Honour Judge D C Heenan, Chairman of Judges, District Court, and His Honour Judge G T Sadleir, District Court.
5. Motor Vehicle Insurance Trust (oral submission)
6. State Government Insurance Office
7. Trades and Labor Council of WA and the Federated Miscellaneous Workers' Union of Western Australia

**APPENDIX II**  
**LIMITATION ACT 1935-1978**

Section 38 (1) Subject to the preceding sections of this Act and as hereinafter provided, actions, suits, or other proceedings as herein set out shall and may be commenced within the time herein expressed after the cause of such actions, suits or other proceedings respectively:-

.....

(c) ( vi) All other actions founded on tort;

.....

Six years.

Section 40 If any person entitled to any such action as is referred to in subsection (1) of section thirty-eight was at the time of the cause of action accrued within the age of twenty-one years or insane, then such person may commence the same within such time as is before limited after being of full age or sane as if that was the time at which the cause of action accrued.

Section 41 If any person against whom there is any such cause of action as is referred to in subsection (1) of section thirty-eight was at the time the cause of action accrued beyond the seas, the party entitled to such action may commence the same within such time as is before limited after the return of such person from beyond the seas as if that was the time at which the cause of action accrued.

Section 42 No part of the Commonwealth of Australia, or of any Territory of the Commonwealth, or Territory governed by the Commonwealth under a mandate, shall be deemed to be beyond the seas within the meaning of that expression in this Act.

Section 47A (1) Notwithstanding the foregoing provisions of this Act but subject to the provisions of subsections (2) and (3) of this section, no action shall be brought against any person (excluding the Crown) for any act done in pursuance or execution or intended execution of any Act, or of any public duty or authority, or in respect of any neglect or default in the execution of the Act, duty or authority, unless -

(a) the prospective plaintiff gives to the prospective defendant, as soon as practicable after the cause of action accrues, notice in writing giving reasonable information of the circumstances upon which the proposed action will be based and his name and address and that of his solicitor or agent, if any; and

(b) the action is commenced before the expiration of one year from the date on which the cause of action accrued,

and for the purposes of this section, where the act, neglect, or default is a continuing one, no cause of action in respect of the act, neglect, or default accrues until the act, neglect or default ceases but the notice required by paragraph (a) of this subsection may be given and an action may thereafter be brought while the act, neglect or default continues.

(2) A person may consent in writing to the bringing of an action against him at any time before the expiration of six years from the date on which the cause of action accrued whether or not the notice as required by subsection (1) of this section has been given.

(3) (a) Notwithstanding the foregoing provisions of this section application may be made to the Court which would but for the provisions of this section have jurisdiction to hear the action, for leave to bring an action at any time before the expiration of six years from the date on which the cause of action accrued, whether or not notice as required by subsection (1) of this section has been given to the prospective defendant.

(b) Where the Court considers that the failure to give the required notice or the delay in bringing the action as the case may be, was occasioned by mistake or by any other reasonable cause or that the prospective defendant is not materially prejudiced in his defence or otherwise by the failure or delay, the Court may if it thinks it is just to do so, grant leave to bring the action, subject to such conditions as it thinks it is just to impose.

(c) Before an application is made under the provisions of paragraph (a) of this subsection, the party intending to make the application shall give notice in writing of the proposed application and the grounds on which it is to be made to the prospective defendant, at least fourteen days before the application is made.

(4) (a) In this section "person" includes a body corporate, Crown agency or instrumentality of the Crown created by an Act or an official or person nominated under an Act as a defendant on behalf of the Crown.

(b) This section is to be construed so as not to affect the provisions of the *Crown Suits Act, 1947*.

Section 48

Except as therein expressly provided, the preceding provisions of this Act do not bind or affect the Crown.

**APPENDIX III**  
**FATAL ACCIDENTS ACT 1959-1973**

Section 4

Where the death of a person is caused by a wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued is liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under such circumstances as amount in law to a crime.

Section 7

(1) Not more than one action lies under this Act for and in respect of the same subject matter of complaint; and every action brought under this Act shall be commenced within twelve months after the death of the person in respect of whose death the cause of action arose.

(2) (a) This subsection applies to every action under this Act to which section six of the *Crown Suits Act, 1947*, section forty-seven A of the *Limitation Act, 1935*, or section ten of this Act, does not apply.

(b) A person may consent in writing to the bringing of an action against him at any time before the expiration of six years from the date of the death of the person in respect of whose death the cause of action arose.

(c) Notwithstanding the foregoing provisions of this section, application may be made to the Court for leave to bring an action at any time before the expiration of six years from the date of the death of the person in respect of whose death the cause of action arose.

(d) When the Court considers that the delay in bringing the action was occasioned by mistake or by any other reasonable cause or that the prospective defendant is not materially prejudiced in his defence or otherwise by the delay, the Court may, if it thinks it is just to do so, grant leave to bring the action subject to such conditions as it thinks it is just to impose.

(e) Before an application is made under the provisions of paragraph (c) of this subsection, the party intending to make the application shall give notice in writing of the proposed application and the grounds on which it is to be made to the prospective defendant, at least fourteen days before the application is made.

Section 9

(1) Where there is no executor or administrator of the deceased person, or where his executor or administrator does not bring an action under this Act within six months after the death of the deceased person, anyone or more of the persons for whose benefit the action might be brought by the executor or administrator may bring the action.

(2) Any action so brought shall be for the benefit of that or those persons and is subject to the same provisions and procedure, as nearly as may be, as if it were brought by an executor or administrator.

Section 10

(1) Every action and cause of action under this Act survives notwithstanding the death of the wrongdoer.

(2) Where the wrongdoer dies before an action under this Act is commenced and within twelve months after the death of the deceased person, an action may be brought under this Act against the executor or administrator of the wrongdoer, if the action is brought within six months after the grant of probate or administration is made, notwithstanding the expiry of the period of twelve months.

(3) Any damages recovered against the executor or administrator are payable in like order of administration as the debts of the wrongdoer and shall be paid accordingly.

## APPENDIX IV

### LAW REFORM (MISCELLANEOUS PROVISIONS) ACT 1941

#### Section 4

(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate. Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims under section ninety-four of the *Supreme Court Act, 1935*, for damages on the ground of adultery.

...

(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless either -

- (a) proceedings against him in respect of that cause of action were pending at the date of his death ; or
- (b) the cause of action arose not earlier than twelve months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation, or twelve months after his death, whichever is the later. Provided, however, that a judge of the Supreme Court may extend the time for instituting proceedings as the justice of the case may require although the application for extension be not made until after the expiration of the aforementioned times.

**APPENDIX V**  
**CROWN SUITS ACT 1947-1954**

Section 6

(1) Subject to the provisions of subsections (2) and (3) of this section, no right of action lies against the Crown unless -

- (a) the party proposing to take action gives to the Crown Solicitor, as soon as practicable or within three months (whichever of such periods is the longer), after the cause of action accrues, notice in writing giving reasonable information of the circumstances upon which the proposed action will be based and the name and address of the party and his solicitor or agent; and
- (b) the action is commenced before the expiration of one year from the date on which the cause of action accrued,

and for the purposes of this section where the act, neglect, or default on which the proposed action is based is a continuing one, no cause of action in respect of the act, neglect or default accrues until the act, neglect or default has ceased but the notice required by paragraph (a) of this subsection may be given and an action may thereafter be brought while the act, neglect or default continues.

(2) The Attorney General may on behalf of the Crown consent in writing to the bringing of an action against the Crown at any time before the expiration of six years from the date on which the cause of action accrued whether or not the notice as required by subsection (1) of this section has been given.

(3) (a) Notwithstanding the foregoing provisions of this section application may be made to the Court having jurisdiction to hear the action when the application is granted for leave to bring an action at any time before the expiration of six years from the date on which the cause of action accrued, whether or not notice as required by subsection (1) of this section has been given to the Crown.

(b) Where the Court considers that the failure to give the notice or the delay in bringing the action as the case may be, was occasioned by mistake or by any other reasonable cause or that the Crown is not materially prejudiced in its defence or otherwise by the failure or delay, it may if it is just to do so, grant leave accordingly subject to such conditions as it thinks it is just to impose.

(c) Before an application is made under the provisions of paragraph (a) of this subsection the party intending to make the application shall give notice in writing of the proposed application and the ground on which it is to be made to the Crown Solicitor, at least fourteen days before the application is made.

## APPENDIX VI

### LOCAL GOVERNMENT ACT 1960-1982

Section 660

(1) Subject to subsection (2) of this section, no action is maintainable against –

a municipality; or

a member, officer, or servant, of a council of a municipality in his capacity as member, officer, or servant, of the council,

in respect of a tort, the provisions of section forty-seven A of the *Limitation Act, 1935* notwithstanding ,

- (a) unless the action is commenced within twelve months after the cause of action arose;
- (b) unless at least thirty-five days before the action is commenced a notice in writing stating,
  - (i) particulars of the cause of action;
  - (ii) the claim; and
  - (iii) the name and address of the party about to sue;

is served on the council by delivering to the clerk in person or by posting it addressed to the clerk by prepaid registered letter post; nor

- (c) unless as soon as practicable after the cause of action arose a notice in writing setting forth so far as the particulars can then be reasonably supplied,
  - (i) particulars of the cause of action;
  - (ii) where personal injury is claimed to have been sustained, particulars of the injury and the name and address of the person injured;
  - (iii) where damage to property is claimed to have been sustained, particulars of the property and the damage;
  - (iv) particulars of the claim being made or about to be made; and
  - (v) an intimation, if such is the case, that action is about to be commenced against the municipality, member, officer or servant;

is so served;

- (d) where personal injury is claimed to have been sustained, unless the person claiming to have been injured submits himself when required by the council at reasonable times to medical examination by a medical practitioner or medical practitioners nominated by the council;

- (e) where damage to property is claimed to have been sustained, unless the owner or person having control of the property permits the property to be examined when required by the council at reasonable times by a person or persons nominated by the council; and
  - (f) unless the person claiming or about to claim against the municipality, member, officer, or servant, when required by the council at reasonable times answers in writing such reasonable inquiries relating to the cause of the action and the claim as are addressed to him by or on behalf of the council, member, officer or servant.
- (2) Notwithstanding -
- (a) that an action has not been commenced within the period prescribed in paragraph (a) of subsection (1) of this section;
- or
- (b) the failure to serve any notice as required to be served by subsection (1) of this section, within the period prescribed by this section for its service,

application may be made at any time before the expiration of six years from the date on which the cause of action arose to a judge for leave to commence the action and if the judge considers that the failure -

- (c) to commence the action within the prescribed period; or
- (d) the failure to give the notice within the prescribed period ,

was occasioned by mistake or by other reasonable cause or that the prospective defendant is not materially prejudiced in his defence or otherwise, by the failure, the judge may if he thinks it just to do so, grant leave to bring the action, subject to such conditions as the judge thinks it is just to impose .

## APPENDIX VII

### NEW SOUTH WALES LIMITATION ACT 1969-1979

Section 57

- (1) For the purposes of this Division -
- (a) "personal injury" includes any disease and any impairment of the physical or mental condition of a person;
  - (b) the material facts relating to a cause of action include the following-
    - (i) the fact of the occurrence of negligence nuisance or breach of duty on which the cause of action is founded;
    - (ii) the identity of the person against whom the cause of action lies;
    - (iii) the fact that the negligence nuisance or breach of duty causes personal injury;
    - (iv) the nature and extent of the personal injury so caused; and
    - (v) the extent to which the personal injury is caused by the negligence nuisance or breach of duty;
  - (c) material facts relating to a cause of action are of a decisive character if, but only if, a reasonable man, knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing -
    - (i) that an action on the cause of action would (apart from the effect of the expiration of a limitation period) have a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action on the cause of action; and
    - (ii) that the person whose means of knowledge is in question ought, in his own interests, and taking his circumstances into account, to bring an action on the cause of action;
  - (d) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields to advise on the medical legal and other aspects of the facts, as the case may require;
  - (e) a fact is not within the means of knowledge of a person at a particular time if , but only if -
    - (i) he does not, at that time, know the fact; and
    - (ii) in so far as the fact is capable of being ascertained by him, he has, before that time, taken all reasonable steps to ascertain the fact; and
  - (f) "limitation period" means a limitation period fixed by an enactment repealed or omitted by this Act or fixed by or under this Act.

(2) In this Division the expression "breach of duty" extends to the breach of any duty, whether arising by statute, contract or otherwise, and includes trespass to the person.

Section 58

(1) This section applies to a cause of action founded on negligence nuisance or breach of duty, for damages for personal injury, not being a cause of action which has survived on the death of a person for the benefit of his estate under section 2 of the *Law Reform (Miscellaneous Provisions) Act, 1944*, and not being a cause of action which arises under section 3 of the *Compensation to Relatives Act of 1897*.

(2) Where, on application to a court by a person claiming to have a cause of action to which this section applies, it appears to the court that -

- (a) any of the material facts of a decisive character relating to the cause of action was not within the means of knowledge of the applicant until a date after the commencement of the year preceding the expiration of the limitation period for the cause of action; and
- (b) there is evidence to establish the cause of action, apart from any defence founded on the expiration of a limitation period,

the court may order that the limitation period for the cause of action be extended so that it expires at the end of one year after that date and thereupon, for the purposes of an action on that cause of action brought by the applicant in that court, and for the purposes of paragraph (b) of subsection (1) of section 26, the limitation period is extended accordingly-

(3) This section applies to a cause of action whether or not a limitation period for the cause of action has expired -

- (a) before the commencement of this Act; or
- (b) before an application is made under this section in respect of the cause of action.

Section 59

(1) This section applies to a cause of action founded on negligence nuisance or breach of duty, for damages for personal injury, which has survived on the death of a person for the benefit of his estate under section 2 of the *Law Reform (Miscellaneous Provisions) Act, 1944*.

(2) Where, on application to a court by a person claiming to have a cause of action to which this section applies, it appears to the court that -

- (a) any of the material facts of a decisive character relating to the cause of action was not within the means of knowledge of either the deceased or the applicant until a date after the commencement of the year next preceding the expiration of the limitation period for the cause of action; and

- (b) there is evidence to establish the cause of action, apart from any defence founded on the expiration of a limitation period,

the court may order that the limitation period for the cause of action be extended so that it expires at the end of one year after that date and thereupon, for the purposes of an action on that cause of action brought by the applicant in that court, and for the purposes of paragraph (b) of subsection (1) of section 26, the limitation period is extended accordingly.

(3) For the purposes of this section, the material facts of a decisive character do not include facts relating only to -

- (a) damages not recoverable by the applicant; or
- (b) funeral expenses of the deceased.

(4) This section applies to a cause of action whether or not a limitation period for the cause of action has expired -

- (a) before the commencement of this Act; or
- (b) before an application is made under this section in respect of the cause of action.

#### Section 60

(1) This section applies to a cause of action for damages which arises (or which would arise, but for the expiration as against the deceased of a limitation period before or after the commencement of this Act) under section 3 of the *Compensation to Relatives Act* of 1897 by virtue of the death of a person caused by a wrongful act neglect or default.

(2) Where, on application to a court by a person claiming to have a cause of action to which this section applies, it appears to the court that -

- (a) any of the material facts of a decisive character relating to the cause of action of the deceased in respect of the wrongful act neglect or default was not within the means of knowledge of the deceased at any time before the year next preceding the death of the deceased; and
- (b) there is evidence to establish the cause of action which the applicant claims to have, apart from the expiration as against the deceased of a limitation period,

the court may order that the expiration as against the deceased of a limitation period for a cause of action by him in respect of the wrongful act neglect or default have no effect in relation to the cause of action which the applicant claims to have and thereupon, for the purposes of an action brought by the applicant in that court on the cause of action which he claims to have, that expiration has no effect.

(3) Where, by virtue of this section, the expiration as against the deceased of a limitation period for a cause of action by him in respect of a wrongful act neglect or default has no effect in relation to a cause of action to which this section applies, and the person against whom the last mentioned cause of action lies brings an action for contribution under subsection (1) of section 5 of the *Law Reform (Miscellaneous Provisions) Act, 1946*, the expiration as against the deceased of a limitation period for a cause of action by the deceased in respect of a wrongful act neglect or default has no effect in relation to the action for contribution.

Section 61                      Where, after the expiration of a limitation period to which this Division applies, the limitation period is extended by order under this Division, the prior expiration of the limitation period has no effect for the purposes of this Act.

Section 62                      Where, under this Division, a question arises as to the means of knowledge of a deceased person, the court may have regard to the conduct and statements, oral or in writing, of the deceased person.

## APPENDIX VIII

### QUEENSLAND LIMITATION OF ACTIONS ACT 1974-1978

Section 30

For the purposes of this section and sections 31, 32, 33 and 34 -

- (a) the material facts relating to a right of action include the following:-
  - (i) the fact of the occurrence of negligence, trespass, nuisance or breach of duty on which the right of action is founded;
  - (ii) the identity of the person against whom the right of action lies;
  - (iii) the fact that the negligence, trespass, nuisance or breach of duty causes personal injury;
  - (iv) the nature and extent of the personal injury so caused; and
  - (v) the extent to which the personal injury is caused by the negligence, trespass, nuisance or breach of duty;
- (b) material facts relating to a right of action are of a decisive character if but only if a reasonable man knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing -
  - (i) that an action on the right of action would (apart from the effect of the expiration of a period of limitation) have a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action on the right of action; and
  - (ii) that the person whose means of knowledge is in question ought in his own interests and taking his circumstances into account to bring an action on the right of action;
- (c) "appropriate advice", in relation to facts, means the advice of competent persons qualified in their respective fields to advise on the medical, legal and other aspects of the facts, as the case may require;
- (d) a fact is not within the means of knowledge of a person at a particular time if but only if: -
  - (i) he does not at that time know the fact; and
  - (ii) so far as the fact is capable of being ascertained by him, he has before that time taken all reasonable steps to ascertain the fact.

Section 31

(1) This section applies to actions for damages for negligence, trespass, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of a contract or such provision) where the damages claimed by the plaintiff for the negligence, trespass, nuisance or breach of duty consist of or include damages in respect of personal injury to any person.

(2) Where on application to a court by a person claiming to have a right of action to which this section applies, it appears to the court -

- (a) that a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation for the action; and
- (b) that there is evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation,

the court may order that the period of limitation for the action be extended so that it expires at the end of one year after that date and thereupon, for the purposes of the action brought by the applicant in that court, the period of limitation is extended accordingly.

(3) This section applies to an action whether or not the period of limitation for the action has expired -

- (a) before the commencement of this Act; or
- (b) before an application is made under this section in respect of the right of action.

## Section 32

(1) This section applies to actions founded on negligence, trespass, nuisance or breach of duty, for damages for personal injury that have survived on the death of a person for the benefit of his estate under section 15D of the *Common Law Practice Act 1867-1972*.

(2) Where on application to a court by a person claiming to have a right of action to an action to which this section applies, it appears to the court-

- (a) that a material fact of a decisive character relating to the right of action was not within the means of knowledge of the deceased person or the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation for the action; and
- (b) that there is evidence to establish the right of action, apart from a defence founded on the expiration of a period of limitation,

the court may order that the period of limitation for the action be extended so that it expires at the end of one year after that date and thereupon, for the purposes of the action brought by the deceased or the applicant in that court, the period of limitation is extended accordingly.

(3) For the purposes of this section, the material facts of a decisive character do not include facts relating only to -

- (a) damages not recoverable by the applicant;
- (b) funeral expenses of the deceased.

(4) This section applies to an action whether or not a period of limitation for the action has expired –

- (a) before the commencement of this Act; or
- (b) before an application is made under this section in respect of the right of action.

Section 33            Where after the expiration of a period of limitation to which this Part applies, the period of limitation is extended by order under this Part, the prior expiration of the period of limitation has no effect for the purposes of this Act.

Section 34            (1) An application under this Part may be made ex parte but the court or a judge may require that notice of the application be given to any person to whom it or he thinks it proper that notice should be given.

(2) Where under this Part a question arises as to the means of knowledge of a deceased person, the court may have regard to the conduct and statements oral or in writing of the deceased person.

## APPENDIX IX

### VICTORIAN LIMITATION OF ACTIONS ACT 1958-1980

Section 23A

(1) This section applies to a cause of action in respect of personal injuries whether or not the cause of action accrued or is claimed to have accrued before the commencement of the *Limitation of Actions (Personal Injuries) Act 1972*.

(2)

Where on an application to a court by or on behalf of a person (in this section called "the claimant") claiming to have a cause of action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision) the damages claimed by the claimant consist of or include damages in respect of personal injuries to any person and it appears to the court that -

(a) any of the material facts relating to the cause of action -

(i) was not known to the claimant; and

(ii) would not have been known to the claimant if he had taken all reasonable steps in the circumstances of the case to ascertain all the material facts -

until a date later than two years after the cause of action accrued or is claimed to have accrued or, if the claimant was under a disability when the cause of action accrued or is claimed to have accrued, two years after the claimant ceased to be under the disability, whichever last occurred; and

(b) there is evidence to establish the cause of action apart from any defence founded on the expiration of the period of three years after the cause of action accrued -

the court may in its discretion order that the period within which an action on the cause of action may be brought be extended so that it expires at the end of one year after the date referred to in paragraph (a) or, provided that application was made to a court before the expiration of one year after that date, on such later date, if any, as is specified in the order.

(3) For the purposes of sub-section (2) "material facts" in relation to a cause of action include -

(a) the fact of the occurrence of negligence, nuisance or breach of duty on which the cause of action is founded;

(b) the nature of the wrongful act, neglect or default that constituted the negligence, nuisance or breach of duty;

(c) the identity of the person whose wrongful act, neglect or default constituted the negligence nuisance or breach of duty;

- (d) the identity of the person against whom the cause of action lies ;
  - (e) the fact that the negligence, nuisance or breach of duty caused personal injury;
  - (f) the nature of the personal injury so caused ;
  - (g) the extent of the personal injury so caused; and
  - (h) the extent to which the personal injury was caused by the negligence, nuisance or breach of duty.
- (4) An application under this section to a court shall be made by summons and a copy of the summons shall be served on each person against whom the claimant claims to have the cause of action.

## APPENDIX X

### SOUTH AUSTRALIAN LIMITATION OF ACTIONS ACT 1936-1975

Section 48

(1) Subject to this section, where an Act, regulation, rule or by-law prescribes or limits the time for -

- (a) instituting an action;
- (b) doing any act, or taking any step in an action;

or

(c) doing any act or taking any step with a view to instituting an action.

a court may extend the time so prescribed or limited to such an extent, and upon such terms (if any) as the justice of the case may require.

(2) A court may exercise the powers conferred by this section in respect of any action that -

(a) the court has jurisdiction to entertain;

or

(b) the court would, if the action were not out of time, have jurisdiction to entertain .

(3) This section does not -

(a) apply to criminal proceedings;

or

(b) empower a court to extend a limitation of time prescribed by this Act unless it is satisfied -

(i) that facts material to the plaintiff's case were not ascertained by him until some point of time occurring within twelve months before the expiration of the period of limitation or occurring after the expiration of that period and that the action was instituted within twelve months after the ascertainment of those facts by the plaintiff;

or

(ii) that the plaintiff's failure to institute the action within the period of the limitation resulted from representations or conduct of the defendant, or a person whom the plaintiff reasonably believed to be acting on behalf of the defendant, and was reasonable in view of those representations or that conduct and any other relevant circumstances,

and that in all the circumstances of the case it is just to grant the extension of time.

(4) Where an extension of time is sought pursuant to this section in respect of the commencement of an action, the action may be instituted in the normal manner, but the process by which it is instituted must be endorsed with a statement to the effect that the plaintiff seeks an extension of time pursuant to this section.

(5) Proceedings under this section may be determined by the court at any time before or after the close of pleadings.

(6) This section does not derogate from any other provision under which a court may extend or abridge time prescribed or limited by an Act, regulation, rule or by-law.

## APPENDIX XI

### TASMANIAN LIMITATION ACT 1974-1978

#### Section 5

(1) An action for damages for negligence, nuisance, or breach of duty (whether that duty exists by virtue of a contract or a provision made by or under an enactment or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance, or breach of duty consist of, or include, damages in respect of personal injuries to any person shall not, subject to this section, be brought after the expiration of a period of 3 years from the date on which the cause of action accrued.

(2) An action for damages under the *Fatal Accidents Act 1934* in respect of the death of a person shall be deemed to be such an action as is referred to in subsection (1), the cause of which accrued on the death of that person.

(3) Notwithstanding anything in the foregoing provisions of this section, upon application being made by the person claiming the damages referred to therein a judge, after hearing such of the persons likely to be affected by that application as he may think fit, may, if he thinks that in all the circumstances of the case it is just and reasonable so to do, extend the period limited for the bringing of the action for such period as he thinks necessary, but so that the period within which the action may be brought does not exceed a period of 6 years from the date on which the cause of action accrued.

(4) The powers conferred on a judge by subsection (3) may be exercised notwithstanding that the period limited by subsection (1) for the bringing of the action may have expired.

(5) For the purposes of this section personal injuries include any disease and any impairment of a person's physical or mental condition.

## APPENDIX XII

### UNITED KINGDOM LIMITATION ACT 1980

#### Section 11

(1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provisions made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

(2) None of the time limits given in the preceding provisions of this Act shall apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below.

(4) Except where subsection (5) below applies, the period applicable is three years from -

- (a) the date on which the cause of action accrued; or
- (b) the date of knowledge (if later) of the person injured.

(5) If the person injured dies before the expiration of the period mentioned in subsection (4) above, the period applicable as respects the cause of action surviving for the benefit of his estate by virtue of section 1 of the *Law Reform (Miscellaneous Provisions) Act 1934* shall be three years from -

- (a) the date of death; or
- (b) the date of the personal representative's knowledge;

whichever is the later.

(6) For the purposes of this section "personal representative" includes any person who is or has been a personal representative of the deceased, including an executor who has not proved the will (whether or not he has renounced probate) but not anyone appointed only as a special personal representative in relation to settled land; and regard shall be had to any knowledge acquired by any such person while a personal representative or previously.

(7) If there is more than one personal representative, and their dates of knowledge are different, subsection (5)(b) above shall be read as referring to the earliest of those dates.

Section 12

(1) An action under the *Fatal Accidents Act 1976* shall not be brought if the death occurred when the person injured could no longer maintain an action and recover damages in respect of the injury ( whether because of a time limit in this Act or in any other Act, or for any other reason).

Where any such action by the injured person would have been barred by the time limit in section 11 of this Act, no account shall be taken of the possibility of that time limit being overridden under section 33 of this Act.

(2) None of the time limits given in the preceding provisions of this Act shall apply to an action under the *Fatal Accidents Act 1976*, but no such action shall be brought after the expiration of three years from -

- (a) the date of death; or
- (b) the date of knowledge of the person for whose benefit the action is brought;

whichever is the later.

(3) An action under the *Fatal Accidents Act 1976* shall be one to which sections 28, 33 and 35 of this Act apply, and the application to any such action of the time limit under subsection (2) above shall be subject to section 39; but otherwise Parts II and III of this Act shall not apply to any such action.

Section 13

(1) Where there is more than one person for whose benefit an action under *the Fatal Accidents Act 1976* is brought, section 12(2)(b) of this Act shall be applied separately to each of them.

(2) Subject to subsection (3) below, if by virtue of subsection (1) above the action would be outside the time limit given by section 12(2) as regards one or more, but not all, of the persons for whose benefit it is brought, the court shall direct that any person as regards whom the action would be outside that time limit shall be excluded from those for whom the action is brought.

(3) The court shall not give such a direction if it is shown that if the action were brought exclusively for the benefit of the person in question it would not be defeated by a defence of limitation (whether in consequence of section 28 of this Act or an agreement between the parties not to raise the defence, or otherwise).

Section 14

(1) In sections 11 and 12 of this Act references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts -

- (a) that the injury in question was significant; and

- (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and
- (c) the identity of the defendant; and
- (d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

(2) For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(3) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire -

- (a) from facts observable or ascertainable by him; or
- (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek;

but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

### Section 33

(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which -

- (a) the provisions of section 11 or 12 of this Act prejudice the plaintiff or any person whom he represents; and
- (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.

(2) The court shall not under this section disapply section 12(1) except where the reason why the person injured could no longer maintain an action was because of the time limit in section 11.

If, for example, the person injured could at his death no longer maintain an action under the *Fatal Accidents Act 1976* because of the time limit in

Article 29 in Schedule 1 to the *Carriage by Air Act 1961*, the court has no power to direct that section 12(1) shall not apply.

(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to -

- (a) the length of, and the reasons for, the delay on the part of the plaintiff;
- (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 or (as the case may be) by section 12;
- (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
- (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
- (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
- (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

(4) In a case where the person injured died when, because of section 11, he could no longer maintain an action and recover damages in respect of the injury, the court shall have regard in particular to the length of, and reasons for, the delay on the part of the deceased.

(5) In a case under subsection (4) above, or any other case where the time limit, or one of the time limits, depends on the date of knowledge of a person other than the plaintiff, subsection (3) above shall have effect with appropriate modifications, and shall have effect in particular as if references to the plaintiff included references to any person whose date of knowledge is or was relevant in determining a time limit.

(6) A direction by the court disapplying the provisions of section 12(1) shall operate to disapply the provisions to the same effect in section 1(1) of the *Fatal Accidents Act 1976*.

(7) In this section "the court" means the court in which the action has been brought.

(8) References in this section to section 11 include references to that section as extended by any of the preceding provisions of this Part of this Act or by any provision of Part III of this Act.

## **APPENDIX XIII**

### **ACTIONS AGAINST THE ESTATE OF A DECEASED PERSON**

#### **1. INTRODUCTION**

1. Under the *Law Reform (Miscellaneous Provisions) Act*, with certain exceptions, all causes of action subsisting against a deceased person survive against his estate and may be instituted against the personal representative of the estate.<sup>1</sup> However, proceedings cannot be instituted if there is no personal representative against whom a writ can be issued. This problem can arise where the executor named in the will has not begun to carry out his duties or where no letters of administration have been granted. It is not possible to commence an action against the Public Trustee in these circumstances because, although the real and personal estate of a deceased person vests in the Public Trustee upon the death of the person until probate or administration is granted in respect of the estate,<sup>2</sup> the Public Trustee cannot be treated as the personal representative of the estate of the deceased person for the purpose of instituting an action.<sup>3</sup> One consequence of this hiatus is that a limitation period may expire before a personal representative is appointed and before an action can be instituted.

#### **2. REFORM IN ENGLAND AND WALES**

2. This unsatisfactory situation also existed in England and Wales before 1970. The position in England and Wales was not as unsatisfactory as the present position in this State because an administrator could be appointed upon the application of an intending plaintiff.<sup>4</sup> However, the Law Commission criticised this procedure because it was cumbersome and inconvenient.<sup>5</sup>

3. The Law Commission recommended that the problem should be overcome by providing that, where there was no personal representative, the plaintiff should be able to issue a writ against "the personal representative of X deceased". The court would be given power, on the application of the plaintiff during the period in which the writ was effective for

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<sup>1</sup> Paras 2.14 to 2.21 above.

<sup>2</sup> *Public Trustee Act 1941-1982*, s 9.

<sup>3</sup> *Re Cameron; Cameron v Public Trustee* [1982] WAR 55.

<sup>4</sup> *Supreme Court of Judicature (Consolidation) Act 1925*, s 162(1)(b). See the case of *In the Estate of Simpson (Deceased)* [1936] P 40 in which the court appointed as administrator the nominee of an intending plaintiff who wished to sue upon a cause of action which survived the person's death but where the only person entitled to a grant of administration refused to act.

<sup>5</sup> Report No 19, *Proceedings Against Estates* (1969) Cmnd 4010, 8 para 14(g).

service, to substitute the names of the personal representatives to whom a grant was made or, in the absence of such a grant, the name of a representative defendant.<sup>6</sup> This recommendation was implemented by the *Proceedings Against Estates Act 1970* and the *Rules of the Supreme Court 1965-1980*, Order 15 rule 6A.

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<sup>6</sup> Id, 16 para 24(d).