NSW Law Reform Commission

REPORT 50 (1986) - COMMUNITY LAW REFORM PROGRAM: NINTH REPORT - LIMITATION OF ACTIONS FOR PERSONAL INJURY CLAIMS

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New South Wales Law Reform Commission
To the Honourable T W Sheahan BA, LLB, MP,

Attorney General for New South Wales

COMMUNITY LAW REFORM PROGRAM: LIMITATION OF ACTIONS FOR PERSONAL INJURY CLAIMS

Dear Mr Attorney General

We make this Report under the reference from the late Honourable D P Landa, LLB, MP, Attorney General dated 5 March 1984.

Mr Keith Mason QC

(Chairman)

Ms Helen Gamble

(Commissioner)

Professor Colin Phegan

(Commissioner)

Mr H D Sperling QC

(Commissioner)

October 1986

The Secretary of the Commission is Mr John McMillan and its offices are at 16th Level, Goodsell Building, 8-12 Chifley Square, Sydney, NSW (telephone (02) 238-7213)).

Terms of Reference

On 5 March 1984, the then Attorney General of New South Wales, the late Honourable D P Landa, LLB MP made the following reference to the Commission:

> To inquire and report on the following matters:
>
> > Whether section 60 of the Limitation Act 1969 should be amended to allow the Supreme Court to grant extensions of time to sue in respect of death claims on the same terms as that currently existing for other personal injury claims.
> >
> > Whether the Limitation Act 1969 should be reconsidered generally insofar as it applies to personal injury claims, to ascertain the need for an additional general discretion under this legislation broad enough to allow courts to prevent a particular injustice which might arise in the application of specific clauses.
> >
> > Any incidental matter.

Participants

For the purpose of the reference a Division was created by the Chairman, in accordance with sl2A of the Law Reform Commission Act 1967. The Division when first constituted on 18 October 1984 comprised the following members of the Commission:

Professor Ronald Sackville (Chairman)

Miss Deirdre O'Connor

Professor Colin Phegan

The Division was reconstituted on 21 March 1985 to comprise:

Mr Keith Mason QC

Miss Deirdre O'Connor*

Professor Colin Phegan*

Mr H D Sperling QC joined the Division in July 1985.

The Division was reconstituted on 7 May 1986 to comprise:

Mr Keith Mason QC

Professor Colin Phegan

Mr H D Sperling QC

Ms Helen Gamble*

[Each person had primary responsibility for the conduct of the reference at a different stage: Miss O'Connor 5 March 1984-21 March 1985, Professor Phegan 21 March 1985-1 April 1986: Ms Gamble 1 April 1986 to its conclusion.]

Research and other assistance:

Ms Shelagh Coleman

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REPORT 50 (1986) - COMMUNITY LAW REFORM PROGRAM: NINTH REPORT - LIMITATION OF ACTIONS FOR PERSONAL INJURY CLAIMS

Summary of Recommendations

Retention of Limitation Period

1. There should be a fixed limitation period running from the date of accrual of the cause of action. (6.1)

2. This is to operate in conjunction with a general discretion to extend. (6.1)

Length of Limitation Period

3. The primary limitation period in cases of personal injury should be three years from the date of accrual of the cause of action. (6.11; Draft Bill Cl 18A(2))

Extension Provisions

Discovery Rule Extension Rejected

4. The discretionary provision for extension of the limitation period under the -discovery rule, as it operates under the Limitation Act 1969, should be abandoned. The discovery rule, which operates in England and Victoria to allow a plaintiff to commence an action as of right on satisfaction of the statutory criteria, should not be adopted. (6.23)

Discretionary Extension Proposed

5. A general discretion to extend the limitation period should be introduced. (6.24; Draft Bill Cl 57(2))

6. In exercising the discretion the court should have regard to all the circumstances of the case including, without derogating from the general discretion, the following considerations:

(a) length of and reasons for the delay;

(b) prejudice to the defendant from the delay;

(c) prejudice to the trial of the matter caused by the delay;

(d) any increase in costs caused by the delay;

(e) the time when the plaintiff became aware of the injury,

(f) the time when the plaintiff became aware of the connection between the injury and the defendant's act or omission;

(g) the time when the plaintiff became aware of the possibility of a cause of action;

(h) conduct of the defendant following discovery of the cause of action;

(i) steps taken by the plaintiff to obtain expert advice and the nature of the advice-,

(j) extent of the plaintiff's injury or loss. (6.30; Draft Bill Cl 59(l))

7. The plaintiff should bear the burden of proof to show that justice and equity require that the limitation period be extended. (6.31)

Compensation to Relatives Actions

8. Actions available under the Compensation to Relatives Act 1897 should be integrated into the limitations system proposed. (6.32)

9. The three year primary limitation period should apply to compensation to relatives actions. The three years would run from the date of death. (6.33; Draft Bill Cl 19)

10. Application for exercise of the discretion to extend should be available in respect of the statutory barring of both

the deceased's cause of action; and

the applicant's cause of action arising after the death. (6.33, 6.34; Draft Bill Cl 58(l)):

11. The statuatory guidelines for exercise of the discretion to extend should be:

(a) length of and reasons for any delays caused by the deceased, the applicant or both of them;

(b) prejudice to the defendant from the delay;

(c) prejudice to the trial of the matter caused by the delay;

(d) any increase in costs caused by the delay;

(e) the time when the applicant became aware of the injury;

(f) the time when the applicant became aware of the connection between the injury and the defendant's act or omission;

(g) the time when the applicant became aware of the possibility of a cause of action;

(h) conduct of the defendant following discovery of the cause of action;

(i) steps taken by the applicant to obtain expert advice and the nature of the advice,

(j) extent of the applicant's injury or loss.

In assessing the responsibility of the deceased for any delay in bringing proceedings the court should have regard to all the circumstances of the case including such of the matters raised in the guidelines as are applicable to the deceased's conduct. (6.35; Draft Bill Cl 58(3))

Ultimate Bar

12. No ultimate bar should apply in personal injury actions. (6.44; Draft Bill Cl 51)

Retrospectivity

13. The general discretion to extend the limitation period should be available to all plaintiffs, regardless of when their cause of action accrued, and regardless of whether it has been barred by the amending legislation. (7.11; Draft Bill Sch 5 Cl 5)

14. The ultimate thirty year bar should be removed in respect of all causes of action, whether accruing before or after the commencement of the amending legislation. (7.11; Draft Bill Sch 5, Cl 4)

15. The reduction of the primary limitation period, from six years to three, should apply only to causes of action arising on or after the commencement of the amending legislation. (7.11; Draft Bill Sch 5, Cls 2 and 3)

16. Where the court would otherwise be disposed to extend the limitation period to enable a plaintiff to commence proceedings it should have the power to set aside:

(a) a judgment except where the judgment was pursuant to a verdict in favour of the defendant on the merits of the plaintiff's claim;

(b) an agreement to compromise a cause of action and any judgment entered pursuant to such an agreement

whether or not the judgment or agreement occurred before the amending legislation. (7.14; Draft Bill Sch 5, Cl 5)

17. Where compensation has already been paid in respect of the injury, the court should have power to take that into account, by making a deduction from the award proposed. Such a deduction should not include payments made under the Social Security Act 1947 (Cth) or Workers' Compensation legislation. (7.13, 7.17)

1. Community Law Reform Program and This Reference

I. INTRODUCTION

A. Background to this Reference

1.1 This is the ninth report in the Community Law Reform Program. The Program was established by the then Attorney General, the Hon F J Walker, QC, MP, by letter dated 24 May 1982 addressed to the Chairman of the Commission. The letter contained the following statement:

> This letter may therefore be taken as an authority to the Commission in its discretion to give preliminary consideration to proposals for law reform made to it by members of the legal profession and the community at large. The purpose of preliminary consideration will be to bring to my attention matters that warrant my making a reference to the Commission under s.10 of the Law Reform Commission Act, 1967.

The background and progress of the Community Law Reform Program are described in greater detail in the Commission's Annual Reports since 1982.

1.2 The Commission was alerted to an injustice arising from the operation of the Limitation Act 1969 by the judgment in *Bergfels v Port Stephen Shire Council*[1] *(Bergfels)* in November 1983. Master Allen of the Supreme Court of New South Wales (as he then was) there called for the reform of the Limitation Act 1969 to remedy the particular hardship caused in that case. The Master further suggested that a general amendment of the Act was perhaps more appropriated.[2]

1.3 The plaintiff in that case, Mrs Bergfels, sought to commence proceedings under the Compensation to Relatives Act 1897 claiming damages for the death of her husband in 1966. The Limitation Act 1969 requires that such actions be brought within six years of the date of death.[3] Ordinary actions claiming damages for personal injuries are also governed by a six year limitation period, as indeed are actions founded on tort or contract generally.[4]

1.4 The Limitation Act 1969 makes provision for the extension of these primary limitation periods in certain defined circumstances. Master Allen reluctantly held that the benefit of those provisions did not extend to persons claiming under the Compensation to Relatives Act 1897. Such actions must always be brought within six years of the date of death.

1.5 This interpretation meant that Mrs Bergfels was unable to commence her proposed negligence action against Port Stephens Shire Council. This was despite the fact that Mrs Bergfels could not reasonably have been expected to commence her action at an earlier time. Since her husband's death, Mrs Bergfels had pursued many formal and informal channels to obtain evidence necessary to sustain her cause of action. It was only in 1981 after an inquest was finally ordered that Mrs Bergfels obtained evidence from which it was possible to infer negligence on the part of the Council. Mrs Bergfels' diligence and tenacity were praised by Master Allen[5] and no suggestion was made of delay or impropriety on her part.

1.6 The case aroused considerable and critical media attention and the Commission gave preliminary consideration to the issues raised in the Master's judgment. Those issues had already been considered and resolution attempted in England, and more recently in Victoria and Western Australia, and the Commission was assisted by reports prepared in those and other jurisdictions. The Commission also consulted the considerable literature dealing with latent injury and disease which is another area in which acute problems arise from limitation of actions.

1.7 By letter dated 20 February 1984 the Commission requested a reference from the Attorney General. The terms of reference subsequently received are set out on page ix. It should be noted that they extend to a

consideration of the specific injustice arising in *Bergfels* and to a general reconsideration of the Limitation Act 1969. In both cases the Commission is required to consider the issues only in relation to personal injury claims. This Includes claims brought under the Compensation to Relatives Act 1897 and the Law Reform (Miscellaneous Provisions) Act 1944. The significant issues arising in relation to latent property damage and economic loss, important as they are, do not fall within this reference.[6]

B. Limitation Statutes-General Effect

1.8 Limitation statutes operate by specifying a time period within which the plaintiff must commence his or her action. After the expiry of that time period, the statute may be invoked as a complete defence or bar to the plaintiff's action regardless of the defendant's culpability in the substantive cause of action. While it is common to refer to the effect of the Act as being to prohibit the commencement of an action after a certain date, or to bar the plaintiff's action, this is not strictly correct. As this Commission pointed out in its 1967 Report *Limitation of Actions,*

> [a]n action can be brought and can successfully be carried to Judgment notwithstanding the apparent words of prohibition: the effect of the statutes is to give to the defendant matter which he [or she] may, but need not, plead by way of defence.[7]

1.9 Although limitation statutes are generally categorised as procedural only, in practice they operate on the substantive rights and liabilities of the parties.[8] The defendant's liability ceases and the plaintiff must seek compensation elsewhere, if at all. The New South Wales Limitation Act 1969 is unique in Australia and in most common law countries[9] in providing that at the expiration of the limitation period, the right and title of the plaintiff to claim damages from the defendant is extinguished.[10] This gives statutory recognition to the fact that the Act operates as a final determination of the litigants' rights and liabilities regardless of their respective merits in the substantive cause of action. The plaintiff's interest in always being able to have an issue determined on its merits is consequently overridden.

C. The Rationale for Limitation Periods

1.10 The fact that limitation statutes are enacted reflects a concern both for the defendant's interests in litigation and for the public interest. By limiting the time within which a plaintiff may make a claim, the defendant's potential liability is made finite and can be predicted with certainty. The potential defendant is thus able to make the most productive use of his or her resources[11] and the disruptive effect of unsettled claims on commercial intercourse is thereby avoided.[12] To that extent the public interest is also served.

1.11 A corollary of this principle is that plaintiffs should not be entitled to "sleep on their rights". Plaintiffs should be encouraged to act promptly to assert their rights and prevent false expectations being aroused in the minds of the defendant or the community.

1.12 The public interest demands that the proceedings be commenced with as little delay as possible for delay can only prejudice the fair trial of the issues involved. The litigation of claims at a time when witnesses or records may no longer be available or reliable is to be discouraged. This is an especially significant consideration in personal injury actions which rely so much for their resolution on the proof of factual matters. These considerations have led in recent times to the development of the branch of the courts' inherent jurisdiction in relation to the stay or dismissal of proceedings for want of prosecution.[13]

1.13 Limitations legislation thus aims at the prevention of avoidable delay and seeks to achieve more abstract objectives of justice in the public interest. Its operation may, however, lead to particular instances of hardship where the plaintiff could not be said to have acted improperly or unreasonably in failing to commence an action within the limitation period. The application of a limitation period in such cases has been justified, albeit reluctantly, by reference to these wider objectives which are said to transcend the individual case.[14]

D. Problems with the Law in Personal Injury Claims

1.14 In recent decades there has been an increasing recognition of circumstances in which the application of limitation statutes according to the above criteria has led to injustice to plaintiffs. The injustice may be the

consequence of an unusual set of circumstances against which no general statutory formula could effectively guard. The Bergfels case is an example of this. Other problem areas can be classified more generally.

1.15 Limitation statutes usually provide that the period within which an action must be commenced runs from the date on which the plaintiff's cause of action is complete or said "to accrue". Where the action is one for personal injury this occurs when the plaintiff suffers damage or injury which can be termed as "real" or not negligible.[15]

1.16 The existence of an injury will normally be apparent to the plaintiff, if not at the time of the wrong, then soon after. Of course some time may need to pass before the full extent of the injury or any complications are known. The length of the limitation period is designed to allow for such developments.

1.17 In many cases, however, the diagnosis of a disease (using the currently available methods of diagnosis) may not be possible until many years, or even generations,[16] after the date of "injury".

1.18 A similar problem may arise in determining the cause of a disease. While a person may be aware that he or she is suffering from a particular disease, the current state of medical knowledge may not have established the existence of a causal link between the disease and a particular activity. The injured person may only become aware of this link, and hence of the possibility of a cause of action, after the expiry of the limitation period.

1.19 A person may also be ignorant as to the right to commence an action. A prospective plaintiff may have received incorrect or misleading advice from a solicitor or from a friend, fellow worker or official. Alternatively, a person may have failed to obtain legal advice due to timidity, ignorance, poverty or fear of reprisals from a prospective defendant.

II. OUTLINE OF THIS REPORT

1.20 The growing concern expressed at the injustice exposed in the above types of cases has led to pressure for the reform of limitations legislation. Attempts have been made to obtain a new balance of the respective litigants' rights which is more favourable to the plaintiff.

1.21 Throughout its deliberations the Commission has been conscious of two competing factors to be accommodated in a limitations statute. On the one hand there must be certainty and an end to litigation. On the other there is a need to see that those who suffer disability at the hands of another do not go uncompensated because of the operation of technical rules. In this Report the Commission examines the ways in which law reform bodies and legislatures in other jurisdictions have attempted to meet these demands. The results of that research are set out in Chapter 4 and a summary of the available options for reform appears in Chapter 5. In Chapter 6 the conclusions which the Commission has reached are stated and explained and its recommendations made. Chapter 7 contains discussion of the Commission's views on whether the amendments recommended should be made retrospective in effect and the likely cost of implementing them. A draft of the amendments which would be necessary to the Limitation Act 1969 if the recommendations are to be implemented is attached in Appendix A.

III. ACKNOWLEDGEMENTS

1.22 In preparing its Report the Commission has had assistance from many people. Thanks are due in particular to Master Allen, now the Honourable Mr Justice Allen, of the Supreme Court of New South Wales, who first drew our attention to the hardship caused by the decision in the Bergfels case. Dr P R Handford, Executive Officer and Director of Research with the Law Reform Commission of Western Australia, and Mr G Bellamy, of the Commonwealth Attorney-General's Department, assisted by providing the Commission with copies of papers on the topic on which they had worked. Mr Bellamy also read and commented on a draft of the Report. Ms Anna Nemanic, Legal Research Consultant with the Commission throughout 1985, was responsible for much of the research and writing involved in the first draft of the Report.

1.23 The Commission is also especially grateful to Parliamentary Counsel, Mr D R Murphy QC, who made a substantial contribution to the Commission's deliberations. The Draft Bill which Mr Murphy prepared appears in Appendix A of the Report and contains the amendments suggested by the Commission to implement its proposals.

FOOTNOTES

1. [1983] 2 NSWLR 578.

2. Id at 584.

3. Limitation Act 1969 s19.

4. *Id* s14(1).

5. Note 1 at 579.

6. This is a matter which the Commission is currently considering in the Community Law Reform Program.

7. New South Wales Law Reform Commission *Limitation of Actions* (LRC 3, 1967) at 106, para 98.

8. D C Pearce *Statutory Interpretation* in Australia (2nd ed, 1981) at 156-157, paras 221-222.

9. The New South Wales approach has since been followed in Scotland: Prescription and Limitation (Scotland) Act 1985; British Columbia: Limitation Act RSBC 1979 c236; and has been recommended for Ontario: Ontario Law Reform Commission *Report on the Limitation of Actions* (1969) at 133.

10. Limitation Act 1969 ss 63-68.

11. P J Kelley “The Discovery Rule for Personal Injury Statutes of Limitations: Reflections on the British Experience” (1978) 24 *Wayne Law Review* 1641 at 1644.

12. Harvard Law Review “Developments in the Law, Statutes of Limitations” (1949-50) 63 *Harvard Law Review* 1177 at 1185.

13. *Birkett v* James [1978] AC 197.

14. *Central Asbestos Co Ltd v Dodd* [1973] AC 518 at 546, per Lord Simon of Glaisdale.

15. *Cartledge v E Jopling* and Sons, Ltd [1963] AC 758, at 772, per Lord Reid; at 774, per Lord Evershed.

16. Diethylstilbesterol (DES), for example, administered in early pregnancy to prevent spontaneous abortion, creates a risk of vaginal or cervical cancer in the recipient’s daughter.

2. Limitations Legislation Governing Personal Injury Actions

I. THE HISTORICAL DEVELOPMENT OF ENGLISH LIMITATIONS LEGISLATION UP TO 1963

2.1 The first and most important general statute dealing with the limitation of common law actions was the Limitation Act 1623 (Imp).[1] It prescribed a range of limitation periods for various classes of actions. In relation to. personal injury actions, a six year limitation period was prescribed for actions founded on tort or contract, subject to a four year period for those alleging trespass to the person.[2] The Act operated in conjunction with a large number of general and specific enactments, the latter prescribing special limitation periods for particular actions, for example the Public Authorities Protection Act 1893 (UK) and the Copyright Act 1911 (UK).

2.2 The Limitation Act 1623 (Imp) remained in force with minor amendments until its repeal by the Limitation Act 1939 (UK). That Act embodied the recommendations of the Law Revision Committee *(the Wright Committee)* for the simplification and codification of existing limitations statutes. Actions founded on tort or contract, including those claiming damages in respect of personal injury, were subject to a six year limitation period,[3] but in 1954[4] the period was reduced to three years in relation to actions for personal injury, on the recommendation of the Departmental Committee on Alternative Remedies *(the Monckton Committee)*. Personal injury actions in England are still governed by a three year limitation period which runs from the date on which the cause of action accrued.[5]

2.3 A major impetus for subsequent amendments to the limitations legislation arose from the difficulties encountered by victims of latent injury and disease in commencing their actions within the limitation period. In such cases the injury or disease is not discoverable, even at a pathological level, until some time (known as the "latency period") has elapsed since its inception. The problem is illustrated by *Cartledge v E Jopling* & Sons, Ltd[6] *(Cartledge).*

2.4 The plaintiff in *Cartledge* contracted pneumoconiosis while employed by the defendant. Pneumoconiosis is caused by the inhalation of noxious dust and the victim suffers a substantial injury to the lungs many years before any physical symptoms are apparent, and before the damage can be detected by medical diagnosis. The relevant limitation period may therefore have expired before the plaintiff is aware of the inception of the disease.

2.5 The House of Lords nevertheless felt constrained to allow the defendant in *Cartledge* to rely on the limitation period as an absolute defence to the plaintiff's claim. It was held that the limitation period ran from the date of "accrual", that is from the date when the plaintiff suffered damage or injury which could be termed as "real" or not negligible.[7] The fact that the plaintiff did not and could not have known that such damage had occurred was considered irrelevant.[8]

2.6 The English approach can be contrasted with that taken in the United States Supreme Court decision in *Urie v Thompson, Trustee*[9] where the plaintiff contracted silicosis while employed by the defendant. There the Court would not accept the defendant's "mechanical analysis" of the date of accrual of the cause of action.[10] Instead, it was held that a plaintiff is injured "only when the accumulated effects of the deleterious substance manifest themselves".[11] To have done otherwise would have given the plaintiff a "delusive remedy" only and thwarted the legislature's purpose.[12]

2.7 The problem of latent injury and disease had been noted by the Wright Committee in its 1936 Report. The Committee argued however that the hardship suffered by such plaintiffs was justified by what it considered to be the primary object of limitations statutes.

> [T]hey aim at putting a certain end to litigation..... whether there has been delay or not.[13]

The Committee accordingly recommended that there be no amendment to the existing system of fixed limitation periods running from the date of accrual. In *Cartledge* however their Lordships unanimously expressed their

concern for victims of latent disease. Unlike the Wright Committee their Lordships did not consider that the resultant hardship was justifiable. Lord Reid, for example, found it

> unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury.[14]

2.8 Following the judgment at first instance in *Cartledge,* but before the appeal to the House of Lords, the problem of latent injury and disease was referred to the Committee on Limitation of Actions in Cases of Personal Injury (the Edmund *Davies* Committee). That Committee considered that there may be other analogous cases of "entirely excusable failure to discover that (the plaintiff) has a claim".[15]

They called these cases of "concealed causation" and offered the following examples:

> a person suffering from symptoms common to a range of conditions may not realise that he or she is suffering from an invidious disease associated with another's behaviour, or
>
> a person may not attribute a disease to a particular cause because there is no sufficiently widespread knowledge of the causal connection between his or her exposure and that disease.[16]

2.9 The Committee concluded that the number of such cases was small but not negligible and that the resultant hardship was serious enough to warrant a reform of the existing law.[17] The Committee was primarily concerned that any reform of the limitation legislation should involve the minimum change possible to the existing law.[18] It was anxious not to breach the well-tried principles of the law of limitations any further than the facts showed this to be necessary.[19] One solution considered but rejected as impracticable would have confined any extensions of the limitation period to a schedule of particular diseases.[20] The Committee also rejected the suggestion that the courts should be given a general and unfettered discretion to extend the limitation period in cases the court considered appropriate. This was said to be too fundamental a change to the existing form of limitation legislation and one to which "practically unanimous" opposition was expressed by those consulted.[21]

2.10 The Committee's compromise solution between the desire for certainty and the avoidance of injustice to plaintiffs was the creation of a statutory formula under which the limitation period could be extended according to certain relatively objective criteria.[22] If the plaintiff could satisfy the court that he or she did not (and could not reasonably have been expected to) discover the existence of the injury, or the cause to which it was attributable, the plaintiff's claim was not to be defeated by the expiration of the limitation period.[23] The Committee gave no further guidance as to the precise formulation of the criteria.

2.11 The Limitation Act 1963 (UK), the model for the current New South Wales legislation, implemented the Edmund Davies Committee's recommendations. The fixed three year period for personal injury actions was maintained but would not afford a defence if the plaintiff could show that

> material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive)[24] of the plaintiff.[25]

The extension, known as the "discovery rule", was one to which the plaintiff was entitled as of *right* on the proof of those criteria. Definitions of key concepts like "material facts", "decisive character" and "knowledge" were set out in the detailed provisions of the Act.

2.12 The detailed provisions have proved elusive and the legislation has not achieved its goal of certainty tempered with flexibility. Particular criticisms of both the form and substance of the 1963 Act will be discussed in Chapter 3 at paras 3.24-3.26 below.

II. THE CURRENT NEW SOUTH WALES LEGISLATION

2.13 In June 1967 the New South Wales Law Reform Commission received a reference to review the law relating to limitation of actions, which was at that time governed by Imperial Acts, some of which were many centuries old. The current Limitation Act 1969 implemented the Commission's recommendations.

2.14 The Act provides for a fixed limitation period of six years for actions based on tort or contract including those for personal injury.[26] Sections 57 to 61 of the Act allow for the extension of that fixed limitation period according to the discovery rule. Although those sections were based on the relevant parts of the Limitation Act 1963 (UK),[27] in New South Wales proof of the statutory criteria does not entitle the plaintiff to an extension as of right, as is the case in England (see para 2.11 above). The criteria are instead preconditions to the court's exercise of a discretion to extend the limitation period. The Commission determined that the court should have a discretion to refuse to extend and envisaged its exercise in cases where damages were likely to be trivial, where evidence was weak or where a special defence could be proved.[28]

2.15 Another significant difference between the English and New South Wales legislation is the inclusion in the latter of an ultimate bar beyond which the extension formula cannot operate. Section 51 of the Limitation Act 1969 provides that no action can be commenced more than thirty years from the date of accrual, notwithstanding the presence of factors entitling a plaintiff to an extension. This Commission recommended the provision on the ground that

> a statute of limitations ought not to allow an indefinite time for the bringing of actions.[29]

III. COMPENSATION TO RELATIVES ACTIONS

2.16 The aspect of the existing legislation which prompted the current reference to this Commission concerns claims made under the Compensation to Relatives Act 1897. That Act reversed the position at common law that a person could not recover damages for the loss occasioned by another's death.[30] Such actions can now be brought for the benefit of certain defined relatives of the deceased (including de facto spouses[31])

> whensoever the death of a person is caused by a wrongful act, neglect or default . . . such as would (if death had not ensued) have entitled the [deceased] to maintain an action and recover damages in respect thereof...[32]

The person for whose benefit such an action is brought will be referred to hereafter as the applicant.

2.17 Confusion as to the operation of these provisions has arisen because compensation to relatives claims are not entirely analogous to ordinary personal injury claims. They do not involve a mere substitution of the applicant for the injured party. Although not identical to the action which the deceased would have had, compensation to relatives actions are derivative actions in the sense that they depend for their existence on the sufficiency of the claim which the deceased would have had but for his or her death. It is therefore necessary to consider two separate limitation periods which are applicable in a compensation to relatives claim.

> That period of limitation applicable to the deceased's hypothetical cause of action. The ordinary six year limitation period running from the date of injury is applicable here. If the deceased dies more than six years after the date of injury, without having commenced proceedings, the applicant's cause of action under the Compensation to Relatives Act 1897 cannot arise.
>
> That period of limitation applicable to the applicant's cause of action. Section 19 of the Limitation Act 1969 specifically requires such actions to be brought within six years of the date of death.

2.18 The Limitation Act 1969 allows for an extension according to the discovery rule of only one of these limitation periods: that applicable to the deceased's hypothetical cause of action.[33] The applicant will not be prejudiced by the deceased's failure to have brought an action in time due to the latter's ignorance of material and decisive facts. However the applicant's action must still be brought within six years of the date of death notwithstanding the applicant's ignorance of the material and decisive facts relating to the cause of action.

FOOTNOTES

1. 21 James I, c16. This was the governing statute in New South Wales until 1969.

2. Limitation Act 1623 (imp) s3.

3. Limitation Act 1939 (UK) s2.

4. Law Reform (Limitation of Actions) Act 1954 (UK).

5. Limitation Act 1980 (UK) s11(4).

6. [1963] AC 758.

7. Id at 772, per Lord Reid; at 774, per Lord Evershed.

8. Id at 772, per Lord Reid; at 778, per Lord Pearce.

9. 337 US 163 (1948).

10. Id at 169, per Rutledge J.

11. Id at 170.

12. Id at 169

13. Law Revision Committee (Wright Committee) *Fifth Interim Report (Statutes of Limitation)* at 12, para 7.

14. *Cartledge v E Jopling &* Sons, Ltd [1963] AC 758 at 773, per Lord Reid.

15. Committee on Limitation of Actions in Cases of Personal Injury (Edmund Davies Committee) *Report* (Cmd 1829, 1962) at 5, para 7.

16. Id at 5-6 , paras 7-9.

17. Id at 8-9, para 16.

18. Id at 9, para 18.

19. Id at 13, para 29.

20. Id at 11-13, paras 20-29.

21. Id at 13, para 31.

22. Id at 14, para 32.

23. Id at 15, para 34.

24. Limitation Act 1963 (UK) s7(5).

25. Id s 1(3).

26. Limitation Act 1969 s14.

27. New South Wales Law Reform Commission *Limitation of Actions* (LRC 3, 1967) at 131, para 272.

28. Id at 133, para 283.

29. Id at 127, para 241.

30. *Baker v* Bolton (1808) 1 Camp 493 (170 ER 1033).

31. Compensation to Relatives (De Facto Relationships) Amendment Act 1984.

32. Compensation to Relatives Act 1897 s3(1).

33. Limitation Act 1969 s60(2).

3. The Need for Reform

I. INTRODUCTION

3.1 The operation of the current legislation has been called into question for a number of reasons and on a number of levels. Arguments of principle have been directed against the concept of fixed limitation periods and their effect on plaintiffs who could not reasonably be expected to commence their actions within the relevant period. The hardship experienced by such plaintiffs cannot be justified by reference to the desire for prevention of delay. Only the public interest in an early trial and the defendant's interest in certainty and finality of liability can justify the limitation on the plaintiff's rights. It is no longer accepted that certainty and finality should be pursued independently of the other goals of limitations statutes.[1] Attempts have been made to accommodate all these interests in limitations schemes.

3.2 Some of these attempts have been inadequate in addressing substantial problems which cannot be solved by a fixed limitation period. Furthermore, practical arguments have been levelled against some legislative changes. Recent statutory formulations have been seen as unnecessarily complex and ambiguous and in need of reformulation.

3.3 In addition to those cases in which it could be said that there has been an unavoidable or excusable failure to commence an action within the limitation period there are some cases which defy generalisation, such as *Bergfels.* There, the failure to commence an action within the limitation period was due to an unusual combination of factors and circumstances peculiar to that plaintiff and which belied any impropriety or lack of diligence. Other cases involve ignorance of the injury or its causation, ignorance of a right to sue for the injury, or a combination of two or more of these.

II. ARGUMENTS OF PRINCIPLE

A. The Bergfels Case

3.4 A brief account of this case was given in Chapter I (paras 1.2-1.6) in describing the background to this reference. We now give a more detailed account in order to illustrate how circumstances may combine to prevent a plaintiff, however diligent, from commencing proceedings within a fixed limitation period.

3.5 Mr Bergfels had suffered from coronary artery disease (arteriosclerosis) since 1963. He was employed as a mechanic by the Port Stephens Shire Council from 2 September 1964 until the time of his death, at work, on 10 November 1966. The Coroner found that death was due to natural causes-a coronary occlusion and dispensed with an inquest.

3.6 Mrs Bergfels originally pursued her remedy through the workers' compensation system alleging that Mr Bergfels' heart condition was aggravated by the nature of his work. Mr Bergfels was engaged in the conversion of disused tanks into water tanks for bushfire fighting trucks. This involved the repair and modification of the tanks which required welding to be performed inside the tanks. Entry into the tanks was secured by crawling through openings cut out of the tanks. The tanks' surfaces were rustproofed by the application of an epoxyresin and rust proofing primer. Mrs Bergfels alleged that the emission of low level toxic fumes during welding inside the tanks aggravated her husband's heart condition and precipitated the coronary occlusion which caused his death. The work area was inadequately ventilated and respiratory equipment had not been supplied.

3.7 Mrs Bergfels encountered considerable evidentlary problems in establishing the level of emission, the degree of exposure and the causal nexus between exposure and death. The Division of Occupational Health and Safety of the Department of Health, for example, reported on 13 March 1968 that Mr Bergfels' maximum exposure inside the tank at the time was ten minutes. Mrs Bergfels, in contrast, asserted that it was from four to five hours.

3.8 On 23 June 1971 Gibson J found against Mrs Bergfels in her workers' compensation claim. Shortly afterwards Mrs Bergfels received information which suggested that her husband's death was due to an electric shock sustained immediately before his death. Because of his heart condition the shock need not have been considerable to be fatal and would not necessarily have marked the body.

3.9 On the basis of this possibility Mrs Bergfels requested an inquest into her husband's death. On 26 January 1972 this was refused. Mrs Bergfels then contacted the Department of Labour and Industry and a re-enactment of the circumstances of death was arranged for 30 May 1972. The Department subsequently reported that the possibility of electrocution was not a feasible one. An independent electrician also present at the re-enactment, however, reported that there was a possibility of electrocution.

3.10 Mrs Bergfels sought leave to re-open her workers' compensation claim to introduce new evidence of electrocution. This evidence had allegedly been concealed by the Council and its employees. Legal Aid was granted in respect of the application which was nevertheless not made for over 18 months. Leave to re-open was ultimately refused on 18 July 1975.

3.11 Mrs Bergfels again applied for an inquest which was ordered on 7 September 1979. The inquest lasted from 10 December 1980 to 27 July 1981. The Coroner found that the cause of death could not be determined on the basis of available evidence and an open verdict was returned.

3.12 By this stage Mrs Bergfels believed that she had a good cause of action against the Council and this was confirmed by legal advice obtained. Mrs Bergfels prepared to commence an action under s3 of the Compensation to Relatives Act 1897 alleging that her husband's death had been caused by an electric shock sustained when he came into contact with an electrical fault In the equipment with which he had been working. The defendant conceded, for the purposes of the proceedings before the court, that there was evidence that Mr Bergfels' death may have been caused by negligence for which the council was responsible. Such actions are governed by a six year limitation period, running from the date of death.[2] As her husband had died in 1966, Mrs Bergfels was considerably out of time and the defendant was able to rely on the expiry of the limitation period as an absolute defence to Mrs Bergfels' action.[3] This was notwithstanding the absence of any lack of diligence and indeed the "remarkable tenacity"[4] exhibited by Mrs Bergfels.

B. Latent Injury and Disease

3.13 Attention was drawn in Chapter I (paras 1. 1 7,1.18) to cases of latent injury or disease where diagnosis, using the currently available methods, may not be possible until many years, or even generations after the date of injury. The injury or disease may not manifest Itself in physical symptoms, or even at the pathological level until a latency period has elapsed. Where this latency period is longer than the relevant limitation period, the plaintiff's action may be barred before the plaintiff discovers or could reasonably be expected to discover the injury or disease.

3.14 While the problem of latency generally arises in relation to diseases which are the accumulated effect of prolonged exposure to some injurious substance, it can also arise in cases of straightforward accident trauma. There is the possibility that an accident, the occurrence of which is immediately obvious, may have serious delayed consequences. Intra cranial tumours or epilepsy, for example, may occur many years after a trivial accident and decompression sickness may develop into serious joint disease after a long latency period.[5] But such cases of latent injury are the exception and the inappropriateness of fixed limitation periods to the problems raised by latent disease is to a certain extent a result of the fact that existing causes of action and limitation principles were developed in the context of accidental or traumatic injury. The conceptual distinction between injury and disease means that the latter may be inadequately dealt with by existing systems.

3.15 If we consider asbestos-related diseases, for example, injury in the sense of tissue damage occurs shortly after the inhalation of asbestos fibres. The victim will not however experience any impairment of lung function or any physical symptoms for between ten and thirty years after exposure. Futhermore the time of manifestation after exposure cannot be predicted. It will depend on the person's tissue response, his or her immune system and on the theory of disease adopted.[6] A physician, for example, will not view as a disease that which has not manifested itself in physical symptoms. An histologist, however, would regard any deterioration of tissue as a disease, whether or not bodily functions were impaired.[7] Where cancer is found to be present it may not be

possible to ascertain the exact date of the development of the first cancer cell and even if it were this may not necessarily be regarded as the date of the disease's inception.[8]

3.16 The traditional common law system of compensation for accidental injury is said to be concerned with the sporadic and isolated.[9] It cannot therefore easily accommodate the concept of diseases which "manifest themselves over time" and whose origins cannot be pinpointed with accuracy.[10] The running of a fixed limitation period from the date of injury is unsuited to latent disease both because the precise date of injury cannot be ascertained, even in retrospect, and in any case the disease may not manifest itself until long after the limitation period has expired.

C. Ignorance of Causation

3.17 Plaintiffs may also encounter difficulties in determining the cause of their injury or disease. There may be "no sufficiently widespread knowledge of the causal connection"[11] between an injury and a particular act or omission of another person. A person may thus not attribute his or her injury or disease to a particular wrongdoing. The relevant limitation period may expire before the existence of the causal link is scientifically recognised. The gradual discovery of the hazardous effects of exposure to asbestos, for example, has been well documented in United States' case law. The first reported cases of asbestos related disease occurred in 1906 and 1907 and the first verifiable death from asbestos exposure occurred in 1924.[12] However it was not until 1935 that a report was published linking exposure to asbestos with the development of carcinomas[13] and it was not until the 1960's that the link between exposure and mesothelioma was established.[14] In Australia, the first case of mesothelioma was diagnosed in 1960 by Dr Jim McNulty, the present Director of Public Health in Western Australia.[15]

3.18 The problem of latent injury and disease was referred in England to the Committee on Limitation of Actions in Cases of Personal Injury (the Edmund *Davies* Committee) which categorised such situations as cases of "concealed causation"[16] and considered them analogous to cases of latent disease, where the injury itself is imperceptible.[17] in both cases the plaintiff's ignorance was said to relate to the nature of the injury. It is therefore not surprising that in some forms of injury, such as asbestosis, problems of latency and concealed causation have both been present.

D. Ignorance of a Worthwhile Cause of Action

3.19 A prospective plaintiff may know that he or she has suffered an injury, may know that it was probably caused by an act or omission of some person but may not be aware that he or she is thus entitled to commence an action claiming damages for that injury. This lack of awareness has been called ignorance of a worthwhile cause of action[18] and may arise in a number of ways.

3.20 People who suffer a particular harm may fail to pursue a legal remedy, or even obtain legal advice due to timidity, ignorance, poverty or social attitude.

> [M]ost people do riot have a legal or business-like turn of mind.....they are reluctant to visit the terra incognita of a solicitor's office.[19]

People may also be reluctant to commence proceedings because of fear of reprisals from a prospective defendant. A plaintiff injured at work, for example, may not seek legal advice for fear of jeopardising his or her job.[20]

3.21 A person's ignorance of the right to bring an action may also be due to the receipt of incorrect advice, be it from a legal adviser, a fellow worker, a union official or a friend. In *Central Asbestos Co Ltd v Dodd*[2l] the plaintiff was informed by his works manager that although he could claim a disablement benefit for his contraction of asbestosis, he could not bring an action for damages against his employer. In consequence, the plaintiff did not seek further legal advice until he heard that a former fellow employee had commenced just such an action. The House of Lords held that "it was reasonable for the plaintiff to rest content with the wrong advice given him by the works manager", even though it was said to have been "obvious that the works manager had no real competence to give the advice".[22]

3.22 In *Do Carmo v Ford Excavations Pty Ltd*[23] the plaintiff contracted silicosis from his exposure to silica dust while at work. He consulted his union's solicitors but was not advised that it was well known in the industry that the risk of contracting silicosis could have been minimised by the taking of certain precautions by his employers. On making this discovery later, the plaintiff promptly sued his employer but by that time the relevant limitation period had expired.

3.23 Other cases can be envisaged where the plaintiff is advised that he or she does not have a worthwhile cause of action. While this advice may correctly state the effect of the then current law, later developments may mean that the plaintiff is entitled to bring an action. These developments may occur after the expiration of the limitation period.

III. PROBLEMS WITH ATTEMPTS AT REFORM

3.24 The introduction of the discovery rule both in England and New South Wales (paras 2.13-2.15) did not achieve the desired certainty and in fact created further difficulties. The complex drafting in particular led the House of Lords to make the following remarks.

> The obscurity of the Act has been frequently and severely criticised: indeed I think this Act has a strong claim to the distinction of being the worst drafted Act on the statute book.[24]
>
> This Act has been before the courts on many occasions during its comparatively short life. I do not think there are many judges who have had to consider it who have not criticised the wholly unnecessary complexity and deplorable obscurity of its language. It seems as if it was formulated to disguise rather than reveal the meaning which it was Intended to bear.[25]

In *Do Carmo v Ford Excavations Pty Ltd*[26], Murphy ACJ noted that the relevant New South Wales sections were

> derived from and copy the complexity and obscurity of the English Limitation Act 1963.[27]

In the same case Deane J[28] and Dawson J[29] referred to the ambiguity of the statutory language.

3.25 A significant problem which ultimately led to the reform of the English Act was the scope of the material facts provision. The range of facts which the plaintiff could rely upon to obtain an extension of the limitation period was far from settled. In Central *Asbestos Co Ltd v Dodd*[30] (para 3.21) the plaintiff knew that he had contracted asbestosis; he knew that it was probably caused by his employment conditions; but he did not know that his employer was therefore liable to him for damages sustained, that is, he did not know that he had a worthwhile cause of action. The plaintiff's work manager had specifically advised him that he could not sue his employer. When the plaintiff subsequently consulted a solicitor and initiated the proceedings in question, the relevant limitation period had expired. The House of Lords therefore had to consider whether the fact that the plaintiff had a worthwhile cause of action was a "material fact" of a "decisive character",[31] ignorance of which entitled the plaintiff to an extension of the limitation period.

3.26 A majority of the House of Lords allowed the plaintiff an extension of the limitation period but a different majority of the House rejected the plaintiff's reasoning. Only Lord Reid and Lord Morris of Borth-y-Gest accepted the plaintiff's argument that ignorance of a worthwhile cause of action was encompassed by the statutory criteria.[32] Lord Simon of Glaisdale, Lord Salmon and Lord Pearson rejected that contention. Lord Pearson found for the plaintiff on another ground. introducing a requirement of "fault" as a middle course between acceptance or rejection of the worthwhile cause of action test. Under this formulation a plaintiff's ignorance that he or she has a worthwhile cause of action will not of itself be sufficient to secure an extension of time, but it will be sufficient that the plaintiff did not know

> as matters of fact...the defendants were at fault and that [the plaintiff's] injuries were attributable to their fault.[33]

Thus no single view received majority support and the law continued in a state of uncertainty and ambiguity.

3.27 The worthwhile cause of action test was considered in Do Carmo and rejected by the High Court (Murphy ACJ dissenting). The majority of the Court adopted the approach of Lord Pearson in *Central Asbestos Co Ltd v Dodd*[34] and the plaintiff was granted an extension of the limitation period even though he knew, at the relevant time, that he had sustained an injury (the inception of silicosis) and that it was caused by the conditions of his employment. The further information which the plaintiff in Do Carmo did not have at his disposal related to the alternative means available to his employers to provide a safe system of work. The High Court held that this was information which the plaintiff could not have been expected to have had and without which he could not have assessed his employer's fault.[35]

3.28 Other key terms in the statutory formula, such as "material" and "decisive" fact have still not been clearly defined. Indeed, they probably defy definition in such a way as to create real certainty about the operation of these provisions of the legislation.

FOOTNOTES

1. S Glimcher "Statutes of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law ?" (1982) 43 *University of Pittsburgh Law Review* 501 at 513.

2. Limitation Act 1969 s19.

3. *Bergfels v Port Stephen Shire* Council [1983] 2 NSWLR 578.

4. Id at 579, per Master Allen.

5. Committee on Limitation of Actions in Cases of Personal Injury (Edmund Davies Committee) *Report* (Cmnd 1829, 1962) at 5, para 6.

6. S Glimcher, note 1 at 504.

7. *Ibid.*

8. Id at 511.

9. D Rosenberg "The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System" (1984) 97 *Harvard Law Review* 851 at 855.

10. Harvard Law Review "Compensating Victims of Occupational Disease" (1980) 93 *Harvard Law Review* 916 at 921.

11. Note 5 at 6, para 8.

12. *Borel v Fibreboard Paper Products Corporation* 493 F 2d 1076 (1973) at 1083, per Wisdom J.

13, Vanderbilt Law Review "Special Project. An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation" (1983) 36 Vanderbilt *Law Review* 573 at 598.

14. Id at 601.

15. T Hall *The Ugly Face of Australian Business* (Harper and Row (A'asia) Pty Ltd, 1980) at

42.

16. Note 5 at 6, para 9.

17. Id at 9-10, para 18.

18. Law Reform Committee (Orr Committee) *Twentieth Report, Interim Report on Limitation of Actions, Personal Injuries Claims* (Cmnd 5630, 1974) at 16, para 42.

19. *Central Asbestos Co Ltd v Dodd* [1973] AC 518 at 530, per Lord Reid.

20. *McCafferty v Metropolitan Police Receiver* [1977] 2 AII ER 756 at 769, per Megaw LJ.

21. [1973] AC 518.

22. Id at 530-1, per Lord Reid.

23. (1984) 154 CLR 234.

24. *Central Asbestos Co Ltd v Dodd* [1973] AC 518 at 529, per Lord Reid.

25. Id at 553, per Lord Salmon.

26. (1984) 154 CLR 234.

27. Id at 238.

28. Id at 250.

29. Id at 253 (Brennan J agreed: id at 249.)

30. [1973] AC 518.

31. This is the wording of ss1(3) and 7(3) of the Limitation Act 1963 (UK).

32. *Central Asbestos Co Ltd v Dodd* [1973] AC 518 at 533, per Lord Reid; at 538, per Lord Morris of Borth-y-Gest.

33. Id at 543, per Lord Pearson.

34. *Do Carmo v Ford Excavations* Ply Ltd (1984) 154 CLR 234 at 239, per Murphy ACJ: at 258-259, per Dawson J (with whom Brennan J agreed at 249).

35. Id at 258-259. This test was applied recently by Yeldham J in *Wills v Minerals Pty Ltd* [1985] 3 NSWLR 543.

4. Developments in Other Jurisdictions Since 1963

I. ENGLAND

4.1 The 1963 Act provided that a plaintiff had only twelve months from the date of knowledge to commence an action.[1] This was in contrast to the ordinary three year period which ran from the date of injury. In 1970, the Law Commission reported on the adequacy of that twelve month period. Although it did not obtain any evidence of actual cases of insufficiency of time, the Commission did recommend that the period be extended to three years.[2] This recommendation was implemented by the Law Reform (Miscellaneous Provisions) Act 1971 (UK).

4.2 The Bergfels anomaly was identified in relation to the English equivalent of the New South Wales Compensation to Relatives Act 1897.[3] Under that Act, applicants could not take advantage of the discovery rule extension as could ordinary personal injury plaintiffs. The applicant thus had only three years from the date of death within which to commence an action, regardless of ignorance of the material facts relating to that cause of action. In *Lucy v W T Henley Telegraph Works Company Ltd*[4] this anomaly was noted by the English Court of Appeal and following that case the Law Commission was requested to advise -on the amendment of the 1963 Act in the light of that judgment. It recommended the assimilation of the position of applicants to that of living plaintiffs. This recommendation was implemented by the Law Reform (Miscellaneous Provisions) Act 1971 (UK) which provided that the three year period ran from the date of death or the applicant's own date of knowledge, whichever was later.

4.3 Thirdly, the 1963 Act required that the plaintiff obtain the leave of the court to sue out of time. Leave was to be granted only if the plaintiff satisfied the court that a good prima facie case existed on both the substantive merits and on the entitlement to rely on the discovery rule extension.[5] The Law Reform Committee *(The Orr Committee)* which was given the task of reviewing the Act found that there was no real need for this procedure and recommended its abolition.[6] However the Committee did not consider that the limitations issue should always be left to be decided at the trial of the substantive action. It envisaged cases where it would be advantageous to all parties to have the limitations question decided as a preliminary issue.[7] No recommendations were, however, made to this effect.

4.4 The most significant and damaging problems with the existing legislation were those arising out of the date of knowledge provisions. The complex statutory formula which was introduced to avoid unnecessary uncertainty (para 2.12) in turn created its own difficulties. These difficulties were discussed in Chapter 3. The decision of the House of Lords in *Central Asbestos Co Ltd v Dodd*[8] (paras 3.25-3.26) added to the state of confusion. It will be recalled that no single interpretation received majority support. In 1971, the Law Reform Committee *(the Orr Committee)* was invited to consider the limitation of personal injury actions in the light of this uncertainty.

4.5 The Committee recommended the introduction of a two tiered scheme for the commencement and extension of personal injury actions. Firstly, the discovery rule was to be retained, resulting in a primary limitation period of three years running from either the date of injury or the date of knowledge, whichever is later. The Committee considered that the plaintiff's right to commence an action within three years from the date of knowledge was a valuable one from which they did not wish to detract.[9] The Committee did however reject the worthwhile cause of action test on the basis that

> [t]he principle that ignorance of the law is no excuse is of long standing and founded on good reasons...[10]

The current Limitation Act 1980 (UK) thus expressly provides that

> ...knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.[11]

4.6 Secondly, the Orr Committee noted the more general criticisms of the Act and concluded that it was

> difficult to draft the statutory formula in clear language and in a way which covers the cases intended to be covered, but no others.[12]

Furthermore, they argued that however skilfully the statutory formula is devised, there will always be the possibility of doing injustice in particular cases.[13] To overcome these inherent difficulties the Committee recommended the introduction of what was termed a "residual" discretion to act as a complement to, and not in substitution for, the primary limitation period.[14]

4.7 The idea of giving the court a discretion to disallow a defence based on the limitation statute had long been mooted in England. Precedents for such a discretion already existed in specific statutes dealing only with certain causes of action[15] and suggestions were made that such a discretion be introduced into limitations legislation as a general principle.

4.8 In 1936, the Wright Committee had considered that such a discretion would

> obviate the cases of hardship which are bound to occur under any rigid system of limitation, however well devised.[16]

However, that Committee rejected the introduction of such a discretion due to the lack of certainty it would engender.[17]

4.9 In its 1962 Report, the Edmund Davies Committee had also considered and rejected the introduction of the discretion. Such a discretion would involve a "fundamental amendment to the existing law", an amendment to which those consulted were "practically unanimous" in their opposition.[18] It would lead to uncertainty and, because it was unfettered, to undesirable divergences of practice among the judiciary.[19]

4.10 By 1974, however, the Orr Committee was able to argue persuasively for the introduction of such a discretion. Criticisms based on subsequent uncertainty were answered by arguing that previous attempts at formulating objective criteria for the extension of time had not led to certainty. They had not allowed "the defendant or his insurers to close their books at any predetermined time".[20]

4.11 The Committee also addressed the criticism that the use of the discretion would lead to divergences of judicial opinion. The Committee recommended a legislative prescription of guidelines to achieve consistency in the application of the court's discretion.[21]

4.12 The Committee emphasised that the discretion was a "residual" one which would come into operation when the strict application of the discovery rule would cause injustice.[22] For example, the plaintiff who knew all the relevant facts of the case but failed to realise that there was a worthwhile cause of action could not rely on the discovery rule extension. It was envisaged that such a plaintiff could apply for a favourable exercise of the discretion. Arguably, however, the discretion provision is, of more general application, and this has in fact been the interpretation given to it in cases subsequent to the enactment of the Limitation Act 1975 (UK).

4.13 In *Firman v Ellis*[23] the Court of Appeal refused to be bound by the Committee's stated intention that the discretion should be a residual one and chose instead to interpret the statutory formula on its face. It was held that the power conferred by the Act was unfettered and general[24] and arose in all cases where the three year limitation period had expired.

4.14 This interpretation of the section was approved by the House of Lords in *Thompson v Brown Construction Ltd*[25] subject to an earlier decision of the House in *Walkley v Precision Forgings Ltd.*[26] In the earlier case the House of Lords considered that the statutory language used required some qualification of the discretionary power. Section 2D of the 1975 Act (which became s33 of the consolidated 1980 legislation) provided that

> (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 (those providing the primary limitation period) prejudice the plaintiff or any person whom he represents.....

the court may direct that those provisions shall not apply to the action

It was held that a prerequisite to the exercise of the discretion was the finding that the plaintiff had been prejudiced by the provisions of ss 11 or 12.

4.15 In Walkley the plaintiff had commenced an action within the relevant limitation period but had allowed the action to lapse. After the expiry of that period the plaintiff sought to issue a second writ in respect of the same action and for this purpose relied on the exercise of the discretion. The application was refused. The prejudice which had resulted to the plaintiff was held to be due to his own inaction and not to the operation of s11 or 12.[27] The primary limitation period could not be said to have caused him any prejudice at all given that the plaintiff had been able to commence his action within that limitation period.[28]

4.16 While this is a significant limit on the operation of the discretionary power, as the cases discussed above indicate, the discretion has still been interpreted more widely than was perhaps intended by the Orr Committee.

II. SCOTLAND

4.17 At common law, actions in Scotland were governed only by a long "negative prescription" which, until recently, was a period of twenty years.[29] At its expiration the right as well as the remedy is extinguished. Since 1954, the commencement of actions has also been governed by the limitation provisions enacted in England. Actions were thus governed by a three year limitation period as well as the ultimate twenty year prescription. The Limitation Act 1963 (UK) and the Law Reform (Miscellaneous Provisions) Act 1971 (UK) also extended to Scotland. The English Limitation Act 1975 which introduced the discretion to extend the primary limitation period did not apply to Scotland. However a similar provision was introduced by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 which provided that a court may allow an action to be brought after the expiry of the limitation period if it seems equitable to do so.[30] The discretion was unfettered with no guidelines for its exercise. The discretion could not however be used to override the long negative prescription.

4.18 In 1980, the Scottish Law Commission recommended that the long negative prescription should not be restored as the sole method of limiting the commencement of actions[31] but the question of whether it should continue to apply to personal injury actions at all was left open.[32]

4.19 In 1982, the Scottish Law Commission recommended that the long negative prescription should no longer govern personal injury claims.[33] It recommended that such claims be governed by a three year limitation period[34] running from the date of injury or the date of knowledge.[35] The Commission made no recommendation in relation to the provisions for discretionary extension, arguing that the 1980 amendments were too recent to allow a judgment to be made on their desirability or efficacy.[36] The Commission's recommendations were implemented in the Prescription and Limitation (Scotland) Act 1984 (UK).

III. VICTORIA

4.20 In 1983, the Victorian Limitation of Actions Act 1958 was amended by the introduction of some of the most sweeping reforms in Australia to date. The reforms have simplified the discovery rule extension formula and introduced a discretionary power of extension. In both cases, significant improvements were made on the English formula of 1975. on which they were modelled.

4.21 The Limitation of Actions Act 1958 (Vic) (which was a consolidation of two earlier Acts[37]) was based on the Limitation Act 1939 (UK). It provided for a fixed limitation period of three years running from the date of accrual of the cause of action. There was no extension provision.[38] In 1972[39] the discovery rule extension formula was introduced but unlike the English provision did not entitle the plaintiff to an extension as of right. Instead, on satisfaction of the statutory criteria, the court had a discretion to allow an extension of up to one year from the date of knowledge.[40] Problems as to the scope of the material facts provisions were encountered in Victoria in similar fashion to the English and New South Wales provisions.

4.22 The Limitation of Actions (Personal Injury Claims) Act 1983 (Vic) was loosely based on the recommendations of the Victorian Chief Justice's Law Reform Committee contained in its 1981 *Report on Limitation of Actions in Personal Injury Claims*. The Committee considered that not all personal injury cases should be treated in the same way for the purpose of extending the primary limitation period . A distinction was drawn between those personal injuries arising out of accident, and those arising out of disease. Limitations problems were said to arise only in relation to the latter case[41] and the Committee's recommendations were so confined.

4.23 The Committee considered that the discovery rule extension formula was unnecessarily complex, intricate and abstruse given that it provided for only a very limited form of extension .[42] They therefore recommended a simplified formula for the running of the limitation period. In the resulting Act, the period runs from the date on which the plaintiff first knows

(a) that he has suffered those personal injuries, and

(b) that those personal injuries were caused by the act or omission of some person.[43]

This formula altered the existing law, firstly, by providing that the extension is as of right and does not require an exercise of the court's discretion and secondly, by excluding the worthwhile cause of action test. Thirdly, the plaintiff who satisfies the new test has the ordinary limitation period within which to commence an action.

4.24 The Committee considered and rejected a suggestion of introducing a discretion to disallow the limitations defence. The introduction of such a discretion was said to lead to too much uncertainty and divergence of judicial opinion.[44] It did however recommend that the court be given a general discretion to extend the limitation period from three to six years but that it was not to be exercised where the failure to commence an action within the limitation period was due to a failure on the part of the plaintiff's legal representative.[45] This part of the Committee's recommendations was not accepted by the government which instead chose to adopt the following scheme.

4.25 The three year limitation period then governing personal injury actions was extended to six years[46] bringing such cases into line with actions founded on tort or contract generally. That period was subject to the discovery rule extension (para 4.23). Further, the Act conferred on the court a general discretion to extend the limitation period if it considered it just and reasonable so to do.[47] Guidelines, closely following the English provisions, were prescribed[48] but the Victorian Act removed the prejudice requirement which has caused difficulties in England (paras 4.14-4.15). The discretionary extension provision is applicable to all personal injury cases and, unlike the discovery rule extension, is not confined to those consisting of a disease or disorder.[49]

4.26 This scheme was extended to actions brought under the Victorian equivalent of the New South Wales Compensation to Relatives Act 1897.[50] The six year limitation period thus runs from the date of death, or the-date when the applicant first knows -

[a] that the death was caused by the injury; and

[b] that the injury was caused by the act or omission of some person....[51]

The applicant may also apply for an exercise of the court's discretion to extend the limitation period for the deceased's cause of action.[52] The relevant guidelines incorporate a consideration of the relative circumstances of both the deceased and the applicant.[53]

4.27 In his Second Reading Speech on the introduction of the above legislation, the Victorian Attorney General praised the simplicity of the scheme which placed no arbitrary limits on the court's powers. The Act was said to be a recognition of the particular difficulties faced by plaintiffs suffering from a disease or disorder.[54]

4.28 The amendments appear to be working satisfactorily. In Walla *v State Transport* Authority[55] the legislation was said to constitute a "radical departure from the previous law".[56] In that case, the plaintiff's ignorance that he

had a worthwhile cause of action was said to be a proper consideration in the court's exercise of its discretion to extend the limitation period.[57]

IV. WESTERN AUSTRALIA

4.29 The Limitation Act 1935 (WA) was merely a consolidation of the Imperial statutes then in force in Western Australia. Actions founded on tort or contract were governed by a six year limitation period, while actions for trespass to the person were governed by a four year period .[58] No provision was made for extension of those primary limitation periods.

4.30 During the 1970's concern was expressed at the difficulties faced by plaintiffs suffering from latent respiratory diseases in commencing their actions within the limitation period.[59] By 1982 the problem of the limitation of personal injury actions, especially those involving asbestos related disease, was becoming urgent.[60] This led to a special reference being given to the Law Reform Commission of Western Australia to consider the limitation of actions brought by those suffering from latent injury and disease.[61]

4.31 In 1982 the Commission's Report on *Limitation and Notice of Actions: Latent Disease and Injury* (Part 1) recommended significant changes to the existing law, not confined to latent disease and injury but extending to personal injury generally. Ultimately those recommendations were not adopted by the government of the day[62] but they remain a valuable model for the reform of limitations legislation.

4.32 The Commission recommended that all personal injury actions be governed by a six year limitation period, but that that period not apply where the court determined that it was just that it not apply.[63] The Commission stressed that its recommendation was not merely a conferral of a judicial discretion. The emphasis was. to be on what was just according to the circumstances of the case and according to certain statutory criteria. One member of the Commission, however, considered that there was no difference between such a scheme and the granting of a judicial discretion exercisable in accordance with statutory guidelines.[64] The Commission recommended the following statutory criteria:

(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.

(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.

(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.

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

(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.

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

(vii) The duration of any disability of the plaintiff whether arising before or after the cause of action accrued.[65]

4.33 The Commission rejected the continued use of extension provisions based on the discovery rule. The English formula was said to be "complicated, confusing and uncertain".[66] The definition of knowledge provisions were said to be operating unsatisfactorily.[67] Moreover these problems could not be overcome by more precise drafting due to the inherent inability of Parliament to legislate in advance for all possible situations.[68]

4.34 Although the Commission's recommendations were not implemented the government continued to seek a solution to the problem of latent injury and disease. The problem of asbestos related disease, at least, had to be addressed. The government rejected the idea of ex gratia compensation to victims of asbestos related disease.[69] Instead the government preferred to amend the Limitation Act 1935 (WA) in respect of asbestos related disease only, by the introduction of a discovery rule formula based on the English Limitation Act 1975.[70] Given the urgency of the government's amendments, it was agreed not to extend them to personal injuries or even latent disease generally until a further and adequate review had been made of relevant issues.[71] The resulting Acts Amendment (Asbestos Related Diseases) Act 1983 (WA) provided that the limitation period runs from the date on which the plaintiff first has knowledge -

(a) that the injury was significant;

(b) that the injury was attributable to the act or omission which is alleged to constitute the cause of action;

(c) of the identity of the defendant.[72]

As in the English provisions, the worthwhile cause of action test is specifically excluded.[73]

4.35 The government was however most concerned about the retrospectivity of the provisions[74] and enacted complex provisions to deal with this issue. In short, those provisions distinguish between claims where the plaintiff's knowledge arose before 1 January 1984, and those where the plaintiff's knowledge arose after 1 January 1984. In the latter case, the plaintiff is entitled to the full benefit of the amendments.[75] In the former, a plaintiff has only three years from the coming into operation of the amendments within which to commence an action. Further, the plaintiff's damages are limited to pecuniary loss[76] only, and in any case may not exceed $120,000. The government indicated that the figure was an arbitrary limit chosen as a balance between a "financially responsible" figure and one which would provide a "worthwhile amount of damages for a successful plaintiff".[77] The figure can be compared with the prescribed amount of $70,000 available under the Workers' Compensation Act which, apart from the amendments, would have been the plaintiff's only source of compensation.

4.36 As it did in 1982 the Commission has again recommended the introduction of a uniform set of rules for all personal injury cases, or at least for all cases involving latent disease. The current distinction made in relation to asbestos related disease was said to be unsatisfactory.[78] The form and substance of any such amendments were not however determined, nor were even the parameters of such change mapped out. A discussion paper covering such details is being prepared.[79]

V. SOUTH AUSTRALIA

4.37 As in Western Australia, the South Australian Parliament has never enacted its own limitations legislation, relying instead on a consolidation of the Imperial statutes then in force.

4.38 The Limitation of Actions Act 1936 (SA) as amended in 1956[80] provided for a three year limitation period for personal injury actions with no power of extension. In 1970, the Law Reform Committee of South Australia recommended the introduction of a discovery rule extension procedure.[81] However the formula contained in the English Limitation Act 1963 was not considered comprehensive enough. Nor was its legislative expression free from ambiguity.[82] Specifically, the Committee rejected the requirement that material facts be of "decisive character" and instead chose the phrase material facts "relating to the cause of action". The Committee further rejected the imposition of constructive knowledge and the legislation refers only to the actual knowledge of the plaintiff.[83]

4.39 The extension of the primary limitation periods is currently governed by provisions inserted in 1972.[84] The court is there given power to extend any limitation period as the justice of the case may require,[85] but only if it is satisfied

> that facts material to the plaintiff's case were not ascertained by him until...after the expiration [of the limitation period] and that the action was instituted within twelve months after the ascertainment of those facts by the plaintiff....[86]

No definition is given of what constitutes material facts and no guidelines are provided as to what is "Just" in the circumstances. These extension provisions are of general application and are not confined to personal injury actions.

4.40 The Law Reform Committee of South Australia has recently made a series of recommendations regarding the commencement of actions by plaintiffs suffering from latent injury or disease.[87] The Committee did not consider that such plaintiffs would automatically be granted an extension under the above scheme and recommended the enactment of specific legislation to deal with their situation.[88]

4.41 The Committee proceeded from the premise that victims of latent toxic injuries should have the right to commence an action upon discovery of that injury and not have to rely upon the discretion of the court.[89] It thus recommended that the plaintiff be entitled to commence an action within three years of the date of knowledge. The Committee approved the date of knowledge formula contained in the Limitation Act 1975 (UK).[90]

4.42 The Committee was further of the view that in all cases, and not just those of latent injury, the Court should have a discretion to extend the limitation period according to the English model.[91] The anomalies caused by the particular drafting of the English provisions (paras 4.13-4.16) were noted and their elimination recommended.[92]

4.43 The Committee however recommended the introduction of an outside limit for the bringing of actions and the operation of the extension provisions. It was suggested that there be imposed a thirty year "long stop" beyond which proceedings could not be commenced.[93] This period would run from the date of injury and not the date of knowledge. The Committee conceded that while such a period might "not catch all latent injury it should enable proceedings to be brought in the vast majority of cases".[94] This attitude is not easy to reconcile with the Committee's earlier expressions of concern for the difficulties faced by victims of latent injury and disease.

4.44 The Committee's recommendations have not yet received legislative consideration.

VI. AUSTRALIAN CAPITAL TERRITORY

4.45 The Limitation Ordinance 1985 (ACT) came into force in December 1985. It repealed New South Wales and Imperial legislation dating back to 1588 and sought to simplify the law in the Territory. Until December 1985 the law in the Territory had been the same as the law in New South Wales prior to the passage of the Limitation Act 1969 (NSW).[95]

4.46 The Ordinance sets a limitation period of six years for most causes of action.[96] This was in part to maintain uniformity with law in force in New South Wales and other jurisdictions in Australia.[97]

4.47 In relation to claims for personal injuries the court is given a general discretion to extend the limitation period where it is thought to be 'just and reasonable to do so".[98] Section 36(3) provides a set of guidelines for the exercise of the discretion. The guidelines are not exclusive of other considerations. In exercising the discretion the court is directed to have "regard to all the circumstances of the case including (without derogating from the generality of the foregoing)" the matters set out in s36(2). Six guidelines are provided, including the length and reasons for the plaintiff's delay, prejudice to the defendant from the delay, the conduct of the defendant in making information available to the plaintiff after the cause of action has accrued, the promptness with which the plaintiff acted after learning of the possibility of a cause of action and the steps taken by the plaintiff to obtain expert advice.

4.48 The Ordinance makes no specific provision for a discovery rule extension but does allow the plaintiff's ignorance to be taken into account under the general discretion to extend. The scheme settled by the Ordinance

is very similar to the guidelines for the exercise of a general discretion suggested by the Law Reform Commission of Western Australia in 1982.[99]

4.49 The Ordinance sets out two limitation periods for actions for compensation to relatives. A relative must bring an action either within six years of the wrongful act or within three years of the death, whichever is the later.[100] The Ordinance allows for an extension of time to be granted to a maximum of six years beyond the death of the person injured.[101]

4.50 Guidelines, similar to those in s36, are provided for the exercise of the discretion to extend the limitation periods.[102]

FOOTNOTES

1. Limitation Act 1963 (UK) s1.

2. Law Commission (Scarman Committee) *Limitation Act 1963* (Cmnd 4532, 1970) at 8, para 22.

3. Fatal Accidents Act 1846 (UK).

4. [1970] 1 QB 393.

5. Limitation Act 1963 (UK) s2.

6. Law Reform Committee (Orr Committee) *Interim Report on Limitation of Actions, Personal Injury Claims* (Cmnd 5630, 1974) at 32, para 86. This Recommendation was implemented in the Limitation of Actions Act 1975 (UK) which repealed ss 1-3B of the Limitation Act 1963 (UK), see s4(5) and Sch 2.

7. Id at 32-33, para 87.

8. [1973] AC 518.

9. Law Reform Committee, note 6 at 13, para 35.

10. Id at 20. para 53.

11. Limitation Act 1980 (UK) s14.

12. Law Reform Committee, note 6 at 12, para 32.

13. *Ibid.*

14. Id at 14, para 38.

15. For example, the Workmen's Compensation Act 1925 (UK) s14(1) provided that -

> (b) failure to make a claim within the [specified] period shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, *or other* reasonable cause.(emphasts supplied)

16. Law Revision Committee (Wright Committee) 5th Interim *Report (Statutes of Limitation)* (Cmnd 5334, 1936) at 11, para 7.

17. Id at 12. para 7.

18. Committee on Limitation of Actions in Cases of Personal injury (Edmund Davies Committee) *Report* (Cmnd 1829, 1962) at 13, para 31.

19. Id at 14. para 31.

20. Law Reform Committee, note 6 at 22, para 57.

21. Ibid.

22. Law Reform Committee, note 6 at 14, para 39.

23. [1978] QB 886.

24. Id at 904-905. per Denning LJ: at 910, per Ormrod LJ; at 915, per Geoffrey Lane LJ.

25. [1981] 2 AII ER 296.

26. [1979] 2 AII ER 548, In Thompson *v Brown* Construction Ltd Lord Diplock commented that he ought not to have expressed prejudice to the plaintiff to be the "only" consideration to be taken into account under s2D. Rather, he said, in view of the wording of s2D(3), prejudice to the plaintiff should be regarded as only one of the matters to be considered, s2D(3) listing many others as well.

27. Id at 551, per Lord Wilberforce.

28. Id at 559, per Lord Diplock.

29. Scottish Law Commission *Time Limits in Actions for Personal Injury* (Memo No 45, 1980) at 2 para 1-5. The Prescription and Limitation (Scotland) Act 1973 (UK) s7 changed the common law.

30. Section 23.

31. Scottish Law Commission, note 29 at 13, para 2-15.

32. *Id* at 13, para 2-12.

33. Scottish Law Commission *Prescription and Limitation of Actions. Personal Injuries Actions and Private International Law Questions* (1982) at 9, para 2.8.

34. *Id* at 22, para 3.31.

35. Id at 10, para 3.2.

36. *Id* at 31, para 4.9.

37. Limitation of Actions Act 1955 (Vic): Limitation of Actions (Extension) Act 1956 (Vic).

38. Limitation of Actions Act 1958 (Vic) s5(l).

39. Limitation of Actions (Personal Injuries) Act 1972 (Vic).

40. Id, s23A.

41. Chief Justice's Law Reform Committee *Report* on Limitation *of Actions in* Personal Injury Claims (1981) at 3.

42. Id, at 4.

43. Limitation of Actions (Personal Injury Claims) Act 1983 (Vic) s3.

44. Chief Justice's Law Reform Committee, note 41 at 3.

45. *Id* at 1-2.

46. Limitation of Actions (Personal Injury Claims) Act 1983 (Vic) s3.

47. Id s5.

48. *Ibid.*

49. *Ibid.*

50. Wrongs Act 1958 (Vic).

51. Wrongs Act 1958 (Vic) (as amended by the Limitation of Actions (Personal Injury Claims) Act 1983 (Vic)) s20(1A).

52. *Ibid.*

53. Id s20(3).

54. The Hon J Cain, MLA, Attorney General, Victorian Parliamentary Debates, Legislative Assembly, 14 December 1982 at 2766-2767.

55. [1985] VR 327.

56. Id at 329, per Murray J.

57. *Ibid.*

58. Limitation Act 1935 (WA) s38(1)(c) and (b) respectively.

59. Law Reform Commission of Western Australia Limitation and *Notice of* Actions (Scope and Approach Paper, Project No 36 Part 11 1984) at 5-6. para 1.4.

60. Id at 6, para 1.5.

61. Law Reform Commission of Western Australia Report on Limitation and *Notice of Actions: Latent Disease* and Injury (Project No 36 Part 1 1982) at 5, para 1.1.

62. Law Reform Commission of Western Australia Annual *Report* 1982-1983 at 24, para 3.38.

63. Law Reform Commission of Western Australia, note 61 at 75, para 4.22.

64. Id at 75, para 4:22, fn 3

65. Id at 77-80, paras 4.25-4.32.

66, Id at 67, para 4.5.

67. *Ibid.*

68. Id at 67, para 4.6.

69. Law Reform Commission of Western Australia, note 59 at 7, para 1.7.

70. Id at 8, para 1.7.

71. West Australian Parliamentary Debates, Legislative Council, 30 November 1983 at 4441, the Hon J M Berinson, Attorney General.

72. Section 38A(7)-(9).

73. Section 38A(7), (for a discussion of the English provisions see para 4.5).

74. S Smith “Asbestos Related Diseases” February 1984 *Brief* 10 at 10.

75. Limitation Act 1935 (WA) (as amended by Acts Amendment (Asbestos Related Diseases) Act 1983 (WA)) s38A(6).

76. Id s38A(2)-(5).

77. West Australian Parliamentary Debates, Legislative Council, 6 December 1983 at 5987, the Hon J M Berinson, Attorney General.

78. Law Reform Commission of Western Australia, note 59 at 86, para 4.8.

79. Law Reform Commission of Western Australia Annual Report (1984-1985) at 34, para 3.71.

80. Limitation of Actions and Wrongs Act Amendment Act 1956 (SA).

81. Law Reform Committee of South Australia *Law Relating to* Limitation *of Timefor* Bringing Actions (No 12, 1970) at 3.

82. *Ibid*.

83. *Ibid.*

84. Statutes Amendment (Miscellaneous Provisions) Act 1972 (SA); substituted by Limitation of Actions Amendment Act 1975 (SA).

85. Limitation of Actions Act 1936 (SA) s48(1).

86. Id s48(3).

87. Law Reform Committee of South Australia *Report Relating to Claims for Injuries from Toxic Substances and Radiation Effects* (No 87, 1985).

88. Id at 10-11.

89. ld at 19.

90. Id at 20-21. Discussed at para 4.5.

91. Law Reform Committee of South Australia, note 87 at 27.

92. Id at 25-26.

93. Id at 27.

94. *Ibid.*

95. Attorney-General’s Department (Cth) Working *Paper, Proposals for the* Reform and Modernization *of the Laws of* Limitation in the Australian Capital Territory 3 para 4.

96. Limitation Ordinance 1985 (ACT) s11(1) but see eg ss14-19 and 23 which set different limitation periods for specific causes of action not related to personal injury, as do ss 17.20,22.27 and 41 of the Limitation Act 1969 (NSW): *Working Paper* at 13 para 20.

97. Attorney General's Department Working Paper at 12.

98. Limitation Ordinance 1985 (ACT) s36(2).

99. See para 4.32.

100. Limitation Ordinance 1985 (ACT) s16.

101. Id s39(2).

102. Id s39(3),(5).

5. Options for Reform

I. INTRODUCTION

5.1 New South Wales is at the same legislative stage at which the Orr Committee confronted limitations in England in 1974. There are obvious difficulties with the current Limitation Act 1969 as it applies to personal injury actions. The judiciary finds the statutory language obscure and ambiguous. Particular injustices and anomalies have been revealed in the cases, for example in *Bergfels.* The legislation cannot, in its present form, avoid injustices. If policy demands that plaintiffs be protected from the effects of the application of fixed principles then the difficult question is raised-what statutory provision would provide a better alternative?

II. OPTIONS FOR REFORM

5.2 The Commission has identified four major viable options for the reform of the existing legislation. Each of these could be subject to variation in legislative expression. Where possible the options have been drawn from existing limitations legislation.

A. Option I-Fixed Limitation Period with a Discovery Rule Extension

5.3 This option embodies the current New South Wales position but some modification or clarification of the legislation would be appropriate. The main features of this option are as follows:

> A fixed (currently six year) limitation period running from the date of accrual of the cause of action or from the date of knowledge, whichever is later.
>
> Redrafting the statutory formulation of the discovery rule to both simplify and clarify it.
>
> Extend the benefit of the discovery rule to applicants under the Compensation to Relatives Act 1897. Provided that the deceased's cause of action would not have been barred at the date of death, such applicants would have six years from the date of death or the date of the applicant's knowledge within which to commence their action. The position of such applicants would thus be assimilated with that of ordinary personal injury plaintiffs and the present anomaly, illustrated in *Bergfels,* would be eliminated.
>
> Remove the ultimate thirty year limit on the commencement of actions contained in the Limitation Act 1969, s51.

5.4 The option differs from the existing New South Wales legislation in the following ways. Under the current formulation, satisfaction of the date of knowledge criteria only allows the court to exercise its discretion to extend the limitation period in the plaintiff's favour. The option would entitle the plaintiff, on proof of the criteria, to an extension as of right. Furthermore the Court is currently empowered to extend the limitation period for up to twelve months from the date of knowledge. Under the above proposal, the plaintiff would be entitled to the full benefit of the primary limitation period running from the date of knowledge. This is the position under both the English and Victorian limitation provisions (paras 4.5,4.23).

5.5 In redrafting the statutory formula for the discovery rule extension. the recent Victorian amendments (para 4.23) illustrate the simplicity and lack of ambiguity which can be achieved. The limitation period there begins to run from the date on which the plaintiff first knows

> (a) that he or she has suffered those personal injuries, and
>
> (b) that those personal injuries were caused by the act or omission of some person.

This implicitly excludes the worthwhile cause of action test. The current English legislation goes even further and expressly excludes it as a matter for consideration in the discovery rule extension of the primary limitation period (para 4.5).

5.6 A further issue to be addressed is whether or not the legislation should impose constructive knowledge and thus prevent a plaintiff from relying on the discovery rule extension. In New South Wales provision is currently made for the plaintiff to be attributed with constructive knowledge In certain circumstances. Sub-paragraph 57(1)(e)(ii) provides that a fact is not within a person's means of knowledge only if

> in so far as the fact escapable of being ascertained by him, he has, before that time, taken all reasonable steps to ascertain the fact.(emphasts supplied)

It has generally been accepted that notwithstanding the use of the words "reasonable steps", this sub-paragraph imposes a subjective test. In England it was held that in relation to a similarly worded provision,

> [w]e are not concerned with "the reasonable man." Less is expected of a stupid or unreasonable man than of a man of intelligence and wide experience.[1]

These remarks were approved in *Do Carmo v Ford Excavations Pty Ltd*[2] where Dawson J stressed that it was

> ...the means of knowledge which were available to the [plaintiff] which are relevant and not the means of knowledge of a hypothetical reasonable man.[3]

5.7 The current English Act also contains a provision imposing constructive knowledge. However, under that provision, a person will not be fixed with knowledge of facts ascertainable only with the help of expert advice if he or she has taken all reasonable steps to obtain that advice.[4]

5.8 The current Victorian legislation does not attempt to define "knowledge" for the purposes of the discovery rule. The legislation, by implication, refers only to the actual knowledge of the plaintiff and does not impose constructive knowledge.

B. Option 2-Fixed Limitation Period with a Discovery Rule Extension and a Discretionary Extension

5.9 This option has been implemented in the most recent amendments to the limitations legislation of England and Victoria.[5] It combines the preceding option with an overriding discretion to direct that the primary limitation period shall not apply in a particular case. The main features of this option are as follows.

> A fixed limitation period running from the date of accrual of the cause of action or from the date of knowledge, whichever is later.
>
> A general discretion is conferred on the court to direct that the above requirements of the statutory formula shall not apply to a particular individual where the court considers it inequitable so to do.
>
> Applicants claiming under the Compensation to Relatives Act 1897 are integrated into the above scheme. Both the discovery rule and the discretion extension are thus applicable to such actions.

5.10 The Victorian legislation although based largely on the English provisions contains significant improvements in legislative expression. The English provisions were so drafted as to require, as a prerequisite to the exercise of the discretion to extend, proof that the primary limitation period had caused the plaintiff prejudice. The discretion is thus not available in cases where the plaintiff has commenced an action within the requisite period but due to a lapse the action has been discontinued.[6] The Victorian provisions have avoided such technicality by giving the court jurisdiction to exercise its discretion if it is just and reasonable so to do.[7] Moreover the Act expressly provides that the discretion can be exercised notwithstanding the fact that "an action in respect of such personal injuries has been commenced".[8]

5.11 The guidelines prescribed for the exercise of the discretion in Victoria and England are virtually identical. While the guidelines are not exclusive and the court is able to consider all the circumstances of the case, they are comprehensive.

5.12 Both Victoria and England have extended the benefit of the discretion to claims made under their equivalents of the Compensation to Relatives Act 1897. The discretion is applicable to both the deceased's hypothetical cause of action and to the applicant's cause of action. The applicant thus has the opportunity of persuading the court that had the proceedings been instituted immediately before the date of death the discretion would have been exercised in favour of the deceased. The Orr Committee recognised that this may involve the court in "too difficult a task" due to the extremely hypothetical nature of such a submission. The Court may be called upon to make a judgment in relation to the circumstances of a person who had died many years before and to an action which had not in fact been instituted.[9] Nevertheless the court was given power to do so by the amending legislation.[10]

5.13 In Victoria, the discretion may be exercised in circumstances where

> (a) the death of the deceased person was caused by a wrongful act, neglect or default; and
>
> (b) the deceased did not before his or her death bring an action in respect of the wrongful act, neglect or default.[11]

The guidelines prescribed for the exercise of that discretion include a specific reference to the knowledge and reasons for the delay of both the claimant and the deceased.[12]

C. Option 3-Fixed Limitation Period with a Discretionary Extension

5.14 This option differs from that preceding in that there is no provision for extension of the primary limitation period as of right from the date of knowledge. That is, there is no discovery rule extension. All plaintiffs who fall outside of the primary limitation period must rely on the court's discretion. The option is similar to one recommended by the Law Reform Commission of Western Australia in its *Report on Limitation and Notice of Actions: Latent Disease and Injury*. (para 4.32) The main features of this option are as follows:

> A fixed limitation period running from the date of accrual of cause of action.
>
> A general discretion is conferred on the Court to direct that the primary limitation period shall not apply to a particular individual where the court considers it equitable so to do.
>
> Applicants claiming under the Compensation to Relatives Act 1897 are integrated into the above scheme. After the expiration of a fixed period from the date of death, the applicant may apply for an exercise of the court's discretion.

5.15 Although this option does not contain the discovery rule extension, the guidelines prescribed for the exercise of the discretion specifically refer to the special circumstances encountered by such plaintiffs. The Law Reform Commission of Western Australia, for example, recommended that the Court have regard to

> the reasons why the plaintiff did not commence the action within the limitation period including..... 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.[13]

D. Option 4-No Limitation Period

5.16 The suggestion that limitation statutes be abolished in relation to personal injury claims has been made at various stages in the development of modern limitations legislation. It is a suggestion which has generally been dismissed, often peremptorily, with arguments of practice and principle.

5.17 As noted in paras 1.10- 1.12, there are three major justifications given for the enactment of limitations legislation. Firstly, such statutes prevent actions being brought at a time when evidence has become unreliable or non-existent. This has been called the evidentiary rationale.[14] Secondly, the defendant is able to achieve a certainty with respect to his or her potential liability and this encourages a productive and efficient use of resources. This has been called the personal certainty rationale.[15] Thirdly, plaintiffs are discouraged from sleeping on their rights, the so-called diligence rationale.[16] These rationales were espoused by the Edmund Davies Committee in 1962[17] and have been repeatedly referred to in subsequent inquiries.[18]

5.18 These major rationales have been undermined by the changing circumstances and conditions of litigation. It is said for example that the evidentiary rationale may be better addressed by the development of stricter rules of evidence and by appropriate training being given to those who are to try the facts.[19] Furthermore, it has been argued that as the onus of proof falls on the plaintiff, it is as much in the plaintiff's as in the defendant's interest to bring an action promptly.[20] It is argued that the plaintiff's self interest in having an action heard promptly is sufficient, and defendants do not need the extra protection of a limitation statute.[21]

5.19 The personal certainty rationale has also been questioned. The Scottish Law Commission referred to the argument that

> the general principle of the law should be against limiting the right of a person to seek redress for injury due to the negligence of another person....[22]

The historical view of litigation as a necessary evil to be discouraged is no longer held, and in fact litigation is seen as a positive vehicle for compensation, discouragement of negligent behaviour and the shifting of losses associated with personal injury.[23] Limitations legislation affects the balance achievable by litigation.

5.20 Furthermore, it is argued that the availability of insurance has released potential defendants from the uncertainty associated with personal injury actions.[24] Moreover, it is argued that defendants should be required to consider the latent potential of their products or practices and should be required to allocate resources with a view to their long term liability.[25]

5.21 Finally, the diligence rationale has been undermined. Whilst in 1974, the Orr Committee asserted that

> all experience shows that plaintiffs do not start proceedings promptly unless there is a sanction for failing to do so[26]

it failed to provide any evidence in support of this assertion. A different conclusion was reached by the Committee on the Limitation of Actions (the Tucker Committee) which reported in 1949 on the then current twelve month limitation period applicable to actions brought against public authorities. The Committee considered statistics supplied by the Scottish Motor Traction Co Ltd in relation to a jurisdiction then governed only by a twenty year prescription period. Over a five year period, it was found that ten percent of claims were commenced within nine months of the date of injury; a further fifty percent within nine to twelve months. a further thirty percent within one to two years; and a further nine percent within two to three years. Only one percent of claims was commenced more than three years after the date of injury.[27] The Committee considered that these figures confirmed Its view that

> save in exceptional circumstances, claims are made, and actions brought where necessary, with reasonable promptitude, irrespective of the existence of any special period of limitation.[28]

5.22 The impact of limitations legislation on victims of latent injury and disease cannot be justified by reference to the diligence rationale. Their delay in commencing actions within the limitation period is due to the imperceptibility of their injury, or its causation, and not to any lack of diligence on their part.

5.23 It has been argued also that in the absence of limitation periods,

> new traditions and standards of diligence may substitute for the present professional tradition of relying on the statute of limitations to help make decisions about the timing of claims.[29]

Lawyers could be expected to use current limitation periods as a guideline for the bringing of actions and would be encouraged by professional pride or fear of negligent loss of evidence to commence actions in good time.[30]

5.24 There is a modern variation on the personal certainty theme. Although insurance has to a significant extent removed the uncertainty of the risk of future liability from the individual defendant, in order to function insurance companies themselves require limits to be placed on their liability.[31] Ultimately, therefore some limitations provision is necessary to make the risk of liability insurable.[32] The Orr Committee considered that open ended liability might make some risks uninsurable resulting in no benefit to anyone.[33]

5.25 However. one commentator has argued that the same problem arises in relation to a system of limitation which includes an unfettered discretion such as that recommended by the Orr Committee. It has been suggested that the existence of such a discretion has the same effect In practice as no limitation provision at all.

> If there are problems of insurability without any statute of limitations there is good reason to believe there are problems of insurability under the [Orr] Committee's proposal.[34]

5.26 Alternatively it has been suggested that the whole issue of limitation could be left to the discretion of the court and the "largely, if not entirely, superfluous fixed periods" could be repealed. A system could be envisaged where the commencement of actions by plaintiffs was not governed by any limitation period. Defendants would, however, be entitled to apply for an exercise of the court's discretion that the plaintiff be prevented from bringing an action. The onus would then be on the defendant to satisfy the court that it was unfair to allow the action to proceed. A similar provision, but in a very different context, was recommended in 1975 by this Commission in its Report on *The Limitation of Actions-Special Protections.* The Commission recommended a fixed limitation period of three years with a power to extend for up to one year further "if satisfied that sufficient cause is shown or that having regard to all the circumstances of the case, it would be reasonable so to do."[35] However the defendant could apply for a Court order that the plaintiff commence proceedings within a period expiring before the expiration of the limitation period.[36] The defendant would have to show "sufficient cause" for such an order to be made or that "having regard to all the circumstances of the case it [was] reasonable to make" such an order.[37] The Commission envisaged that a defendant could rely on the provision where there was a possibility that witnesses may be lost or die; where the possibility of litigation could frustrate future planning; or where fear of the outcome of litigation was so severe that it might prejudice the defendant's hopes so much as to "sap his present incentives to work and save money."[38]

FOOTNOTES

1. *Central Asbestos Co Ltd v Dodd* [1973] AC 518 at 530, per Lord Reid.

2. (1984) 154 CLR 234.

3. Id at 258-259.

4. Limitation Act 1980 (UK) s14(3).

5. Limitation Act 1975 (UK) (now consolidated in Limitation Act 1980 (UK)): Limitation of Actions (Personal Injury Claims) Act 1983 (Vic).

6. *Walkley v Precision Forgings* Ltd [1972] 2 AII ER 548; Thompson *v Brown Construction Ltd* [1981] 2 All ER 296.See also para 4.12.

7. Limitation of Actions Act 1958 (Vic) s23A(2).

8. Id s23A(4).

9. Law Reform Committee (Orr Committee), *Interim Report* on Limitation of Actions, Personal Injury Claims (Cmnd 5630, 1974) at 45, paras 128-129

10. Limitation Act 1980 (UK) ss12(3), 33(4) and (5).

11. Wrongs Act 1958 (Vic) s20(2).

12. Id s20(3)(a) and (e).

13. Law Reform Commission of Western Australia Report on Limitation and *Notice of Actions* (Project No. 36 Part 1 1982) at 77-78, paras 4.25-4.26.

14. P J Kelley "The Discovery Rule for Personal Injury Statutes of Limitations: Reflections on the British Experience" (1978) 24 Wayne *Law Review* 1641 at 1644.

15. *Ibid.*

16. *Ibid.*

17. Committee on Limitation of Actions in Cases of Personal Injury (Edmund Davies Committee) Report (Cmnd 1829, 1962) at 9, para 17.

18. See for example: Law Reform Committee (Orr Committee) note 9 at 9, para 24: New South Wales Law Reform Commission *Limitation of Actions* (LRC 3, 1967) at 133, para 280; Law Reform Commission of Western Australia, note 13 at 8-9, para 1.10; Law Reform Committee of South Australia *Claims.for Injuries from Toxic Substances and Radiation Effects* (No

87. 1985) at 6: Law Reform Commission of British Columbia Report on Limitations (1974)

at 9.

19. Harvard Law Review "Developments in the Law. Statutes of Limitations" (1949-50) 63 *Harvard Law Review* 1177 at 1186.

20. Trades Union Congress, Submission to the Orr Committee, note 9 at 9, para 26.

21. P J Kelley, note 14 at 1670.

22. Scottish Law Commission Prescription and Limitation *of Actions* (Memo No 9, 1969) at 48, para 74.

23. P J Kelley, note 14 at 1646-1647.

24. P J Kelley, note 14 at 1646.

25. S Peters "Occupational Carcinogenesis and Statutes of Limitation: Resolving Relevant Policy Goals" (I 979) 10 *Environmental law* 13 at 124.

26. Law Reform Committee, note 9 at 9. para 27.

27. Committee on the Limitation of Actions (Tucker Committee) *Report* (Cmd 7740, 1949) at 8. para 15.

28. *Ibid.*

29. P J Kelley, note 14 at 1671-1672.

30. Id at 1671.

31. P J Kelley. note 14 at 1672.

32. Id at 1646-1647.

33. Law Reform Committee, note 9 at 10, para 27.

34. P J Kelley. note 14 at 1675.

35. New South Wales Law Reform Commission *The Limitation of Actions-Special Protections* (LRC 21. 1975) at 42. para 140.

36. *Id* at 43, para 143.

37. Id Appendix D at 64, s50A. Proposed Limitation (Amendment) Bill.

38. Id at 43, para 143.

6. Recommendations

I. RETENTION OF LIMITATION PERIOD

6.1 **The Commission recommends that the limitation of personal injury actions be governed by a primary fixed limitation period running from the date of accrual of the cause of action, with a general discretion conferred on the court to extend the primary period where injustice would otherwise result.** Injustice refers to injustice between the particular parties to the action, not injustice in the abstract, and would involve consideration of the respective circumstances of the parties. The discretion would operate as an exception to the primacy of the fixed period.

6.2 The Commission believes that the primary limitation period should be retained as a sanction for those who do not commence their actions promptly. Although available evidence is far from conclusive (see para 5.2 1) and the sanction may not be necessary as a deterrent given the plaintiff's own interest in bringing an action promptly (see para 5.18) a fixed limitation period does put a definite limit on the litigation of late claims, thus ensuring the benefits of prompt litigation. These include more reliable and readily available evidence; the protection of defendants from the continuing threat of liability which accords with both a personal sense of justice and allows efficient use of resources, the latter being necessary for effective commercial practice; and the efficient operation of the machinery of justice which requires claims to be dealt with expeditiously.[1] These are benefits to both individual plaintiffs and defendants and to the community.

6.3 Nevertheless the Commission recognises that any such system can cause injustice as between individual plaintiffs and defendants if applied without exception. In Chapter 3 we have outlined the main areas for concern. As well as certain identifiable categories such as latent injury and disease there are the myriad cases which, because of peculiarities and combinations of circumstances, result in hardship to the plaintiff. Such cases require provision for extension beyond the fixed limitation period.

II. LENGTH OF LIMITATION PERIOD

6.4 The commencement of personal injury actions in New South Wales is governed by a six year limitation period, as are actions founded on contract or tort generally.[2]

6.5 In England, the six year limitation period for personal injury was reduced to three years in 1954.[3] This reduction was followed in Queensland[4] and South Australia[5] in 1956, in Victoria[6] in 1958 and in Tasmania[7] in 1965. In each case, the limitation period for actions founded on tort or contract generally, remained at six years. The Northern Territory legislation, enacted in 1981, provides for a three year limitation period for actions based on tort or contract generally, including those claiming damages for personal injury.[8]

6.6 The shortening of the limitation period in England implemented the recommendations of the Monckton Committee. The Committee stressed that although the plaintiff must be given adequate time within which to commence an action, the six year limitation period was too long.

> It seems clearly unreasonable that a prospective plaintiff should have the power to keep the threat of an action hanging over the [defendant] for so long a period as six years.[9]

The Committee consequently recommended that personal injury actions be governed by a three year limitation period and this has remained the situation in England since 1954. The Orr Committee, in its 1974 Report, supported the retention of the three year period having received no evidence that it be either "extended or abridged".[10]

6.7 In 1975, this Commission echoed those sentiments and recommended the introduction of a three year limitation period for all actions based on tort including those involving personal injury, with power in the court to

extend up to one year further "if satisfied that sufficient cause is shown or that having regard to all the circumstances of the case, it would be reasonable so to do".[11] Actions founded on contract would continue to be governed by a six year period.[12] The Commission argued that although the six year period went back as far as 1623 and was familiar to the community, it was ultimately an arbitrary limit which could be altered without harm.[13]

6.8 There is an interaction between the length of the limitation period and the existence of provisions for extension of that period. The main argument for the lengthening of the limitation period is to prevent the exclusion of worthwhile cases, such as those involving latent injury and disease. However, all such cases will never be fairly accommodated under a rigid system of limitations running from the date of accrual of the cause of action; unless the period is so long as to be meaningless in terms of the rationale for limitations.[14] There is always the risk that time will run, and even expire before the injury is discovered or reasonably discoverable. If, however, a satisfactory extension formula is found for such cases, there is no need for a lengthy primary limitation period.

6.9 While there has been an overall tendency since the 1950s to shorten limitation periods applicable to personal injury actions, the most recent Australian amendments have restored the six year period. In the 1983 Victorian amendments, which simplified the discovery rule and introduced a discretionary extension, the primary limitation period was extended from three to six years bringing it into line with actions founded on tort or contract generally. In his second reading speech on the amending Bill, the Victorian Attorney General stated that

> [t]he Government does not understand why a claim for damages arising out of personal injury should be treated differently from any other cause of action.[15]

6.10 The Law Reform Commission of Western Australia also recommended the retention of the six year limitation period for personal injury actions notwithstanding its recommendation for the introduction of a broad power of extension.[16]

6.11 There is much to be said for uniformity between States and Territories, but preservation of a six year limitation period in New South Wales would not produce uniformity. A shorter period is desirable, primarily to encourage the early determination of contested claims. The argument for a longer period is met by a provision for discretionary extension of time. **The primary limitation period in cases of personal injury should therefore be three years from the date of accrual of the cause of action.**

6.12 The Commission is persuaded that the public interest is better served by requiring early prosecution of personal injury claims, that it will be the exceptional case only that will not be accommodated by the primary period of three years and the discretionary extension suggested.[17] It must be appreciated that the delay permitted by a limitation period is that which occurs in the initiation of the proceedings and not any delay which may then ensue in bringing the matter to trial. If there are good reasons for delaying the hearing they can be dealt with under the control of the Court. Reasons for a delayed hearing are not reasons for a longer limitation period.

III. EXTENSION PROVISIONS

A. The Discovery Rule Extension

6.13 The discovery rule extension formula is concerned only with latent injury and disease and does not address wider areas of hardship arising under the primary limitation period. It has received various statutory forms since its introduction in England in 1963.[18] In New South Wales it currently operates on a discretionary basis. On satisfaction of the date of knowledge criteria, the court may order that the limitation period be extended by one year from the date of knowledge.[19] In England and Victoria the rule operates to allow a plaintiff to commence an action *as of right* on satisfaction of the criteria. Furthermore plaintiffs receive the benefit of the ordinary limitation period which then runs from the date of knowledge.[20] In this way, the position of victims of latent injury and disease has been fully integrated with that of ordinary personal injury claimants. In England, the two situations have been equated as the norm, in contradistinction to cases brought under the discretionary provisions.[21] In some cases also the Supreme Court is able to achieve an extension of the limitation period by use of the discretion in Part 20 of the Supreme Court Rules 1970 to allow amendments. It is clear from the decision of the Court of Appeal in *McGee v Yeomans*[22] that such amendments may, by allowing additional causes of action in

the proceedings, have the effect of allowing an extension of the limitation period in relation to such new causes of action, although only where arising out of the same or similar facts.[23]

6.14 The extension as of right has improved the position of victims of latent injury and disease. This improvement has been noted by recent reformers and there is a reluctance to detract from that position. The Orr Committee, in 1974, for example, referred to the valuable right which had been conferred on plaintiffs entitling them to commence their actions within three years of the date of knowledge. It was a right from which the Committee did not wish to detract. They asserted that

> [t]o make the plaintiff entirely dependent on the court's discretion would...be a retrograde step...[24]

6.15 In 1982 the Scottish Law Commission argued that there was

> a wide acceptance of a short limitation period.....sufficiently flexible to take account of the claimant's lack of knowledge.[25]

After consultation that Commission found that there had been no support for an option involving only a fixed limitation period with a discretionary extension without a discovery rule extension.[26]

6.16 More recently the Victorian government has upheld this principle. In his second reading speech on the Limitation of Actions (Personal Injury Claims) Bill, the Attorney General stressed that the amendments meant that

> [t]he injured person in disease or disorder cases will no longer be dependent on the discretion of a court to extend the limitation period but will have a postponed limitation period as of right.[27]

6.17 Most recently, the Law Reform Committee of South Australia has asserted that victims of latent injury should have the right to commence an action for damages upon the discovery of that injury and not have to rely on the court's discretion.[28]

6.18 However the fact remains that all of these extensions are based on a version of the discovery rule and concern has been expressed at both its formulation and its adequacy in principle.

6.19 Particular legislative drafting of the discovery rule has been criticised. The English Act was said to be "complicated, confusing and uncertain",[29] with the date of knowledge provisions, in particular, operating unsatisfactorily.[30] These criticisms could, however, be overcome by improved drafting. The Victorian discovery rule, for example, has been simplified and clarified and appears to be operating satisfactorily.

6.20 More cogent has been the criticism that, while the discovery rule deals with a significant form of injustice arising under a system of fixed limitation periods, it fails to address the many other situations where injustice may arise. The enactment of specific formulae addressing each situation in turn is incapable of doing justice in every case because the legislature cannot be expected to foresee all the possibilities.

> It is an illusion that drafting in detail achieves certainty: it inevitably leaves gaps, and, as time passes, growing uncertainty.[31]

6.21 This problem is heightened by the greater emphasis being placed on individualised justice, especially in the area of limitations.[32] The courts have referred to the desirability of a limitations system where the actual relative merits of plaintiff and defendant can be balanced. This is in contrast to the predetermined and abstract balancing of interests which occurs under the discovery rule formula. There, every plaintiff who satisfies the statutory criteria is entitled to an extension regardless of the consequent hardship to a particular defendant. Any plaintiff who cannot satisfy the criteria is statute barred, regardless of the consequent hardship suffered by that plaintiff.

> ...individual justice has assumed greater importance than ever before. Our legislature has realised that if it lays down firm rules, however carefully formulated and however many express exceptions, injustice will occasionally be done, for firm rules are inflexible and unable to take account of the hard case.[33]

> 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 a case.[34]

6.22 Furthermore there is an inherent inconsistency between on the one hand providing a detailed formula for extension and on the other hand conceding that because that formula may lead to injustice in certain cases a discretionary extension is also required. This is an acknowledgement that the discovery rule provisions are not able to resolve the very issues with which they purport to deal because, wherever there is a difficult case, the issue is left to be decided by judicial discretion.[35]

6.23 These arguments led the Law Reform Commission of Western Australia to reject a model for reform based on the discovery rule principle. Instead it chose to adopt a model based on a fixed limitation period with a form of discretionary extension. All those plaintiffs failing outside the fixed period must rely on an exercise of the court's discretion. We agree with this approach.

B. The Discretionary Extension

6.24 The Commission has recommended that the limitation of personal injury actions be governed by a fixed limitation period. The significance and primacy of the limitation of actions are thereby asserted and a necessary sanction to the dilatory commencement of claims is provided. Nevertheless the Commission recognises that injustice and hardship is certain to arise under such a system. Moreover, it acknowledges that such hard cases are no longer justifiable by reference to general principles of certainty and abstract justice. **The Commission recommends the introduction of a discretionary extension to resolve such injustice.** The discretion would operate as a complement to, and not in substitution for, the primary limitation period. Whereas limitations legislation has traditionally involved a predetermined and fixed balancing of the interests of the plaintiff and defendant, the Commission recognises the need for an individualised balancing in cases where the primary limitation period is exceeded. The balance between litigants is to be weighed in each case according to their respective circumstances and merits.

6.25 The existence of such a discretion in relation to some causes of action was noted by the Wright Committee in 1936. They rejected its introduction into the law of limitations generally on the grounds that it would lead to uncertainty. They recognised, however, that such a discretion would

> obviate the cases of hardship which are bound to occur under any rigid system of limitation, however well devised.[36]

6.26 The introduction of such a discretion was again rejected by the Edmund Davies Committee in 1962. The Committee had two main objections to the discretion. Firstly there was the uncertainty which would be engendered by such a discretion. Plaintiffs and defendants would not know where they stood in their ability to commence or defend an action.[37] Furthermore the discretion would lead to divergences of practice among the judiciary.[38]

6.27 The Orr Committee was however able to counter these two objections. Although the Committee agreed that the discretion would erode the certainty of the law, it was argued that previous attempts at formulating objective criteria of extension had failed.[39] In order to achieve consistency in the application of the court's discretion, certain guidelines were formulated for the guidance of the Court.[40] These guidelines are riot exhaustive, nor are they prerequisites to the exercise of the discretion. The subsequent English legislation implemented the recommended guidelines with very minor changes.[41] These guidelines form the basis for the latest Victorian amendments and for those proposed by the Law Reform Commission of Western Australia.[42]

6.28 In contrast, the discretion introduced in 1980 in Scotland is unfettered as are the discretions found in Tasmania. In Scotland, the court may allow all action to be brought after the expiry of the limitation period if it "seems equitable to do so".[43] In Tasmania the relevant criteria are "that in all the circumstances of the case it is just and reasonable so to do".[44]

6.29 This Commission is persuaded of the desirability of guidelines based on those of the English Limitation Act 1980. Due to our rejection of the discovery rule formula, however, some modification will have to be made. We have, for example, included a specific reference to the plaintiff's ignorance of the existence of an injury or of its cause a,-, well as ignorance of a worthwhile cause of action.

6.30 **We accordingly recommend that the three year limitation period should be subject to a general discretion in the exercise of which the court would have regard to the following considerations and any other considerations that are relevant.**

(a) the length of and reasons for the delay;

(b) the extent to which, having regard to the delay, there is or may be prejudice to the defendant:

(c) the extent to which the defendant has altered his or her position in reliance on the expiration of the limitation period;

(d) the extent to which the delay has prejudiced or may prejudice a fair trial of the matter by reducing the availability or reliability of oral or other evidence;

(e) the extent to which the delay may have increased the costs of the trial;

(f) the time at which the injury became known to the plaintiff;

(g) the time at which the plaintiff became aware of a connection between the injury and the defendant's act or omission:

(h) the time at which the plaintiff became aware of the potential for an action for damages in relation to the injury;

(i) the conduct of the defendant after the cause of' action arose, including the extent (if any) to which the defendant responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which are or might be relevant to the cause of action;

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

(k) the extent of the plaintiff's injury or loss.

6.31 **The Commission recommends that the plaintiff bear the onus of showing that it is just and reasonable for the limitation period to be extended.**

IV. COMPENSATION TO RELATIVES ACTIONS

6.32 **The Commission recommends that the position of applicants under the Compensation to Relatives Act 1897 should be fully integrated into the above scheme.** Such an applicant should be in no better nor worse position to commence an action than the deceased would have been. It is only in this way that injustices of the kind which arose in *Bergfels* can be resolved.

6.33 The Commission's recommendations regarding the length of the limitation period would be applicable to actions arising under the Compensation to Relatives Act 1897. **Such actions would be governed by a three year limitation period running from the date of death.** In order for the applicant's action to arise at all, however, the deceased must have had a good cause of action at the date of death. That is, the deceased's cause of action must not have accrued more than three years before the date of death unless proceedings were commenced by the deceased in time and were incomplete at the date of death. The applicant can thus become statute barred in two ways:

if the deceased dies more than three years after the cause of action accrued without commencing an action; and

if the applicant does not commence the compensation to relatives action within three years of the date of death.

The Commission recommends that the discretionary extension be available to an applicant, in an action under the Compensation to Relatives Act 1897, whether the applicant is barred because the deceased died more than three years after the accrual of the deceased's cause of action or is statute barred because the compensation to relatives action is commenced more than three years after the death of the deceased.

6.34 This accords with both the Victorian and English provisions.[45] **The guidelines which we recommend for the operation of the discretionary extension will have to incorporate specific reference to both the deceased's and the applicant's respective circumstances**.[46]

6.35 **In assessing the conduct of the applicant in a claim under the Compensation to Relatives Act 1897 the Commission recommends that the court should have regard to the conduct of the people for whose benefit the action might be brought.** This recommendation is made in recognition of the nature of the claim made under the Act. Although taken in the name of the personal representative of the deceased, or of one of the dependents, the action is "for the benefit of" the dependents of the deceased. Although under a duty to consolidate their claims into one action, each dependent is conceived as having a separate entitlement. This means that the barring of one dependent does not automatically lead to the barring of all for time runs against each individually.[47] The action brought by one, however, is in satisfaction of the claims of all the dependents. The responsibility for ensuring that all claims are consolidated into the one action rests on the person who brings the action and the remedy of the dependent whose claim is omitted from the consolidated action is to sue the claimant for breach of fiduciary duty.[48] The Commission's view is that unjustifiable delay on the part of one of them, whether the personal representative or a dependent, should not necessarily deprive another or others of their entitlements. It may be proper, in the circumstances of the case, for the court to allow one of the dependents to bring an action after the expiry of the limitation period while denying the right to others.

6.36 The position under the Compensation to Relatives Act is to be contrasted with the cause of action which survives to the benefit of the deceased's estate. A survivor action is brought or continued by the personal representative on behalf of the estate. In pursuing the action the personal representative is simply fulfilling the commitment to gather in the assets of the estate. Although the size of the estate may be expanded as a result, the action is not taken on behalf of those who are to benefit in the same way as in the case of a compensation to relatives claim. There is therefore not the same importance to be attached to the conduct of individual beneficiaries in the case of a survivor action. The conduct of the beneficiaries in the case of a survivor action may nonetheless be taken into account in an appropriate instance under the court's general discretion to have regard to all the circumstances of the case. Accordingly, it would not be appropriate, as in the case of claims under the Compensation to Relatives Act, to make provision for a limitation period to be extended selectively for the benefit of some only of those who would benefit in the case of a survivor action.

6.37 Given that the Limitation Act 1969 currently deals with the limitation of compensation to relatives actions, the Commission recommends that the discretionary extension of such actions also be dealt with in that Act. It is both simpler and more efficient to combine the criteria applicable to compensation to relatives claims and to ordinary personal injury actions.

V. THE ULTIMATE BAR

6.38 As noted above (para 2.15), the limitation of actions in New South Wales is currently subject to an ultimate bar of thirty years from the date of accrual.[49] This bar overrides any extension procedure otherwise available under the Act. For example a plaintiff could not rely on the discovery rule where the date of knowledge arose more than thirty years from the date of injury. Given that the latency period of some diseases is between twenty and forty years, this can operate as an effective bar to the commencement of any such action.

6.39 The section was originally introduced on the recommendation of this Commission because it was argued that

> a statute of limitations ought not to allow an indefinite time for the bringing of actions even if the.....matters dealt with in [the discovery rule] do exist.[50]

The Law Reform Commission of British Columbia in its 1974 Report recommended the introduction of an ultimate limitation period of thirty years. It referred, with approval, to the reasoning of this Commission.[51]

6.40 More recently the Law Reform Committee of South Australia has recommended the introduction of an "outside limit" for the bringing of actions. This would override both the discovery rule and discretionary extensions also proposed by that Committee. The Committee argued that the thirty year period was the "usual limit of latency" according to current scientific knowledge but admitted that it might "not catch all latent injury."[52] No provision was made for those actions which might not be caught.

6.41 However no such provision exists in the English legislation or that of other Australian states. In 1974, the Orr Committee in England considered and rejected this so-called "long-stop" approach. Although the approach was said to add certainty to any discretion by making it finite,[53] it was argued that the long-stop would either be too long to serve any useful purpose or too short to allow for recovery in many cases of latent injury or disease.[54]

6.42 In 1982, the Scottish Law Commission recommended that the twenty year ultimate bar then applicable in Scotland be abolished.[55] Its major objection to the limit was the possibility of injustice occurring in cases of latent injury or disease.[56] The Commission's recommendations were implemented in the Prescription and Limitation (Scotland) Act 1984 (UK).

6.43 The Law Reform Commission of Western Australia also rejected an approach which would have placed an ultimate limit on the exercise of the discretion. In doing so it concurred in the above arguments of the Orr Committee.[57]

6.44 On balance we also find the arguments of the Orr Committee persuasive. Notwithstanding the earlier recommendation of this Commission and its subsequent implementation, **we recommend that no ultimate bar should apply for personal injury claims (including claims under the Compensation to Relatives Act 1897).**

FOOTNOTES

1. Scottish Law Commission *Prescription and the Limitation of Actions. Personal Injuries Actions and Private International Law Questions* (1982) at 3, para 1.5.

2. Limitation Act 1969 s14(1).

3. Law Reform (Limitation of Actions) Act 1954 (UK).

4. Law Reform (Limitation of- Actions) Act 1956 (Qld): now contained in Limitation of Actions Act 1974 (Qld).

5. Limitation of' Actions and Wrongs Amendment Act 1956 (SA); now contained in the consolidation, the Limitations of Actions Act 1936 (SA).

6. Limitation of Actions Act 1958 (Vic); since repealed.

7. Limitations of Actions Act 1965 (Tas) provided for a limitation period for personal injury actions of Two years and six months subject to a judicial discretion to extend up to six years. The three year limitation period is now contained in Limitation Act 1974 (Tas).

8. Limitation Act 1981 (NT).

9. Departmental Committee on Alternative Remedies (Monckton Committee) Final *Report* (Cmnd 6860, 1946) at 47, para 107.

10. Law Reform Committee (Orr Committee) *Interim Report on Limitation of Actions, Personal Injury Claims* (Cmnd 5630, 1974) at 14, para 39.

11. New South Wales Law Reform Commission Limitation *of Actions-Special Protections* (LRC 21, 1975) at 42, para 140.

12. Id at 43, para 145.

13. Id at 41, para 135.

14. See for example the comment of the Trades and Labour Council and the Federated Miscellaneous Workers' Union of Western Australia on the draft Report of the Law Reform Commission of Western Australia that the period of limitation be extended to fifty years. "or-more sensibly-be abolished." Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions: Latent Disease and Injury* (Project No 36. Part 1, 1982) at 9, para 1.12, fn 5.

15. Victorian Parliamentary Debates. Legislative Assembly, 27 March 1 983 at 3453, the Hon J Cain. MLA, Attorney General.

16. Law Reform Commission of Western Australia, note 14 at 63, para 4.2.

17. For a full discussion of the Commission's views see paras 1.10- 1.13.

18. Limitation Act 1963 (UK).

19. Limitation Act 1969 s58(2).

20. limitation Act 1980 (UK) s11(4); Limitation of Actions Act 1958 (Vic) s5(1A).

21. Walkley *v Precision Foryings Ltd* 11 9791 2 AII ER 548 at 557, per Lord Diplock: *Firman v Ellis* [1978] QB 886 at 910-911. per Ormrod LJ.

22. [1977] 1 NSWLR 273.

23. Id at 280 per Glass J A and 284 per Mahoney J A.

24. Law Reform Committee, note 10 at 13, para 35.

25. Scottish Law Commission, note 1 at 2, para 14.

26. Id at 27-28. para 4.2

27. Victorian Parliamentary Debates, Legislative Assembly, 14 December 1982 at 2766, the Hon J Cain. MLA, Attorney General.

28. Law Reform Committee of South Australia *Claims, for Injuries from Toxic Substances and Radiation Effects* (No 87, 1985) at 19.

29. Law Reform Commission of Western Australia, note 14 at 67, para 4.5.

30. Ibid.

31. W Dale "Statutory Reform: The Draftsman and the Judge" (1981) 30 *International and Comparative Law Quarterly* 141 at 159.

32. Law Reform Committee, note 10 at 2 1, para 56.

33. *Firman v Ellis* [1978] QB 886 at 911, per Ormrod LJ.

34. P J Davies “Limitations of the Law of Limitations” (1982) 98 *Law Quarterly Review* 249 at 277-278.

35. Id at 258.

36. Law Revision Committee (Wright Committee) *5th Interim Report (Statutes of* Limitation) (Cmnd 5334. 1936) at 11, para 7.

37. Committee on Limitation of Actions in Cases of Personal Injury (Edmund Davies Committee) *Report* (Cmnd 1829. 1962) at 13, para 31,

38. Id at 1 4. pa ra 3 1.

39. Law Reform Committee. note 10 at 22, para 57.

40. Id at 27, para 69.

41. Limitation Act 1980 (UK) s33(3).

42. Chief Justice’s Law Reform Committee *Report on Limitation of Actions in Personal Injury Claims* (1981) at 8: Law Reform Commission of Western Australia, note 14 at 78-80, paras 4.26-4.32.

43. Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 s23.

44. Limitation Act 1974 (Tas) s5(3).

45. Limitation Act 1980 (UK) s12(3); Wrongs Act 1958 (Vic) s20(2).

46. See for example. Administration and Probate Act 1958 (Vic), s29(3A).

47. Compensation to Relatives Act 1897. ss4 and 6 allow a dependent to bring the action if the personal representative fails to do so within six months of the death. This view was confirmed by Enderby J in *Bendt v Green* (Unreported, Supreme Court of New South Wales. 7 April 1983) where the expiry of the limitation period against the wife did not bar the claims of’ the deceased’s children who were under age at the time of the death.

48. *McIntosh v* Williams [1976] 2 NSWLR 237 at 243, per Moffitt. P: “The responsibility for bringing in all persons, whose claims as dependents warrant consideration, rests upon the person who brings the action.” The remedy of the dependent who is omitted from the action is a claim against the claimant for breach of fiduciary duty. *Erwin v Shannon’s Brick. Tile and Pottery Co Ltd* (1938) 38 SR (NSW) 555 at 561 per Jordan C J.

49. Limitation Act 1969 s51.

50. New South Wales Law Reform Commission *Limitation of Actions* (LRC 3, 1967) at 127, para 241.

51. Law Reform Commission of British Columbia *Report on Limitations* (I 974) at 101.

52. Law Reform Committee of South Australia. note 28 at 27.

53. Law Reform Committee, note 10 at 13, para 36.

54. Id at 13. para 37.

55. Scotish Law Commission *Time Limits in Actions for Personal Injuries* (Memo No 45, 1980) at 9, para 2.8.

56. *Id* at 8, para 2.5.

57. Law Reform Commission of Western Australia, note 14 at 68, para 4.7.

7. Incidental Matters

I. RETROSPECTIVITY

7.1 Any amendments made to limitations legislation raise acutely the problem of retrospectivity. Are the amendments to apply to all causes of action regardless of when they accrued, or only to those which have accrued after the commencement of the legislation? What effect will the amendments have on actions in which proceedings have already been commenced, or final judgment entered? In the absence of an express provision dealing with the operation of the amendments, certain presumptions are raised according to formal rules of statutory interpretation. For example, it is presumed that a statute which affects substantive rights and liabilities is not intended to have a retrospective operation. A statute which merely affects procedural matters will, however, be given a retrospective operation.[1] These presumptions can, however, be overridden by express language. Because the application of the presumptions cannot be predicted with certainty, and because they may not in any case achieve Parliament's wishes, the Commission has thought it necessary to make express recommendations on the issue of retrospectivity.

7.2 Without special provisions to the contrary, the Commission's recommendations would have the following effects on causes of action which have accrued before the commencement of the proposed amending legislation. Firstly, the reduction of the limitation period from six years to three years would have the effect of depriving some plaintiffs of up to three years of time within which to commence their actions. Secondly, the conferral of the general discretion would give plaintiffs a new opportunity to have a discretion exercised in their favour. This could have the effect of reviving a cause of action which was statute barred before commencement. Thirdly, the ultimate thirty year bar is to be removed. These last two considerations could of course adversely affect the rights and liabilities of particular defendants.

7.3 In considering the issue of retrospectivity there are two competing principles to be considered. Firstly. fairness requires that rights and duties already vested at the time of commencement of a statute should not be adversely affected by that statute. In particular, revival of a statute barred action is said to be unjust because it deprives a defendant of a defence which had already become effective.[2] This is an argument against making the Commission's proposals retrospective in operation. Secondly there is the argument that where the law is changed in response to a particular hardship or injustice, the objective of that change will be partially frustrated if it only applies to causes of action which accrue after its commencement. Thus the benefit of any amendments should be extended to all plaintiffs whether or not their actions were already barred by the amended legislation.[3] In *Maxwell v Murphy*[4] for example, Fullagar J rejected an approach which presumed that statutes were not intended to interfere with a "vested defence" or "acquired immunity".

> I am not able to see any inherent probability that the legislature would.....have been zealous to avoid disappointment to a wrongdoer who might have thought himself safe, or his insurance company. I should rather have thought the legislature, being concerned to enlarge the remedy of [plaintiffs], would have seen nothing fundamentally unjust allowed in extending the enlarged remedy to persons who had the old abnormally short period to elapse...[5]

7.4 The Limitation Act 1969 introduced the discovery rule extension into the New South Wales legislation. The Act was said to be "fully retrospective",[6] in that the extension provisions applied to a cause of action whether or not a limitation period had expired before the commencement of the Act.[7] However, plaintiffs whose actions accrued before commencement were to retain the benefit of any limitation period which was shortened by the Act.[8] Nor were actions which had already been commenced before the commencement of the Act affected.[9]

7.5 This approach followed that implemented in the English reforms since 1963. According to that approach, plaintiffs obtained the benefit of any amendment beneficial to them, even though their cause of action had accrued before the date of commencement, and even though their action had been barred already under the

amended law. Furthermore, the amendments were also applied to any action in which proceedings had been commenced. Analogously, plaintiffs were able to retain the benefit of any legislation which was more beneficial than the amendments.[10] Thus the Law Reform (Limitation of Actions) Act 1954 (UK), which reduced the limitation period for personal injury actions from six years to three years, preserved the benefit of the six year period for those actions which had accrued before its commencement.[11]

7.6 The Orr Committee pointed out, however, that notwithstanding its concern that any amendments beneficial to a plaintiff be made retrospective, Parliament had not "gone so far as to approve a measure which would enable a judgment or settlement to be upset because of the change in the limitation period".[12] The effect of this is that a plaintiff who had actually been declared statute barred by a court would not be entitled to rely on the new provision. even though there was an appeal pending, or the time for appealing had not expired. The latest English amendments have upheld this principle.[13]

7.7 This concern that judgments not be overturned has been echoed by the Law Reform Commission of Western Australia which argued that there was a strong public interest in preserving the finality of judgments. This was said to outweigh any injustice experienced by plaintiffs who were thus unable to take advantage of the amendments.[14]

7.8 By way of contrast we refer to other approaches which have been taken to the issue of retrospectivity. The transitional provisions in the Acts Amendment (Asbestos Related Diseases) Act 1983 (WA) were based on suggestions made by the Law Reform Commission of Western Australia. Although they recommended full retrospectivity, the Commission recognised that this could expose defendants or their insurers to a potential liability which did not previously exist.[15] The cumulative effect of full retrospectivity could cause hardship to a particular defendant and the Commission considered that the impact on defendants could be lessened, inter alia, by limiting the damages which could be awarded in retrospective cases.[16] The Commission's concern regarding full retrospectivity was echoed in the parliamentary debates on the amendments. The government was most concerned that the amendments would fix insurers with liability which previously did not exist and which would not have been considered when premium levels were set. The effect of potentially large and unanticipated awards could have led to liquidation which would have benefited no one, least of all the plaintiffs.[17]

7.9 A compromise was struck. The Act, which introduced the discovery rule extension, drew a distinction between actions where the relevant dates of knowledge occurred before and after 1 January 1984. In cases where the plaintiff's requisite knowledge arises before that date, damages can only be awarded in respect of pecuniary loss and in any case cannot exceed $120,000. Such actions must also be commenced within three years of the date of commencement of the Act, as opposed to the usual six year period which runs from the date of knowledge.[18] The choice of the $120,000 limit was said to be an arbitrary one, achieving a balance between being "financially responsible" and providing a "worthwhile amount of damages for a successful plaintiff".[19] This is in contrast to an approach based on the full economic cost of the injury to the plaintiff over a lifetime.

7.10 The latest Victorian amendments, which lengthened the limitation period from three to six years, simplified the discovery rule and introduced a discretionary extension, were stated to have a very limited retrospective operation.[20] The amendments apply to all causes of action which had accrued within six years before the commencement of the Act.[21] This has the effect of reviving some causes of action which would have been barred under the old three year period. Any actions which had accrued more than six years before commencement will continue to be governed by the repealed legislation.[22] This is not a satisfactory solution given that those repealed provisions, which had been found to be unsatisfactory, will continue to govern such actions indefinitely and may result in parallel systems operating for some years to come. This can only exacerbate the feelings of injustice and hardship felt by plaintiffs whose actions had accrued more than six years before commencement.

7.11 **The Commission recommends that certain of its recommendations be given full retrospectivity.** The discretionary extension for example should be available to all plaintiffs regardless of when their causes of action accrued and notwithstanding that their actions had been statute barred by the previous legislation. Similarly **the ultimate thirty year bar should be removed so as not to affect any action.** In contrast, **the reduction of the limitation period from six years to three years should be prospective and plaintiffs whose actions accrue up until the day of commencement should be able to retain the benefit of the six year period.** Such

plaintiffs will not, however, be able to retain the benefit of the discovery rule extension which would have been available to them under the repealed legislation. To allow this would be to attract the same criticisms made of the Victorian transitional provisions in the last paragraph. The Commission notes that this will not disadvantage plaintiffs because in New South Wales the discovery rule operates on a discretionary basis. The equivalent English and Victorian provisions entitle the plaintiff to an extension as of right on proof of the knowledge criteria. Moreover the Commission believes that any injustice which may arise due to the removal of the discovery rule extension is more than outweighed by the introduction of the discretionary extension.

7 . 12 The Commission has, however, identified a number of areas where there should be an exception to the otherwise full retrospectivity. The English approach has been to make any matters which have proceeded to judgment an exception to retrospectivity even where an appeal is pending or the time for appealing has not expired.[23] The Commission considers that such a blanket exception is unwarranted and operates unfairly as between statute barred plaintiffs who have commenced actions and those who have not. The former class of plaintiffs should not be prejudiced as against the latter class, especially when one considers the often technical and complex reasons for a finding of limitation under the discovery rule. The Commission, however, recommends that where the judgment included a finding against the plaintiff on the substantive merits of the cause of action (apart altogether from any matter of limitation) the plaintiff should not be entitled to commence an action under the amendments. In such circumstances the necessity for finality of judgments does require that there be no retrospectivity.

7.13 The Commission also considered the possibility that the plaintiff may have received damages for the same injury already notwithstanding that he or she was statute barred under the amended legislation. This may have been in the form of a settlement, or a judgment against a negligent solicitor for failing to commence an action within the limitation period.

7.14 The fact that the plaintiff has entered into a settlement which purports to bar future litigation on the merits does not seem a sufficient ground in itself on which to deny retrospectivity. The settlement may well have been compromised because of the parties' assessment that the plaintiff's cause of action was likely to have been statute barred by operation of the provisions of the Limitation Act. Also there seems no proper basis on which to distinguish this case from the case where the plaintiff has pursued the matter to judgment, but has been denied relief because of the operation of the 1969 Act. The Commission recognises, however, that there is a distinction to be drawn between a meritorious claim settled unfavourably because of the influence of the Limitation Act and the more speculative claim which, even if reopened, would require little adjustment of the compensation paid. As statutory provisions for the identification of the different types of claims are likely to be cumbersome, and therefore productive of much litigation themselves, **the Commission recommends that a discretion to reopen a settlement be given to the court to be exercised in circumstances where it is thought to be just and equitable to do so.** The Commission does not anticipate that many such applications are likely to be brought.

7.15 The Victorian Chief Justice's Law Reform Committee recommended that the discretionary extension should not be available in cases where the failure to commence an action within the limitation period was due "substantially to failure on the part of the legal representative to act with due care, expedition and diligence".[24] The Committee considered that this was the most usual cause of failure to bring proceedings in time and, that if it was so excluded, "cases of genuine hardship" only could be addressed.[25] The Law Reform Commission of Western Australia also recommended that the Court take into account the fact that the plaintiff may have a claim in negligence against his or her solicitor.[26]

7.16 The Law Reform Committee of South Australia has, however, recommended that the fact that the plaintiff has an action against his or her legal representative should not be a factor in the court's exercise of its discretion. The Committee arrived at this conclusion because it thought that "unless the Court is sure that the plaintiff would have been certain to win (which is certainly not the case in the normal latent injury case), the plaintiff may well not recover the entire amount from the solicitor that would been recovered from the original (intended) defendant"....It also thought that "it should also be borne in mind that the solicitor's insurance may not provide sufficient coverage".[27] The Commission agrees that this possibility should not be a factor which influences the court's exercise of its discretion to extend. It should not prevent the bringing of such an action, but money recovered in respect of the same cause of action, whether from the wrongdoer, a negligent solicitor, or his or her agent, should be taken into account by the court when assessing the damages payable to the plaintiff.

7.17 The Court should have power to make its award for damages on the terms that **any amount of money already received by the plaintiff by reason of the cause of action being statute barred should be deducted from the award.** This formula would not include payments made under the Social Security Act 1947 (Cth) or the Workers' Compensation system, such payments would continue to be governed by the usual rules against double recovery applicable to them.

7.18 In recommending that the amending legislation have retrospective effect the Commission is conscious that it may give rise to causes of actions which were not within contemplation when the injury occurred. It is in the very nature of many types of latent diseases and injuries that their causes may not have been discoverable at the time they occurred. The fact that the plaintiff suffered injury at all, and the cause of the injury, may be matters which can be discovered only after further advances have been made in medical science. The Commission also recognises that on some occasions the costs of a successful action may have to be borne by the defendant personally as the type of injury or disease found may not have been covered by the policies of insurance in use at the time of the injury. If included within the policy, however, it is likely that the insurance cover provided will extend to events occurring many years in the past, for it is only in recent years that insurers have adopted the practice of insuring only against claims -notified during the currency of the policy.[28]

II. FINANCIAL IMPACT

7.19 After extensive inquiries the Commission has been unable to estimate in any satisfactory way the potential financial cost of its recommendations. Our inquiries, and those made in the other jurisdictions mentioned below (paras 7.21 -7.22), reveal that there is no sure way of assessing the number of extra claims which could be expected to follow the amendments recommended. Because people who are out of time do not generally institute proceedings there is no official record of their existence. Some indication of the potential effect of our recommendations can be seen from various interstate and international reports on the topic. The Commission considers this information a valuable but inconclusive guide.

7.20 In New South Wales, the Supreme Court has expressed concern at the potential cost to defendants and their insurers of asbestos related disease. In *James Hardie Industries Ltd v QBE Insurance (International)*,[29] Rogers J noted that the litigation was of "immense consequence to the future financial well-being of the parties".[30]

7.21 During the introduction of the Victorian amendments in 1983, concern was expressed especially at the retrospective nature of those changes.

> No provision would have been made for those cases in insurance, and, for the various payers who might be required to pay. Therefore, we can look forward to some additional premiums, some additional costs, being required of the community.[31]

Estimates made by the Victorian Government Insurance Office in 1982 ranged from $40 million to $50 million.[32] The Attorney General however considered that there was insufficient information on which such estimates could be made, but that there was

> ...no evidence of the insurance industry dancing up and down and saying that this will bankrupt it or lead it to enormous increases in premiums.[33]

Nevertheless he accepted that the amendments would result in increased insurance costs, a sum which would ultimately be paid by the community in increased premiums.[34]

7.22 The Law Reform Commission of Western Australia referred to the concern expressed by the Motor Vehicle Transport Trust that it would be faced by a large number of stale claims. The Commission concluded that the fear was unfounded and that the Trust would not be unreasonably burdened or inconvenienced.[35]

7.23 In the debate on the Acts Amendment (Asbestos Related Disease) Act 1983 (WA) reference was made to a possible indebtedness of insurance companies of "anything up to $30 million" in relation to asbestos related disease alone.[36] The Attorney General replied that the State Government Insurance Office should be able to meet the prospective claims as they arise. In relation to retrospective claims, the Attorney asserted that the State

Government Insurance Office would meet the legal costs of the actions “out of established reserves and its normal margin of profit”. More substantial claims would require government contribution. In any case it was not proposed that the premiums of the insured be increased to cover any additional amounts.[37]

7.24 An American commentator sent detailed questionnaires to six British insurance companies with a particular interest in latent lung disease to determine the effect on claims of the introduction of the discovery rule and its lenient interpretation as applying to plaintiffs ignorant of their cause of action. The response of the insurance companies was that they did not keep records so as to isolate the effects of changes in limitation periods.[38]

7.25 In discussing potential cost it should be emphasised that there are two relevant stages of litigation. First the plaintiff must commence the action within the appropriate limitation period and then the substantive cause of action must be proved against the defendant. In relation to actions based on the contraction of disease, and in particular latent disease, plaintiffs face heavy burdens in proving their substantive cause of action. The fact that such plaintiffs may become newly entitled to commence their actions because of amendments recommended in this Report does not necessarily guarantee the subsequent success on the merits. This point was noted by the West Australian Attorney General in presenting that State’s recent amendments.

> Frankly, it has been disturbing to observe the apparent assumption that -an amendment to the Limitation Act will ensure the recovery of damages by all persons affected by asbestos-related diseases. This is not a safe assumption. Each case will go on its own facts and merits and will have to satisfy the usual negligence criteria. Two cases that I am aware of on the asbestos-related disease of mesothelioma have already failed, despite being treated as not statute-barred.....[T]his is an area for some restraint in terms of expectations.[39]

7.26 A similar point was made by the Law Reform Committee of South Australia in its 1985 Report.

> Even if satisfactory limitation provisions are devised to assist plaintiffs in latent injury toxic tort claims, that by no means solves the plaintiff’s problems. Once it is established that the plaintiff is within the limitation provisions he must set about the difficult task of proving his cause of action.[40]

The Committee then went on to examine ways in which plaintiffs could be assisted to establish the substance of their cases including altering the burden of proof, lowering the standard of proof and making recovery easier but placing a limit on the defendant’s liability.[41]

7.27 We do not accept that reliable data can be found which support the view that our recommendations would lead to a substantial increase in the volume of claims and thus have a significant impact on the cost of insurance. It is not the function of this Report to canvass the broader issues of whether compensation for personal injury in cases of latent injury and disease would be better provided under a special statutory scheme. The Victorian Attorney General noted the possibility of a national insurance scheme not based on fault.[42] This Commission has recommended the introduction of a Transport Accident Compensation scheme which provides for compensation within carefully prescribed limits without proof of fault.[43] If the compensation of latent injury and disease proves to be beyond the capacity of the common law, a limitation provision which operates to exclude arbitrarily such injury from compensation is a very blunt instrument with which to attempt to solve the problem. It is preferable to reshape limitations legislation so as to make it as fair and equitable as possible across the whole range of personal injury claims without arbitrary distinctions. Alleviation of the general problem of the cost of compensating personal injury has to be faced directly and independently if and when thought necessary.

FOOTNOTES

1. *Maxwell v Murphy* (1957) 96 CLR 261 at 267, per Dixon C J.

2. Law Reform Committee (Orr Committee) *Interim Report on Limitation of Actions, Personal Injury Claims* (Cmnd 5630, 1974) at 49, para 146.

3. *Ibid.*

4. (1957) 96 CLR 261.

5. Id at 284-285.

6. New South Wales Law Reform Commission Limitation *of Actions* (LRC 3, 1967) at 135, para 299.

7. Limitation Act 1969 s58(3).

8. *Id* s6(d).

9. *Id* s6(a).

10. Law Reform Committee, note 2 at 49, para 145.

11. Section 7.

12. Law Reform Committee, note 2 at 49, para 145.

13. Law Reform Committee, note 2 at 49, para 144. The Committee was here referring to the effects of the Limitation Act 1963 (UK) s6, the Law Reform (Miscellaneous Provisions) Act 1971 (UK) Sch 2 and the Limitation Act 1975 (UK) s3(1), (2).

14. Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions: Latent Disease and Injury* (Project No 36, Part 1, 1982) at 84, para 4.38.

15. *Id* at 85, para 4.39.

16. *Id* at 86, para 4.40.

17. West Australian Parliamentary Debates, Legislative Council, 3 November 1983 at 5550, the Hon J M Berinson, MLC, Attorney General.

18. Acts Amendment (Asbestos Related Diseases) Act 1983 (WA) s38(2),(3),(4) and (5).

19. West Australian Parliamentary Debates, Legislative Council, 6 December 1983 at 5987, the Hon J M Berinson, MLC, Attorney General.

20. Victorian Parliamentary Debates, Legislative Assembly, 14 December 1982. at 2767-2768, the Hon J Cain, MLA, Attorney General.

21. Limitation of Actions (Personal Injury Claims) Act 1983 (Vic) s11(1).

22. *Id* s11(2).

23. Limitation Act 1975 (UK) s3(1), (2).

24 Victorian Chief Justice's Law Reform Committee *Report on Limitation of Actions in Personal Injury Claims* (1981) at 2.

25. *Id* at 5.

26. Law Reform Commission of Western Australia, note 14 at 79-80, para 4.31.

27. Law Reform Committee of South Australia *Claims for Injuries from Toxic Substances and Radiation Effects* (No 87. 1985) at 26.

28. A view expressed by representatives of the Insurance Council of Australia during a meeting with the Commission in June 1986.

29. (Unreported) 19 November 1984, Supreme Court of New South Wales, Rogers J.

30. Id at 6.

31. Victorian Parliamentary Debates, Legislative Assembly, 23 March 1983 at 3449, Mr Maclellan, MLA.

32. Ibid.

33. Id at 3453, the Hon J Cain, MLA, Attorney General.

34. *Ibid.*

35. Law Reform Commission of Western Australia, note 14 para 4.35.

36. West Australian Parliamentary Debates, Legislative Council, 6 December 1983 at 5983, the Hon G C McKinnon, MLC.

37. Id at 5987, per the Hon J M Berinson, MLC, Attorney General. It should be recalled perhaps that the Western Australian legislation limited the damages recoverable to a maximum of $120.000 [para 4.35].

38. P J Kelley “The Discovery Rule for Personal Injury Statutes of Limitations: Reflections on the British Experience” (1978) 24 Wayne L R at 1672, fn 108.

39. West Australian Parliamentary Debates, Legislative Council, 30 November 1983 at 5551, the Hon J M Berinson, MLC, Attorney General,

40. Law Reform Committee of South Australia, note 27 at 31.

41. Id at 31-47.

42. Victorian Parliamentary Debates, Legislative Assembly, 23 March 1983 at 3453, the Hon J Cain, MLA, Attorney General.

43. Law Reform Commission of New South Wales *Report on a Transport Accidents Scheme for New South Wales* (LRC 43, 1984).

Appendix A - Limitation (Amendment) Bill 1986

A BILL FOR

An Act to amend the Limitation Act 1969 relating to the limitation of actions for personal injury.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:

Short title

1. This Act may be cited as the "Limitation (Amendment) Act 1986".

Commencement

2. (1) Sections I and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor and notified by proclamation published in the Gazette.

Amendment of Act No. 31, 1969

3. The Limitation Act 1969 is amended in the manner set forth in Schedule 1.

SCHEDULE 1

(Sec. 3)

AMENDMENTS TO THE LIMITATION ACT 1969

(1) Section 6 **(Transitional provisions)**-

(a) Section 6-

Omit "Subject to section 26 and to Division 3 of Part III", insert instead "Subject to section 26 and Schedule 5".

(b) Section 6 (2)-

At the end of "section 6", insert:

(2) Schedule 5 has effect.

(2) Section 11 **(Interpretation)**-

(a) Section 11(1)-

After the definition of "Action", insert:

"Beneficiary", when used in relation to an order under section 58 or an application for such an order, means a person for whose benefit an action might be, or might have been, brought under the Compensation to Relatives Act 1897.

"Breach of duty", when used in relation to a cause of action for damages for personal injury, extends to the breach of any duty, whether arising by statute, contract or otherwise, and includes trespass to the person.

(b) Section 11(1)-

After the definition of "Mortgagor", insert:

"Personal injury" includes any disease and any impairment of the physical or mental condition of a person.

(3) Section 18A-

After section 18, insert:

Personal injury

18A. (1) This section applies to a cause of action, founded on negligence, nuisance or breach of duty, for damages for personal injury, but does not apply to a cause of action arising under the Compensation to Relatives Act 1897.

(2) An action on a cause of action to which this section applies is not maintainable if brought after the expiration of a limitation period of 3 years, running from the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims.

(4) Section 19-

Omit the section, insert instead:

Compensation to relatives

19. An action on a cause of action arising under the Compensation to Relatives Act 1897, by virtue of a death, is not maintainable if brought after the expiration of a limitation period of 3 years running from the date of the death.

(5) Section 51 **(Ultimate bar)**-

At the end of section 51, insert:

(2) Subsection (1) does not apply to-

(a) a cause of action, founded on negligence, nuisance or breach of duty, for damages for personal injury; or

(b) a cause of action arising under the Compensation to Relatives Act 1897.

(6) Part III, Division 3 (sections 57-62)-

Omit the Division, insert instead:

DIVISION 3- Personal injury cases

Ordinary action (including surviving action)

57. (1) This section applies to a cause of action, founded on negligence, nuisance or breach of duty, for damages for personal injury, but does not apply to a cause of action arising under the Compensation to Relatives Act 1897.

(2) If an application is made to a court by a person claiming to have a cause of action to which this section applies, the court, after hearing such of the persons likely to be affected by the application as it sees fit, may, if it decides that it is just and reasonable to do so, order that the limitation period for the cause of action be extended for such period as it determines.

Compensation to relatives

58. (1) This section applies to-

(a) a cause of action for damages arising under the Compensation to Relatives Act 1897 by virtue of the death of a person caused by a wrongful act, neglect or default; and

(b) such a cause of action that would arise under the Compensation to Relatives Act 1897 but for the expiration as against the deceased of a limitation period.

(2) If an application is made to a court by a person claiming to have a cause of action to which this sectioft applies, the court, after hearing such of the persons likely to be affected by the application as it sees fit, may, if It decides that it is just and reasonable to do so, order-

(a) that the expiration of a limitation period for the cause of action of the deceased for the wrongful act, neglect or default has no effect in relation to the cause of action that the applicant claims to have; or

(b) that a limitation period for the cause of action that the applicant claims to have be extended for such period as It determines,

or both.

(3) The court may, in an order under this section, exclude any beneficiary or class of beneficiaries from the operation of the order, if It decides that it is just and reasonable to do so.

Matters to be considered by court

59. (1) In exercising the powers conferred on it by section 57 or 58, a court shall have regard to all the circumstances of the case and (without affecting the generality of the foregoing) shall, to the extent that they are relevant to the circumstances of the case, have regard to the following:

(a) the length of and reasons for the delay;

(b) the extent to which, having regard to the delay, there is or may be prejudice to the defendant;

(c) the extent to which the defendant has altered his or her position in reliance on the expiration of the limitation period;

(d) the extent to which the delay has prejudiced or may prejudice a fair trial of the matter by reducing the availability or reliability of oral or other evidence;

(e) the extent to which the delay may have increased the costs of the trial;

(f) the time at which the injury became known to the plaintiff;

(g) the time at which the plaintiff became aware of a connection between the injury and the defendant’s act or omission;

(h) the time at which the plaintiff became aware of the potential for an action for damages in relation to the injury;

(i) the conduct of the defendant after the cause of action arose, including the extent (if any) to which the defendant responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which are or might be relevant to the cause of action;

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

(k) the extent of the plaintiff's injury or loss.

(2) In the application of this section to an application for an order under section 57 in respect of a cause of action that has survived on the death of a person for the benefit of the person's estate under section 2 of the Law Reform (Miscellaneous Provisions) Act 1944, references in subsection (1) of this section to the plaintiff shall be read as including references to the deceased and the applicant, or any of them, as appropriate in the circumstances.

(3) In the application of this section to an application for an order under section 58 (2) (a)-

(a) references in subsection (1) of this section to the plaintiff shall be read as including references to the deceased, the personal representative of the deceased, and the beneficiaries, or any of them, as appropriate in the circumstances; and

(b) regard may also be had to delay occurring after the death of the deceased,

whether or not a limitation period has expired in relation to the cause of action that the applicant claims to have, and whether or not the applicant is also making an application under section 58 (2) (b).

(4) In the application of this section to an application for an order under section 58 (2) (b), references in subsection (1) of this section to the plaintiff shall be read as including references to the personal representative of the deceased, and the beneficiaries, or any of them, as appropriate in the circumstances.

Effect of order

60. (1) If a court orders under section 57 or section 58 (2) (b) that a limitation period for a cause of action be extended for a period determined by the court, the limitation period is accordingly extended for the purposes of-

(a) an action brought by the applicant in that court on the cause of action that the applicant claims to have; and

(b) section 26 (1) (b) In relation to any associated contribution action brought by the person against whom that cause of action lies.

(2) If a court orders under section 58 (2) (a) that the expiration of a. limitation period for a cause of action has no effect in relation to the cause of action that the applicant claims to have, that expiration has no effect for the purposes of-

(a) an action brought by the applicant in that court on the cause of action that the applicant claims to have: and

(b) any associated contribution action brought by the person against whom that cause of action lies.

(3) If a court excludes a beneficiary or class of beneficiaries from the operation of an order under section 58, the beneficiary or beneficiaries shall be treated as not being entitled to compensation in any compensation action brought as a consequence of the making of the order.

(4) In this section-

"compensation action" means an action under the Compensation to Relatives Act 1897;

"contribution action" means an action for contribution under section 5 (1) of the Law Reform (Miscellaneous Provisions) Act 1946.

Prior bar, etc., ineffective

61. (1) If, after the expiration of a limitation period to which this Division applies, the limitation period is extended by an order under this Division, the prior expiration of the limitation period has no effect for the purposes of this Act.

(2) Applications and orders may be made under this Division as if Division I of Part IV had never been in force.

(3) This Division applies to a cause of action whether or not a relevant limitation period has expired before an application is made under this Division in respect of the cause of action.

Evidence

62. If, under this Division, a question arises as to the knowledge of a deceased person, the court may have regard to the conduct and statements, oral or in writing, of the deceased person.

(7) Section 77 **(Rules of Court)**-

Omit "58, 59, 60" wherever occurring, insert instead '57, 58".

(8) Schedule 5-After Schedule 4, insert:

SCHEDULE 5

(Sec. 6(2))

FURTHER TRANSITIONAL PROVISIONS

Limitation (Amendment) Act 1986

Interpretation

1. (1) In this Schedule-

"legal professional negligence" extends to the breach of any duty of professional care owed by a solicitor or barrister, whether arising in tort, by contract or otherwise;

"limitation period" means a limitation period fixed by an enactment repealed or omitted by this Act or fixed by or under a provision of this Act (including a repealed or omitted provision of this Act).

(2) In this Schedule, a reference to a judgment given extends to a judgment entered, and also to an agreement entered into before and in connection with any such judgment.

Existing causes of action for personal injury to continue to have limitation period of 6 years

2. Section 18A as inserted by the Limitation (Amendment) Act 1986 does not apply to a cause of action that accrued before the commencement of that Act.

Existing causes of action under Compensation to Relatives Act to continue to have limitation period of 6 years

3. Section 19 as substituted by the Limitation (Amendment) Act 1986 does not apply to a cause of action that accrued before the commencement of that Act, and section 19 as in force before that commencement continues to apply to such a cause of action as if the section had not been replaced.

Removal of ultimate bar applicable to pre-existing causes of action

4. Section 51 (2) as inserted by the Limitation (Amendment) Act 1986 applies to a cause of action whether or not a relevant limitation period has expired before the commencement of the Limitation (Amendment) Act 1986.

Provisions permitting extension of limitation periods for personal injury cases to apply to pre-existing causes of action

5. (1) Division 3 of Part III as substituted by the Limitation (Amendment) Act 1986 applies to a cause of action-

(a) whether or not a relevant limitation period has expired-

(i) before the commencement of the Limitation (Amendment) Act 1986; or

(ii) before an application is made under that Division in respect of the cause of action;

(b) whether or not an action has been commenced on the cause of action before that commencement;

(c) whether or not a judgment on the cause of action has, on the ground that a limitation period applying to the cause of action had expired before that commencement, been given (whether before or after that commencement); and

(d) whether or not a judgment in respect of legal professional negligence has, on the ground that a limitation period applying to the cause of action had expired before that commencement, been given (whether before or after that commencement).

(2) A reference in Division 3 of Part III as substituted by the Limitation (Amendment) Act 1986 to a limitation period shall be read as including a reference to a limitation period as defined by this Schedule.

Pre-existing judgments and settlements

6. (1) In this clause, “previously barred cause of action” means a cause of action that was not maintainable immediately before the commencement of the Limitation (Amendment) Act 1986, but to which Division 3 of Part III as substituted by that Act applies.

(2) Without affecting the generality of that Division, an action on a previously barred cause of action may be brought as a result of an order made under that Division, even though-

(a) a judgment on the cause of action has, on the ground that a limitation period applying to the cause of action had expired before the commencement of the Limitation (Amendment) Act 1986, been given (whether before or after that commencement), or

(b) a judgment in respect of legal professional negligence has, on the ground that a limitation period applying to the cause of action had expired before the commencement of the Limitation (Amendment) Act 1986, been given (whether before or after that commencement),

or both.

(3) Such an action may be brought as if the action in which such a judgment was given had not itself been commenced.

(4) If such an action is brought after the commencement of the Limitation (Amendment) Act 1986 on such a previously barred cause of action, the court hearing the action may, if it decides that it is just and reasonable to do so, do any or all of the following:

(a) set aside any such judgments already given on or in relation to the cause of action;

(b) take into account any amounts paid or payable by way of damages under any such judgments;

(c) take into account any amounts paid or payable by way of costs in connection with any actions In which any such judgments were given.

(5) The Supreme Court may, on application, exercise the power to set aside a judgment under subclause (4)(a) even though it is not hearing the action.

(6) A court (other than the Supreme Court) may not, under this clause, set aside a judgment of any other court.

Existing orders for extensions not affected

7. Division 3 of Part III as in force before the commencement of the Limitation (Amendment) Act 1986 continues to apply to and in respect of an order made under that Division before the commencement of that Act as if that Act had not been enacted.

Appendix B - Table of Statutes

Australia
Commonwealth

Social Security Act 1947 - 7.17

Australian Capital Territory

Limitation Ordinance 1985 - 4.45-4.50

New South Wales

Compensation to Relatives Act 1897 - 1.4, 1.7, 2.16-2.18, 6.32,6.37

Limitation Act 1969 - 1.4, 1.9, 2.1, 2.13- 2.18,3.12,4.45, 5.3, 5.6, 6.4, 6.13, 6.38,7.4,7.14

Law Reform (Miscellaneous Provisions) Act 1944 - 1.7

Supreme Court Rules 1970 - 6.13

Northern Territory

Limitation Act 1981 - 6.5

Queensland

Limitation of Actions Act, 1974 - 6.5

Law Reform (Limitation of Actions) Act, 1956 - 6.5

South Australia

Limitation of Actions Act 1936 - 4.38,4.39

Limitation of Actions Amendment Act 1975 - 4.39

Limitation of Actions and Wrongs Act Amendment Act 1956 - 4.38,6.5

Statutes Amendment (Miscellaneous Provisions) Act 1972 - 4.39,6.5

Tasmania

Limitation Act 1974 - 6.5, 6.28

Limitation of Actions Act 1965 - 6.5

Victoria

Administration and Probate Act 1958 - 6.34

Limitation of Actions Act 1958 - 4.20-4.21, 6.5

Limitation of Actions (Extension) Act 1956 - 4.21

Limitation of Actions (Personal Injuries) Act 1972 - 4.21

Limitation of Actions (Personal Injury Claims) Act 1983 - 4.22-4.27, 5.4, 5.8-5.13,6.9,7.10

Wrongs Act 1958 - 4.26,5.13,6.34

Western Australia

Acts Amendment (Asbestos Related Diseases) Act 1983 - 4.35, 7.8-7.9, 7.23

Limitation Act 1935 - 4.29, 4.35

Canada

British Columbia

Limitation Act RSBC 1979 c236 - 1.9

Great Britain

England

Copyright Act 1911 - 2.1

Fatal Accidents Act 1846 - 4.2

Limitation Act 1623 - 2.1-2.2. 6.6

Limitation Act 1939 - 2.2,4.21

Limitation Act 1963 - 2.11, 2.12-2.14, 3.24-3.26, 4.1-4.3, 4.17,4.41,6.13,7.6

Limitation Act 1975 - 4.12-4.14, 4.17, 4.34,7.6,7.12

Limitation Act 1980 - 2.2, 4.5, 5.4, 5.7, 5.9-5.13, 6.13, 6.27, 6.29,6.34

Law Reform (Limitation of Actions) Act 1954 - 2.2, 2.4, 6 . 5, 7.5

Scotland

Appendix C - Table of Cases

Appendix D - Reports of the Law Reform Commissions on Limitation of Actions for Personal Injury Claims

	Paragraph
Australia	
Australian Capital Territory	
Attorney-General's Department (Cth.), Working Paper, Proposals for the Reform and Modernization of the Laws of Limitation in the Australian Capital Territory	4.45-4.46
New South Wales	
New South Wales Law Reform Commission:	
Report on a Transport Accidents Scheme for New South Wales (LRC 43, 1984)	7.27
Limitation of Actions (LRC 3, 1967)	1.8, 2.13, 6.39, 7.4
Limitation of Actions Special Protections (LRC 21, 1975)	5.26, 6.7-6.8
South Australia	
Law Reform Committee of South Australia:	
Claim for Injuries from Toxic Substances and Radiation Effects (No.87, 1985)	4.40, 5.17, 6.17, 6.40, 7.16, 7.26
Law Relating to Limitation of Time for Bringing Actions	4.38, 4.41-4.44

(No. 12, 1970)

Victoria

Chief Justice's Law Reform Committee, Report on Limitation of Actions in Personal Injury Claims, 1981	4.22, 4.24, 6.27, 7.15

Western Australia

Law Reform Commission of Western Australia:

Limitation and Notice of Actions (Scope and Approach Paper) (Project No.36, No.II) 1984	4.30, 4.36
Report on Limitation and Notice of Actions: Latent Disease and Injury (Project No.36, Part 1) 1982	4.30-4.34, 4,36, 5.14-5.15, 6.8, 6.19, 6.27, 6.43, 7.7-7.9, 7.22

Canada

British Columbia

Law Reform Commission of British Columbia, Report on Limitations 1974	5.17, 6.39

Ontario

Ontario Law Reform Commission, Report on Limitation of Actions 1969	1.9

United Kingdom

England

Scotland