

THE LAW REFORM COMMISSION  
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

(LRC 21 - 1987)

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REPORT ON THE STATUTE OF LIMITATIONS: CLAIMS IN  
RESPECT OF LATENT PERSONAL INJURIES

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IRELAND  
The Law Reform Commission  
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## CHAPTER 1: INTRODUCTION

Under section 4 (2) (c) of the *Law Reform Commission Act 1975*, the former Attorney General, Mr John Rogers SC, referred a number of subjects to us, with the request that we formulate proposals for their reform. One of these subjects is the law relating to compensation in personal injury cases, including, in particular, provision for periodic payments and the making of provisional awards and the Statute of Limitations in cases of latent personal injuries. In the present Report we address the latter aspect of this subject, namely, the Statute of Limitations in cases of latent personal injuries. The Report contains our analysis of the policy issues and our final recommendations. It is perhaps worth noting that in the Report we confine ourselves to the question of latent *personal injuries*. We have already addressed the complex question of latent defects in buildings in our *Report on Defective Premises*,<sup>1</sup> published over five years ago.

In preparing our Report, we set up a Working Group, composed of the President, the Secretary, Mr P Connolly SC (who was nominated by the General Council of the Bar of Ireland), Mr N Smith, Solicitor (who was nominated by the Law Society), Mr B Fitzsimon BL ACIL, Head of Underwriting & Claims, Hibernian Insurance PLC (who was nominated by the National Council of the Insurance Institute of Ireland), Mr A Kerr, Lecturer in Law, University College, Dublin and Mr William Binchy BL, a Research Counsellor with the Commission. We are especially grateful to the members of the Working Group from outside the Commission who contributed most helpfully to its work. The Commission is solely responsible for any inaccuracies in the Report, however, and its recommendations do not necessarily reflect the views of any of the outside members of the Working Group.

<sup>1</sup> LRC 3 - 1982, para. 12. See also Appendix C, paras 25-26 of that Report.

## CHAPTER 2: THE PRESENT LAW<sup>1</sup>

### A. CASES OF LATENT PERSONAL INJURY

Section 11 (2) (b) of the *Statute of Limitations 1957* provides that:

“An action claiming damages for negligence, nuisance or breach of duty ... where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, shall not be brought after the expiration of three years from the date on which the cause of action accrued.”

In *Cartledge v E. Jopling and Sons Ltd*,<sup>2</sup> the House of Lords held that, on the true construction of the corresponding section of the English *Limitation Act 1939*, a cause of action accrued as soon as a wrongful act caused personal injury beyond what could be regarded as negligible, even when that injury was unknown to and could not be discovered by the sufferer.<sup>3</sup>

The question has yet to be decided in Ireland. In *Cahill v Sutton*,<sup>4</sup> it was submitted that this was also the true construction of the Irish provision and that the imposition of a time limit having this consequence was unconstitutional. The articles of the Constitution invoked in this context were Article 40, s. 3 sub-s. 1, under which the State guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen and Article 40, s. 3, sub-s. 2, imposing a duty on the State to protect by its laws as best it may from unjust attack and, in the case of injustice done, to vindicate the life, person, good name and property rights of every citizen. In that case, however, the plaintiff was at all material times aware of the facts necessary for the making of a claim against the defendant and the Supreme Court held that, in such circumstances, the plaintiff could not be allowed to invoke the putative constitutional rights of a hypothetical third party and that she had, accordingly, no *locus standi* to challenge the constitutionality of the section on that ground. Henchy J, however, observed:

“While in the circumstances of this case the court is unable to rule on the validity of the claim made against the constitutionality of s. 11, sub-s 2 (b) of the Act of 1957, it is proper to point out that the justice and fairness of attaching to that sub-section a saver such as was inserted by the British Parliament in s. 1 of the Limitation Act 1963 are so obvious that the enactment by our Parliament of a similar provision would merit urgent consideration.”<sup>5</sup>

In *Norris v Attorney General*,<sup>6</sup> McCarthy J, in the course of a dissenting judgment, said of this passage:

“The latter expression of judicial urgency has met with the same legislative inactivity as similar hopes expressed in *Goulding's Chemicals Limited v Bolger*,<sup>7</sup> being in marked contrast to the reaction to the decision of this court in the *The State (Pine Valley) v Dublin County Council*.<sup>8</sup> It is now over three years since the *locus standi* issue was argued in *Cahill's Case* and in July it will be three years since the decision of this Court. I think it is fair to infer from that decision that the Court inclined to the view that the relevant sub-section of s. 11 of the Act of 1957 was constitutionally invalid.”

Neither the English legislation of 1963, nor subsequent legislation in 1975 and 1980 made any special provision for tort actions other than those in respect of personal injuries caused by negligence, nuisance or breach of duty. It was held by the House of Lords in *Pirelli General Cable Works Ltd v Oscar Faber and Partners*<sup>9</sup> that a cause of action in tort for negligence in the design or workmanship of a building accrued at the date when physical damage occurred to the building, whether or not the damage could have been discovered with reasonable diligence at that date by the plaintiff, overruling a decision to the contrary effect of the Court of Appeal in *Sparham-Souter v Town and Country Developments (Essex) Ltd*.<sup>10</sup> In *Morgan v Park Developments Ltd*.<sup>11</sup> where the defendants relied on Pirelli's case, Carroll J, having referred to the acknowledgement by the Law Lords in *Cartledge v E. Jopling and Sons Ltd* and Pirelli's case that the results were unreasonable and unjustifiable in principle and - in the former case - “harsh and absurd”, went on as follows:

“The 1957 Act is a post-1937 Statute and has the benefit of the presumption of constitutionality. If there are two interpretations, one of which is unconstitutional and one of which is constitutional, it must be presumed that the Oireachtas intended the interpretation which was constitutional.

The English Parliament do not operate within the confines of a written Constitution whereas in this country the Oireachtas can only pass laws which are compatible with the Constitution. It seems to me that no law which could be described as ‘harsh or absurd’ or which the courts could say was unreasonable and unjustifiable in principle (as did the English courts) could also be constitutional....

If I interpret accrual as denoting the date of the negligent act, it may have the effect of depriving an injured party of a right of action before he knows he has one. If I interpret

accrual as denoting the date of discoverability, it may operate with hardship to a defendant (as) that action may not be brought for many years afterwards...

The original House of Lords decision in *Cartledge v E. Jopling and Sons Ltd* is based on the reasoning that because the Limitation Act 1939 made special provision for fraud or mistake, this necessarily implied that if fraud or mistake were not involved, time must begin to run whether or not the damage could be discovered.

However, it seems to me that the provisions regarding fraud or mistake do not preclude the interpretation which takes the date of discoverability as the date of accrual. In my opinion the provisions of s. 71 can co-exist with that interpretation. Therefore of the two possible interpretations I prefer the one adopted in the *Sparham-Souter* case which has the date of discoverability as the date of accrual. Whatever hardship there may be to a defendant in dealing with a claim years afterwards, it must be less than the hardship to a plaintiff whose action is barred before he knows he has one. The latter interpretation appears to me indefensible in the light of the Constitution.

Accordingly I hold that the date of accrual in an action for negligence in the building of a house is the date of discoverability, meaning the date the defect either was discovered or should reasonably have been discovered."<sup>12</sup>

Since the learned judge went on to find that in the instant case the plaintiff's claim was statute barred even taking the date of discoverability as the relevant date, it may be that her observations should be regarded as *obiter*.

More recently a different view has been taken by Barron J in *Hegarty v O'Loughran and Edwards*.<sup>13</sup> This, unlike *Morgan v Park Developments Limited*, was a claim for personal injuries. The plaintiff sued two doctors in respect of their alleged negligence in carrying out two operations to her nose. Both defendants relied on the Statute of Limitations, but in the case of the first defendant, the learned Judge found as a fact that, even if the date of discoverability was the relevant date, the claim against that defendant would have been statute barred. In regard to the claim against the second defendant, however, the learned Judge found that there was no reason for the plaintiff to seek legal advice until 1980, i.e. within three years before the institution of the proceedings. It seems a reasonable inference from the general tenor of the decision that the plaintiff could not by the exercise of reasonable diligence have discovered that she had a possible cause of action against the second named defendant at any earlier date. But Barron, J. felt himself coerced by earlier authority to treat the claim as nonetheless statute barred. He put the matter thus:

"The plaintiff submits that a cause of action accrues when a reasonable man exercising reasonable diligence with regard to his own affairs could have discovered the manifestation of damage. In essence the plaintiff relies upon the general proposition that a Statute of Limitation should

not deprive a person of a cause of action before he has become aware that it existed.

Support for this proposition is to be found in *Morgan v Park Developments*.<sup>14</sup> In that case Carroll J held that the date of accrual in an action for negligence in the building of a house is the date of discoverability. I agree that this should be the law and for the reasons given. Further I see no reason why such a proposition, if valid, should not apply to all actions for damages for negligence including those involved in personal injuries, though it does seem to me that there should not be an unlimited period based upon discoverability.

Nevertheless, the accrual of a cause of action for damages for negligence historically has been regarded as occurring when the act causing the damage is committed. This view was accepted by all the members of the former Supreme Court in *Carroll v Kildare County Council*.<sup>15</sup> The issue in that case was whether or not by virtue of the provisions of Section 1 (a) of the Public Authorities Protection Act 1893, the time limited for the commencement of proceedings under the Act ceased to run while there was a continuance of damage as distinct from a continuance of the act or neglect causing the damage. The majority of the Court held against this view but all the members of the Court accepted that where as in that case the damage was caused once and for all at a particular time that that time was the date of the accrual of the cause of action.

In my view, the proper interpretation of Section 11 (b) (2) of the Statute of Limitations 1957 is to give it this meaning. If the Oireachtas had wished it could have added to Part 3 of the Act further provisions dealing with circumstances like the present.

In the course of argument before me, reference was made to submissions in other cases that the provisions of Section 11 (b) (2) are invalid having regard to the provisions of the Constitution. However, as I have indicated no such issue arises before me nor indeed on the pleadings."

As Barron J points out, the decision of the former Supreme Court in *Carroll v Kildare County Council* turns essentially upon the construction to be given to the words "in case of a continuance of injury or damage" in Section 1 (a) of the Public Authorities Protection Act 1893. It is, however, clearly implicit in the judgments of all the members of the Court that, unless the construction urged by the plaintiff could be given to those words, the action would inevitably be statute barred. To that extent, the decision supports the view that the date of discoverability is not the date of the accrual of the cause of action for the purposes of the Statute of Limitations 1957, but it should be observed that Counsel for the plaintiff did not contend for any other view of the law. However, the case may reasonably be taken as indicating a general acceptance in Ireland of the *Cartledge v E. Jopling and Sons Limited* position before that case was actually decided in 1963. Unlike the views of Carroll J in *Morgan v Park Developments Limited*, the statement of Barron J is not *obiter*. It is obvious, however, that in view of the divergent views expressed by Carroll

J and Barron J and the doubts raised as to the constitutionality of the section in the event of the latter view being correct, the law cannot be regarded as settled. Three possible views seem to be open:-

- (i) The law is as stated in *Hegarty v O'Loughran and Edwards* and, accordingly, the plaintiff will be statute barred even though he did not know and could not have known that he had a cause of action when the limitation period expired.
- (ii) The law is as stated by Carroll J in *Morgan v Park Developments Limited* and applies equally to an action in respect of personal injuries.
- (iii) The correct construction of s. 11 (2) (b) is as stated in *Hegarty v O'Loughran and Edwards* and not the construction adopted obiter by Carroll J in *Morgan v Park Developments Limited*, but the provisions of s. 11 (2) (b) are invalid having regard to the articles of the Constitution invoked in *Cahill v Sutton*.

If s. 11 (2) (b) were to be successfully challenged by a plaintiff who did not lack the *locus standi* of the plaintiff in *Cahill v Sutton*, it would follow that there was then no statutory period of limitation in cases of personal injuries. The possibility that this may indeed be the legal position cannot be lightly dismissed in view of the observations already quoted of McCarthy J (who, it may be noted in passing, was Counsel for the Plaintiff in *Cahill v Sutton*).<sup>16</sup> It may, however, be reading too much into the observations of Henchy J in *Cahill v Sutton* and McCarthy J may not have had the advantage of reading the judgement of Carroll J in *Morgan v Park Developments Limited* when writing his judgment in *Norris v Attorney General*.

## B. THE EEC DIRECTIVE ON PRODUCTS LIABILITY

The question of limitations is addressed in the EEC Directive on products liability, issued on 25 July 1985.<sup>17</sup> Member States must bring into force not later than 30 July 1988 the laws, regulations and administrative provisions necessary to comply with the Directive.<sup>18</sup> It should be noted that the Directive supplements rather than replaces the existing remedies in tort and contract under Irish law.<sup>19</sup>

We need not concern ourselves in any detail with the substantive rules of the Directive. It is sufficient to note that it imposes liability on producers<sup>20</sup> for damage caused by defects<sup>21</sup> in their products.<sup>22</sup>

Article 6 is concerned with the circumstances in which a product is defective. Under this Article a product is defective when it "does not provide the safety which a person is entitled to expect", taking all circumstances into account. The key word in Article 6 is *safety*. This limitation contrasts with the present law of negligence,<sup>23</sup> which extends liability to cases where the product falls short of the

legitimate expectations of the consumer, rather than being dangerous.

One of the three circumstances specifically mentioned by Article 6, which the Court is to take into account in determining whether the product was defective is "the time when the product was put into circulation". This factor may operate in one of two ways. First, the passage of time may be relevant as throwing light on what a person is "entitled to expect". The second way the time factor specified by Article 6 operates is somewhat different. It relates to the fact that safety standards may change over a period of time. This change may be as a result of a development in the state of scientific and technical knowledge.<sup>24</sup> But safety standards may also change without direct reference to such scientific and technical developments. What may have been an acceptable risk from a product twenty years ago may simply cease to be acceptable to the community over this period. The thrust of Article 6 is to seek to ensure that producers will not suffer unduly from these changes in attitude.

"Damage", for the purposes of Article 1, is defined by Article 9 as including "damage caused by death or by personal injuries". Thus actions on behalf of dependants under the *Civil Liability Act 1961* appears to come within the scope of the Directive.<sup>25</sup> Article 9 is specified as being without prejudice to national provisions relating to non-material damage.<sup>26</sup>

As far as personal injuries were concerned, the Explanatory Memorandum to the draft Directive stated that "(t)he term 'personal injuries' comprises the cost of treatment and of all expenditure incurred in restoring the injured person to health and any impairment of earning capacity as a result of the personal injury".<sup>27</sup> The Explanatory Memorandum noted that the draft Directive did "not include payment of compensation for pain and suffering or for damage not regarded as damage to property (non-material damage). It is therefore possible to award such damages to the extent that national laws recognise such claims, *based on other legal grounds*."<sup>28</sup> The Directive, as it finally emerged in Article 9, involved some drafting changes from what originally appeared as Article 6, but on the question of death and personal injuries, the substantial position has not been altered.

Questions of proof and causation are dealt with in Article 4,<sup>29</sup> which provides that:

"The injured person shall be required to prove the damage, the defect and the causal relationship between the defect and damage."

Article 7 provides several defences to the strict liability principle. Two are of present relevance. One<sup>30</sup> relieves a producer from liability where he proves that:

"having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards."

The other defence <sup>31</sup> is established if:

“the state of scientific and technical knowledge at the time when (the producer) put the product into circulation was not such as to enable the existence of the defect to be discovered.”

As to the first defence, the Commission noted:

“One of the conditions for the liability of the producer is that the defect in the article should arise in the producer’s production process.... Liability is therefore excluded where the defect arose only after the time it was put into circulation ....”<sup>32</sup>

The second defence may be important in cases where the injury is discovered long after the product was put into circulation. If the product at the time of production was as safe as the “state of the art” would allow, subsequent improvements in safety in the production process with respect to this product may not be relied on by an injured plaintiff as setting the standard of safety.

We must now consider how the Directive confronts the question of limitations and the extinction of liability. Article 10 requires Member States to provide in their legislation that a limitation period of three years is to apply to proceedings for the recovery of damages as provided for in the Directive. The limitation period begins to run from the day on which the plaintiff becomes aware, or should reasonably have become aware, of the *damage*, the *defect* and the *identity of the producer*. However, the laws of Member States regulating suspension or interruption of the limitation period are not affected by the Directive.

Article 11 requires Member States to provide in their legislation that the rights conferred on the injured person pursuant to the Directive are to be extinguished on the expiry of a period of ten years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer.

It should be noted that the effect of Article 11 in extinguishing the injured person’s rights after the expiry of ten years from the date the producer put the product in circulation, is to render inoperative the laws of Member States regulating suspension or interruption of the limitation period - on the basis of minority, or mental incapacity, for example. It is true that Article 10 provides that these laws “shall not be affected by this Directive”; but Article 11 is concerned with the *extinction of rights* rather than a limitation period within which an action must be taken.

The merits and disadvantages of Article 11 have been widely debated. In favour of the absolute cut-off point, the English Law Commission has observed that:

“It is in the producer’s interest that he should be able to close his books on a product after it has been in circulation for a fixed period. It assists him in assessing the risk and it facilitates insurance and amortisation, thus keeping the insurance premium down. There is thus some saving, albeit marginal, which redounds to the general benefit of the public.

More important, perhaps, it sets a date after which the producer no longer has the burden of proving that a product which has caused an accident was not defective when he put it into circulation. This burden is increasingly difficult for him to discharge as the years pass and it seems only fair that there should come a point when it is entirely removed."<sup>33</sup>

As against this, several objections have been made to the ten-year cut-off point. First, it has been stigmatised as a rather crude and arbitrary solution. Some products - various types of machinery or aircraft, for example - may well be expected to last for more than ten years, so that it *could* properly be said of them (say) twelve years after they were put into circulation that, in spite of their age, they were "defective". For other products - a loaf of bread, for example - twelve years is an entirely irrelevant figure. The Council of Europe, who favoured the same approach as was ultimately adopted by the EEC Directive, was conscious of the problem but nonetheless considered ten years "an acceptable period in view of the need to fix some limit (ten years being a fair average) and the desirability of affording producers some security".<sup>34</sup> Similarly the framers of the draft Directive considered that ten years "appeared as an average period".<sup>35</sup> This notion of an "average period" has been challenged in view of the vast range of products, each with a different life-span of use.

The ten-year cut-off period has not been met with universal support by producers, some of whom

"argue that the period is too long, that for them to maintain records to establish that goods were not defective when originally sold will be an expensive exercise, and the longer the period for which records must be kept the greater the expense. As the consumer must bear this cost in the price of the goods is it to his advantage to pay for record keeping which can be of benefit on only the most rare occasions?"<sup>36</sup>

One of the grounds on which the Scottish Law Commission objected to the ten-year "cut-off" point was that it would be unfair to an injured person, who normally would not know on what date the product had been put into circulation. Different cut-off periods would apply in respect of each component:

"an injured person wishing to sue a component maker would have at the very least a complicated task in ascertaining whether his action was likely to be timebarred, and evidence to this effect might not emerge until after the injured person has incurred considerable expense in pursuing his claim."<sup>37</sup>

## FOOTNOTES

- <sup>1</sup> See James C Brady & Tony Kerr, *The Limitations of Actions*, ch 3 (1984), B McMahon & W Binchy, *Irish Law of Torts* ch 35 (1981)
- <sup>2</sup> (1963) A C 758
- <sup>3</sup> Remedial legislation, limited to cases involving personal injury was enacted in England six months later *Limitations Act 1963*
- <sup>4</sup> (1980) I R 269
- <sup>5</sup> *Id*, at 288
- <sup>6</sup> (1984) I R 36 at 89 (Sup Ct, 1983)
- (1977) I R 221 See A Kerr & G Whyte *Irish Trade Union Law* 250 (1985) McMahon & Binchy, *op cit*, 448
- <sup>6</sup> (1984) I R 407 See further G Hogan & D Morgan, *Administrative Law* 381 (Irish Law Texts 1986)
- <sup>9</sup> (1983) 2 A C 1, analysed by Robertson, *Defective Premises and Subsequent Purchasers* 99 L Q Rev 559 (1983), Rossiter & Stone *Latent Defects in Buildings When Does the Cause of Action Arise?* 59 Austr L J 606 (1985) Todd, *Latent Defects in Property and the Limitation Act A Defence of the "Discoverability" Test* 10 NZ U L Rev 311 (1983) Rafferty *Note Limitation and Latent Damage The Canadian Experience* 6 Oxford J of Stud 464 at 467 468 (1986) Pickering, *Should Time Run From the Date of Damage or From the Date of Its Discovery?* 57 L Inst J 443 (1983)
- <sup>10</sup> (1976) Q B 858
- <sup>11</sup> (1983) I L R M 156
- <sup>12</sup> *Id*, at 159 160
- <sup>13</sup> Unreported, judgment delivered 27 May 1987
- <sup>14</sup> 1983 I L R M 156
- <sup>15</sup> (1950) I R 258
- <sup>16</sup> It is understood that a number of actions are pending in which the constitutionality of the section has been challenged and the Attorney General named as a notice party
- <sup>17</sup> See Binchy, *The EEC Directive on Products Liability* 80 Incomp L Soc of Ireland Gazette 37, 73 (1986) Schuster *Product Liability* ch 10 of P Ussher and B O'Connor ed *Doing Business in Ireland*, para 10 04 (1987)
- <sup>18</sup> Article 19
- <sup>19</sup> Article 13
- <sup>20</sup> Cf Article 3 See further Binchy, *op cit*, at 38 39
- <sup>21</sup> Cf Article 6 See further Binchy, *op cit*, at 39 41
- <sup>22</sup> Article 1 See further Binchy, *op cit*, at 37
- <sup>23</sup> See *Ward v McMaster*, (1985) I R 29 (High Ct Costello J)
- <sup>24</sup> Cf Article 7, clause (e), considered *infra*, p 7
- <sup>25</sup> Cf the *Explanatory Memorandum of the Draft Directive*, para 17
- <sup>26</sup> Cf the *Civil Liability Act 1961*, sections 49 (1) (a) (ii) and 49(1) (b) as amended by the *Courts Act 1981* See further McMahon & Binchy, *op cit* 117 119
- <sup>27</sup> Para 17 of the *Explanatory Memorandum*
- <sup>28</sup> *Id* (Emphasis added)
- <sup>29</sup> See Binchy, *op cit*, at 73
- <sup>30</sup> Clause (b) of Article 7
- <sup>31</sup> *Id*, clause (e)
- <sup>32</sup> *Explanatory Memorandum to the draft Directive*, para 14
- <sup>33</sup> Eng Law Com No 82 & Scot Law Com No 45, para 152
- <sup>34</sup> *Explanatory Report to the Strasbourg Convention on Products Liability in Regard to Personal Injury and Death*, para 68
- <sup>35</sup> *Explanatory Memorandum to the draft Directive*, para 14
- <sup>36</sup> Marriott, *Products Liability in Europe What of the Future?* 3 J of Prod Ly 15 at 16 (1979) See however, Schuster *op cit* para 10 04(2)
- <sup>37</sup> Eng Law Com No 82 & Scot Law Com No 45 Para 158

## CHAPTER 3: COMPARATIVE ASPECTS

In this chapter we examine some features of the law in other countries which are relevant to the policy issues we must confront when recommending reform of the law.

### 1. ENGLAND

The *Limitation Act 1939*, following the recommendations of the Wright Committee<sup>1</sup> provided that the period of limitation in all actions of tort should be six years. In 1949 the Tucker Committee<sup>2</sup> recommended that the period of limitation for actions<sup>3</sup> in respect of personal injuries should be two years from the accrual of the cause of action, but that the court should have a discretion to grant leave to bring an action after the expiration of that period, but not later than six years from the accrual of the cause of action. The Committee considered that the two year period was suitable, 'having regard to the desirability of such actions being brought to trial quickly, whilst evidence is fresh in the minds of the parties and witnesses'.<sup>4</sup>

The Committee did not enlarge on its proposal to give the Court a discretionary power to extend the limitation beyond two years, save to prescribe that the Court would be entitled to grant leave "if satisfied that it is reasonable in all the circumstances to do so".<sup>5</sup>

The Tucker Committee's recommendations had some influence on the *Law Reform (Limitation of Actions) Act 1954*, which reduced the limitation period for actions for personal injuries to three years from the date on which the cause of action accrued (rather than two years, as the Committee had recommended). The Act contained no provisions for a discretionary power of extension.

In Chapter 2, we noted that in *Cartledge v E. Jopling and Sons Ltd*,<sup>6</sup> the House of Lords held that a cause of action accrued as soon as a wrongful act caused more than negligible personal injury, even when the injury could not be discovered by the sufferer.

The result for plaintiffs of this rule was clearly a harsh one. The Edmund Davies Committee addressed the issue in its Report.<sup>7</sup> The Committee had the benefit of submissions from a wide range of interested bodies, including a number of doctors, Government Departments, major employers such as I.C.I., the T.U.C. the C.B.I. and professional bodies etc. It considered carefully the possibility of confining any remedy in the *Cartledge v Jopling* situation to a limited number of diseases. Having rejected the solution as impracticable, it then turned to consider more general solutions.

One solution was to confer upon the courts an unfettered discretion to extend the three years period in any case which appeared appropriate. This had been opposed by nearly all the legal witnesses who had appeared before the Committee. The Committee also showed little hesitation in rejecting it, both because it would encourage the institution of pointless proceedings and, more seriously, because it would render the law very uncertain. The Committee then went on to examine three possible safeguards which might be introduced if a relaxation of the three year rule was permitted. They were

- (a) imposing a heavier burden of proof, i.e., beyond reasonable doubt, on the plaintiff in such cases;
- (b) requiring the plaintiff's evidence to be corroborated;
- (c) requiring the plaintiff to persuade a Judge that he has a reasonable case on the merits, that his injury was undiscoverable and that he had originated proceedings with reasonable promptitude after he had discovered them.

The Committee rejected the safeguards embodied in (a) and (b), but incorporated (c) in its recommendations. So far as relevant, these were

- (1) that the limitation period should run from the time at which a plaintiff might reasonably have been expected to discover the existence or cause of his injury;
- (2) that the extended limitation period should be for one year only;
- (3) that the plaintiff should be entitled to avail himself of the extended period of twelve months only where he had obtained the leave of a Judge to bring proceedings out of time.

The Committee also considered that the application for leave should be *ex parte*, that the decision of the Judge on such an application should not be binding on the Trial Judge and that, where appropriate, the plaintiff should be allowed to obtain leave during the proceedings themselves. It also recommended that there should be a right of appeal from the decision of the Judge to grant such leave.

The recommendations of the Edmund Davies Committee were largely implemented by the *Limitation Act 1963*. This provided that

the plaintiff was not to be defeated by a defence of limitation if he remained in a justifiable state of ignorance for more than the first two years of the normal three year limitation period *and* instituted proceedings within twelve months of his "date of knowledge". A plaintiff was treated as being in a justifiable state of ignorance if there were outside his knowledge (actual or constructive) "material facts of a decisive character". It also provided<sup>8</sup> that the plaintiff should obtain the leave of the Court. Where claims were brought after the injured person's death, a claim which would otherwise have been out of time could be brought if -

- (1) the deceased had been in a state of justifiable ignorance until he died and the proceedings were commenced (with leave) within twelve months of his death; or
- (2) the deceased's "date of knowledge" had been less than twelve months before his death and the proceedings had been commenced (again with leave) within twelve months of that date.

A major difficulty under the 1963 Act related to the nature of the knowledge which triggered the limitation period. It was not clear whether a plaintiff who was fully aware of the facts but who neither knew nor ought to have known that he had a worthwhile cause of action for damage for personal injuries could assert under the Act that time had not run against him until he acquired or ought to have acquired that knowledge.<sup>9</sup> The Act also gave rise to two other difficulties, i.e.

- (1) an injustice could be done to a widow whose husband had died in a state of ignorance and who did not, and could not find out that he had had a cause of action against the defendant until more than a year after his death: see *Lucy v W.T. Henley's Telegraph Works Company Limited and Others*,<sup>10</sup> and
- (2) It was thought that the twelve months period from the plaintiff's date of knowledge did not allow sufficient time for him to instruct solicitors and for them to obtain leave and institute proceedings.

These two matters were referred to the Law Commission, who produced another Report.<sup>11</sup> They recommended (in November 1970) that

- (a) the period running from the injured person's date of knowledge should be extended to three years; and
- (b) in claims arising out of the injured person's death, the claimant should have a similar period, running from his own date of knowledge or from the injured person's death, whichever was the later.

These recommendations were substantially implemented by the *Law Reform (Miscellaneous Provisions) Act 1971*.

The Orr Committee, facilitated no doubt by their somewhat wider terms of reference, adopted a broader approach to the whole

problem of the limitation period in personal injury cases. In the first place, they declined to reject out of hand the view that there should be no limitation period in personal injury claims as distinct from other types of litigation. This was the view urged upon them by the T.U.C. (like the Edmund Davies Committee, the Orr Committee received submissions from a number of interested bodies). Their argument was that, having regard to the burden of proof on the injured person, it is as much to the plaintiff's as to the defendant's advantage (usually more so) to institute the proceedings quickly. They argued on this basis that there was no need to give to the defendant the additional protection afforded by the law of limitation. Moreover, in cases where the plaintiff could not reasonably have instituted proceedings earlier, any limitation period is likely to produce arbitrary and unjust results. The Committee, however, rejected the proposition. They advanced a number of reasons, possibly the most cogent being that, since it was in the interests of justice that the trial should be held as soon as practicable and at a time when the recollection of witnesses was at its most reliable, the limitation period constituted an essential sanction to ensure that they were commenced within a reasonable time. The Committee then went on to consider a number of possible approaches to the general problem of limitation periods in personal injury cases, i.e.

- (1) prescribing a comparatively short rigid period for all cases, inevitably creating a number of hard cases;
- (2) prescribing a single rigid period of such length that there would be only a negligible number of hard cases;
- (3) providing for a comparatively short period but specifying circumstances in which the limitation period would not apply;
- (4) specifying a comparatively short period but giving the Court discretion to extend it;
- (5) prescribing as a variation of (4), a "longstop" period which the Court would have no discretion to extend.

The Committee, having considered all these possibilities, came to the conclusion that none of them was entirely satisfactory. This, they found, was not surprising, since limitation legislation inevitably involves a compromise between conflicting interests and such compromises can never effect complete justice in every case. Ultimately, they opted for what was in effect a combination of (3) and (4), i.e. providing for a relatively short period which was not to apply where the plaintiff did not have the necessary knowledge and giving the Court a residual discretionary power to extend that period where the strict application of the "date of knowledge" principle would cause injustice.

The Committee gave exhaustive consideration to the difficulties arising in defining the date of knowledge for the purpose of a limitation period as they had been highlighted by the 1963 Act and the decision of the House of Lords in *Central Asbestos Company*

*Limited v Dodd*.<sup>12</sup> They said there were three possible dates which could be treated as the date of knowledge:

- (1) the date the plaintiff acquired knowledge both of his injured condition and of its having been caused by an act or omission of the defendant; or
- (2) the date of his acquiring knowledge of those facts and also that he had a "worthwhile cause of action" against the defendant; or
- (3) some intermediate date, as for example when he became aware (adopting the words of Lord Pearson in *Dodd's* case) "that the defendants were at fault and that his injuries were attributable to their fault".

The Committee adopted the first date. The second they rejected as introducing an unjustifiable exception to the fundamental principle that ignorance of the law is no excuse and one which would cause hardship to defendants. They rejected the third on the grounds of its vagueness: too much difficulty would be experienced, in their view, in determining what was meant by "fault".

The Committee were satisfied that the Court should have a residual discretion to extend the time, having weighed the actual hardship on both sides. They thought, however, that in order to achieve consistency in the application of the court's discretion, it would be advisable to prescribe "guidelines" for the Courts on which their practice could be founded. They did not think that it was desirable to empower the Court to impose conditions on the exercise of its discretion, such as allowing the action to proceed on the basis that the plaintiff should recover only a proportion of the damages or on terms that he should recover no damages in respect of losses occurring before a certain date. They also were of the view that, in determining whether steps taken by a person in relation to the taking of advice were "reasonable", the test applied should be subjective rather than objective.

The Committee considered the question raised by Lord Salmon in *Dodd's* case as to whether knowledge of a fact should be imputed to a plaintiff when his continuing ignorance of the fact might be due, indirectly, to his having received defective legal advice. They considered that there were two possible approaches to this:

- (a) to provide that a plaintiff should not be fixed with constructive knowledge of a fact which was ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain that advice; and
- (b) to treat such a fact as being ascertainable by the plaintiff if it was reasonable for him to seek expert advice and the appropriate expert could reasonably have been expected to ascertain the fact, regardless of what any expert (if he was consulted) actually advised.

They were unable to reach a unanimous conclusion as between these two approaches, the first of which they describe as the "liberal" approach and the second as the "strict" approach.

The Committee's recommendations took the form of what was virtually a draft Bill and upon which the relevant provisions of the *Limitation Act 1975* were based. The draft Bill provided for both the "liberal" and "strict" approach to the problem referred to in the preceding paragraph. As will be seen, the Legislature adopted the "liberal" alternative.

Legislation in 1975 gave effect to the Orr Committee's proposals. That legislation was re-enacted in the *Limitation Act 1980*, which is a consolidating Act. It is useful to examine some of its principal provisions.

Section 11 provides that the applicable period of limitation in a personal injuries case is three years from:

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

Section 14 (1) provides that references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts:

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

The sub-section also 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.”

The sub-section, accordingly, makes it plain that knowledge that the injuries were as a matter of fact attributable to the negligence triggers the limitation period. Whether or not the person was also aware that these facts constituted negligence, nuisance or breach of duty on the part of the proposed defendant as a matter of law is irrelevant.

Section 14 (3) provides that, for the purposes of the Section,

“A person's knowledge includes knowledge which he might reasonably have been expected to acquire:

- (a) from facts observable or ascertainable by him; or
- (b) from facts ascertainable by him with the help of medical or other appropriate expert evidence which it is reasonable for him to seek...”

A person is not to be fixed under the sub-section with knowledge from facts ascertainable only with the help of expert advice, however, so long he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice. Thus, a plaintiff is not fixed with knowledge of the facts which an expert should have discovered but did not, so long as all reasonable steps were taken to obtain, and where appropriate, act on the advice. But failure by an expert to give appropriate advice on a *matter of law*, will not prevent time running.

For the purposes of Section 14, an injury is defined as significant if the plaintiff:

“would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.”

This provision has been criticised.<sup>13</sup> It is pointed out that a very minor injury would be worth litigating on the basis that liability is not in dispute and the money is there for the asking. There may also be difficulties in deciding whether the test to be applied in determining whether it was reasonable to regard the injury as not “sufficiently serious” is an objective or a subjective test.<sup>14</sup> It would, however, appear that the time limit under Section 11 will still apply where the original injury was not trivial, but the plaintiff did not realise that it would subsequently turn out to be more serious than he supposed. This is in contrast to the case where the original injury is so trivial as to justify the plaintiff in not bringing proceedings (subject to the query already mentioned as to whether a reasonable plaintiff would refrain from bringing proceedings for even a trivial injury against a defendant admitting liability who was a mark).<sup>15</sup>

The 1975 Act, in addition to the changes already noted, gave the Court a discretion to order that the time limit should not apply in actions in respect of personal injuries. This was also re-enacted in s. 33 (1) of the 1980 Act, which provides that:

“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 and 12 of this Act prejudice the plaintiff or any person whom he represents;
- (b) any decision of the court under this sub-section would prejudice the defendant or any person whom he represents;

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.”

Under sub-section (3) the Court in exercising its discretion is to have regard to:

“all the circumstances of the case and in particular...

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

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

With one important qualification, the provisions of sub-section (1) seem clear and reasonable. The court is required to balance the prejudice caused to the plaintiff by the application of the limitation period against the prejudice caused to the defendant if it is not applied. In a sense, of course, a plaintiff will always be prejudiced by the application of the limitation period, unlike a defendant who may or may not be. It may be that in assessing the degree of prejudice to which the plaintiff is necessarily subjected by applying the limitation period, one is entitled to take into account the comparative strength or weakness of the plaintiff's cause of action and the extent of his injuries, although there does not appear to have been any decision as yet on this point. The House of Lords have, however, held in *Thompson v Brown Construction (Ebbw Vale) Limited*<sup>16</sup> that the Court's discretion to make or refuse an order under the section is unfettered. In particular, it was held in that case that the fact - if it be the fact - that the plaintiff has a "cast iron" cause of action against his solicitor does not mean that the discretion can be exercised in only one way, viz. applying the limitation period, although it is a highly relevant factor to be put into the balance.

The qualification arises from the somewhat difficult decision of the House of Lords in *Walkley v Precision Forgings Limited*,<sup>17</sup> where it was held that, if a writ was issued and served within the three year period and not proceeded with, the court had no discretion to extend the time. In that case, the delay in proceeding with the first action meant that it would inevitably have been struck out for want of prosecution. In these circumstances, it was held that the plaintiff had not been prejudiced by the provisions of the corresponding section to s. 11 in the 1975 Act. No such prejudice could arise, it was said, where proceedings had in fact been issued within the limitation period. While it may be granted

that there is a certain logic in this view, there is clearly another view open on the section. If a plaintiff's legal advisers have issued proceedings but have been so lethargic in pursuing them that they are ripe to be dismissed for want of prosecution, there is nothing to prevent them from issuing a second set of proceedings, provided they are within the limitation period: *Birkett v James*.<sup>18</sup> Once the limitation period has expired, however, they are in a wholly different position: they can issue viable proceedings only if the court exercises its discretion in their favour under s. 33. In the latter case, they are accordingly prejudiced by the provisions of s. 11 and it seems immaterial that the prejudice in question is the product of the combined inaction of the plaintiff's legal advisers and the provisions of s. 11. Equally, it could be said that, in a case where the plaintiff's legal advisers have simply failed to issue any proceedings at all within the three year period, the prejudice to the plaintiff results, not simply from the provisions of s. 11, but from the combined inaction of the plaintiff's legal advisers and the provisions of s. 11. Yet it is clear from *Thompson v Browne Construction (Ebbw Vale) Limited* that, in the latter case, the court may make an order under section 33. It would seem desirable to avoid any similar confusion in this jurisdiction.

Finally it should be noted that the Law Reform Committee was asked by the Lord Chancellor to consider the Law of Limitation in negligence cases involving latent defects (other than personal injury cases) and to make recommendations, following the decision in *Pirelli General Cable Works Limited v Oscar Faber and Partners*.<sup>19</sup> The Report of the Committee<sup>20</sup> was published in November 1984. They recommended that, in negligence cases involving latent defects, the six year period should be subject to an extension which would allow a plaintiff three years from the date of discovery or reasonable discoverability of the existence of significant damage. They also recommended, however, that there should be a "long stop" applicable to all negligence cases involving latent defects (other than personal injuries) of fifteen years. Their recommendations have been implemented by the *Latent Damages Act 1986*.

#### AUSTRALIA<sup>21</sup>

In Australia, the problem of the undiscoverable injury has been resolved by legislative rather than judicial innovation.<sup>22</sup> Statutory reform has varied from state to state. The differing strategies are of considerable interest and relevance.

#### NEW SOUTH WALES

In New South Wales, the New South Wales Law Reform Commission, in its *First Report on the Limitation of Actions*,<sup>23</sup> published<sup>24</sup> in 1967, proposed the introduction of provisions on the general lines of the English legislation of 1963. The Commission disagreed with the principle (given effect by section 1 (2) of the 1963 Act) that an extension should be capable of being permitted where the damages include, not merely personal injuries but damages of other types. They pointed out that, at least in the cases of causes of action for trespass and negligence, the plaintiff has separate causes of action for damages for personal injury, on the one hand

and for damages to his property on the other.<sup>25</sup> They considered that “(t)he special circumstances which alone justify the extension of the limitation period do not.... justify an extension for a cause of action for damages for injury to property, whether or not there is also injury to the person”<sup>26</sup> The *Limitation Act 1969*<sup>27</sup> gave effect to the Commission’s proposals.

In their *Third Report on the Limitation of Actions - Special Protections*,<sup>28</sup> published in 1975, the Commission proposed that the legislation should include a provision enabling the Court to *shorten* the limitation period. They argued as follows:

“Where a person believes that another person may have a claim to litigate against him, the first-mentioned person should, we suggest, be enabled to apply to a court for an order that the claimant sue, if at all, within a period expiring before the expiration of the relevant limitation period. He may have good reason for wanting finality. For example, witnesses may be lost or may die, the possibility of litigation or of an adverse judgment may frustrate planning for the future and, indeed, a person may fear that the outcome will be so severe and his future hopes so prejudiced as to sap his present incentives to work and save money. The community has an interest that that should not happen.

This proposal would have a somewhat limited operation, for it would only be useful if the prospective defendant knew that a claim might be made. And it would be scarcely any use against a fake claim. But, that admitted, we tend to the view that such a provision would be an aid to prospective defendants in a significant number of cases, would not be unjust to claimants, and therefore should be adopted.”<sup>29</sup>

No legislative action has yet been taken on this recommendation.

#### NORTHERN TERRITORY

Section 44 (1) of the *Limitation Act 1981* confers on the Court a general power of extension of any period of limitation “to such extent, and upon such terms, if any, as it thinks fit”. However, section 44 (3) provides that the Court may not thus extend a limitation period unless it is satisfied that -

- “(i) facts material to the plaintiff’s case were not ascertained by him until some time within 12 months before the expiration of the limitation period or occurring after the expiration of that period, and that the action was instituted within 12 months after the ascertainment of those facts by the plaintiff: or
- (ii) the plaintiff’s failure to institute the action within the limitation period resulted from representations or conduct of the defendant, or a person whom the plaintiff reasonably believed to be acting on behalf of the defendant, and was reasonable in view of those representations or that conduct and other relevant circumstances,

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

## QUEENSLAND

Section 30 to 32 of the *Limitation of Actions Act 1975-81* contain provisions similar to those of the English legislation of 1963.

## SOUTH AUSTRALIA

The Law Reform Committee of South Australia, in its Twelfth Report, entitled *Law Relating to Limitations of Time for Bringing Actions*, published in 1970, recommend<sup>30</sup> the introduction of legislation on the general lines of the English Act of 1963 but proposed that the judicial power to extend time should be given in relation to any cause of action arising in any jurisdiction of the Court (other than conferred Federal jurisdictions). Among other differences, the committee proposed that the knowledge of the plaintiff should have to be actual knowledge. They sought to justify their proposal to delete the reference to constructive knowledge on the basis that:

“‘constructive notice’ would include the knowledge of the party’s solicitor whereas it is quite frequently the mistake of the solicitor against which the proposed plaintiff wishes to be relieved in making an application for extension of time.”<sup>31</sup>

Legislation in 1972<sup>32</sup> gave effect to the Committee’s recommendations.

## TASMANIA

Section 5 of the *Limitation Act 1974* deals with the subject. The normal period of limitation where the damages claimed consist of, or include, personal injuries is 3 years from the date on which the cause of action accrued. But section 5(3) provides that, notwithstanding this,

“upon application being made by the person claiming (these) damages..., a judge, after hearing such of the persons likely to be affected by that application as he may think fit, may, if he thinks that in all the circumstances of the case it is just and reasonable so to do, extend the period limited for the bringing of the action for such period as he thinks necessary, but so that the period within which the action may be brought does not exceed a period of 6 years from the date on which the cause of action accrued.”

## VICTORIA

In Victoria legislation in 1972<sup>33</sup> introduced provisions on the general lines of the English legislation of 1963 but drafted in somewhat different terms. Of interest is the definition<sup>34</sup> of “material facts” in relation to a cause of action as including:

- “(a) the fact of the occurrence of negligence, nuisance or breach of duty on which the cause of action is founded;
- (b) the nature of the wrongful act, neglect or default that constituted the negligence, nuisance or breach of duty;
- (c) the identity of the person whose wrongful act, neglect or default constituted the negligence, nuisance or breach of duty;

- (d) the identity of the person against whom the cause of action lies;
- (e) the fact that the negligence, nuisance or breach of duty caused personal injury;
- (f) the nature of the personal injury so caused;
- (g) the extent of the personal injury so caused; and
- (h) the extent to which the personal injury was caused by the negligence, nuisance or breach of duty."

This approach was changed eleven years later. *The Limitations of Actions (Personal Injury Claims) Act 1983* extends the limitation period to six years after the plaintiff first knows that he has suffered injury.<sup>35</sup>

#### WESTERN AUSTRALIA

The *Acts Amendment (Asbestos Related Diseases) Act 1983* provides for the extension of time in respect of latent injury<sup>36</sup> attributable to the inhalation of asbestos.

"Knowledge" of the injury includes knowledge that it was significant and that it was attributable in whole or in part to the act or omission alleged to constitute the cause of action, as well as knowledge of the identity of the defendant.<sup>37</sup>

#### CANADA

In Canada, the general trend of the judicial decisions is clearly in favour of the discoverability rule in relation to the limitation of actions.<sup>38</sup> Judicial attention has concentrated on the difficult issue of discoverability in respect of latent defects in property and in the context of professional malpractice litigation.

In the leading decision, *City of Kamloops v Nielsen*,<sup>39</sup> the Supreme Court of Canada addressed the issue of limitations in respect of latent defects. The Court had the advantage of being in the position to consider the *Pirelli* decision of the House of Lords, which offered no attraction. Wilson J said:

"There are obvious problems in applying *Pirelli*. To what extent does physical damage have to have manifested itself? Is a hair-line crack enough or does there have to be a more substantial manifestation? And what of an owner who discovers that his building is constructed of materials which will cause it to collapse in five years' time? According to *Pirelli* he has no cause of action until it starts to crumble. But perhaps the most serious concern is the injustice of a law which statute-bars a claim before the plaintiff is even aware of its existence. Lord Fraser and Lord Scarman were clearly concerned over this but considered themselves bound by *Cartledge*. The only solution in their eyes was the intervention of the Legislature.

This court is in the happy position of being free to adopt or reject *Pirelli*. It would reject it. This is not to say that *Sparham-Souter* presents no problem. As Lord Fraser pointed out in *Pirelli*, the postponement of the accrual of the cause of action until the date of discoverability may involve the

courts in the investigation of facts many years after their occurrence. *Dennis v Charnwood Borough Council*<sup>40</sup> is a classic illustration of this. It seems to me however, to be much the lesser of two evils.<sup>41</sup>

The *Kamloops* decision clearly endorses a discoverability rule, but the scope of the holding has given rise to some degree of uncertainty.<sup>42</sup>

After *Kamloops*, the lower courts had the difficult task of determining its scope. In *Bera v Marr*<sup>43</sup> Lander J applied its principle to a claim for personal injuries.

In *Central Trust Co. v Rafuse*,<sup>44</sup> the Supreme Court of Canada returned to the question. The case concerned the issue of the liability of solicitors in tort for negligence. Le Dain J, delivering the judgment of the Court, referred in detail to the argument pressed by Lords Fraser and Scarman in *Pirelli* to the effect that the matter was so complex that it was properly one for legislative rather than judicial resolution. He added:

"These considerations were obviously before the Court in *Kamloops*, yet in spite of them the majority chose to apply the discoverability rule to s. 738(2) of the Municipal Act. While noting the importance attached in *Cartledge* to s. 26 of the Limitation Act, 1939, they did not suggest that *Cartledge* and *Pirelli* were distinguishable because of the particular legislative context in *Kamloops*. Indeed, it is questionable whether they were distinguishable on that basis. While s. 738(2) was in force, prior to its repeal and replacement by s. 16 of the Limitation Act, S.B.C. 1975, s. 37, which makes express provision for the discoverability rule and an outside limit, the Statute of Limitations, R.S.B.C. 1948, c. 191, afforded a similar basis for an argument as to legislative intent in s. 38, which provides that the right of action for the recovery of any land or rent of which a person may have been deprived by concealed fraud 'shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered.'

There is a similar provision in s. 28 of the Nova Scotia Statute of Limitations, R.S.N.S. 1967, c. 168. Although Wilson J, who delivered the judgment of the majority in *Kamloops*, did not comment explicitly on the opinion that the introduction of the discoverability rule should be left to legislative rather than judicial decision, it is an obvious implication of her reasons and conclusion that she disagreed with the views on this question expressed in *Cartledge* and *Pirelli*. She appears to have been led to this conclusion essentially by the acknowledged injustice of the rule applied out of judicial restraint in those cases...

I am thus of the view that the judgment of the majority in *Kamloops* laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence, and that the rule should be followed and applied to the appellant's cause of action in tort against the

respondents under the Nova Scotia Statute of Limitations, R.S.N.S. 1967, c. 168. There is no principled reason, in my opinion, for distinguishing in this regard between an action for injury to property and an action for the recovery of purely financial loss caused by professional negligence, as was suggested in *Forster v Outred*.<sup>45</sup><sup>46</sup>

It seems, therefore, clear that *Cartledge* has no support in the Supreme court of Canada, even if its rejection, strictly speaking, has been *obiter*.<sup>47</sup>

In *Streng v Winchester Township*,<sup>48</sup> Smith J, of the Ontario High Court, held that section 15 of the Canadian Charter of Rights and Freedoms enabled that Court to strike down a 3 month limitation period for actions against municipalities, supplemented by a requirement that notice of the claim be served on the municipality within ten days of the injury.

Section 15(1) provides as follows:

“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law, without discrimination...”

Smith J said:

“A basic tenet I think of the law of limitations is that statutes of limitation should be intended only to affect the time allowed for exercising existing rights, cutting off the remedy *only* after a reasonable time for action has elapsed. A presumption arises following a reasonable time that no claim is contemplated or that if the intent to litigate is present, an inference of lack of diligence is in order and is a natural one to make, leading not unreasonably to the suppression of the right to claim. But there ought always to be some inordinateness of delay before the remedy is taken away. Delay can only be the subject of a presumption if the limitation period is on its face reasonable.”<sup>49</sup>

As regards statutory reform, it is worth noting that Manitoba’s *Limitation of Actions Act* contains provisions similar to England’s legislation of 1963. It also provides for an ultimate period of limitation of 30 years after the occurrence of the acts or omissions that gave rise to the cause of action.

In 1969 the Ontario Law Reform Commission, in its *Report on Limitations of Actions*, recommended that there would be an extension procedure in actions for personal injury, property damage and professional negligence in cases where the plaintiff was not aware that he had a cause of action.<sup>50</sup> The extension would be granted where a potential plaintiff was unaware of material facts which, if he were a reasonable person knowing those facts and having obtained appropriate advice with respect to them, would have been of a decisive character in determining that he had an action (a) which would have a reasonable prospect of succeeding, and (b) result in the award of damages sufficient to justify bringing it.<sup>51</sup> The Commission recommended that applications for extension should be made to the Court which would have jurisdiction over the action and should be required to be made within twelve months

from the time the potential plaintiff became aware of the relevant material facts.<sup>52</sup>

It is worth noting the Attorney-General's Bill 160, *An Act to Revise the Limitation Act*, which received its first reading on 16 December 1983. The Bill did not receive second and third readings and died on the table.<sup>53</sup>

Section 3(1) of the Bill provided that an action for damages in respect of injury to persons or property should not be brought after the expiration of two years after the date on which the cause of action arose. Section 10 provided as follows:

“(1) In an action,

- (a) for personal injury;
- (b) for damage to property;
- (c) for economic loss arising from breach of a duty of care, whether the duty arises in tort or contract or by statute;
- (d) for breach of trust, fraud or deceit where the action is not one referred to in section 9;<sup>54</sup>
- (e) for conspiracy to commit any wrong referred to in clauses (a) to (d);
- (f) in which material facts relating to the cause of action have been wilfully concealed;
- (g) for relief from the consequences of a mistake; or
- (h) under Part V of the Family Law Reform Act;

the limitation period fixed by this Act does not begin to run against a person until he knows or, in all the circumstances of the case, he ought to know the identity of the defendant and sufficient facts to indicate that he has a cause of action.

- (2) The burden of proving that the running of the limitation period has been postponed under subsection (1) is on the person claiming the benefit of the postponement.”

The British Columbia Law Reform Commission addressed the issue in its *Report on Limitations*,<sup>55</sup> published in 1974. The Commission considered<sup>56</sup> that the approach favoured by the New South Wales Law Reform Commission<sup>57</sup> was preferable to that favoured in England<sup>58</sup> and Ontario.<sup>59</sup> On the question of a “long-stop” provision. They observed that it was:

“doubtful if all potential plaintiffs to whom relief should be given will emerge during a six-year period. Respiratory diseases such as silicosis can be discovered well beyond that time. Professional negligence may emerge even later. A surveyor may negligently issue a certificate of nonencroachment containing an error which would only be discovered when the property is resurveyed, an event unlikely to occur within six years. A solicitor may negligently fail to register

a document, thus permitting a third party to acquire an interest in land or goods which is only discovered some years later.”<sup>60</sup>

Legislation was enacted following the publication of this Report. Against a general two year limitation period<sup>61</sup> in relation to actions for damages in respect of injury to persons or property, section 6(3) provides that in actions for personal injury (*inter alia*) time does not run against the plaintiff:

“until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that

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

Section 6(4) defines “appropriate advice” as meaning “the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require.” Moreover, “facts” include:

- (i) the existence of a duty owed to the plaintiff by the defendant; and
- (ii) that a breach of duty caused injury, damage or loss to the plaintiff.

Section 8 provides for an ultimate limitation period of 30 years or, in the case of an action against a hospital or hospital employee, based on negligence, or against a medical practitioner based on professional negligence or malpractice, of 6 years from the date when the right to bring an action arose.

It is perhaps useful to record the observations of the Alberta Commissioners to the Uniform Law Conference of Canada on section 6 of the British Columbia legislation:

“We think that this balance of the interests is too much in favour of plaintiffs. It would seem to allow a plaintiff who, within the limitation period, has decided not to sue, to bring action outside the limitation period if new evidence turns up. It would also appear that a favourable legal opinion outside the limitation period, following upon an unfavourable one within it, would start the time running again. It also appears to us that time would not run until the plaintiff knows that there is a duty and a breach, and we think that it would be difficult for a defendant to bring that sort of knowledge home to him. This of course is an existing solution to a very difficult problem and the reasons behind it cannot be ignored, but our choice would be for a more restrictive provision.”<sup>62</sup>

The proposed *Uniform Act 1982* is in harmony with the approach of the Alberta Commissioners. Section 13(2) of the Act provides as follows:

“The beginning of the limitation period for an action is postponed until the plaintiff knows or, in all the circumstances of the case, he ought to know

- (a) the identity of the defendant; and
- (b) the facts upon which his action is founded.”

The Newfoundland Law Reform Commission, in its *Report on Limitation of Actions*,<sup>63</sup> published in December 1986, has proposed<sup>64</sup> that in a wide range of actions<sup>65</sup> the running of time should be postponed against the plaintiff “until he knows or, in all the circumstances of the case, ought to know, that he has a cause of action”.<sup>66</sup> However, this postponement should not allow an action:

- “(a) after the expiration of ten years after the date of the act or omission on which the action is based; or
- (b) in the case of an action based upon a series of acts or omissions or a continuing course of conduct, after the expiration of ten years after the date of the last of the series or the termination of the course of conduct.”<sup>67</sup>

The Alberta Institute of Law Research and Reform addressed the subject in its Report for Discussion No. 4, *Limitations*, published in September 1986. The Institute recommended that new legislation should provide that:

“if a claim subject to this Act is not brought within two years after the date on which the claimant first knew, or in his circumstances and with his abilities ought to have known,

- (a) that the injury for which he claims a remedial order had occurred,
- (b) that the injury was to some degree attributable to conduct of the defendant, and
- (c) that the injury, assuming liability on the part of the defendant, was sufficiently serious to have warranted bringing an action,

the defendant, upon pleading this Act as a defect, is entitled to immunity from liability under the claim.”<sup>68</sup>

If the defendant pleaded the Act as a defence, the claimant would have the burden of proving that his claim had been brought within the discovery period.<sup>69</sup>

The Institute went on to propose<sup>70</sup> an ultimate limitation period of ten years after the claim arose. A claim based on a breach of duty of care would arise when the careless conduct occurred.<sup>71</sup> The Institute observed in relation to the proposed ultimate limitation period that its objective was:

“to benefit the entire society of potential defendants by cleansing the slate as to any alleged breach of duty at some fixed point in time after it occurred... A potential defendant can only begin counting at the time of his conduct, and he will frequently have no knowledge that particular conduct may have breached a duty owed to someone. Thus, in order to achieve its objective as a provision of repose, the ultimate period must begin when a person did, or failed to do, something. As most claims will accrue at the time of the defendants’ conduct, beginning the ultimate period at the accrual of a claim will usually be quite functional. However, this will not always be so.”<sup>72</sup>

### THE UNITED STATES OF AMERICA

The law in the United States of America offers some interesting comparisons with the position under the present law in Ireland. We will examine the subject under two headings: (i) accrual and discoverability; and (ii) statutes of repose.

#### (i) Accrual and Discoverability

The general approach in the United States formerly was that the limitation period was computed from the time when either the tortious act was committed or the injury occurred rather than the time when it was first capable of being discovered.<sup>73</sup> Over the past forty years or so, and especially in the past decade, there has been a move towards acceptance of the discoverability test.<sup>74</sup> Now, “(a)most all the states whose high courts have addressed the issue have some form of discovery rule.”<sup>75</sup>

The discoverability test first proved attractive in cases of medical malpractice where a foreign object was left in the patient’s body<sup>76</sup>. The particularly short limitation periods applying in relation to medical malpractice made the case for adoption of a discoverability test all the more pressing.

The discovery rule has since been widely adopted in many other areas.<sup>77</sup>

By 1982, thirty-six jurisdictions had adopted date of discovery rules either by statute or by judicial determination.<sup>78</sup> The solutions adopted range very widely. Some legislatures<sup>79</sup> have limited the discoverability rule to personal injury actions, others<sup>80</sup> also embrace damage to real property.

The decisions have tended to address the issue in a specific context, and have not generally sought to articulate a new rule governing all tortious liability. These specific contexts include legal<sup>81</sup> and medical<sup>82</sup> malpractice, product liability,<sup>83</sup> negligence in the construction or improvement of buildings and the exposure to toxic substances.<sup>84</sup>

Some of the leading decisions are worthy of particular note. In *Urie v Thompson*, in 1949, the United States Supreme Court applied the discoverability test in proceedings under the *Federal Employers’ Liability Act*, in respect of the plaintiff’s contracting of silicosis. Justice Rutledge, delivering the opinion of the Court, wrote:

"If Urie were held barred from prosecuting this action because he must be said, as a matter of law, to have contracted silicosis prior to November 25, 1938, it would be clear that the Federal legislation afforded Urie only a delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability...

We do not think the humane legislative plan intended such consequences to attract a blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights."<sup>85</sup>

In 1962, in *Quinton v United States*,<sup>86</sup> the Fifth Circuit, inspired by Urie's "blameless ignorance" criterion, applied the discoverability test to medical malpractice suits brought against the federal government under the *Federal Torts Claims Act*. Turle CJ said:

"The... rule that a cause of action for malpractice accrues on the date of the negligent act, even though the injured patient is unaware of his plight, has been subjected to every criticism over the years. It has almost uniformly been condemned as an unnecessarily harsh and unjust rule of law...

Since this... rule, so far as we can discern, has no significant redeeming virtue, we decline to apply it... Rather, we think by far the most sensible and just rule to be applied under that section is that a claim for malpractice accrues against the Government when the claimant discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice."<sup>87</sup>

In *United States v Kubrick*,<sup>88</sup> the United States Supreme Court confronted the question of the time of accrual of a right of action for medical malpractice. In April 1968, Mr Kubrick had been given an antibiotic, Neomycin, by Veterans' Administration doctors when they were conducting surgery on his right femur. Six weeks after he had been discharged from the hospital, he noticed a ringing sensation in his ears as well as some hearing loss. The following January, he was informed by medical specialists that it was highly possible that his condition was attributable to the Neomycin treatment.

Mr Kubrick applied unsuccessfully for an increase in his government disability, the Veterans' Administration stating (in September 1969) that his case had been proper. On 2 June 1971, a doctor specifically told Mr Kubrick that the neomycin had been improperly administered and was the cause of his disability. The Veteran's Administration turned down his appeal in August 1972.

Mr Kubrick took legal proceedings. He was successful in federal district court and on the appeal to the Third Circuit Court of Appeals; but the Supreme Court reversed.

Justice White, for the majority, wrote:

"We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask. If he does ask and if the defendant has failed to live up to minimum standards of medical proficiency, the odds are that a competent doctor will so inform the plaintiff...

We thus cannot hold that Congress intended that "accrual" of a claim must await awareness by the plaintiff that his injury was negligently inflicted. A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government.<sup>89</sup> If there exists in the community a generally applicable standard of care with respect to the treatment of his ailment, we see no reason to suppose that competent advice would not be available to the plaintiff as to whether his treatment conformed to that standard. If advised that he has been wronged, he may promptly bring suit. If competently advised to the contrary, he may be dissuaded, as he should be, from pressing a... claim. Of course, he may be incompetently advised or the medical community may be divided on the crucial issue of negligence, as the experts proved to be on the trial of this case. But however or even whether he is advised, the putative malpractice plaintiff must determine within the period of limitations whether to sue or not, which is precisely the judgment that other tort claimants must make. If he fails to bring suit because he is incompetently or mistakenly told that he does not have a case, we discern no sound reason for visiting the consequences of such error on the defendant by delaying the accrual of the claim until the plaintiff is otherwise informed or himself determines to bring suit, even though more than two years have passed from the plaintiff's discovery of the relevant facts about injury."<sup>90</sup>

Since, in the majority view, Mr Kubrick had known of the cause of his injury by January 1969, and reasonable enquiry by him would have disclosed the impropriety of the treatment, his claim was barred by the statute of limitations, in spite of the technical complexity of the negligence question it raised.

Justice Stevens,<sup>91</sup> dissenting, said:

“Essentially, there are two possible approaches to construction of the word ‘accrues’ in statutes of limitations: (1) a claim might be deemed to ‘accrue’ at the moment of injury without regard to the potentially harsh consequence of barring a meritorious claim before the plaintiff has a reasonable chance to assert his legal rights, or (2) it might ‘accrue’ when a diligent plaintiff has knowledge of facts sufficient to put him on notice of an invasion of his legal rights. The benefits that flow from certainty in the administration of our affairs favour the former approach in most commercial situations.<sup>92</sup> But in medical malpractice cases the harsh consequences of that approach have been generally considered unacceptable. In all events, this Court adopted the latter approach over 30 years ago when it endorsed the principle that ‘blameless ignorance’<sup>93</sup> should not cause the loss of a valid claim for medical injuries...

In my judgment, a fair application of this rule forecloses the Court’s attempt to distinguish between a plaintiff’s knowledge of the cause of his injury on the one hand and his knowledge of the doctor’s failure to meet acceptable medical standards on the other. For in both situations the typical plaintiff will, and normally should, rely on his doctor’s explanation of the situation.

The *Urie* rule would not, of course, prevent the statute from commencing to run if the plaintiff’s knowledge of an injury, or its cause, would place a reasonably diligent person on notice that a doctor had been guilty of misconduct. But if he neither suspects, nor has any reason to suspect, malpractice, I see no reason to treat his claim differently than if he were not aware of the cause of the harm or, indeed, of the harm itself...

The Court is certainly correct in stating that one purpose of the statute of limitations is to require ‘reasonably diligent presentation of tort claims against the Government.’ A plaintiff who remains ignorant through lack of diligence cannot be characterized as ‘blameless.’ But unless the Court is prepared to reverse the Court of Appeals’ judgment that the District Court’s findings were adequately supported by the evidence, the principle of requiring diligence does not justify the result the Court reaches today...”<sup>94</sup>

(ii) Statutes of Repose

Statutes of repose, which are “long stop” legislative provisions, have been very widely adopted.<sup>95</sup> The periods of repose range broadly, from five<sup>96</sup> to twelve<sup>97</sup> years.<sup>98</sup>

Many of the statutes contain an absolute outer time limit, regardless of when the plaintiff is injured or when first his injury becomes reasonably capable of discovery. Other statutes “embody a flexible outer limit so that a person who is injured by a defective product a few days before the expiration of the statute of repose may bring suit within the applicable tort statute of limitations, notwithstanding the prohibition within the statute of repose.”<sup>99</sup>

Every jurisdiction in the United States save Arizona, Iowa, Kansas and Vermont has enacted special statutes of repose for those involved in designing and building real property.<sup>100</sup> At least 25 jurisdictions have introduced statutes of repose in respect of medical malpractice.<sup>101</sup>

Statutes of repose in regard to product liability developed more recently.<sup>102</sup> Fewer have been enacted than those adopted in relation to the building industry. About a third of the states have at one time adopted product liability statutes of repose,<sup>103</sup> but the courts in five states<sup>104</sup> have held the statutes unconstitutional.

Statutes of repose in products liability cases were seen (at all events by the insurance companies) as having two main benefits: (1) they would solve the problem of open-ended liability and thus help to stabilise insurance rates;<sup>105</sup> (2) they would prevent the use of time-of-trial standards to determine products liability many years after the time of their development and manufacture.<sup>106</sup>

The repose statutes in relation to products were a response to an upheaval in the law on the subject over the previous decade.<sup>107</sup> The extension of strict liability principles<sup>108</sup> as well as the expansion of traditional tort theories<sup>109</sup> led to an escalation in the amount of litigation with very high awards being made in many cases.<sup>110</sup> In the view of insurance companies this was responsible for the massive increase in insurance premiums,<sup>111</sup> with the resulting risk that products liability insurance might be beyond the reach of small manufacturers.<sup>112</sup>

A further pressure for statutory change arose from the expanding liability for time-delayed injuries from products with a wide distribution.<sup>113</sup> The courts showed an increasing willingness to permit compensation for injuries resulting from products manufactured and sold perhaps decades previously, even to purchasers who were the parents of the plaintiffs then before the courts.

Statutes of repose have provoked constitutional challenge<sup>114</sup> on a number of fronts, principally that they offend against guarantees of equal protection,<sup>115</sup> due process<sup>116</sup> and access to the courts.<sup>117</sup>

The equal protection argument concentrates on the lack of a rational basis for preventing some injured plaintiffs, but not others, from taking proceedings within a reasonable time of discovering their injury. Why, it is asked, should the victim of the negligence of a doctor or architect lose his right of action when he would not do so if some other category of defendant were involved? And, so far as a specific category of liability is concerned, such as products liability, for example, why should the statute extend to a manufacturer but not a distributor of a product? So far as this latter question is concerned, most statutes now attempt to enumerate all the possible classes of products liability defendants or simply apply, across the board, to all actions for products liability.<sup>118</sup>

The due process attack on the constitutionality of statutes of repose has generally been met with the reply that the statutes are rationally related to permissible objectives<sup>119</sup> such as preventing

the assertion of claims involving stale evidence, protecting the defendant from open-ended liability, as well as the need to keep down insurance rates (and thus consumer prices also). Moreover, a rather circular argument to the effect that only vested rights merit protection has also been pressed in rebuttal of a due process attack.<sup>120</sup>

As regards the argument based on access to the courts, most state constitutions contain provisions guaranteeing that the courts of justice are open to everyone for the redress of an injury, "without favour, denial or delay," or words to that effect.

Herring Hicks explains the general lack of success of an attack on the statutes of repose based on these constitutional provisions:

"Relying on three principal arguments, most courts have found that statutes of repose do not violate open courts provisions. First, these courts reason that the right to bring a cause of action is not a vested right and that legislatures have the power to abrogate a nonvested right. Second, open courts provisions guarantee access to the courts only for 'legal injuries,' and plaintiffs injured after the expiration of the statutory period have no legally cognizable injuries. Third, these courts argued that open courts provisions are mandates to the judiciary, not the legislatures. These arguments are similar to the arguments relied on in a due process analysis. Indeed, some courts refer to open courts provisions as state due process clauses. Because of this similarity, some courts go beyond relying solely on this reasoning and apply a basic due process analysis to open courts challenges, looking for a reasonable relation between the statute and a legitimate legislative purpose. These decisions, therefore, generally parallel due process decisions."<sup>121</sup>

Herring Hicks goes on to say:

"A growing number of courts has found that statutes of repose violate open courts provisions. These courts have followed various approaches. One line of cases maintains that the open courts provision prohibits the legislature from abolishing certain common-law rights without providing an alternative remedy, unless there is an overriding public necessity."<sup>122</sup>

In view of its interesting parallels with Irish constitutional law, it may be useful to quote the observations of a commentator writing in the *Harvard Law Review*<sup>123</sup> in 1983:

"The Supreme Court's recent holdings on the right of access to the courts suggest that the judiciary may step in to protect the toxic tort victim's cause of action from legislative attack. A cause of action is a species of property protected by the due process clause.<sup>124</sup> Any restriction on court access that abridges this property interest and imperils basic individual interests that can be vindicated only through state-monopolized means will be struck down, absent a 'countervailing state interest of overriding significance.'<sup>125</sup>

Viewed as restrictions on court access that impede the ability of toxic tort plaintiffs to enforce their common law and statutory rights, statutes of limitations can be evaluated under this procedural due process standard. The interest in personal security and bodily integrity is a fundamental one;<sup>126</sup> it is at least as worthy of protection as was the entitlement to obtain a divorce protected in *Boddie v Connecticut*,<sup>127</sup> in which the Court first articulated the standard for protecting the right of court access.<sup>128</sup> This fundamental bodily interest, moreover, can be vindicated in practice only through state-monopolized court procedures."

## FOOTNOTES

- <sup>1</sup> Law Revision Committee, *Fifth Interim Report* (*Statutes of Limitations*) (1936)
- <sup>2</sup> *Report of the Committee on the Limitation of Actions* (Cmd 7740, 1949)
- <sup>3</sup> The Committee excluded from its recommendation actions for trespass to the person, false imprisonment, malicious prosecution and defamation
- <sup>4</sup> Para 22 of the Report
- <sup>5</sup> *Id*, para 22
- <sup>6</sup> (1963) A C 758
- <sup>7</sup> *Report of the Committee on Limitation of Actions in Cases of Personal Injury* (1962) The Committee had been appointed after the plaintiffs unsuccessful appeal to the Court of Appeal in *Cartledge*, (1962) 1 Q B 189
- <sup>8</sup> So far as the law of England and Wales was concerned
- <sup>9</sup> Cf *Central Asbestos Co Ltd v Dodd*, (1972) 2 All E R 1135
- <sup>10</sup> (1970) 1 Q B 393
- <sup>11</sup> Law Com No 25
- <sup>12</sup> (1972) 2 All E R 1135
- <sup>13</sup> See Current Law Statutes Annotated 1980 and the Supreme Court Practice 1979, Volume 2, par 4535
- <sup>14</sup> See *McCafferty v Metropolitan Police Receiver* (1977) 2 All E R 756
- <sup>15</sup> See *Millar v London Electrical Manufacturing Company* (1976) 2 Ll Rep 284 and *Knipe v British Railways Board* (1972) 1 Q B 361
- <sup>16</sup> (1981) 2 All E R 296
- <sup>17</sup> (1979) 2 All E R 548
- <sup>18</sup> (1977) 2 All E R 801
- <sup>19</sup> (1983) A C 1
- <sup>20</sup> 24th Report of the Law Reform Committee, *Latent Damages*, (Cmd 9390, 1984)
- <sup>21</sup> See Frindade & P Cane, *The Law of Torts in Australia*, ch 25 (1985)
- <sup>22</sup> The courts have however shown themselves willing to distinguish *Cartledge* in some cases see e.g., *Footner v Broken Hill Associated Smelters Pty Ltd*, 33 S A L J 58 (Sup Ct, Jacobs, J, 1983), *Joosten v Midaho Pty Ltd* unreported, Western Australia Sup Ct, Wallace, J, No 1052 of 1979, referred to in *Footner*, at 74. In *Hawkins v Clayton*, (1986) 5 NSWLR 109, the *Pirelli* test was applied in claim for negligence against a solicitor
- <sup>23</sup> L R C 3 (1967)
- <sup>24</sup> *Id*, paras 272-301
- <sup>25</sup> *Brunsdon v Humphey*, 14 Q B D 141 (1884)
- <sup>26</sup> Para 301 of the Report
- <sup>27</sup> Act No 31, 1963, Division 3. See further *Do Carmo v Ford Excavations Pty Ltd*, (1981) 1 NSWLR 409 (Cross, J, 1980). *Gruber v Arunta Finance Pty Ltd*, (1981) 1 NSWLR 432 (Ash J)
- <sup>28</sup> L R C 21 (1975)
- <sup>29</sup> *Id*, paras 143-144
- <sup>30</sup> P 3 of the Report
- <sup>31</sup> *Id*, p 4
- <sup>32</sup> Act No 58 of 1972, further amended by Act No 21 of 1975. See *Van Vliet v Griffiths*, 20 S A S R 524 (Sup Ct (In Banco), 1979), *Footner v Broken Hill Associated Smelters Pty Ltd* 33 S A S R 58 (Sup Ct, Jacobs J, 1983)
- <sup>33</sup> *Limitation of Actions (Personal Injuries) Act 1972* inserting section 23A in the *Limitation of Actions Act 1958*. See further *Harris v Gas & Fuel Corporation of Victoria*, (1975) VR 619 (Sup Ct Full Ct)
- <sup>34</sup> Section 23A(3) inserted by section 3 of the 1972 Act
- <sup>35</sup> See Gerber, *Note Torts Negligence Property Damage Accrual of Cause of Action When Does Time Begin to Run?* 57 Austr L J 530 at 531 (1983)
- <sup>36</sup> Section 4 of the Act (incorporating a new section 38A into the *Limitation Act 1935-1978*) defines 'latent injury' as meaning 'a disease or injury of such a nature that, at the time it is suffered by a person that person does not know and could not reasonably be expected to know that he has suffered the disease or injury'
- <sup>37</sup> Section 38A(7) as so inserted by section 4
- <sup>38</sup> Cf Rafferty *Note Limitation and Latent Damage The Canadian Experience* 6 Oxford J of Leg Stud 464 (1986)
- <sup>39</sup> 10 D L R (4th) 641 (Sup Ct Can 1984) analysed by Feldthusen *Civ of Kamloops v Nielsen*

*A Comment on the Supreme Court's Clarification of Colonial Tort Law*, 30 McGill L.J. 539 (1985), Rafferty, *supra*, at 469-471

<sup>40</sup> (1982) 3 All E.R. 486

<sup>41</sup> 10 D.L.R. (4th), at 684-685

<sup>42</sup> Cf. Rafferty, *supra*, at 469-470

"Wilson, J.'s discussion of the limitation issue is regrettably short and leaves open a number of questions. In particular, it is not at all clear whether she saw the plaintiff's damage as economic loss or property damage. At one point of her judgment, she saw the loss correctly as economic because she spent much of her judgment justifying the recovery of purely economic loss in these circumstances. On the other hand, when dealing with the British Columbia Limitations Act, she seemed to regard the action as one in respect of injury to property. Secondly, she does not discuss any of the leading Canadian cases dealing with the accrual of causes of action in tort. She does not mention any of the cases concerning solicitors' liability. She does not deal with the question whether the presence of a contractual relationship between the parties should be relevant. It is not even clear whether she would support the conclusion reached in *Cartledge* with respect to personal injuries, though, by implication, she would not. The scope of Wilson, J.'s judgment is particularly in doubt because less than four months later the Supreme Court refused leave to appeal in *Costigan v Ruzicka*, 13 D.L.R. (4th) 368 (1984), where the Alberta Court of Appeal held that, in negligence proceedings against a solicitor, the cause of action accrued when it was sustained and not when it was discoverable. The possibility thus remained that the reasonable discoverability test was limited to cases of negligent construction and perhaps also to cases where there was no contractual nexus between the parties."

<sup>43</sup> 31 C.C.L.T. 294 (B.C. Sup. Ct. Lander J., 1985)

<sup>44</sup> 37 C.C.L.T. 117 (Sup. Ct. Can., 1986)

<sup>45</sup> (1982) 2 All E.R. 753, at 765-766 (C.A.)

<sup>46</sup> 37 C.C.L.T., at 179-180

<sup>47</sup> It is perhaps worth noting that, in *Martin v Perrie*, 36 C.C.L.T. 36 (1986), the Supreme Court of Canada held that a statute in Ontario introducing a "discoverability" rule into medical malpractice litigation, to replace a strict one-year limitation period, was not retrospective in its operation.

<sup>48</sup> 37 C.C.L.T. 296 (Ont. High Ct. Smith, J., 1986)

<sup>49</sup> *Id.*, at 302

<sup>50</sup> P. 198 of the Report

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Cf. the Newfoundland Law Reform Commission's *Working Paper on Limitation of Actions*, p. 431 (NLRC WP1, 1985)

<sup>54</sup> That is, fraud or fraudulent breach of trust to which the trustee was a party or of which he had knowledge.

<sup>55</sup> LRC 15/1974

<sup>56</sup> *Id.*, p. 76

<sup>57</sup> Cf. pp. 19-20, *supra*

<sup>58</sup> Cf. pp. 11-19, *supra*

<sup>59</sup> Cf. pp. 23-24, *supra*

<sup>60</sup> LRC 15/1974, p. 78

<sup>61</sup> *Limitation Act* (c. 236), section 3(1)(a)

<sup>62</sup> *Uniform Law Conference of Canada's Annual Meeting 1979*, at 193, quoted in the Newfoundland Law Reform Commission's *Working Paper on Limitation of Actions*, pp. 198-199 (NLRC WP1, 1985)

<sup>63</sup> NLRC R.1. The Report reflects the conclusion at which the Commission arrived after the publication of its *Working Paper on Limitation of Actions* (NLRC WP 1, January 1985), modified in its *Supplement*, published in February 1986.

<sup>64</sup> NLRC R.1, p. 4

<sup>65</sup> The six categories of actions are as follows:

- (a) personal injury actions
- (b) property damage actions
- (c) professional negligence actions
- (d) actions for relief from the consequences of a mistake
- (e) actions under *The Fatal Accidents Act*
- (f) actions for nonfraudulent breaches of trust

- <sup>66</sup> The onus of proving that the accrual of action had been postponed would be on the person claiming the benefit of the postponement NLRC - R 1, p 7
- <sup>67</sup> NLRC R 1, p 7 See further NLRC WP 1 p 204
- <sup>68</sup> Para 2 184 of the Report
- <sup>69</sup> *Id.*, para 2 185
- <sup>70</sup> *Id.*, para 2 198
- <sup>71</sup> *Id.*, para 2 213
- <sup>72</sup> *Id.*, para 2 195
- <sup>73</sup> See Prosser & Keeton, *The Law of Torts*, 165 (5th ed., 1984), Dworkin, *Product Liability of the 1980s "Repose Is Not the Desury of Manufacturers,"* 61 N Car L Rev 33 at 36 (1982), Anon, *Developments in the Law Statutes of Limitations*, 63 Harv L Rev 1177 at 1200-1203 (1950) Muscara, *Comment* 4 W New England L Rev 155, at 158 (1981), J K S., *Comment, Preserving Causes of Action in Latent Injury Cases The Locke v Johns-Manville Corp Date-of-the Injury Accrual Rule*, 68 Va L Rev 615, at 620 (1982)
- <sup>74</sup> Cf Dworkin, *supra*, at 36-37, Strand, *Comment, The Inapplicability of Traditional Tort Analysis to Environmental Risks The Example of Toxic Waste Pollution Victim Compensation*, 35 Stan L Rev 575, at 581, fn 23 (1983), Feinberg, *Denial of a Remedy Former Residents of Hazardous Waste Sites and New York's Statute of Limitations*, 8 Colum J of Environmental L 161 (1982), Rubin, *Note Manufacturers Must Seek Alternative Limitations to Liability as New Hampshire Supreme Court Strikes Down State Statute of Repose*, 18 Suffolk U L Rev 757, at 762 763 (1984), Biernacki, *Note The Statute of Limitations for Radiation Injuries* 26 Nat Resources J 629, at 635 (1986)
- <sup>75</sup> Creswell, *Statutes of Limitation Counterproductive Complexities*, 37 Mercer L Rev 1, at 29 (1985)
- <sup>76</sup> Dworkin, *supra*, at 37, Ruhl, *Toxic Tort Remedies The Case Against the "Superduper Fund" and other Reform Proposals*, 38 Baylor L Rev 597, at 620, fn 54 (1986), see also Creswell, *supra*, at 51
- <sup>77</sup> Cf Prosser & Keeton, *op cit.*, 166-167
- <sup>78</sup> Feinberg, *Denial of a Remedy Former Residents of Hazardous Waste Sites and New York's Statute of Limitations*, 8 Colum J of Environmental L 161, at 170, fn 55 (1982)
- <sup>79</sup> E.g. Connecticut, Kansas, Missouri, North Carolina, South Carolina and Vermont *id*
- <sup>80</sup> E.g. Nebraska *id*
- <sup>81</sup> See Kosmach, *Note Professional Malpractice - Statute of Limitations Cause of Action Accrues in Professional Malpractice Tort Claims from the Date the Alleged Injury is Discovered*, 25 De Paul L Rev 568 (1976), Koffler, *Legal Malpractice Statutes of Limitations A Critical Analysis of a Burgeoning Crisis*, 20 Akron L Rev 209, at 236 246 (1986)
- <sup>82</sup> See Sherman, *Note For Want of a Nail The Discovery Rule in Medical Malpractice Cases*, 27 Ariz L Rev 265 (1985), Bornhoft, *Note Statutes of Limitations - Reinstating the Discovery Rule in Medical Malpractice Cases*, (1985) Ariz State L J 763, Holbrook, *Reaffirming the Discovery Rule in Medical Malpractice Actions*, 28 S Tex L Rev 139 (1985)
- <sup>83</sup> See Reynolds, *Statute of Limitations Problems in Products Liability Cases - Exercises in Privy, Symmetry, and Repose*, 38 Okla L Rev 667 (1985), Birnbaum, *"First Breath's Last Gasp" The Discovery Rule in Products Liability Cases*, 13 Forum 279 (1977)
- <sup>84</sup> See Shaw, Cihon & Myers, *The Discovery Rule Fairness in Tox Tort Statutes of Limitations*, 33 Clev St L Rev 491 (1985), Birnbaum, *Statutes of Limitations in Environmental Suits The Discovery Rule Approach*, 16 Trial No 4, p 38 (April 1980), Fulton, *Comment, Hazardous Waste Third-Party Compensation for Contingencies Arizing from Inactive and Abandoned Hazardous Waste Disposal Sites*, 33 S C L Rev 543, at 558-560 (1982), Hurley Bruno, *Comment The Development of a Strict Liability Cause of Action for Personal Injuries Resulting from Hazardous Waste*, 16 New Eng L Rev 543, at 567 569 (1981), Glumcher, *Note, Statute of Limitations and the Discovery Rule in Latent Injury Claims An Exception or the Law?* 43 U Pitt L Rev 501 (1982)
- <sup>85</sup> *Id.* at 169 170
- <sup>86</sup> 304 F 2d 234 (1962)
- <sup>87</sup> *Id.* at 240
- <sup>88</sup> 444 U S 111 (1979), analysed by Abney *For Whom the Statute Tolls Medical Malpractice Under the Federal Tort Claims Act*, 61 Notre Dame L Rev 696 (1986), Muscara, *Comment, Accrual of a Medical Malpractice Claim Under the Federal Tort Claims Act Accrual of Medical Malpractice Action United States v Kubrick* 4 W New England L Rev 155 (1981), Hamblett, *Comment, Federal Tort Claims Act Lack of Reason to Know of Possible Medical Malpractice Claim Does Not Toll the Statute of Limitations United States v Kubrick*, 14 Suffolk U L Rev 1428 (1980)
- <sup>89</sup> In a supporting footnote, 444 U S, at 123, fn 10, it is stated  
 "As the dissent suggests at 128 we are thus in partial disagreement with the conclusion of the lower courts that Kubrick exercised all reasonable diligence Although he diligently

ascertained the cause of his injury, he sought no advice within two years thereafter as to whether he had been legally wronged. The dissent would excuse the omission. For statute of Limitations purposes, we would not."

<sup>90</sup> 444 U.S., at 122-124.

<sup>91</sup> With whom Justices Brennan and Marshall joined.

<sup>92</sup> Citing *Gates Rubber Co. v. U.S.M. Corp.*, 508 F.2d 603, at 611 (C.A.7, 1975).

<sup>93</sup> *Urie v. Thompson*, 337 U.S. 163, at 170 (per Justice Rutledge, delivering the opinion of the Court, 1949), quoted *supra*, p. 28.

<sup>94</sup> 444 U.S., at 126-128.

<sup>95</sup> Turner, *The Counter Attack to Retake the Citadel Continues: An Analysis of the Constitutionality of Statutes of Repose in Products Liability* 46 J. of Air L. & Commerce 449, at 456, fn. 55 (1981); Herring Hicks, *Note: The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 Vand. L. Rev. 327, at 628-631 (1985); Rubin, *Note: Manufacturers Must Seek Alternative Limitations to Liability as New Hampshire Supreme Court Strikes Down State Statute of Repose* 18 Suffolk U.L. Rev. 757, at 764-766 (1984).

<sup>96</sup> E.g., Kentucky.

<sup>97</sup> E.g., Arizona, Florida, Illinois, New Hampshire.

<sup>98</sup> Turner, *supra*, at 456, fn. 55; Liebman, *Note: When the Product Ticks: Products Liability and Statutes of Limitations*, 11 Indiana L. Rev. 693, at 718 (1978).

<sup>99</sup> Turner, *supra*, at 458.

<sup>100</sup> Randall, *Comment: Due Process Challenges to Statutes of Repose*, 40 Southwestern L.J. 997, at 1000 (1986). See generally Hermes, *Note: Actions Arising Out of Improvements to Real Property: Special Statutes of Limitation* 57 N.D.L. Rev. 43 (1981); Rogers, *The Constitutionality of Alabama's Statute of Limitation for Construction Litigation: The Legislature Thins Again* 11 Cumb. L. Rev. 1 (1980); Moore, *Note: Design for Challenge: The Kentucky Statute of Repose for Improvements to Real Property* 73 Ky. L.J. 1143 (1985); Heller, *The District of Columbia's Architects' and Builders' Statute of Repose: Its Application and Need for Amendment*, 34 Cath. U.L. Rev. 919 (1985).

<sup>101</sup> See Ward, *Note: Austin v. Litrak, Colorado's Statute of Repose for Medical Malpractice Claims: An Uneasy Sleep*, 62 Denver U.L. Rev. 825, at 827 (1985). See generally, O'Neil, *Note: Medical Malpractice: Ohio's Statute of Limitations*, 16 Akron L. Rev. 302 (1982); Sullivan, *Note: Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts* 63 Neb. L. Rev. 150 (1983); Andrews, *Note: Questions Surrounding the Texas Medical Malpractice Statute of Limitations* 38 Baylor L. Rev. 751 (1986); Carter et al., *Comment: An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, (1975) Duke L.J. 1417, at 1429-1436; Porter, *Note: The Discovery Rule Dies in a Medical Malpractice Case*, 17 Texas Tech L. Rev. 1009 (1986).

<sup>102</sup> See Massery, *Date of Sale Statutes of Limitation: A New Immunity for Product Suppliers*, (1977) Ins. L.J. Z535; Hoening, *Products Liability Problems and Proposed Reforms*, (1977) Ins. L.J. 213, at 231-233; Albers, *Statute of Limitations in Illinois Strict Liability Suits*, 74 Ill. Bar J. 586 (1986).

<sup>103</sup> Randall, *supra*, at 1001, fn. 18.

<sup>104</sup> Alabama, Florida, New Hampshire, North Carolina (less clearly) and Rhode Island: see Randall, *supra*, at 1001, fn. 18.

<sup>105</sup> See Dworkin, *Product Liability of the 1980s: "Repose Is Not the Destiny of Manufacturers"*, 61 N. Car. L. Rev. 33, at 35, fn. 10 (1982).

<sup>106</sup> Dworkin, *supra*, at 34, fn. 4, 35, fn. 10; Henderson, *Coping with the Time Dimension in Products Liability*, 69 Calif. L. Rev. 919 (1981); Philips, *The Standard for Determining Defectiveness in Products Liability* 46 U. Cincinnati L. Rev. 101, at 115-119 (1977); See also Rosen, *Products Liability*, (1984) Ann. Survey of Amer. L. 825, at 833-840.

<sup>107</sup> Dworkin, *supra*, at 33; Turner, *The Counter Attack to Retake the Citadel Continues: An Analysis of the Constitutionality of Statutes of Repose in Products Liability* 46 J. of Air L. & Commerce 449 (1981). Cf. Felder, *Note: Kensington v. Abbot Laboratories: DES and the Statute of Limitations* 17 Pac. L.J. 1531 (1986).

<sup>108</sup> See Epstein, *Products Liability: The Search for the Middle Ground*, 56 N. Car. L. Rev. 643 (1978).

<sup>109</sup> Dworkin, *supra*, at 33-34.

<sup>110</sup> Cf. Roscoe, *Note: The Proposed Product Liability Statute in Ohio: Its Purpose and Probable Results* 29 Clev. St. L. Rev. 141, at 141, fn. 3; Turner, *supra*, at 449.

Turner, *supra*, at 449. The view of the insurance companies was seriously contested by the Interagency Task Force on Product Liability set up in 1976 under the direction of the United States Department of Commerce: see Johnson, *Products Liability: Reform: A Hazard to Consumers* 56 N. Car. L. Rev. 677, at 678-679 (1978); Leibman, *Note: When the Product Ticks: Products Liability and Statutes of Limitations* 11 Ind. L. Rev. 693, at 694-699 (1978). See also Phillips, *Future Implications of the National Tort Reform Movement: Tort Reform and Insurance Crisis in the Second Half of 1988* 22 Gonzaga L. Rev. 277, at 286-288 (1987).

- Talmadge & Petersen, *In Search of a Proper Balance*, 22 *Gonzaga L. Rev.* 259 (1987).  
 Schroeter & Rutzick, "Tort Reform" Being an Insurance Company Means Never Having to Say You're Sorry 22 *Gonzaga L. Rev.* 31 (1987)
- <sup>112</sup> Roscoe *supra*, at 143
- <sup>113</sup> See *Lawscape - Toxic Time Bombs*, 67 *Am. Bar Assoc. J.* 139 (1981). Many of the cases relate to liability in respect of asbestos drugs administered during pregnancy and defoliation spray ("Agent Orange") used during the Vietnam war. See *Anon., Note, Market Share Liability: An Answer to the DES Causation Problem*, 94 *Harv. L. Rev.* 668 (1981). *Comment, DES and a Proposed Theory of Enterprise Liability*, 46 *Fordham L. Rev.* 963 (1978). Meagher, *Note, Market Share Liability: A New Method of Recovery for DES Litigants*, 30 *Cath. U. L. Rev.* 551 (1981). Strand, *Comment, The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 *Stan. L. Rev.* 575 (1983).
- <sup>114</sup> See Rubin, *Note, Manufacturers Must Seek Alternative Limitations to Liability as New Hampshire Supreme Court Strikes Down State Statute of Repose*, 18 *Suffolk U. L. Rev.* 757, at 767ff (1984).
- <sup>115</sup> Cf. e.g., *Heath v. Sears, Roebuck & Co.*, 123 *N.H.* 512, 464 *A.2d* 288 (1983), noted by Rubin, *Note, Manufacturers Must Seek Alternative Limitations to Liability as New Hampshire Supreme Court Strikes Down State Statute of Repose*, 18 *Suffolk U. L. Rev.* 757 (1984), see also Vargo & Liebman, *Products Liability*, 12 *Indiana L. Rev.* 227, at 251-253 (1979). Calkins O'Toole, *Note, Wilder v. Amatrex Corp.: A First Step Toward Ameliorating the Effect of Statutes of Repose on Plaintiffs with Delayed Manifestation Diseases*, 64 *N. Car. L. Rev.* 416, at 425-428 (1986). Moore, *supra*, at 1155-1161. Sherman, *Note, For Want of a Nail: The Discovery Rule in Medical Malpractice Cases*, 27 *Ariz. L. Rev.* 265 (1985).
- <sup>116</sup> See Randall, *Comment, Due Process Challenges to Statutes of Repose*, 40 *Sw. L. J.* 997 (1986).
- <sup>117</sup> See Sullivan, *Note, Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts*, 63 *Neb. L. Rev.* 150 (1983). *Neagle v. Nelson*, 685 *S.W.2d* 11 (Tex. Sup. Ct., 1985), noted by Holbrook, *Reaffirming the Discovery Rule in Medical Malpractice Actions*, 28 *S. Tex. L. Rev.* 139 (1985).
- <sup>118</sup> Cf. Turner, *supra*, at 467.
- <sup>119</sup> See Herring Hicks, *Note, The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 *Vand. L. Rev.* 627, at 637, 642-643 (1985). *Johnson v. Star Machiner Co.*, 27 *Or.* 694, 530 *P.2d* 53 (1975).
- <sup>120</sup> Cf. e.g., *Mathis v. Eli Lilly & Co.*, 719 *F.2d* 134 (6th Cir. Ct. App., 1983), noted by LeVan, 52 *Tenn. L. Rev.* 97 (1984). *Sowers v. M.W. Kellogg Co.*, 663 *S.W.2d* 644 (Tex. Ct. App., 1983), but see *Saugaard v. Baltic Cooperative Building Supply Association*, 349 *N.W.2d* 419, at 427 (S.C. Sup. Ct., 1983). See further Rubin, *Note, Manufacturers Must Seek Alternative Limitations to Liability as New Hampshire Supreme Court Strikes Down State Statute of Repose*, 18 *Suffolk U. L. Rev.* 757, at 768-769 (1984).
- <sup>121</sup> Herring Hicks, *supra*, at 645. See *Battilla v. Allis Chambers Manufacturing Co.*, 392 *So. 874* (Fla. Sup. Ct., 1981). *Lankford v. Sullivan Long & Hagerty*, 416 *So. 2d* 996 (Ala. Sup. Ct., 1982).
- <sup>122</sup> Herring Hicks, *supra*, at 646.
- <sup>123</sup> *Anon., Note, The Fairness and Constitutionality of Limitations for Toxic Tort Suits*, 96 *Harv. L. Rev.* 1683, at 1692ff (1983).
- <sup>124</sup> Citing *Logan v. Zimmerman Brugh Co.*, 455 *U.S.* 422, at 428-429 (1982).
- <sup>125</sup> *Id.*, at 429-30, & n. 5, (citing *Boddie v. Connecticut*, 401 *U.S.* 371, at 377, 379-80 (1971)).
- <sup>126</sup> Citing *Igraham v. Wright*, 430 *U.S.* 651, at 673, & nn. 41-42 (1977).
- <sup>127</sup> *Supra*.
- <sup>128</sup> Referring to *The Supreme Court, 1970 Term*, 85 *Harv. L. Rev.* 104, at 107, n. 17 (1971) (noting that compensation for serious personal injury seems "no less important as (a) prerequisite to personal happiness than the ability to dissolve an unwanted marriage").

## CHAPTER 4: PROPOSALS FOR REFORM

In this chapter we examine the policy basis of the law and make proposals for reform. We can best approach this task by first examining a range of competing options, some quite radical, with a view to clarifying the issues requiring resolution.

### 1. NO TIME LIMITS

First we must consider the possibility of providing no time limits for actions involving claims for damages for personal injuries. In favour of this solution it may be argued that several benefits would flow from it.

*First*, as will become clear, any limitation period may result in individual cases of hardship and injustice to plaintiffs. The removal of time limits would resolve this problem.

*Secondly*, the absence of a time limit would be unlikely to provoke fraudulent or speculative claims. It is in the interests of a plaintiff to have his case resolved with a reasonable degree of expedition. Witnesses may become less clear in their evidence, or may become old or even die; records may be lost; the defendant may go out of business or leave the country.

The onus of proving his case generally rests on the plaintiff.<sup>1</sup> If the evidence is unsatisfactory or vague, the Court, in spite of its sympathy for the plaintiff's plight, may be obliged to dismiss his case.

As against this, it can be argued<sup>2</sup> that limitation periods provide a useful incentive to plaintiffs to take proceedings within a reasonable time. It appears that, even though it may not be in their best interests, plaintiffs (or, in some cases, their legal advisers) are often slow to proceed. Limitation periods may be regarded as being for the benefit of the plaintiff, the defendant and the Court before which the evidence is to be adduced.<sup>3</sup> That a minority of cases may call for an extension of time is not a good reason for the complete removal of any limitation period. It would moreover be wrong to ignore the possible hardship and injustice to some defendants

resulting from the (probably minute) number of proceedings brought by fraudulent or utterly speculative plaintiffs.

We consider that the balance of the argument lies against the removal of all time limits in cases involving personal injuries. We are satisfied that the better approach is to devise sensitive rules to ensure that the limitation periods do not operate unjustly in individual cases.

## **2. LIMITATION BASED ON THE PERIOD OF THREE YEARS SINCE THE INJURY WAS SUSTAINED.**

We now must consider whether the limitation period should be based simply on the period of three years since the injury was sustained, without regard to whether or not the plaintiff could have discovered the injury within this period. In favour of this approach, it may be argued that it offers a reasonably certain solution, in contrast to any option involving further extensions of time. The whole purpose of a limitations system is to reconcile as far as possible the conflicting interests of plaintiffs and defendants. No rule can yield a perfectly satisfactory outcome in every case. Even the most sensitively refined "discovery" rule can work hardship on either the plaintiff or the defendant. Indeed, it may be said that the search for perfect justice for the plaintiff in every individual case does an injustice, no less real for its being less obvious, to potential defendants as a group. To concentrate exclusively on the parties before the court ignores the genuine interests of those whose conduct may never be the subject of litigation but which is constantly under the cloud.

To this argument, it may be replied that basing the limitation period simply on the period of three years since the time the injury was sustained is certain to yield injustice in many (if not all) of those cases where a plaintiff loses his right of action before he could reasonably have become aware of it. The injustice of these cases is so clear that we do not favour this option; we consider that our law should make some attempt to resolve the problem.

## **3. A LONGER LIMITATION PERIOD.**

We now must consider an option which at first sight may seem very similar to option no. 2, but on reflection may be seen to involve somewhat different policy choices. This option would prescribe a limitation period far longer than that of three years - perhaps 10 or 12 years - since the time the injury was sustained; as with option no. 2, it would not permit any extension beyond this period to cover cases where the injury could not reasonably have been discovered by the plaintiff within the prescribed period.

The advantage of this solution, of course, is that, the longer the period it prescribes, the more "deserving cases" it catches. But it can be criticised from opposite standpoints. First, to the extent that it is not sufficiently long to catch all "deserving cases," it may be perceived as failing in its goal. Secondly, a long limitation period has all the drawbacks we have already mentioned, in relation to the poor quality of the evidence, and in the unfairness, not only to defendants, but also to plaintiffs for whom a shorter limitation

period acts as a real incentive to get on with their case, which is in their own interests. A further difficulty is that a long limitation period "would inevitably increase the expense of insurance and the difficulty of obtaining cover."<sup>4</sup> A potential defendant would have to seek cover for liability against *all* plaintiffs regardless of the reason for their dilatoriness, not merely in relation to "deserving" cases where the plaintiff who took proceedings after many years could not have discovered the injury earlier.

#### **4. A SHORT LIMITATION PERIOD, SUPPLEMENTED BY A BROAD JUDICIAL DISCRETION TO EXTEND THE PERIOD.**

We must now consider whether it would be appropriate to have a short limitation period, supplemented by a broad judicial discretion to extend the period where justice requires this.<sup>5</sup> There may seem much to be said in favour of this solution in principle: it offers a way out for innocent plaintiffs where justice calls for one, while at the same time denying any extension to undeserving plaintiffs. Moreover, the opportunity for discretionary extension "would enable shorter general periods to be prescribed, without the danger of increasing th(e) cases of hardship."<sup>6</sup> In practice, however, we see major objections to this approach. The first, and most obvious, is that it would introduce great uncertainty into the law.<sup>7</sup> No potential defendant could ever "close the books" on potential liability. For all he knows, an isolated, but highly "deserving" case may crop up at any time in the future. A further objection is that the inevitable price of judicial discretion is that this discretion (unless it is to be illusory) will tend to be exercised somewhat differently from judge to judge.<sup>8</sup> This can lead to differing outcomes which are impossible to reconcile. Of course, the very nature of the judicial process involves a degree of variation in the application of the law from judge to judge, but what is proposed here is that a broad new discretion should specifically be conferred. We consider that this solution would scarcely be more satisfactory than option 1, which we have already rejected.

#### **5. A "DISCOVERABILITY" TEST**

We now must consider whether the best solution is to provide that the limitation period runs from the time the plaintiff could reasonably have discovered his injury, rather than from when he sustained it. We have already noted the central argument in favour of this solution, namely, that, "(w)hatever hardship there may be to a defendant in dealing with a claim years afterwards, it must be less than the hardship to a plaintiff whose action is barred before he knows he has one."<sup>9</sup> Indeed, as we have seen, Carroll J, in *Morgan v Park Development Ltd.*,<sup>10</sup> considered that a rule denying a plaintiff a right to sue in such circumstances is inconsistent with the Constitution.

A second argument in favour of this approach is that it centres on a largely factual question,<sup>11</sup> although ultimately depending on the Court's judgment as to whether proven facts rendered the injury reasonably capable of being discovered.

As against this, it may be said that although the general sentiment endorsed by the discovery test commands ready and

widespread support, it is far from clear where and why the line should be drawn against plaintiffs with what might unsympathetically be described as a hardluck story. Should the test embrace cases where the plaintiff was at all times aware of his injury but had not discovered its legal implications for several years?<sup>12</sup> Should it extend to cases where that ignorance was the result of bad legal advice? Should time not run until the plaintiff becomes aware of the defendant's identity? To ask these questions shows that the scope and meaning of the concept of discoverability are less clear than might at first be imagined. Rather than simply embracing essentially scientific criteria, the notion of discoverability raises more wide-ranging issues of policy and justice, extending beyond the limitation of actions into the general area of tort liability.

We fully appreciate the force of this criticism. In our view, however, it does not amount to a sound reason for setting aside the discoverability test; rather does it raise important questions which do indeed require resolution when seeking to give legislative substance to the notion of discoverability as the appropriate criteria of limitations in respect of personal injuries.

*We therefore recommend that the discoverability test should be incorporated explicitly in legislative provisions.*

#### **THE NECESSARY ELEMENTS OF KNOWLEDGE**

We now must consider the elements of knowledge, actual or constructive, that should be sufficient to set the clock in motion, for the purposes of the discoverability rule. One approach would be for the legislation to give the Court no specific guidance on this question, since any attempt at precision may well lead to unjust or arbitrary distinctions in particular cases. We appreciate the force of this apprehension but we consider that this solution would leave too many important issues of policy unanswered. No doubt, the Courts, when confronted with these issues, would be likely to make sound policy choices; in doing so over a series of cases, they would probably develop rules of general application. Thus perforce the Courts would have been obliged to do on an *ad hoc* basis what the legislature could more conveniently accomplish after a general consideration of the broad policy issues involved.

If, therefore, the legislation should specify at least some of the ingredients of knowledge, the question arises as to what it should include.

##### **(1) KNOWLEDGE OF THE INJURY ITSELF**

*It seems clear that, for time to begin to run, it should be necessary to show that the plaintiff is, or ought reasonably to be, aware that he had sustained a personal injury.*

"Personal injuries" are defined in section 2(1) of the *Statute of Limitations 1957* as including "any disease or any impairment of a person's physical or mental condition."

This definition seems appropriate to apply in the present context.

As regards the *extent* of injury, a problem may sometimes arise. A person may be conscious of some tiny impairment of his physical

or mental condition but, in view of its triviality, let matters drift. Very gradually, the condition may worsen. It would seem unjust that time should be held to have started to run from the moment the person was aware of the tiny impairment. While it is difficult to provide a clearly defined reference point, *we consider that the best approach would be for the legislation to require that, for time to begin to run, the plaintiff ought to have been aware that the injury is significant.*

## **(2) KNOWLEDGE THAT THE INJURY WAS ATTRIBUTABLE (IN AT LEAST SOME DEGREE) TO THE CONDUCT OF ANOTHER**

On one view, it should be sufficient that the plaintiff be aware that he has suffered an injury.<sup>13</sup> We do not agree. *We consider that time should begin to run only where the plaintiff becomes or ought to become aware that the injury is attributable, in at least some degree, to the conduct of another.* It would be quite unjust for an injured person to be defeated by a limitation period merely because he was for a long time aware that he had an injury, in a case where he reasonably attributed his injury to natural causes.

## **(3) THE IDENTITY OF THE DEFENDANT**

We now must consider whether the time should not begin to run until the plaintiff is apprised of sufficient information to make the identity of the defendant reasonably accessible to him. There is nothing revolutionary about this notion. It is already part of the law in England, Victoria and British Columbia and the *Canadian Uniform Act 1982*,<sup>14</sup> for example, and is required also by the E.E.C. Products Liability Directive.<sup>15</sup>

It is perhaps most useful to consider first the argument *against* this requirement. There are many cases in which a person may be the victim of a tort but nonetheless be unable to identify the defendant: a 'hit and run' victim, for example, or a person who is the victim of an intentional attack, such as a "mugging" victim. So far as defamation is concerned, a person may be the victim of a "poison pen" letter, with no visible defendant. As regards liability in tort for fire, the identity of an arsonist may never be revealed.

In all these cases there will undoubtedly be sympathy for the victim, but we would scarcely characterise the problem as one relating to *limitations*.<sup>16</sup> True, the victim will not be able to sue unless and until he or she discovers the identity of the transgressor, but that fact, of itself, scarcely makes the problem essentially one of limitations.

As against this, one may conceive of cases in which the identity of the defendant constitutes a problem very much in the context of limitations. A person who lives near a rubbish dump contracts cancer. He later learns that toxic products were left there, covertly, but he is unaware of the identity of the firms whose products were involved. There is an appealing case that the statute of limitations should not run until he can reasonably discover the identity of these prospective defendants.

On balance we consider that the legislation should include a specific reference to the identity of the defendant. We do not envisage any difficulties in relation to the types of cases we have mentioned in respect of victims of "hit and run" accidents. In the very unlikely event of the identity of such a transgressor becoming revealed several years later, there seems no injustice in bringing the defendant within the range of liability.<sup>17</sup>

#### DISCOVERABILITY: A SUBJECTIVE OR OBJECTIVE TEST?

We now must consider the question whether the discoverability test should be determined by subjective or objective considerations. We are satisfied that it would be wrong for the legislation to provide that time would begin to run only when the plaintiff *actually* acquired the relevant knowledge.<sup>18</sup> Such a test would put a premium on indolence and carelessness.<sup>19</sup>

If actual knowledge is not a fair test, it seems to us that the time when the knowledge ought to have been discovered is the appropriate reference point. It can be argued that there is not in general a great deal of difference between an objective and a subjective approach in this context. The test of what a reasonable man should know is in one sense undoubtedly objective,<sup>20</sup> but it also must take account of at least some aspects of the particular person's subjective experience. Thus, for example, if the plaintiff is a doctor, this fact should not be ignored when assessing what he or she might reasonably have been expected to know about his or her condition. *We consider that if the effect of the accident is to slow the injured person down so that he is less diligent in finding out about how it was caused than an ordinary healthy person would be, the question of the reasonableness of the discoverability of his injuries should embrace the fact of his debilitated condition.*<sup>21</sup> Beyond this we consider that no further deference to subjective considerations would be appropriate in determining whether the plaintiff *has acted reasonably*. The real difficulty centres on the question whether the fact that a plaintiff has acted reasonably should always have the effect of preventing time from beginning to run until the relevant knowledge actually comes to his attention. He may, for example, have consulted a doctor or lawyer and as a result of incompetent advice from the doctor or lawyer, he may fail to investigate a factual question which, if properly advised, he would have done. Why should he be prejudiced because of the incompetence of his adviser? It may be considered unjust that he should lose his right of action against the defendant, in spite of having acted reasonably in every way.<sup>22</sup>

It can also be said that the defendant's liability to the plaintiff arises because he is at fault. Why should he be relieved from liability because of the circumstance, wholly unrelated to his own culpability, that another person has been at fault?

In this context, it is necessary to distinguish between the plaintiff's knowledge of the *facts* and his knowledge of his *legal rights*. If a plaintiff has taken all reasonable steps to ascertain the *facts* on which the defendant's liability is based, but has failed to ascertain them, it would seem right that the running of the

limitation period should be postponed until he actually ascertains them. It may be reasonable for him to take an expert's advice and if he does not do so, there is no reason why time should not run against him. If, however, he actually consults the expert and is the victim of mistaken advice, his continued ignorance of the facts is no fault of his: he has acted reasonably and, it would seem that the limitation period should not run until he ascertains the true position.

Different considerations, however, arise in relation to the obtaining of legal advice. It may be that, as a result of erroneous legal advice, the plaintiff may fail to pursue a particular line of enquiry and may hence remain in a state of excusable ignorance as to the facts. Again, in that situation, it would seem wrong that the limitation period should run against him. If, however, the plaintiff is aware of all the facts giving rise to the defendant's liability, but fails to take proceedings, either because he assumes that he has no legal cause of action or is wrongly advised to that effect, postponing the period of limitation poses a different problem. The long standing principle that ignorance of the law is no excuse would be substantially qualified by such a provision.<sup>23</sup>

One solution to this difficult problem is to observe the distinction suggested in the preceding paragraph between the plaintiff's excusable ignorance of the facts and his inexcusable ignorance of the law, but to allow the Courts a residual discretion to extend the time where, having regard to all the circumstances including the possible hardships to the plaintiff and the defendant, it was thought equitable so to do. This was the approach ultimately favoured by the Orr Committee in England and embodied in the Limitation Act 1975.

We think that the balance of the argument is in favour of a postponement of the limitation period where the plaintiff acts reasonably in taking expert advice but remains in ignorance of the facts. We consider, however, that similarly postponing the period where he is ignorant of the law as a result of failing to take legal advice or receiving erroneous legal advice is, on balance, not justified. While the suggestion of a residual judicial discretion to be applied in cases of hardship has much to commend it, we think that its disadvantages on the whole outweigh its advantages. Either the discretion would have to be in broad and unfettered terms - in which case it would introduce an extremely undesirable state of uncertainty into the law - or it would have to be hedged with qualifications. The latter approach was adopted in the English Limitation Act 1975, but its subsequent history does not suggest it as a desirable model.

*We recommend that in determining when the limitation period begins, a person's knowledge should include knowledge which he might reasonably have been expected to acquire from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek, but that he should not be fixed with knowledge of a fact ascertainable only with the help of such advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice. We*

*further recommend that knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty should be irrelevant.*

#### **POSTPONEMENT OR EXTENSION**

On the basis that the discoverability rule should apply, we must now consider whether the rule should have the effect of automatically postponing the accrual of the cause of action or whether the plaintiff should be required to apply to the Court *ex parte* for leave to commence the action. The latter approach found favour in the English legislation of 1963.

*We are firmly of the view that the discoverability rule should automatically postpone accrual.* The requirement of an *ex parte* application seems to us to be a cumbersome redundancy. We agree with the observations of the British Columbia Law Reform Commission to the effect that:

“(i)t is not clear what useful purpose is served by requiring the plaintiff to apply for leave to commence an action. It might be argued that the application tends to identify and eliminate frivolous or unfounded actions before substantial costs are incurred. It is difficult to see, however, why frivolous or unfounded actions should be any more of a problem in this area than they are generally.”<sup>24</sup>

#### **ONUS OF PROOF**

*We consider that the onus of proof that the accrual of a cause of action has been postponed under our recommended rules as to discoverability should be on the person claiming the benefit of the postponement.* This approach commands general favour elsewhere.<sup>25</sup> Any other solution would in our view impose too great a burden on the other party. As the Alberta Institute of Law Research and Reform has observed:

“When a claimant first knew something is based on his state of mind, and is a subjective matter peculiarly within his own knowledge. Moreover, the objective written or oral evidence of what a claimant was told will usually be more available to him than to the defendant. When the issue is when the claimant ought to have discovered the requisite knowledge, the objective evidence as to his particular situation will also probably be more readily available to the claimant.”<sup>26</sup>

#### **A “LONG STOP”**

We must now consider whether the legislation should include a “long stop” provision specifying a maximum period of time within which the plaintiff’s action must be initiated after the defendant’s wrongful conduct. With such a provision, no action initiated after the specified time had elapsed would be capable of being sustained, regardless of any question of discoverability of the injury.

We have already noted the divergent views on article 11 of the E.E.C. Directive on Products Liability which provides for the extinguishment of the injured person’s rights at the expiration of a period of ten years from the date on which the product is put into circulation. It is also clear that the insurance industry would

understandably welcome such a proposal as enabling them to close their books on particular claims.

We have, however, come to the conclusion that the overriding objective of our other recommendations - to endeavour to prevent injustice arising from the absence of a "discoverability" rule - could be frustrated in at least some cases if such a provision were to be introduced. Moreover, however long or short the "long stop" period ultimately settled on may be, it must of its nature be crude and arbitrary and have no regard to the requirements of justice as they arise in individual cases.

It is also relevant in this context to point out that the Supreme Court have in any event in *O'Domhnaill v Merrick*<sup>27</sup> held that, where there is "inordinate and inexcusable delay" in the bringing of proceedings and there are no countervailing circumstances, the Court has power to strike out such proceedings as an abuse of the process of the Court, even where a limitation period has not expired. However, this has only arisen so far in the context of the extended limitation period available to minors and there is no reason to suppose that it would be availed of by the Courts other than in exceptional circumstance.

*We recommend that the proposed legislation should contain no "long stop" provision.*

#### DEATH OF THE VICTIM

We now must consider the situation where a person dies as a result of injuries that were inflicted tortiously. In most cases, the injuries will have been discoverable<sup>28</sup> during his lifetime; in other cases it will not. This general situation raises issues in respect of: (a) the survival of his own action after his death, and (b) the right of action of his dependants for the loss they have sustained as a result of his death.

##### (a) SURVIVAL OF ACTIONS<sup>29</sup>

Where a person dies, all causes of action (other than "excepted causes of action"<sup>30</sup> within the meaning of the Act) vested in him at the time of his death survive for the benefit of his estate.<sup>31</sup> The damages recoverable in such an action do not include damages "for any pain or suffering or personal injury or for loss or diminution of life or happiness."<sup>32</sup> This does not mean, of course, that no cause of action survives where personal injuries are involved: other heads of damage, such as property damage, may be claimed.

Three possible scenarios have to be considered in 'discoverability' cases.

(1) *The limitation period from the date of discoverability has expired before the death of the injured person and no proceedings have been issued.*

This possibility does not require any special treatment. The cause of action should remain barred, just as it remains barred in a straightforward "non-discoverability" case.

*(2) The limitation period running from the date of discoverability has not expired when the injured person dies and no proceedings have been issued.*

There is a practical problem if the limitation period has been running for a relatively short time. But if it has been running for some time so that, for example, only a week is left at the date of death, a major difficulty arises. The personal representative has then only one week within which to obtain a grant and issue proceedings. This difficulty can be met by providing that the limitation period, in such a case, is to run from the date of the deceased's death. But it should be observed that the position of the personal representative in this instance is, in legal theory at least, the same as the position of a personal representative in an ordinary "non-discoverability" case where a week only of the limitation period is left at the death of the injured person. Under the present law, he also must take all the necessary steps within that period. It would seem indefensibly discriminatory that the personal representative of the injured person should be in a stronger position in a "discoverability" case than in an ordinary "non-discoverability" case.

*(3) The cause of action is not discoverable at any time prior to the death of the injured person.*

If this is to be dealt with at all, it can only be dealt with by providing that the limitation period is to run in such a case from the date at which the cause of action is discoverable by the personal representative.

It would seem quite clear that, in cases where the victim dies within three years of the discoverability date, time should not begin to run after his death until the personal representative has had a reasonable opportunity of investigating the position and, where appropriate, taking proceedings. As the Alberta Institute of Law Research and Reform noted:

"if the death were accidental, the deceased would almost certainly not have discussed the claim with the (personal representative). Even a person who anticipated death from illness would seldom have the combination of strength and inclination required to perform such a business chore. If the discovery period began against the personal representative when it began against the deceased in this case, it would reflect a conclusion that the estate of the deceased, and hence his beneficiaries, should suffer the possible loss of a claim because the deceased failed to communicate knowledge to a (personal representative) when few persons could reasonably have been expected to do so, and when the personal representative had neither the right nor the duty to take any action based on knowledge."<sup>33</sup>

It may be said that these considerations are peculiar to a 'discoverability' case and that, accordingly, any alteration in the law should be confined to such a case. Since, however, the whole thrust of any reform of the law must be, so far as practicable, to

assimilate the discoverability date and the normal cause of action date, plaintiffs in the former category should not be given an advantage denied to plaintiffs in the latter category in cases where death supervenes. The straightforward way of dealing with the problem, accordingly, would be to provide that in all cases where the injured person died before the expiration of the relevant period, the limitation period in respect of the action for the benefit of his estate would run from the date of death.<sup>34</sup>

There remains the problem posed by the third scenario, i.e., where the injured person died without having had a reasonable opportunity of discovering that he had a cause of action. The policy considerations here are similar to those which arise in a claim under Part IV of the *Civil Liability Act 1961* by the dependants of the deceased. Providing that the period of limitation should only start running in such cases where the personal representative or the relevant dependant of the deceased had a reasonable opportunity of knowing that there was a cause of action, undoubtedly involves the danger of creating open ended liability, stretching out decades after the death of the victim. But if it is right in principle, as the legislature has decided, that causes of action (other than those of a purely personal nature, such as actions in respect of personal injuries or defamation) should survive the death of the injured person and be available to his family, it is difficult to see any basis, other than simple expediency, for treating "discoverability" cases differently.

*We consider that, where a person injured dies before the expiration of the limitation period the period applicable in both "discoverability" and "non-discoverability" cases as respects the cause of action surviving for the benefit of his estate by virtue of s. 7 of the Civil Liability Act 1961 should be three years from the date of death or the date of discoverability by the personal representative, whichever is the later.*

We must now consider the position where the personal representative was already aware of the injury and its cause before he was appointed as personal representative. *We recommend that time should start to run only from the moment of appointment.* Before then he was under no duty to have any knowledge or to take any step regarding the victim. If the limitation period were to run from the time he first acquired knowledge, the period might have actually elapsed at the death of the victim, in a case where the injury became capable of discovery by the person who was later appointed personal representative during the lifetime of the victim.

#### **(b) FATAL INJURIES**

We now must consider the fatal injuries provisions under Part IV of the *Civil Liability Act 1961*. Where a person is killed by the wrongful act of another in circumstances where, had he not died, he would have been entitled to sue for damages on account of the wrong, an action may be brought on behalf of the dependants of the deceased person. The action may be brought by the personal representative of the deceased or, if at the expiration of six months from the death, there is no personal representative or no action has been brought by the personal representative, by all or any of the

dependants. The action must be commenced within three years of the death of the deceased. Only one action for damages may be brought against the same person in respect of the death.

We have already touched on the policy considerations that arise where the limitation period expires before the personal representative has any reasonable opportunity of discovering the cause of action. Since the legislature has thought it right that the dependants of a person who has been wrongfully killed by another should be entitled to recover damages in respect of that wrongful death, there is no reason in principle for allowing the limitation period to run in respect of such a cause of action where the dependants could not reasonably have been aware that the cause of action existed, which would not equally apply to a personal injuries action brought by the deceased during his lifetime. *We consider that in actions under Section 48(1) of the Civil Liability Act 1961 the period of limitation should be three years from the date of death or the date of knowledge of the person for whose benefit the action is brought, whichever is the later.*

#### MINORS

Section 49 of the Statute of Limitations 1957 provides that, in the case of a person under disability, an action for damages for personal injuries has to be brought within three years from the cesser of the disability. It was also provided, however, (in s. 49 (2) (a) (ii)) that the extension of the limitation period in cases of disability was not to apply unless the plaintiff proved that the person under the disability was not at the time when the right of action accrued to him in the custody of a parent. In the result, prior to the lowering of the age of majority by the *Age of Majority Act 1985*, the limitation period in respect of such actions by minors could be anything up to twenty four years, unless the minor was in the custody of a parent. (It could, of course, be very much shorter, depending on when the accident happened). In *O'Brien v Keogh*,<sup>35</sup> however, the proviso that the extended limitation period was not to apply, when the minor was, at the time the cause of action accrued, in the custody of a parent, was found to be unconstitutional. Thereafter, such actions could be brought at any time up to the expiration of three years from the attainment by the minor of his or her majority. It followed that, in an extreme case, such as where the injury was alleged to have been caused by medical negligence at the time of birth, the effective limitation period could be twenty four years.

It was, however, held by the Supreme Court in *O'Domhnaill v Merrick*<sup>36</sup> that, where there was inordinate and inexcusable delay in the bringing of the proceedings and there were no countervailing circumstances, the Court had power to strike out such proceedings as an abuse of the process of the Court, even though the extended limitation period had not expired.

In *Moynihan v Greensmyth*,<sup>37</sup> the Supreme Court expressly reserved the question as to whether *O'Brien v Keogh* was correctly decided.

The 1957 Statute was modelled on the English *Law Reform (Limitation of Actions etc.) Act 1954*. However, the provision in respect of minors who, at the time of their injury, are in the custody of a parent, was removed by the Limitation Act 1975, s. 2 (2), schedule 2.<sup>38</sup> No change was effected in the English position by the Limitation Act 1980, so that the position in the two jurisdictions is now the same. Although the limitation period in the case of minors is now, accordingly, twenty one years, as it is in Ireland, there has been a notable judicial reluctance in England to erode in any way a period of limitation fixed by the Legislature, however inordinate the resultant delay in the action coming to trial.<sup>39</sup> As a result, the approach favoured in *O'Domhnaill v Merrick* has not been adopted.

In many cases a person who is injured when a child will have no difficulty in discovering his injury, its cause and the identity of the defendant. But that should not mean that the Statute should run against him during his minority. *Our proposals in relation to discoverability should not have the effect of imposing on any minor the duty of taking proceedings during his minority. Moreover in a case where the minor has discovered his injury during his minority, he should nonetheless have a full three years after reaching majority within which to take his action.*

We do not consider it necessary for the legislation to include any specific provisions relating to the parents or other custodian of the minor who may have knowledge of his injury and the circumstances of its occurrence. We can see that a defendant sued many years after the event might well consider it unjust that the parents or other custodians had neither taken action on the child's behalf nor informed the child, whether during his minority or later, of the facts relating to the injury. However, as we have already indicated, the Supreme Court have made it clear in *O'Domhnaill v Merrick* that the Courts retain an inherent jurisdiction to strike out proceedings as an abuse of the process of the courts in cases of inordinate and inexcusable delay and where there are no countervailing circumstances. Accordingly, we do not consider it appropriate to recommend any change in the law in this area...

However, in the light of the decisions with a constitutional dimension affecting minors, *we consider that any proposed legislation should make it clear that the suspension of the limitation period during a person's minority is applicable whether or not he is in the custody of a parent at the time when the right of action accrues to him. We accordingly recommend the deletion of s.49 (2) (a) (ii) of the Statute of Limitations 1957.*

#### **MENTALLY DISABLED PERSONS**

We must refer briefly to an implication of our recommendations relating to discoverability, so far as mentally disabled persons are concerned. During the period of their disability, under present law, time does not run against them.<sup>40</sup> It may be that, during this period, the injury may for the first be discovered by them. In such a case, should time run from the moment of discovery or from when their disability ends? *We are satisfied that it should run from the latter moment.* We agree with the Alberta Institute of Law Research

and Reform that a person under a disability is not deemed able to make reasonable judgments in respect of matters relating to his estate, "and that surely applies to decisions relating to a claim."<sup>41</sup>

#### **CONTRIBUTION**

The implications of our proposals relating to discovery for the law relating to contribution should be noted briefly. Let us take the case where a plaintiff is injured by two defendants, D1 and D2, who are concurrent wrongdoers. The limitation period against D1 may expire earlier than that against D2. If the plaintiff allows this to happen against D1 then, if he sues D2 within the limitation period for his action for D2, he will be held contributorily negligent to the extent of D1's fault, and will not be able to recover damages for that proportion in his action against D2.<sup>42</sup> This result has been criticised by some commentators.<sup>43</sup>

Of course, a discoverability rule such as we propose often has the effect of limitation periods against different defendants expiring at different times. We record this fact without further comment. The law of contribution is a large subject which we do not propose to examine in the present Report.

#### **TRANSITIONAL PROVISIONS**

The normal rule is that legislation does not affect vested rights in existence at the time legislation takes effect. Accordingly, in the absence of any legislative provision, our proposals would only apply to causes of action which had not been barred at the date of commencement of new legislation. This would clearly frustrate in a number of cases the objective of the proposed reform of the law. In England the 1963, 1971 and 1975 Acts all provided that the change in the law was to apply to causes of action which accrued both before and after the coming into force of the relevant Act. *We recommend that the proposed legislation should apply to causes of action accruing before its commencement. We also recommend that it should apply to proceedings pending at its commencement.*

## FOOTNOTES

<sup>1</sup> This is so in negligence, save to the extent that the *res ipsa loquitur* principle may be considered to qualify the rule of *McMahon & Binchy, op cit*, 204-211, Harlow, *Res Ipsa Loquitur* A Progress Report, 3 Kingston L. Rev 1 (1972) In cases of trespass, there is no clear Irish authority challenging the historical rule that on proof of an injury directly inflicted by the defendant, the onus shifts onto the defendant to show that he acted neither intentionally nor negligently cf our *Report on the Liability in Tort of Mentally Disabled Persons*, pp 5-7 (LRC 18 1985) Proof of the identity of the defendant and of a causal connection between his act and the plaintiff's injury is essential before the onus shifts in trespass Cf section 1 (3) of the *Civil Liability Act 1961*, which is designed to assist a plaintiff who can show that more than one defendant is "at fault," where it is not possible to decide which of them is causally responsible for the damage

<sup>2</sup> See the *Orr Committee Report*, para 27(2) But cf Kelley, *The Discoverability Rule for Personal Injury Statutes of Limitations: Reflections on the British Experience*, 24 Wayne L Rev 1641, at 1670-1672 (1978)

<sup>3</sup> Cf the *Orr Committee Report*, para 27 (2)

"We think it is in the public interest that meritorious claims should, where this is practicable, be settled at an early date and, if they cannot be settled, should come on for trial while the evidence is still fresh If the sanction of limitation were removed, the incentive to 'get on with it' would be very much weaker "

<sup>4</sup> *Orr Committee Report*, para 31

<sup>5</sup> Cf the *Wright Committee Report*, para 7

<sup>6</sup> Id

<sup>7</sup> Cf the *Wright Committee Report*, para 7, the *Edmund Davies Committee Report*, para 31, the *Orr Committee Report*, para 35, and the Alberta Institute of Law Research and Reform's Working Paper, *Limitation of Actions*, p 59 (1977)

<sup>8</sup> Cf the *Edmund Davies Committee*, para 31 and the *Orr Committee*, para 35 See also Keeley, *The Discoverability Rule for Personal Injury Statutes of Limitations: Reflections on the British Experience*, 24 Wayne, L Rev 1641, at 1679-1682 (1978)

<sup>9</sup> *Morgan v Park Development Ltd*, (1983) 1 L R M 160, (High Ct., Carroll, J.), see also *Urre v Thompson*, 337 U S 163, at 170 (per Justice Rutledge, delivering the opinion of the Court, 1949)

<sup>10</sup> Supra

<sup>11</sup> Cf the *Alberta Report for Discussion No 4*, para 2 14

<sup>12</sup> Cf the *United States v Kubrick*, 444 U S 111 (1979)

<sup>13</sup> Cf the Alberta Institute of Law Research and Reform's Working Paper, *Limitation of Actions*, p 59 (1977)

"It seems to us that all the plaintiff should have to know is that he has suffered damage, and he is then in the same position as any other plaintiff "

<sup>14</sup> Section 13(2)

<sup>15</sup> It should, however, be noted that the Newfoundland Law Reform Commission, having originally proposed that knowledge of the identity of the defendant should be necessary before time began to run (*Working Paper on Limitation of Actions*, pp 203 204 (NLRC-WP1, 1985), abandoned this requirement after further consideration of the issue (*Working Paper on Limitation of Actions, Supplement*, (NLRC-R1, 1986))

<sup>16</sup> Cf the *Edmund Davies Report*, para 18

<sup>17</sup> In this context, our attention has been drawn to the position of the Motor Insurers Bureau Although under the terms of their agreement with the Minister for Trade and Commerce, that body is not required to compensate the victim of a hit and run accident (since the recovery of judgment against an uninsured defendant is a necessary pre-condition of their liability), the Bureau do in fact compensate such victims on an informal basis (See the notes to the agreement) We do not think, however, that this should present any difficulty in implementing our recommendations if the identity of the defendant in a hit and run accident is subsequently established and he proves to be either insured or a mark, the Bureau should be able to recover the compensation paid out by them under the doctrine of subrogation

<sup>18</sup> Cf South Australia's *Limitation of Actions Act, 1936 1975*, sections 47-50

<sup>19</sup> Cf the position historically as regards the requirement of knowledge by licensors of concealed dangers on their property that may be a rap for licencees see *McMahon & Binchy, op cit*, 247 248 *Rooney v Connolly*, Sup Ct., 19 December 1986 (340/86) We think it helpful to record the eloquent argument made by Mr Peter Fraser, in favour of postponing the running of time until the plaintiff actually acquires knowledge, in a Memorandum of Dissent to the British Columbia Law Reform Commission's proposals in their *Report on Limitations*, pp 82 83 (LRC 15 1974)

"I am troubled by the prospect that the uneducated, slow-witted, emotionally disturbed, or perhaps merely foolish person would, simply because he is that way, be denied relief This is the sort of person the law should be concerned to protect

The reason for limiting the ambit of postponement is the same as that put forward in defence of limitation periods at all, the sense of unfairness to the defendant, who may have difficulty putting forward a defence to a claim he may not have expected and which springs from an event which occurred some while before. But the 'unfairness' implies that the potential plaintiff is busily preparing while the potential defendant does nothing. In the absence-of-knowledge situation, assuming the worst possible prejudice to the defendant, neither party expected the lawsuit and neither made special preparation for it.

What should govern the availability of postponement is the actual state of knowledge of the potential plaintiff, not the hypothetical state of knowledge of the hypothetical reasonable man. Time should not begin to run until the potential plaintiff knows

- (a) that a past event has caused him the injury, damage or loss for which relief is claimed,
- (b) that the circumstances of the event were such that a cause of action may have arisen, and
- (c) the identities of the potential defendants

This standard implies that the potential plaintiff must have all the information which a lawyer would require in order to commence an action on behalf of a client.

It seems to me unlikely that, if this proposal were law, there would be a danger that a potential plaintiff would wilfully fail to inform himself in order to keep his right to litigate alive beyond the ordinary limitation period. However, since this is hypothetically possible, provision could be made that a defence based upon a limitation period will be available where the plaintiff has deliberately kept himself ignorant with the intent of prejudicing the defendant in his defence and where prejudice has actually resulted."

<sup>20</sup> Cf. *McMahon & Binchy*, *op cit*, 151-152; *Byrne v McDonald*, unreported, Sup. Ct., 7 February 1957, *per* Kingsmill Moore, J., at p. 10 of his judgment; *Sullivan v Creed*, (1904) 2 I.R. 317, at 331 (K.B. Div.), *per* Pilles, C.B. 1903, *aff'd* by C.A., 1903.

<sup>21</sup> Cf. *Newton v Cammel Laird & Co. Ltd.*, (1969) W.L.R. 415 (C.A.). See further the English Law Commission's *Limitation Act 1963*, para. 13 (Law Com. No. 35, 1970), and the *Orr Committee Report*, para. 59.

<sup>22</sup> Cf. the *Edmund Davies Report*, para. 19.

<sup>23</sup> It has been said that the maxim in its correct form *ignorantia juris haud neminem non excusat* means no more than that ignorance of the law does not relieve a person from performing his duty (*Per* Lord Denning in *Kirin Cotton Co. Ltd. v Dewani*, (1906) A.C. 192, at 204. Cf. *Dolan v Neligan* (1967) I.R. 247, at 260). However, in the context of the present discussion, we are assuming that the plaintiff is under a duty to the defendant to act reasonably in bringing his claim before the Court at the earliest possible opportunity.

<sup>24</sup> British Columbia Law Reform Commission, *Report on Limitations*, p. 77 (L.R.C. 15 1947).

<sup>25</sup> See, e.g., British Columbia's *Limitation Act*, section 6(5), the *Uniform Act 1982*, section 13(4), the Newfoundland Law Reform Commission's *Report on Limitation of Actions*, p. 7 (NLRC-R1, 1986), and the Alberta Institute of Law Research and Reform's *Report for Discussion No. 4, Limitations*, para. 2 185 (1986).

<sup>26</sup> *Op cit*, para. 2 158.

<sup>27</sup> (1984) I.R. 151 (Sup. Ct.).

<sup>28</sup> Our discussion of this problem is based on the concept of discoverability of injury which we have already proposed in relation to living plaintiffs.

<sup>29</sup> See the *Civil Liability Act 1961*, Part II, *McMahon & Binchy*, *op cit*, ch. 9.

<sup>30</sup> Cf. the *Civil Liability Act 1961*, section 6.

<sup>31</sup> *Id.*, section 7(1).

<sup>32</sup> *Id.*, section 7(2).

<sup>33</sup> Report for Discussion No. 4, *Limitations*, para. 2 192 (1986).

<sup>34</sup> A similar provision has existed in England since 1975, and is now contained in the *Limitation Act 1980*, section 11(5). This change in the law has provoked little comment among textbook writers there, although it is worth noting J.R. Spencer's relatively mild observation in *Clerk & Lindell on Torts*, para. 9-54, fn. 18 (15th ed., 1982) to the effect that

"(i)t might have been better to allow such actions to be governed so far as possible in the same way as those brought by injured persons themselves, with time running from the accrual of the cause of action or the date of the deceased's knowledge before his death, and a maximum period of three years from the death if the injured person died without the requisite knowledge. Cases of hardship could then have been left to the court's discretion under section 33.

<sup>35</sup> (1972) I.R. 144.

<sup>36</sup> (1984) I.R. 151.

<sup>37</sup> (1977) I.R. 155 (Sup. Ct.).

<sup>38</sup> The "custody of a parent" provision was inserted in the English *Limitation Act 1939* because of misgivings that school boards would be exposed to the threat of stale claims as a result of the abolition of the draconian time limit against such authorities which was then six months.

<sup>39</sup> See *Tolley v Morris*, (1979) 2 All E R 561, *Birkett v James*, (1977) 2 All E R 801

<sup>40</sup> *Statute of Limitations 1957*, section 49

<sup>41</sup> Report for Discussion No 4, *Limitations*, para 6.8 (1986)

<sup>42</sup> *Civil Liability Act 1961*, section 35(1)(i)

<sup>43</sup> Cf Weir, *Complex Liabilities*, in 11 *International Encyclopedia of Comparative Law*, ch 12 section 123 (1976), Kutner *Contribution Among Tortfeasors: The Effects of Statutes of Limitations and Other Time Limitations*, 33 *Okla L. Rev* 203, at 267 (1980)

## CHAPTER 5: SUMMARY OF RECOMMENDATIONS

1. Legislation should prescribe a “discoverability” test in regard to the limitation of actions relating to personal injuries: p. 43.
2. For time to begin to run, it should be necessary to show that the plaintiff is, or ought reasonably to be, aware:
  - (1) that he has sustained a personal injury of significant proportions; pp. 43-44,
  - (2) that the injury is attributable, in at least some degree, to the conduct of another: p. 44,
  - (3) of the identity of the defendant: p. 45.
3. Where the effect of the accident is to slow the injured person down so that he is less diligent in finding out about how it was caused than an ordinary healthy person would be, the question of the reasonableness of the discoverability of his injuries should embrace the fact of his debilitated condition: p. 45.
4. In determining when the limitation period begins, a person’s knowledge should include knowledge which he might reasonably have been expected to acquire from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek, but he should not be fixed with knowledge of a fact ascertainable only with the help of such advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice. Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty should be irrelevant: p. 46-47.
5. The discoverability rule should automatically postpone accrual: p. 47.
6. The onus of proof that the accrual of a cause of action has been postponed by reason of the discoverability rule should be on the person claiming the benefit of the postponement: p. 47.
7. The legislation should not include a “long stop” provision: p. 48.

8. Where a person injured dies before the expiration of the limitation period in both "discoverability" and "non-discoverability" cases, the period applicable as respects the cause of action surviving for the benefit of his estate by virtue of s. 7 of the Civil Liability Act 1961 should be three years from the date of death or the date of discoverability by the personal representative, whichever is the later: p. 50.

9. Where a personal representative was already aware of the injury and its cause before he was appointed as personal representative, time should start to run only from the moment of appointment: p. 50.

10. In actions under Section 48 (1) of the Civil Liability Act 1961 the period of limitation should be three years from the date of death or the date of knowledge of the person for whose benefit the action is brought, whichever is the later: p. 51.

11. In a case where a person has discovered his injury during his minority, he should nonetheless have a full three years after reaching majority within which he may take his action: p. 52.

12. The proposed legislation should make it clear that the suspension of the limitation period during a person's minority is applicable whether or not he is in the custody of a parent at the time when the right of action accrues to him. Accordingly s. 49 (2) (a) (ii) of the Statute of Limitations 1957 should be deleted: p. 52.

13. Where a mentally disabled person first discovers his injury during a period of disability, time should not begin to run until the period of disability ends: p. 52.

14. The proposed legislation should apply to causes of action accruing before its commencement. It should also apply to proceedings pending at its commencement: p. 53.

**GENERAL SCHEME OF A BILL TO AMEND THE  
STATUTE OF LIMITATIONS 1957 AND THE CIVIL  
LIABILITY ACT 1961 BY PROVIDING NEW PERIODS OF  
LIMITATION IN RESPECT OF ACTIONS FOR PERSONAL  
INJURIES AND OTHER MATTERS CONNECTED  
THEREWITH.**

1. Provide that the Act may be cited as the Statute of Limitations (Amendment) Act 1987.

2. Provide that in an action for damages for negligence, nuisance or breach of duty where the damages claimed consist of or include damages in respect of personal injuries the applicable limitation period shall be three years from:

(a) the date on which the cause of action accrued:

(b) the date of knowledge (if later) of the person injured.

3. Provide that, if the person injured dies before the expiration of the period mentioned in section 2 above, the period applicable as respects the cause of action surviving for the benefit of his estate by virtue of s.7 of the Civil Liability Act 1961 shall be three years from:

- (a) the date of death; or
  - (b) the date of the personal representative's knowledge whichever is the later.
4. Provide that for the purposes of section 3 "personal representative" shall include any person who is or has been a personal representative of the deceased, including an executor who has not proved the Will (whether or not he has renounced Probate) but that regard shall not be had to any knowledge acquired by any such person before he became a personal representative.
5. Provide that for the purpose of section 3, if there is more than one personal representative, and their dates of knowledge are different, section 3 (b) shall be read as referring to the earlier or earliest of those dates.
6. (1) Provide that references to a person's date of knowledge for the purposes of sections 2 and 3 and section 7 below is the date on which the person first had knowledge of the following facts:
- (a) that the person alleged to have been injured had been injured; and
  - (b) that the injury in question was significant; and
  - (c) that the injury was attributable in whole or in part to the act or omission which was alleged to constitute negligence, nuisance or breach of duty; and
  - (d) the identity of the defendant; and
  - (e) if it is alleged that the act or omission is that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;
- and that knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty shall be irrelevant.
- (2) Provide that for the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire -
- (a) from facts observable or ascertainable by him; or
  - (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek
- but that
- (a) a person shall not be fixed with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice;
  - (b) a person shall not be fixed with knowledge of a fact which he has failed to acquire as a result of the injury.
7. Provide that in actions under section 48(1) of the Civil Liability

Act 1961 the action shall not be brought after the expiration of three years from

(a) the date of death or

(b) the date of knowledge of the person for whose benefit the action is brought

whichever is the later.

8. Provide that for the purposes of section 7, where there is more than one person for whose benefit the action is brought, the section shall be applied separately to each of them.

9. Provide that, subject to section 10 below if by virtue of section 8 the action would be outside the time limit prescribed by section 7 as regards one or more, but not all, of the persons for whose benefit it was brought, the Court shall direct that any person as regards whom the action would be outside that limit shall be excluded from those for whom the action is brought.

10. Provide that the Court shall not give such a direction as is mentioned in section 9 if it is shown that, if the action were brought exclusively for the benefit of the person in question, it would not be defeated by a defence of limitation (whether in consequence of section 49 of the Statute of Limitations 1957 or an agreement between the parties not to raise the defence or otherwise).

11. Provide for the amendment of the Statute of Limitations 1957 by the deletion of all the words in subsection (2) of section 49 from and including the word "and" in line three of paragraph (a) (i) to the end of the subsection.

12. Provide that the Act shall apply to causes of action accruing before its commencement and to proceedings pending at its commencement.

#### NOTES

2. This alters the law in the same manner as s.11 of the English Limitation Act 1980 and, in effect, ensures that the decision in *Cartledge v E. Jopling and Sons Limited*<sup>50</sup> will no longer be applied in Ireland.

3. This alters the law in a similar fashion where the person dies before the limitation period expires. It also alters the law by providing that in ordinary "non-discoverability" cases the applicable limitation period where the person dies before the limitation period expires shall be three years from the date of death. This has been the law in England since 1975.

4. This provides for a wide definition of the expression "personal representative". It also provides that knowledge acquired by a person before he became the personal representative is not knowledge for the purpose of establishing a date of "discoverability" of the cause of action.

6. This elaborates the nature of the knowledge which is necessary for the purposes of s.2 to start the statute running. It is based on s. 14 of the English 1980 Act and makes it clear that knowledge

that the acts constituted negligence etc. in law is not essential. It also makes it clear that knowledge which could have been obtained from an expert will be knowledge for the purposes of the section.

7. This provides that in fatal accident cases time will not begin running against the personal representative until he has had a reasonable opportunity of discovering the cause of action.

8. This provides that in fatal accident cases section 7, providing for a new extended limitation period in "discoverability" cases, is to be applied to each of the dependants separately.

9. This provides that in a fatal accident case where the application of the new "discoverability" period means that the limitation period has expired in the case of one or more but not all, of the dependants, the court must exclude the relevant dependants from any award.

10. This provides that section 9 is not to apply where the relevant dependant would not in any event be affected by the expiration of the limitation period, whether because he is a person under disability or because the defendant has agreed not to raise the defence or for any other reason.

11. This brings the Statute of Limitations 1957 into conformity with the decision of the Supreme Court in *O'Brien v Keogh*<sup>51</sup> by deleting the portion of s. 49 (2) found invalid having regard to the provisions of the Constitution by the Court in that case.

<sup>50</sup> (1963) A.C. 758.

<sup>51</sup> (1972) I.R. 144.

