THE LAW REFORM COMMISSION

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER

ON

THE STATUTES OF LIMITATION: CLAIMS IN CONTRACT AND TORT IN RESPECT OF LATENT DAMAGE (OTHER THAN PERSONAL INJURY)

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St. Stephen's Green, Dublin 2

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THE LAW REFORM COMMISSION

Background
The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act, 1975.*

The Commission's Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in January 1977. The Commission also works on matters which referred to it on occasion by the Office of the Attorney General under the terms of the Act.

To date the Commission has published fifty-eight Reports containing proposals for reform of the law; eleven Working Papers; twelve Consultation Papers; a number of specialised Papers for limited circulation; and nineteen Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in an Annex to this Consultation Paper.

Membership
The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners. The Commissioners at present are:

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Full-time Commissioner: Arthur F Plunkett, Esq., Barrister-at-Law;

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INTRODUCTION

1. The Reference of the Attorney General

1. On 11 November 1997, pursuant to section 4(2)(c) of the *Law Reform Commission Act, 1975*, the Attorney General, Mr David Byrne, SC, requested the Law Reform Commission to review the *Statute of Limitations, 1957 and 1991* in relation to claims in contract and tort (other than claims in respect of personal injuries) in circumstances where the loss is latent - i.e. in circumstances where the person was not aware, or could not have been aware of, the accrual of the right of action until after the expiration of the relevant limitation period - and to submit to him proposals for reform in respect of such law as the Law Reform Commission considered appropriate.

2. The Layout of this Consultation Paper

2. This Consultation Paper has been prepared in response to the Attorney General's reference.

Overview Chapter 1 gives an overview of the law of limitation in order to place the issue posed by this reference into an appropriate framework of reference. It outlines the historical development of limitation statutes and the various justifications for their existence.

Existing Law Chapter 2 sets out the current Irish law in tort and contract relating to latent defects and limitation statutes. It looks at how the Law Reform Commission previously considered the issue of latent defects in the context of personal injuries. Recent statutory reform of limitation law in respect both of personal injuries and of defective products is also reviewed.

Benchmarks for Reform Chapter 3 contains an analysis of the law relating to latent defects and limitation periods in several common law jurisdictions and also civil law jurisdictions such as France and Germany. The purpose of this analysis is to identify recent patterns of law reform overseas which may serve as a blueprint for practicable reform in this jurisdiction.

Options for Reform	In Chapter 4 we evaluate the possible options for reform and make provisional recommendations in this regard.
Summary	Chapter 5 contains a summary of our provisional recommendations.

3. The Consultation Process

3. We would like to stress that all the recommendations in this paper are tentative and provisional. The final recommendations of the Commission will be made only after the careful consideration of all submissions received and upon extensive consultation with interested parties. Following this consultation process, the Commission will present its final Report to the Attorney General. **Those who wish to do so are requested to make their submissions in writing to the Commission by 29 January 1999.**

CHAPTER 1: OVERVIEW OF THE LAW OF LIMITATION

1. The Nature and Purpose of Statutes of Limitation

1.01 A statute of limitations is legislation which sets time-limits for instituting court proceedings. The time within which the plaintiff must commence an action to enforce a claim is called the "limitation period". If proceedings are commenced after the expiration of the limitation period specified for the particular kind of claim at issue, the defendant may plead as a defence that the proceedings are "statute-barred". In such a situation, decision is not taken on the merits of the claim; instead the claim is defeated by operation of the limitation period.

1.02 Limitation periods serve a dual purpose. First, they discourage plaintiffs from unreasonably delaying in instituting proceedings. Such periods provide an incentive for prospective plaintiffs to be vigilant in the protection and legal vindication of their own rights and interests. Secondly, limitation periods serve to protect defendants from stale claims.

2. Historical Development of Statutes of Limitation[1]

1.03 At Common Law there was no limit on the time within which actions now classified as torts or simple contracts might be brought. This position was considerably qualified by Equity. The equitable maxim "equity defeats delay" gave rise to doctrines such as *laches* and *acquiescence*.[2] These doctrines provide a time bar of sorts. The effect of the doctrine of *laches* is that where there has been unreasonable delay in the bringing of proceedings which would render it unjust to grant relief, a plaintiff may find his claim barred in equity. *Acquiescence* means that where one party infringes another's rights and that other party does nothing, equity infers that the latter has acquiesced in the former's actions and equity will not permit the latter to pursue his claim.

1.04 The concept of limitation, in contrast to the equitable doctrines of *laches* and *acquiesence*, is entirely a creature of statute. The first limitation periods applied to land actions. Before 1237, plaintiffs could not claim land on the basis of a seisin from before the day in 1135 when Henry I died.[3] In 1540, limitation periods were set for the first time by reference to a fixed period of

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1 See Brady and Kerr, *The Limitation of Actions*, 2nd ed. (1994), pp.1-41.

2 See Delany, *Equity and the Law of Trusts in Ireland*, pp.23-27.

3 Sir F Pollock and FW Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed. (1968), p.81.

time rather than a fixed date.[4]

1.05 A limitation period for actions equating to tort and contract was first provided in England in 1623 by the statute 21 Jac. 1, c.16. This provided that all actions on the case (except slander), actions of account, of trespass *quare clausum fregit*, of debt grounded upon any lending or contract without speciality, of debt for arrears of rent, of detinue, of trover and of replevin must be brought within six years; actions of assault, battery, wounding and imprisonment within four years; and of slander within two years.[5] This statute was not enacted in Ireland, but a subsequent Irish statute contained almost identical provisions.[6] The Irish statute, which was the subject of several amendments, was repealed when the *Common Law Procedure Amendment Act (Ireland), 1853.* Subject to minor amendments, the provisions therein remained in force until January 1, 1959 which was the effective date for the *Statute of Limitations, 1957.*

1.06 The 1957 Statute, together with the *Statute of Limitations (Amendment) Act 1991*, contains the general law relating to limitation periods in this jurisdiction. It is the operation of these statutes in cases of latent damage giving rise to non-personal injuries that is considered in this Consultation Paper.

1.07 With respect to claims in tort or contract for non-personal injuries, the net effect of the relevant statutory provisions contained in the 1957 Act is to bar all actions after a period of six years, irrespective of whether or not the plaintiff knew or could reasonably have known that he had a cause of action (see Chapter 2, below). No judicial discretion exists to extend or disapply the period of limitation in the case of a plaintiff who neither knew nor could reasonably have known that he had a cause of action before its expiry.

1.08 Typical examples of the type of cases with which we are concerned here include:

(i) cases involving structural defects, where the faults in a building may display themselves many years after the construction takes place;

(ii) cases regarding professional negligence where the act or omission of the professional (e.g. incorrect legal advice on the title to property) is not discovered until a considerable time after it took place.

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4 *The Act of Limitation, with a proviso*, 32 Hen VIII, c.2 (1540).

5 Brady and Kerr, *op. cit.* note 1 *supra*, at p.2.

6 10 Car. 1. sess 2, c.6 Ir.

3. The Various Bases of Legitimacy for Limitation Periods

1.09 Limitation periods in their nature curtail the right or ability of a plaintiff to pursue a claim. They therefore require strong justification. Many of these justifications focus on the competing rights, interests and needs of the defendant. Some arguments emanate from broader conceptions of the public interest. The net question addressed in this Consultation Paper is not so much whether the arguments for limitation periods are cogent - which is accepted - but whether they are cogent enough to justify ignoring the fact that the plaintiff could not have reasonably discovered a cause of action before the expiry of the six-year limitation period. To place the issue in context it is worthwhile rehearsing the various arguments as follows.

(a) Arguments from Fairness to the Defendant: The Increasing Risk of Injustice as Time Progresses

1.10 The argument based on fairness is that it is unreasonable that a potential defendant should be subject to an indefinite threat of being sued. Delay in bringing proceedings may unfairly prejudice a defendant's ability to contest the plaintiff's claim; evidentiary problems are likely to increase as time passes. This has long been recognised:

> "[The] legislature thought it right...by enacting the Statute of Limitations [1623] to presume the payment of that which had remained so long unclaimed, because the payment might have taken place and the evidence of it might be lost by reason of the persons not pursuing their rights."[7]

1.11 A witness' evidence based on human memory becomes less reliable over time. The death of a witnesses may result in the loss of evidence; the departure of a witness from the jurisdiction in which the case is being tried may make it more difficult and more expensive to obtain evidence. Written records may have been lost or destroyed, as it may be thought that they have outlived their usefulness.

1.12 Clearly plaintiffs can be affected by the deterioration of evidence also, but it is arguable that rights and interests of defendants are, on balance, placed in greater jeopardy on account of deteriorating evidence than are those of plaintiffs. It is the plaintiff who decides when to commence proceedings and who can use the time before the claim is brought to not only preserve his evidence, but to augment it by collecting statements, affidavits and documents. If the defendant has no knowledge of a claim he is unlikely to take any steps to develop his defence. Another factor which may place the plaintiff in an advantageous position is that, having suffered the harm, he is accordingly likely

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7 *Thompson v. Eastwood* (1877) 2 App Cas 215, 248 *per* Lord Hatherley.

to have a better recollection of the facts than a defendant who perhaps supplies goods or services to many persons.

1.13 The argument has also been made that since the law is constantly evolving to meet changing societal conditions and cultural values, it will be harder to measure, much later, the conduct of the defendant against standards prevailing at the time when the alleged infringement of the plaintiff's rights took place.

(b) Arguments from Certainty: The Need for Closure of Claims

1.14 It is also argued that people should be entitled to have legal disputes resolved in a timely manner so that they can plan their affairs secure in the knowledge that a claim can no longer be brought against them. The law serves not merely to resolve disputes but also to provide a backdrop of security against which life-plans can be implemented without fear of undue interruption. In this regard it has been said that

> "long dormant claims have more of cruelty than of justice in them."[8]

It can therefore be asserted that open-ended threats of liability is inimical to security and that limitation periods serve to provide that security.

(c) Arguments from Economics: The Need to Encourage Economic Activity through Closure of Claims

1.15 The absence of a limitation period may deleteriously affect social and economic security in other ways. If such a period does not exist, the burden of insuring against and defending unlimited claims will inevitably be passed on to potential defendants through higher insurance premia and on to consumers in general through increased costs for goods and services. Furthermore, the imposition of a limitation period permits more accurate assessments of potential liability. Thus, it is said, the concepts of insurance closure and debt amortisation in a society which underwrites economic activity deserve the utmost attention in any reform of the law.

(d) Arguments from the Scarcity of Public Resources: The Need to Optimise the Judicial System

1.16 It is generally recognised that the public has an interest in resolving disputes as quickly as possible. Society provides a judicial system to assist its members in the orderly resolution of disputes. It can forcefully be argued that this system should not be burdened with old disputes which could reasonably

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8 *A'Court v. Cross* (1825) 3 Bing 329, 332 *per* Best CJ, 130 ER 540, 541.

have been settled at some point in the past. This argument might impel one to the view that more space should be left for fresh or relatively recent claims over stale ones in order to optimise a scarce public resource. Limitation periods ensure that claims do not drag on indefinitely, so that the slate is wiped clean from time to time and the judicial system is not excessively burdened.

4. Setting the Modalities of Limitation Periods: Striking a Balance

1.17 If the cumulative weight of the above arguments for limitation periods is accepted - as we believe it must - then the real question is how the relevant limitation periods should be crafted. A balance must be struck between the competing interests of the plaintiff and defendant and the supervening interests of society.

1.18 It must also be borne in mind that there is a social dimension to a plaintiff's right to pursue a claim. This is in addition to the individual dimension. In the absence of a comprehensive regulatory regime (or one which is thoroughly enforced), the maintenance of proper standards depends on the bringing of individual claims to challenge anti-social behaviour. Therefore the plaintiff's rights are not merely important in themselves but also for society at large.

1.19 More particularly for the purposes of this Consultation Paper, there is also the vexed question of the sensitivity, or otherwise, of limitation periods to the circumstances of the plaintiff. Injustice may result where the limitation period has expired before a plaintiff knew, or ought reasonably to have known that he/she possessed a lawful claim against the defendant. As the Alberta Law Reform Institute has noted:

> "[I]n encouraging the timely resolution of disputes, a limitations system must strike a proper balance among the interests of potential claimants, potential defendants and society at large. Potential claimants have an interest in obtaining a remedy for injury from legally wrongful conduct; potential defendants have an interest in being protected from endless claims; and society at large has an interest in providing a range of remedies for injury from wrongful conduct and an orderly and fair process for determining when it is appropriate to award them."[9]

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9 Alberta Law Reform Institute, *Report No 55: Limitations* (1989) p.16.

5. The Central Question Addressed in this Consultation Paper

1.20 To sum up: the arguments against indefinite exposure to suit and therefore for limitation periods seem unanswerable. What is at issue is the striking of an appropriate balance between the competing right of the plaintiff to pursue a cause of action and the right of the defendant to shield himself against such actions (or the threat of such actions).

1.21 The central question posed by the reference from the Attorney General and pursued in this Consultation Paper is whether the correct balance is struck by the existing Irish law on limitations dealing with claims for damage other than personal injury, which forecloses a right of action after the relevant six-year period has elapsed in circumstances where the claimant was not aware *and could not have been aware* of the right of action until after the expiration of the said six-year period.

1.22 We propose to examine the relevant law to evaluate whether the inflexible nature of the existing law creates an imbalance that unduly favours defendants and which requires reform. We propose to make provisional recommendations for reform after examining how other legal systems have struck the appropriate balance.

CHAPTER 2: THE CURRENT LAW IN IRELAND

A: TORT LAW

1. Existing Law

(a) The General Rule: A Six-Year Period of Limitation without any Allowance for the Level of Awareness of the Plaintiff

2.01 Section 11(2) of the *Statute of Limitations Act, 1957* states that, subject to certain provisions (see para. 2.05 below):

> "an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."

This limitation period does not however apply to any action for equitable relief, such as an injunction (except in so far as such limitation period may be applied by analogy).[1]

2.02 "Cause of action" has been defined as

> "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court".[2]

2.03 The first issue that arises is: when does a cause of action "accrue" for the purposes of the section? The answer is that for torts actionable only on proof of damage (such as negligence), the cause of action will accrue when the defendant's wrongful act causes damage. This can be separate in point of time from the act that led to the damage. The cause of action accrues irrespective of whether the plaintiff knew or could with reasonable diligence have discovered the damage. For torts actionable without proof of actual damage (such as trespass), the cause of action will accrue when the tortious act is committed.

2.04 The net effect of the six-year rule is to bar all actions after a period of six years from accrual, irrespective of whether or not the plaintiff knew that he had a cause of action.

2.05 The actual period of six years is reduced in only two instances. In

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1 *Cf.* s.11(9). Claims for equitable relief may of course be barred by the equitable doctrines of *laches* or acquiescence.

2 *Read v. Brown* (1888) 22 QB 128, 131, *per* Lord Esher M.R.

(a) actions for damages for slander[3] and in (b) actions for damages in respect of personal injuries caused by negligence, nuisance or breach of duty,[4] a three-year limitation period applies.

2.06 Although it is acknowledged by many that the strict application of the above rules has led to many harsh results, the judiciary consider themselves bound to such an application.

(b) Judicial Unease with the Inflexibility of the Statutory Rule

(i) Building Defects Caselaw

2.07 Apart from cases involving personal injuries,[5] the question of when a cause of action accrues has received scant consideration by the higher courts of this jurisdiction. In England, the case of *Pirelli General Cable Works Ltd. v. Oscar Faber and Partners*[6] contains the leading authoritative statement on the accrual of a cause of action for physical damage to property. The case concerned cracks in a chimney which occurred prior to 1971. The chimney was constructed in 1969, but the cracks were not discovered until 1977. The writ was issued in 1978. At issue was the fact that the cracks were not discoverable until 1972. Relying on the decision in *Cartledge v. E. Jopling and Sons Ltd.*[7] (a personal injuries case), the House of Lords held that the cause of action for physical damage accrued when the cracks first occurred, whether or not the claimant was aware of their existence. The Lords, in rejecting the date the damage was first discoverable as the date when the cause of action accrued, overruled the Court of Appeal judgment in *Sparham-Souter v. Town and County Developments (Essex) Ltd.*[8] which advocated a reasonable discoverability starting date.[9] Accordingly the limitation period began to run prior to 1971. As the six-year limitation period had expired, the action was statute-barred.

2.08 The first time that the higher courts in this jurisdiction have considered the question of when a cause of action accrues in the context of negligence not involving personal injury but rather damage to property was in the case of *Morgan v. Park Developments*.[10] This concerned the attempts of the

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3 *Statute of Limitations, 1957*, s.11(2)(c).

4 *Statute of Limitations (Amendment) Act, 1991*, s.3.

5 See *Cahill v. Sutton* [1980] I.R. 269, *Hegarty v. O'Loughran* [1990] 1 I.R. 148.

6 [1983] 2 AC 1 (HL).

7 [1963] AC 758. Here the House of Lords held that, on a true construction of the English *Limitation Act, 1939*, a cause of action accrued as soon as a wrongful act caused personal injury beyond what could be reasonably be regarded as negligible, even when that injury was unknown to and could not be discovered by the sufferer.

8 [1976] QB 858.

9 Remedial legislation to deal with the injustice that the *Pirelli* decision could cause was enacted by virtue of the Latent Damage Act 1986. This is discussed more fully in chapter 3.

10 [1983] ILRM 156.

plaintiff to recover damages for negligence as a result of defects in a house built for him by the defendant company. The plaintiff purchased the house from the defendant company in 1962, it having been completed a year previously. Shortly after taking up occupation, the plaintiff notified the defendants of cracks that had appeared in the walls. The defendants repaired the defects but these reappeared and required further repairs in 1965. In 1979 the plaintiff consulted an architect who advised him that the cracks resulted from a serious structural defect. The plaintiff commenced proceedings in 1980.

2.09 In the High Court, Carroll J. was asked to consider whether, for the purposes section 11 of the *Statute of Limitations, 1957*, the cause of action accrued on the date on which the damage caused by the negligence first occurred, or on the date the damage became discoverable with reasonable diligence. Of the two possible interpretations, the learned judge preferred that which had previously been adopted in the *Sparham-Souter* case and which had the date of discoverability as the date of accrual. She opined that if she applied the first construction, the effects would be "harsh and absurd" and that:

> "no law which could be described as 'harsh and absurd' or which the Courts could say was unreasonable and unjustifiable in principle could also be constitutional".[11]

2.10 As the Act was post-1937 and accordingly had the benefit of the presumption of constitutionality, Carroll J. chose the construction which she considered most consistent with the Constitution.[12] This incorporated the discoverability test.

2.11 The case of *Hegarty v. O'Loughran*[13], although it concerns personal injuries, is important in the present discussion because of the consideration given by the Supreme Court to Carroll J.'s interpretation of the 1957 Statute in *Morgan* above. Finlay C.J. expressed the view that the distinction identified by the learned trial judge between the law in this country and that in England by virtue of our Constitution and the existence of a presumption of constitutional validity in the construction of the Acts of the Oireachtas was correct. However he, along with all other members of the Court, was of the opinion that this distinction was only relevant where there are two or more alternative constructions of the statutory provisions open. He concluded that this was not the case, citing section 71 of the *Statute of Limitations, 1957,* subsection (1) of which provides:

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11 *ibid.*, p. 160.

12 The constitutional provisions which Carroll J. considered would have been breached by adopting the *Pirelli* decision would appear to be Articles 40.3.1° and 40.3.2°:

> Article 40.3.1° states: "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."
> Article 40.3.2° states: "The State shall, in particular, by its laws protect as best as it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen."

13 [1990] 1 IR 148.

"Where, in the case of an action for which a period of limitation is fixed by this Act, either -

(a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or
(b) the right of action is concealed by the fraud of any such person,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it."

2.12 In considering this section the Chief Justice was of the opinion that:

"[i]f the true meaning of the date at which the cause of action accrued were, as is contended, the date at which the plaintiff discovered or ought to have discovered that he had a cause of action, then section 71 would be an entirely superfluous section."[14]

2.13 In effect, the explicit provision of reasonable discoverability which is confined to one section in the 1957 Act was held to exclude its general application throughout the Act. Similar considerations were held to apply to the provisions of section 48 of the Statute, which relate to disability, and accordingly the possibility of a discoverability test operating within the existing wording of section 11 was rejected.

2.14 In the result, the cause of action was held to accrue when the defect first occurred, and no discoverability test was adopted by the court into Irish law. Thus the decision of Carroll J. in *Morgan* was effectively overruled.

(ii) Professional Negligence Caselaw

2.15 It is important to note that latent defects in actions of tort arise outside the area of building defects. An analogous problem arises in relation to negligent advice or negligent failure to advise. A typical example occurs where a solicitor advises incorrectly as to title to property, but the negligence may not be discovered for many years until a reason arises to rely on the negligent advice, such as when an attempt is made to resell the property.[15]

2.16 Again the question arises as to when time should begin to run in the context of the relevant limitation period. This was considered in the case of

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14 *ibid.*, p.156.

15 *Forster v. Outred & Co.* [1982] 2 All ER 753, [1982] 1 WLR 86 C.A.

Touhy v. Courtney (No.1).[16] Here the plaintiff claimed that he purchased a house in 1978 in the belief that he was acquiring a freehold interest in the property subject only to a ground rent. He subsequently discovered that the title was leasehold, with less than 30 years to run on the lease. The defendant solicitor against whom negligence was alleged on the basis of his acting in the purchase on behalf of the plaintiff pleaded that the action was statute-barred as the summons was not issued until 1987. Strictly interpreting section 11, Blayney J. held that the cause of action accrued in 1978 and accordingly the claim was barred.

2.17 Subsequently, the plaintiff challenged the constitutionality of the section having regard to Articles 40.3[17] and 43[18] of the Constitution.[19] However, Lynch J. did not find it necessary to express any views on the question, much debated before him, as to whether a cause of action was a personal right of access to the courts protected by Article 40.3.1° or a property right protected by Articles 40.3.2° and 43. This was because he did not accept that the fact that section 11 would operate in a harsh manner was conclusive as to its unconstitutionality. No indication was given as to what level of harshness might amount to a constitutional breach.

2.18 On appeal, the Supreme Court[20] again decisively rejected the notion that the lack of a discoverability test in the Statute could be attacked on constitutional grounds. It held that the Oireachtas, in legislating on limitation, was engaged in a balancing of constitutional rights and duties, and that in a challenge to the constitutional validity of any statute the role of the courts was not to impose its own view of what these rights and duties should be.

(c) The Limit of the Judicial Remit to Reform the Law: The Separation of Powers

2.19 Section 11 has been the subject of further constitutional challenges, albeit in the context of personal injuries cases.

2.20 In *Cahill v. Sutton*,[21] the plaintiff was prescribed tablets by the

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16 High Court, unreported, 10 April 1991.

17 The text of this Article is reproduced at note 11 *ante*.

18 Article 43 states: "1.1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods. 1.2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property. 2.1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice. 2.2° The State, accordingly, may as occasion requires delimit by law the exercise of the social rights with a view to reconciling their exercise with the exigencies of the common good.

19 High Court, unreported, 3 September 1992.

20 *Touhy v. Courtney (No.2)* [1994] 2 ILRM 503.

21 [1980] IR 269. This case was in fact a claim for damages arising from an alleged breach of a contractual duty, the plaintiff having abandoned her claim in tort.

defendant doctor in 1968. Although the plaintiff suffered ill-effects almost immediately, she did not commence proceedings until 1972. Counsel for the plaintiff contended that if her action was statute-barred (as it fell outside the three-year limitation period applicable in personal injuries actions), the section was unconstitutional as it offended Articles 40.3.1° and 40.3.2°, since a plaintiff could lose the right to bring a claim before he or she knew of its existence.

2.21 The challenge to the constitutionality of section 11(2)(b)[22] was rejected by the Supreme Court. The challenge was based on the absence of a discoverability provision, which even if present would not have been applicable to the facts of her claim. The plaintiff had known in 1968 all the facts necessary to enable her to institute an action against the defendant claiming damages for personal injuries caused by the defendant's breach of his contractual duty. Accordingly, the plaintiff failed to establish the *locus standi* necessary to challenge the constitutionality of the subsection, since it was not permissible to "conjure up, invoke and champion the putative constitutional rights of a hypothetical third party" (the so-called *jus tertii*).[23]

2.22 The members of the Court declined to state whether, if the plaintiff had established the necessary standing, the challenge would have succeeded, although all members of the Court agreed with Henchy J's statement:

> "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 subsection a saver as was inserted by the British Parliament in s.1 of the Limitation Act, 1963[[24]] are so obvious that the enactment by our Parliament of a similar measure would merit urgent consideration."[25]

2.23 Interestingly, Mc Carthy J. referred to *Cahill v. Sutton* during the course of his judgment in *Norris v. Attorney-General* and was of the opinion that it was

> "fair to infer that the Court inclined to the view that the relevant subsection of s.11 of the Act of 1957 was constitutionally invalid".[26]

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22 S.11(2)(b), repealed by s.3(2) of the *Statute of Limitations (Amendment) Act, 1991*, stated:

> "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."

23 [1980] IR 269, 279 *per* Henchy J.

24 [This introduced a discoverability test in the case of personal injuries. Such a provision is now found in that jurisdiction in s.11 of the *Limitation Act, 1980.*]

25 [1980] IR 269, 288.

26 [1984] IR 36, 89.

2.24 In *Hegarty v. O'Loughran*[27] McCarthy J. opined that no discoverability principle existed in Irish law and said:

> "I recognise the unfairness, the harshness, the obscurantism that underlies this rule, but it is there and will remain there unless qualified by the Legislature or invalidated root and branch by this Court."[28]

2.25 However, in *Hegarty*, as mentioned above,[29] the Supreme Court rejected the contention of the plaintiff that the presumption of constitutionality *required* that 11(2)(b) be interpreted as meaning *other than* that the limitation period commenced when provable personal injury, capable of attracting monetary compensation, occurred. The case did not involve an actual challenge to the constitutional validity of the subsection, and therefore the Court declined to consider that issue.

2.26 The case of *Brady v. Donegal County Council*[30] concerned a constitutional challenge to s.82(3A) of the *Local Government (Planning and Development) Act, 1963*, as amended by s.42 of the *Local Government (Planning and Development) Act, 1976*, which provides that challenges to the validity of decisions of planning authorities upon application for planning permission must be made to the court within two months of the date of such decisions. The plaintiffs acquired knowledge of a certain planning permission granted by the County Council more than two months after it had been granted, and upon institution of proceedings in the High Court, were met with the plea that they were statute- barred. The plaintiffs submitted that the subsection was unconstitutional, in that it infringed their right to challenge the Council's decision, which was a property right protected by Article 40.3.2° of the Constitution.

2.27 In the High Court, Costello J., considered *Cahill v. Sutton* and in particular the comments of Henchy J. drawing attention to the injustice of not providing in legislation a saver in favour of plaintiffs whose ignorance of their cause of action was not attributable to any fault of their own. The learned judge was of the opinion that:

> "a limitation period which contains no saver of plaintiffs whose ignorance of their cause of action is attributable to the defendants wrong-doing would appear to be unjust, and *very likely, unconstitutional.*"[31] [emphasis added]

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27 [1990] 1 IR 148.

28 *Ibid.*, p.164.

29 paras. 2.11-2.14, *supra.*

30 [1989] ILRM 282.

31 *Ibid.*, p.288.

Since the two-month limitation period contained no saver, the learned judge declared subsection 3A repugnant to the Constitution.[32]

2.28 On appeal the Supreme Court acknowledged that the issue of constitutional validity depended upon the absence from the subsection of a saving clause to cover exceptional cases. It remitted the case for retrial in the High Court, ordering that the issues of fact be tried before the constitutional issue. If the plaintiffs' case transpired not to be exceptional, then they lacked the *locus standi* to challenge the constitutional validity of the subsection.

2.29 The Supreme Court decision in *Brady* does not appear immediately reconcilable with the other cases decided by the Court on the general point under discussion. It would appear that this divergence can only be explained on the basis that the limitation period being considered in *Brady* (three months) was so drastically short that it placed it in a qualitatively different category than the usual three-year or six-year period. Even so, this does not adequately explain the apparent willingness of the Supreme Court in *Brady* to declare unconstitutional limitation periods that expire before the plaintiff reasonably knows that he has a cause of action, when set against its refusal to do so in all the other cases just considered.

2.30 It is evident from its various pronouncements on the issue that the judiciary views itself as occupying a difficult position in this area of law. They have recognised that the law as it stands is clearly unsatisfactory. They have acknowledged that palpable injustice can arise in the case of meritorious claims because the defect (and consequently the claim) is discoverable only after the limitation period has expired. Despite this, and mainly because of the constitutional doctrine of the Separation of Powers,[33] the courts do not consider it appropriate for them to reform the law of limitation. The real agent for legitimate change in this regard is the Legislature.[34]

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32 It is noteworthy that Costello J. felt that the subsection was invalid having regard to Article 40.3, in that the State had to protect citizens as best it might from unjust attack and, in the case of injustice done, to vindicate their rights. The learned judge did not consider the jurisprudence developed under Article 34 relating to access to the courts: see eg. *The State (Quinn) v. Ryan* [1965] IR 70, *Macauley v. Minister for Posts and Telegraphs* [1966] IR 345, *Murphy v. Greene* [1990] 2 IR 566. See also G. Hogan & G. Whyte, *Kelly: The Irish Constitution*, pp.385-388.

33 See generally D. Morgan, *The Separation of Powers in the Irish Constitution*.

34 Article 15.2.1^{0} of the 1937 Constitution states: "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."

2. The Law Reform Process to Date

(a) Previous Law Reform Commission Consideration of Latent Defects (1977, 1982): Endorsement of the Discoverability Rule

2.31 In its very first Working Paper (effectively a Consultation Paper) entitled *The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises*[35] (1977) the Law Reform Commission had occasion to consider the question of the period within which actions for damages arising from defective premises should be brought. In the General Scheme of the Bill attached to that Working Paper it was provided that for the purpose of the Statute of Limitations a cause of action against a person undertaking or executing building work should be deemed to have accrued:

> (a) where the work undertaken was executed to the order of any person, at the time when that person notified the person responsible for the work (whether or not he undertook the work in question) that he first accepted the work as confirming to the order or at the time when the first person took possession of the premises, whichever is the earlier;
>
> (b) in any other case, at the time when the work was completed or at the first time thereafter when an interest in the premises is acquired by any person, whichever is the later.

2.32 However, in its subsequent Report on Defective Premises,[36] (to which the Working paper gave rise) the Commission resiled from the position previously adopted and accepted instead the submission made by the Dublin Solicitors Bar Association that the above provisions could lead to injustice where defects in building work manifest themselves long after the work is completed. The Commission was made mindful of the fact that it is not uncommon for such defects to remain hidden for many years. This change of view was reflected in its final Report. Accordingly, the Commission recommended that time should not begin to run for the purposes of the Statute of Limitations until the prospective plaintiff knew or ought to have known of the injury or damage suffered. This amounted to an acceptance of a 'reasonable discoverability' test.

2.33 Before making this recommendation the Commission took account of representations from the Construction Industry Federation that no action should lie after a period of ten years has elapsed from the date of doing the work. But the importance of protecting defendants from stale or dilatory claims was, in the Commission's view, outweighed by the injustice of denying to a plaintiff a right of action for injury or damage just because that injury or damage

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35 *LRC Working Paper No. 1 (1977).*

36 LRC-3 (1982).

had not manifested itself within a given period.[37]

(b) Recent Statute Law Reform of the Law of Limitations with respect to Personal Injuries (1991): The 'Date of Knowledge' Test

2.34 The question of the operation of the Statute of Limitations in cases of latent *personal injuries* had previously been referred to the Law Reform Commission by the Attorney-General. Whilst this branch of latent defects is outside the terms of the present reference, it is nevertheless useful as a comparative exercise to state the law as it stands.

2.35 Pursuant to that reference from the Attorney-General, the Commission issued a report on limitation periods in relation to latent personal injuries in 1987.[38] One of the recommendations of that Report was that amending legislation should be introduced to provide for a "discoverability" test in relation to the limitation of actions in cases of personal injury. The Commission noted the central argument in favour of such a reform, *viz.:*

> "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."[39]

2.36 This recommendation was in fact implemented by the *Statute of Limitations (Amendment) Act 1991*,[40] section 3(1) of which states:

> "An action.....claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty.....shall not be brought after the expiration of three years from the date on which the cause of action accrued or the date of knowledge [as defined] (if later) of the person injured."

2.37 Section 2 defines the date of knowledge as the date on which the person first had knowledge of certain facts, namely:

> (a) that the person alleged to have been injured had been

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37 *Ibid.*, p.10. Section 5 of the Draft Bill attached to the Report stated that in the case of a breach of the duty to build premises properly, the cause of action accrued when the defect was known of, or ought reasonably to have been known of. Section 8 stated that in the case of the breach of the duty of the disponer of the premises to take reasonable care to see that all persons who might reasonably be expected to be affected by defects are reasonably safe from personal injuries or from damage to their property caused by such defects, the cause of action again accrued when the defect was known of, or ought reasonably to have been known of. Such a provision causes difficulties in the case of subsequent purchasers: see Mullany, *Reform of the Law of Latent Damage*, (1991) 54 MLR 349, 357, Robertson, *Defective Premises and Subsequent Purchasers* (1983) 99 LQR 559.

38 LRC-21 (1987) *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries.*

39 *ibid.*, p.42, quoting from *Morgan v. Park Developments* [1983] ILRM 158, 160 *per* Carroll J.

40 Attempts to have the Bill amended at Committee Stage to include "non-personal injuries" were ruled out of order: see 409 Dáil Debates cols.2333-2350.

injured,

(b) that the injury in question was significant,

(c) 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,

(d) the identity of the defendant, and

(e) 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 the action against the defendant.[41]

Only when the plaintiff has knowledge of *all* of the above facts will he be fixed with knowledge under the Act.

2.38 Consideration has recently been given to what constitutes "knowledge". In the case of *Gallagher v. Minister for Defence and Others*[42] O'Higgins J. cited with approval the case of *Halford v. Brookes*,[43] where in relation to similar provisions in the English legislation, Lord Donaldson said:

> "In this context 'knowledge' clearly does not mean 'know for certain and beyond possibility of contradiction'. It does, however, mean 'know with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking legal or other advice and collecting evidence.' Suspicion, particularly if it is vague and unsupported, will not be enough, but reasonable belief will normally suffice".[44]

2.39 The meaning of the word "significant" has also received judicial attention in the case of *Whitely v. Minister for Defence and Others*[45]. In the U.K. an injury is "significant" if the person whose date of knowledge is in question would "reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment" (*Limitation Act, 1980*, s.14(2)). Quirke J. in considering the position of the Irish legislation in *Whitely* stated:

> "Accordingly Section 2 of the 1991 Act expressly avoids any attempt to define what is meant by a 'significant' injury within the meaning of sub-section 2(1)(b) of the Act and I take the view that by excluding any definition it was the intention of the Legislature to

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41 These constituent parts of "knowledge" are almost identical to those found in s.14(1) of the English Limitation Act 1980. See also *Whitely v. Minister for Defence, Ireland and the Attorney General*, High Court, unreported 10 June 1997, where Quirke J. deals with some of the principles concerning the application of section 2 of the 1991 Act.

42 High Court, 25 February 1998.

43 [1991] 1 WLR 428.

44 *Ibid.*, at 433.

45 High Court, 10 June 1997 (unreported).

avoid confining the sense in which the word 'significant' ought to be understood to the terms of the definition contained in Section 14(2) of the English Act or to any particular terms. If I am correct and if it was intended that a broader test should be applied than was contemplated by the definition contained within Section 14(2) of the English Act, then it would seem to follow that *the test to be applied should be primarily subjective and that the Court should take into account the state of mind of the particular plaintiff at the particular time having regard to his particular circumstances at the time.*"[46] [emphasis added].

2.40 In the English case of *Marston v. British Railways Board*[47], Croom-Johnston J., in considering the corresponding section of the (U.K.) *Limitation Act, 1980*, said that the "he" which is referred to was the plaintiff himself and not his servants or other agents.[48] However, in the Irish case of *Boylan v. Motor Distributors Ltd.*,[49] before Lynch J. in the High Court, it was accepted on behalf of the plaintiff that knowledge by her solicitor must be attributed to the plaintiff herself.[50]

2.41 Section 2(3) of the 1991 Statute implements the Law Reform Commission recommendation[51] that a person's knowledge should include "constructive knowledge", namely 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 expert advice so long as he has taken all reasonable steps to obtain, and where appropriate to act on, that advice.[52] The test of reasonableness, according to the Commission, whilst objective, "must take account of at least some aspects of the particular person's subjective experience".[53]

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46 *id.* at p. 13 of transcript.

47 [1976] ICR 124.

48 *Ibid.*, p.135.

49 [1994] 1 ILRM 115.

50 *Ibid.*, p.123.

51 LRC-21, *op. cit.*, note 38 *supra*, at p.46.

52 *ibid.*, p.59 (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).

53 *ibid.*, p.45. Mullany, *op. cit.*, note 37 *supra*, at p.352, queries whether factors such as the plaintiff's financial capacity to consult experts/professionals or his reluctance to consult as a result of his social background are relevant in any such scheme.

(c) *Recent Product Liability Legislation (1991): An EC- Inspired Movement Toward a 'Reasonable Awareness' Test*

2.42 The question of limitations is also addressed in the *Liability for Defective Products Act, 1991*. This Act gave belated effect to Council Directive 85/374/EEC.[54] The principal effect of the Act is to introduce into Irish law the remedy for damages based on the principle of strict or no-fault liability[55], whereby liability is imposed on a producer for damage caused wholly or partly by a defect in his product irrespective of whether the producer was negligent or not. The Act is of importance in the present discussion because section 7 thereof provides:

> "An action for the recovery of damages under this Act shall not be brought after the expiration of three years from the date on which the cause of action accrued or the date (if later) on which the plaintiff became aware, *or should reasonably have become aware*, of the damage, the defect and the identity of the producer.[56] [emphasis added]

2.43 Section 7(5)(c) of the *Liability for Defective Products Act, 1991* provides that the above references to the plaintiff's date of awareness are to be construed in accordance with section 2 of the *Statute of Limitations (Amendment) Act, 1991* (see para. 2.37 above).

2.44 Since the Act does not make a distinction between personal injury and damage to property, this section introduces a discoverability test into Irish law which actually has effect beyond the scope of personal injuries (albeit in the narrow context of product liability). In addition to this, section 7(2)(a) provides:

> "A right of action under this Act shall be extinguished upon the expiration of the 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."[57]

2.45 This ten-year cut-off point is known as a 'long stop' provision and is an absolute time-bar to a strict liability action under the Act. The introduction of such a provision under the directive proved to be very contentious. The Law Reform Commission has previously noted the wide diversity of views on the matter of 'long stops'.[58] The Law Commission of England & Wales has

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54 The Directive was issued on 30 July, 1985. See Binchy, *The EEC Directive on Products Liability*, 80 Incorp. L. Soc. of Ireland Gazette 37, 73 (1986), Schuster, *Products Liability*, ch. 10 of P. Usher and B O'Connor ed., *Doing Business in Ireland*, para 10.04 (1987).

55 See B. Mc Mahon & W. Binchy, *Irish Law of Torts*, 2nd ed. (1990), p.22.

56 Implementing Article 10 of the Directive.

57 Implementing Article 11.

58 LRC-21, *op. cit.* note 38 *supra*.

observed that:

> "It is in the producer's interests 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 time when it is entirely removed.[59]

2.46 On the other hand, the cut-off period has been criticised in so far as it is quite arbitrary, when the range of products potentially covered is considered. Binchy has noted that some products, such as various types of machinery, may well be expected to last for more than ten years, whilst for other products, particularly perishable ones, the time period is entirely inappropriate.[60]

2.47 It is instructive to note that the Law Reform Commission has previously rejected the option of introducing a 'long stop' provision in the area of latent personal injuries. The Commission came to the conclusion that the overriding objective of their 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. The Commission was also of the opinion that whatever period of time was settled on, it would of its nature be crude and arbitrary, and have no regard to the requirements of justice as they arise in individual cases.[61] Reliance was instead placed on inherent judicial discretion to strike out claims where there was "inordinate and inexcusable delay" as enunciated by Henchy J. in *O'Domhnaill v. Merrick*.[62]

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59 Eng. Law Com. No.82 & Scot. Law Com. No.45, para.152 (Cmnd. 6831).

60 *op. cit.*, note 54 *supra*, at p.75.

61 LRC-21, *op. cit.*, note 38 *supra*.

62 [1984] IR 151. The principle in *O' Domhnaill* was subsequently applied by the Supreme Court in *Toal v. Duignan (No 2)* [1991] ILRM 140, where Finlay CJ said that the courts have an inherent jurisdiction to dismiss a claim in the interests of justice where the length of time which has elapsed between the events out of which the claim arises and the time when it comes for hearing is in all the circumstances so great as that it would be unjust to call upon a particular defendant to defend himself.

B: CONTRACT LAW

2.48 Section 11(1)(a) of the *Statute of Limitations, 1957* states that [subject to the provisions of the 1991 Act][63] no action founded upon simple contract can be brought after the expiration of six years from the date on which the cause of action accrued. Section 11(1)(b) provides that a six-year limitation period shall likewise apply to actions founded upon "quasi-contract". The six-year limitation period does not however apply to actions for equitable relief, such as specific performance.[64]

2.49 Section 11(1)(a) is subject to an exception in the case of an action for damages for the breach of a duty existing by virtue of a contract, where the damages claimed are in respect of personal injuries. Here the limitation period is three years as outlined above in the discussion of the *Statute of Limitations (Amendment) Act, 1991.*

2.50 If we return to Lord Esher's definition of cause of action ("every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court"[65]), it is apparent that the general rule in contract law is that the cause of action accrues when the breach occurs, rather than when any damage is suffered, since the essence of liability in an action for breach of contract is the breach, rather than damage which occurs as a result. The fact that actual damage is not suffered by the plaintiff until some date later than the breach does not extend the time within which he must sue. If, however, the facts of the case disclose the commission of the tort of negligence, the cause of action does not accrue until the damage occurs, since negligence is not actionable unless actual damage is proved. When, therefore, the defendant has acted negligently in the performance of a contract, the plaintiff may be able to bring a claim in tort and take advantage of the fact that the limitation period starts to run at a later date in tort.[66]

2.51 Whilst therefore the problems of latent defects in contract cases may not be as acute as they first appear to be, by virtue of the above-mentioned marriage of causes of action in relation to breach of contract and negligence, they can nevertheless arise.

2.52 To give an example of when the limitation period would begin to run in a typical breach of contract situation, in an action for breach of warranty against the vendor of goods, the cause of action accrues when the goods are delivered rather than when the defect is discovered.[67] This gives rise to the

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63 See para. 2.49 *infra.*

64 *Cf.* note 1, *supra.*

65 *Read v. Brown, op. cit.*, note 2 *supra.* See also *Letang v. Cooper* [1965] 1 QB 232, [1964] 2 All ER 929.

66 See *Cahill v. Sutton* [1980] IR 269.

67 *Lynn v. Bamber* [1930] 2 KB 72.

unfortunate scenario where a plaintiff may be statute-barred from bringing a case before he even knows that he has a cause of action. No discretion exists to extend or disapply the period of limitation.

2.53 It is interesting to note that in England, where a discoverability provision has been introduced for any action for damages arising from negligence on the part of the defendant by virtue of the *Latent Damage Act, 1986*, it has been held that the provision does not apply where the plaintiff is suing in contract alleging that the defendant has been in breach of a contractual duty to act with reasonable care.[68] This is discussed in greater detail in Chapter 3 below.

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68 *Iron Trade Mutual Insurance Co. Ltd. v. JK Buckenham Ltd.* [1990] 1 All ER 808.

CHAPTER 3: COMPARATIVE ASPECTS

A: COMMON LAW JURISDICTIONS

England & Wales

(a) Judicial Unease with the Rigidity of the Statutory Rule

3.01 Section 2 of the *Limitation Act, 1980* provides that an action founded in tort cannot be brought "after the expiration of six years from the date on which the cause of action accrued".

3.02 As we have mentioned in the previous chapter, for torts actionable only upon proof of damage, such as negligence, the cause of action will accrue upon the relevant damage occurring. Accordingly, the issue arises as to *when* the relevant damage occurs.

3.03 Apart from cases involving personal injuries,[1] the problem of latent defects and limitation periods has presented itself frequently since the early 1970's in cases involving defective construction. In *Dutton v. Bognor Regis Urban District Council*,[2] where negligent inspection was alleged against a local authority acting under building byelaws made under the *Public Health Act, 1936*, Lord Denning M.R. stated that the damage was done when the foundations were badly constructed, and consequently the limitation period began to run from the time the construction took place.[3] This narrow interpretation tipped the balance decisively against plaintiffs.

3.04 The question of when damage occurs for the purposes of ascertaining the commencement of any limitation period was again considered in *Sparham-Souter v. Town and County Developments (Essex) Ltd.*[4] where the Court of Appeal held that the limitation period began to run from the time when the owner discovered, or with reasonable diligence ought to have discovered, the defect. This 'reasonable discoverability' starting date tipped the balance back in favour of would-be plaintiffs.

3.05 However, in *Pirelli General Cable Works Ltd. v. Oscar Faber and Partners*,[5] the House of Lords expressly overruled the *Sparham-Souter* decision,

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1 See *Cartledge v. E. Jopling & Sons Ltd.* [1963] AC 758.

2 [1972] 1 QB 373.

3 See also *Higgins v. Arfon Borough Council* [1975] 2 All ER 589.

4 [1976] QB 858.

5 [1983] 2 AC 1.

concluding that the cause of action arising from defective design to a building accrued at the time when the damage occurred as opposed to when it was or could have been discovered upon reasonable examination. As it had done in *Cartledge*,[6] the House of Lords regretted the judgment which it felt compelled to give, and expressed the view that a legislative solution to the problem would be necessary.

(b) Proposals for Law Reform in England & Wales

3.06 Prior to *Pirelli*, the Law Reform Committee of Parliament in its 1977 Report (*Limitation of Actions*),[7] had expressed concern at problems raised by the meaning and applicability of the test propounded in *Sparham-Souter*. However, no consensus was reached by the Committee on how best to resolve the problem of latent damage. Subsequently the Lord Chancellor invited the Committee to:

> "consider the law relating to
>
> (i) the accrual of the cause of action, and
> (ii) limitation
>
> in negligence cases involving latent defects (other than latent disease or injury to the person) and to make recommendations."

3.07 A Sub-Committee of the Law Reform Committee was set up, and it issued a Consultative Document in July 1981.[8] By the time the Law Reform Committee had presented its Final Report, the decision had been handed down in *Pirelli*. This Report *(Latent Damage)*[9] was published in November, 1984. The Committee stated:

> "Three principles are of critical importance in this branch of law. They are:
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> i. that plaintiffs must have a fair and sufficient opportunity of pursuing their remedy;
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> ii. that defendants are entitled to be protected against stale claims;
>
> iii. that uncertainty in the law is to be avoided wherever possible.

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6 See fn. 1 *supra*.

7 21st Report: *Final Report on Limitation of Actions* , Cmnd. 6923 (1977).

8 See *Current Law Statutes Annotated* [1986] Vol. 1 p.37-3.

9 Law Reform Committee, 24th Report: *Latent Damage*, Cmnd 9390 (1984).

We would not find any proposal for reform of the law acceptable which failed in any significant respect to satisfy these criteria."[10]

3.08 The Committee proposed that there should be no change in the general rule whereby a cause of action in negligence accrues at the date of occurrence of the resulting damage.[11] However, in negligence cases involving latent defects, it considered that 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. Finally the Committee were of the opinion that there should be a 'long stop' applicable to all negligence cases involving latent defects (other than personal injuries) which would bar a plaintiff from initiating proceedings more than fifteen years from the defendant's breach of duty, whether damage had manifested itself or not.

(c) Statutory Reform to Date in England & Wales

i. Scope of the Latent Damage Act, 1986

3.09 The *Latent Damage Act, 1986*[12] is based on the above-mentioned recommendations. The full title of the Act is:

> "An Act to amend the law about the limitation of actions in relation to actions for damages for negligence not involving personal injuries, and to provide for a person taking an interest in property to have, in certain circumstances, a cause of action in respect of negligent damage to property occurring before he takes that interest."

3.10 It will thus be seen that the Act applies to actions for damages in respect of negligence only and has no application to actions for breach of contract. In *Iron Trade Mutual Insurance Co. Ltd and others v. JK Buckenham Ltd*[13] it was argued that the omission of any reference to breach of duty was an oversight on the part of the draftsman. Such an argument was rejected by the court. [14] The Law Commission of England and Wales has recently noted that even though the reasoning behind such a decision is convincing, it is far from clear that there is any justification in principle for the differing treatment of

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10 para. 4.2.

11 The possibility of basing the cause of action on the defect, rather than on the damage, has been considered by the Judiciary. In *Pirelli*, Lord Fraser stated: Except perhaps where the advice of an architect or a consulting engineer leads to the erection of a building which is so defective as to be doomed from the start, the cause of action accrues only when the physical damage occurs to the building ([1983] 2 AC 1, 18). The defect approach was subsequently rejected in *Ketterman v. Hansel Properties Ltd.*[1985] 1 All ER 352; *Jones v. Stroud District Council* (1986) 279 EG 213.

12 c. 37. See Brown, *Latent Damage - The Remaining Uncertainties* (1994) 137 NLJ 191, James, *Statutory Liability for Negligence and the Latent Damage Act 1986* (1994) 45 NILQ 301.

13 [1990] 1 All ER 808.

14 See also *Islander Trucking Ltd v. Hogg Robinson and Gardner Mountain (Marine) Ltd* [1990] 1 All ER 826, *per* Evans J; *Societe Commerciale de Reassurance v. ERAS International Ltd* [1992] 2 All ER 82.

contract claims and tort claims.[15]

3.11 The fact that the 1986 Act does not extend to breaches of contractual duty has been undermined by the recent decision of the House of Lords in *Henderson v. Merrett Syndicates Ltd*[16] where it was confirmed that there can be concurrent actions in contract and tort arising out of the same facts. As a result, a plaintiff who alleges a negligent breach of contract can bring an action in the tort of negligence, and thus avail of the benefit of the 1986 Act. It is interesting to note that the wording of the Act does not extend to any case where the liability is strict. This can be contrasted with the situation under the *Liability for Defective Products Act, 1991* in this jurisdiction which does contain a discoverability provision for latent damage arising from defective products where a standard of strict liability is employed.

ii. 'Starting Date' of Limitation Period under the 1986 Act

3.12 Section 1 of the 1986 Act inserts ss.14A and 14B into the *Limitation Act, 1980.* Section 14A(3) states that no cause of action may be brought following the expiration of the limitation period, expressed to be either six years from the date on which the cause of action accrued (the existing period under s.2) or three years from the "starting date" if that period expires later than six years from when the cause of action accrues. The "starting date" is:

> "the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action".[17]

iii. 'Date of Knowledge' under English Law

3.13 The date of knowledge is the date when the plaintiff first knew of such "material facts about the damage"[18] "as would lead a reasonable person who had suffered such damage to consider 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",[19] along with the following facts:

> (1) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence;

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15 Law Commission Consultation Paper No. 151, *Limitation of Actions* (1998), para. 3.89. See also Jones, *Latent Damage - Squaring the Circle?* (1985) 48 MLR 564; Mullany, *Reform of the Law of Latent Damage* (1991) 54 MLR 349.

16 [1995] 2 AC 145.

17 *Limitation Act, 1980*, s.14A(5).

18 *ibid.*, ss.14A(5) and 14A(6)(b).

19 *ibid.*, s.14A(7).

(2) the identity of the defendant; *and*

(3) 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.[20]

3.14 Several points of note arise here. First, the constituent parts of "knowledge" mirror those found in section 14 of the *Limitation Act, 1980* which deals with personal injury claims. The complexity of these elements has been the subject of much criticism.[21] It has been claimed that the importance placed upon a notional defendant who admits liability and can satisfy a judgment in assessing the seriousness of damage suffered is of particular concern. This reference was inserted in an attempt to ensure that a difficulty foreseen by the Law Reform Committee would not arise, namely that plaintiffs would not be penalised for failing to take action as soon as the first trivial evidence of damage is known to them.[22] However, it has been argued that if the plaintiff is aware of any damage, this will start time running. As Davies has commented (in respect of the analagous provision in the context of personal injuries):

> "[I]s it not arguable that as against a defendant who does not dispute liability and who has sufficient assets (or insurance cover) to satisfy an award of damages it is almost every cough and sprain that will be sufficiently serious to justify an action?"[23]

3.15 In such a situation it seems that only if the costs (of proceedings) which cannot be recovered are likely to exceed the damages recoverable that an action would be unjustified.[24]

3.16 In many cases, particularly those involving construction, liability is often disputed and the ability of builders to satisfy a judgment is in doubt. In those circumstances, such damage "as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages" would be considerably greater than the damage that would induce a claim by a plaintiff in the fortunate position of suing a solvent defendant who admits liability.[25]

3.17 In the context of the overall definition it is interesting to note that the Irish *Statute of Limitations (Amendment) Act, 1991* contains, with reference to

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20 *ibid.*, ss.14A(8) and 14(A)(6)(b).

21 See Davies, *Limitations of the Law of Limitations* (1982) 98 LQR 249, 254, Mullany, *op. cit.*, note 15 *supra*, at p.351.

22 24th Report *op. cit.*, note 9 *supra*, at paras. 4.7-4.8.

23 Davies, *op. cit.*, note 21 *supra*, at pp.257-258.

24 Mullany, op. cit., p. 351.

25 Jones, *op. cit.*, note 15 *supra*, at p.569.

personal injuries cases only, a description os the constituent elements of knowledge that is almost identical to those found in the English legislation.

3.18 The issue of who constitutes a "reasonable person" for the purpose of the section also merits consideration, and in particular the question of when this "reasonable person" would consider it prudent to seek expert advice for the purposes of section 14A(10) which states:

> "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 appropriate expert advice which it is reasonable for him to seek;
>
> but a person shall not be taken by virtue of this subsection to have 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."

3.19 Knowledge, then, includes actual knowledge and constructive knowledge.[26] The Law Reform Committee had accepted the need for a definition wider than one including only actual knowledge, though it concluded that the notion of constructive knowledge should include some subjective considerations also.[27] No guidelines as to the factors to be taken into account when assessing the reasonableness of the plaintiff's conduct are found. Mullany[28] poses the following questions:

> "At what stage, for example, should the owner of premises call on an engineer or surveyor to investigate cracks in the walls? Is the plaintiff's financial capacity to consult experts relevant? What if due to his social background he is reluctant or afraid to consult "professionals"?[29] If a plaintiff simply has no idea where or to whom to turn will this be taken into account?"

3.20 The approach to the "knowledge" issue is almost identical to the position adopted by the Oireachtas in this country, in enacting the *Statute of Limitations (Amendment) Act, 1991*, which applies to personal injuries claims only. In that Act, the objective standard of the reasonable man includes a subjective element a person is fixed with knowledge ascertainable with expert

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26 It is only the plaintiff's personal knowledge (actual or constructive) that counts: see *Marston v. British Railways Board* [1976] ICR 124, 135 *per* Croom-Johnston J.

27 20th Report, *Interim Report on Limitation of Actions in Personal Injury Claims*, Cmnd 5630 (1974) para. 59.

28 *op. cit.*, note 15 *supra*, at p.352.

29 See *Yianni v. Edwin Evans & Sons* [1982] QB 438, where the evidence was that the vast majority of purchasers do not have their house surveyed, tending to rely on the valuation by the building society surveyor.

advice which it is reasonable *for him* [emphasis added] to seek. Significantly, however, our 1991 Act omits any reference to a defendant who does not dispute liability or who has sufficient assets to satisfy a judgment.

3.21 Under section 14A(7) of the English Act the damage must be sufficiently serious to justify legal action. There have been conflicting decisions on the meaning of "the damage". In the case of *Horbury v. Craig Hall & Rutley*[30] the plaintiff bought property in 1980 after relying on a surveyor's report. This report negligently failed to reveal a number of defects in the property. The plaintiff became aware of some of the defects, including an unsafe chimney, in 1982. These defects could have been corrected for £132. In 1985 she noticed further defects, the repairing of which required extensive re-building of the house. In 1988 she sued the surveyors. It was held that the plaintiff had a single cause of action in respect of the report and that "the damage" meant all the damage suffered by the plaintiff in consequence of her reliance on that report. The discovery of the defects in 1982 was sufficiently serious to cause a reasonable person to issue proceedings against the notional defendant who did not dispute liability and who was able to satisfy a judgment. Accordingly, time started to run against the plaintiff from that point, with the result that the plaintiff's cause of action was time-barred.

3.22 However, this can be contrasted with the decision reached in *Felton v. Gaskill Osborne & Co.*[31] This case concerned a negligent surveyor's report, which failed to refer to four defects in the property. The plaintiff was aware of two of the minor defects not referred-to in the report and had decided that they were tolerable. It was held that "the damage" in section 14A(7) meant the particular head of damages in respect of which the plaintiff was seeking to claim, and not 'damages in general'. The fact that another person might have instituted a negligence action against the surveyors in respect of the defects of which the plaintiff was initially aware did not preclude the plaintiff from suing in respect of the more serious defects when they came to his attention. Time did not begin to run in respect of all the damage suffered by the plaintiff when he was aware of the initial damage suffered.

3.23 This conflict of authorities has recently been considered by the Court of Appeal. In *Hamlin v. Edwin Evans*[32] the plaintiffs purchased a house, relying on a structural survey report provided by the defendant. This report did not reveal the presence of dry rot or structural defects. The dry rot was subsequently discovered, and a claim was made against the defendant which was settled. The structural defects, which were much more serious, were not discovered until four years later, and by the time the plaintiff commenced proceedings, six years had elapsed since the discovery of the dry rot. The Court of Appeal held that only one cause of action existed, which arose from the negligent making of the report.

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30 [1991] CIIL 692.

31 [1993] 2 EGLR 176.

32 [1996] 2 EGLR 106.

The date of knowledge was the date on which the plaintiffs first had actual or constructive knowledge of damage arising from that negligence, which was when the dry rot was discovered. Accordingly the action was time-barred, and the decision reached in *Horbury v. Craig Hall & Rutley* was affirmed.

iv. 'Long Stop' Provision under English Law

3.24 The introduction of the discoverability concept and the resultant tipping of the scales in favour of would-be plaintiffs is tempered by section 14B of the 1980 Act which provides that all actions covered by the Act are barred by time fifteen years after the date of the defendant's breach of duty, regardless of whether either or both of the time-periods have expired or even begun.[33] The fact that the plaintiff still does not know of his cause of action at the end of this period is deemed irrelevant.

3.25 This final cut-off point was introduced to offset the possibility that, with the introduction of the discoverability rule, damage may remain undetected for a long period after the negligent act complained of is committed. In introducing the provision, it was recognised that in attempting to compromise the conflicting interests of plaintiffs and defendants, a balance has to be struck between the would-be plaintiff whose action may be barred before he knows it exists, and the potential defendant who may face difficulties when subjected to claims arising years after documents have been mislaid or destroyed, or witnesses have died. There is no escaping the fact that the introduction of any 'long stop' provision will result in hardship in isolated cases where the plaintiff will be statute-barred from bringing a claim prior to his cause of action being discoverable.

3.26 The Law Reform Committee had considered the possibility of extending the 'long stop' to twenty years but concluded that this would have been undesirable.[34]

3.27 No provision exists that permits the judiciary to extend or disapply the 'long stop'. This can be contrasted with the discretion to extend the limitation period (as opposed to the 'long stop') that is positively legislated-for in the area of latent personal injuries by virtue of section 33 of the *Limitation Act, 1980.* The discretion can be exercised where it is equitable to do so having regard to statutory guidelines. No 'long stop' exists in relation to personal injuries.

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33 A distinction arises between barring the remedy and extinguishing the right; see *Ronex Properties Ltd. v. John Laing Construction Ltd.* [1983] QB 398 (CA), 404 *per* Donaldson LJ, where the learned judge opined that limitation legislation operated only as a bar. This distinction has been criticised by various law reform agencies; see eg Scottish Law Reform Commission, No. 122: *Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues)* (1989) p.20, Saskatchewan Law Reform Commission, *Proposals for a New Limitations Act: Report to the Minister for Justice* (1989) pp.47-49, Ontario Law Reform Commission, *Report on Limitation of Actions* (1969) pp.126-133.

34 Cmnd 9390 (1984) para. 3.4, 3.9, 4.19.

3.28 Rather predictably, the introduction of the fifteen-year 'long stop' was criticised by the Royal Institute of British Architects who felt that the period was too long and instead proposed a ten-year limit. The Institute also suggested that ordinary building insurance should be extended to cover latent defects.[35]

3.29 As mentioned above, time begins to run for the purpose of the 'long stop' when the negligent breach of duty takes place. This is particularly problematic.[36] In *Midland Bank Trust Co. Ltd. v. Hett, Stubbs and Kemp*[37] the defendant solicitor failed to register an option to purchase land on behalf of his client. Oliver J. held that the cause of action in tort did not accrue until the damage was sustained in 1967, when the option was defeated by the sale of the land. The plaintiff's cause of action in contract (which accrues at the date of breach) also accrued in 1967 because the defendants were in "continuing breach" of their contractual duty by failing to remedy the initial breach for as long as they had an opportunity to do so.

3.30 The principle to be extracted from this decision is that in any situation where the defendant is in a position to remedy the consequences of his negligence before damage occurs he could be regarded as being in continuing breach of duty, up to the point at which he ceases to have such control. This will usually be the date on which damage occurs. If the 'long stop' period is to commence on this date, damage that is delayed will not be affected by the 'long stop', but damage that is not reasonably discoverable will. Such a result then defeats the purpose of introducing a discoverability provision. The concept of continuing breach has not been expounded by the judiciary in this country, but the potential difficulty of the question of when time should begin to run for the purpose of any 'long stop' must nevertheless be recognised in the context of any provisional recommendations made.

v. The Position of Subsequent Purchasers under English Law

3.31 Section 3 of the 1986 Act attempts to deal with the concern raised by Lord Fraser in *Pirelli* that fresh limitation periods may start to run upon successive purchases of property.[38] Such a problem arose in *Perry v. Tendring District Council*.[39] Here Judge Newey QC, following *Pirelli*, held that where the plaintiff purchased the property after the damage occurred, he would, quite apart from the question of limitation, not have any action in negligence against the defendant because the plaintiff did not have any interest in the property at the

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35 For a discussion on insurance specifically designed to tackle the difficulties of latent defects, see Minogue & Mc Closkey, *Latent Defects Insurance: A Viable Alternative?* Solicitors Journal, 19 June 1992, p.600.

36 See Jones, *op. cit.*, note 15 *supra*, at pp.571-574.

37 [1979] Ch. 384.

38 See Robertson, *Defective Premises and Subsequent Purchasers* [1983] 99 LQR 559, Street, *Damage by Subsidence: The Conveyancing Problem* [1979] Conv. 241.

39 [1985] 1 EGLR 260.

time when the cause of action accrued.[40] The principle involved has been stated thus:

> "The plaintiff in a case like the present is not in a position to sue when the defective work is done and approved if he does not own the house at the time, because it is trite law that there is no claim in tort for damage to property in which the plaintiff has no proprietary interest. Nor is there any legal doctrine by which, in the absence of an assignment, he can be said to have bought the house with a claim for negligence built in and the limitation period already running, because it is equally trite law that there is no claim in tort for damage to property which a plaintiff does own if it occurred whilst he did not."[41]

3.32 Section 3 of the *Latent Damage Act, 1986* deals with the problem by providing that where a cause of action has already accrued, and another person acquires an interest in the property after the original cause of action has accrued, but before the material facts[42] about the damage are known to anyone who, at the time he first has knowledge of those facts,[43] has any interest in the property, a fresh cause of action accrues to the person acquiring the interest at the date of acquisition. For limitation purposes, the cause of action is deemed to have accrued when the original cause of action accrued.[44] This is a legal fiction, conflicting with the axiom that time cannot run against a plaintiff who, lacking a proprietary interest, has no claim.[45] The drafting of this section has been criticised as being too wide.[46] It has been noted that it is not fair that the purchaser's rights are determined solely by the state of knowledge of persons previously interested in the particular subject matter.

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40 (that being the date when the damage occurred).

41 Spenser, *A House Built on Sand...* (1976) 35 CLJ 222, 223.

42 Defined by section 3(5) as: "such facts about the damage as would lead a reasonable person who has an interest in the damaged property at the time when those facts became known to him to consider 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".

43 A person's knowledge is defined to include constructive knowledge - s.3(6) of the *Latent Damage Act, 1986*.

44 *Latent Damage Act, 1986*, section 3(2)(b).

45 *Margarine Union GmbH v. Cambay Prince Steamship Co. Ltd.* [1969] 1 QB 219, 250 *per* Roskill J.; *Sutherland Shire Council v. Heyman* (1985) 157 CLR 424, 493 *per* Brennan J.; *Leigh & Sillivan Ltd. v. Aliakmon Shipping Co. Ltd.* [1986] 1 AC 785 (HL), 809-810 *per* Lord Brandon.

46 Mullany, *op. cit.* note 15 *supra*, at p.357; Griew, (1986) 136 NLJ 1201.

Scotland

(a) Overview of Scots Law

3.33 Scottish law uses both the concept of prescription, which originated in Roman law and is found in civil law jurisdictions such as France and Germany, and that of limitation, which is derived from English Law. Prescription is a legal presumption of abandonment or satisfaction of the claim, meaning that prescription periods can extinguish the plaintiffs rights. Limitation, on the other hand, merely bars the remedy.[47] At present the Scottish law on prescription and limitation is primarily contained in the *Prescription and Limitation (Scotland) Act, 1973*, the *Prescription and Limitation (Scotland) Act, 1984*[48], section 12 of the *Law Reform (Miscellaneous Provisions)(Scotland) Act, 1985* and by the *Prescription Act, 1987.*

(b) The Prescription and Limitation (Scotland) Act, 1973

3.34 The 1973 Act introduced three statutory schemes which provid rules of prescription/limitation in relation to an obligation to make reparation.

3.35 Under the first scheme, an obligation (whether arising from any enactment, or from any rule of law, or from or by reason of any breach of a contract or promise) to make reparation for damage sustained (subject to the exceptions below) expires under the five-year short negative prescription.

3.36 The second scheme imposes a three-year limitation period for the bringing of a reparation action where the damages claimed consist of or include damages in respect of personal injuries or death resulting from such injuries (other than where caused by a defective product), and in respect of defamation, a limitation period as provided-for in sections 17-23 of the Act.

3.37 The third scheme, applicable to defective products under the *Consumer Protection Act, 1987* [49] imposes a three-year limitation period exists for bringing a claim for reparation for damage involving death or personal injury, or for damage to or destruction of property (other than the defective product itself), caused by a defective product. The main relevant statutory provisions are sections 7(2) and 22A-22D of the Act[50].

3.38 It is the first scheme that concerns us in the present discussion.

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47 See note. 33 *supra.*

48 Prescription and Limitation of Actions - Report on Personal Injuries Actions and Private International Law Questions (1983) Scottish Law Commission No. 74.

49 Implementing the EEC Directive (85/374/EEC) providing for strict liability for defective products.

50 As incorporated by Sched. 1 Part II of the 1987 Act.

3.39 The five-year short negative prescription was introduced by section 6 of the 1973 Act. Section 6 provides that if after "the appropriate date" an obligation to which the section applies[51] has subsisted for a continuous period of five years without any relevant claim having been made in relation to the obligation, and without any relevant acknowledgment of the obligation, then as from the expiration of that period the obligation shall be extinguished. The short negative prescription applies primarily to the areas of law corresponding to contract, tort and restitution in English law.[52] The "appropriate date" identifies, as the starting point for the running of the prescriptive period, "the date when the obligation becomes enforceable".[53] The obligation does not become enforceable until some loss, injury or damage caused by an act, neglect or default has been sustained.[54] It has been held that this provision requires that there must have been concurrence between the damage and the act, neglect or default.[55] Subsection (1) reflects this.

3.40 Subsection (2) deals with the situation where, as a result of a continuing act, neglect or default, damage has occurred before the cessation of that act, neglect, or default. In such a situation the damage is deemed to have occurred on the date when the act, neglect or default ceases. This later date then constitutes the date when the obligation becomes enforceable for the purposes of fixing the start of the prescriptive period.

3.41 Subsection (3) introduces a discoverability test in relation to short negative prescription where there is latent damage. This applies to obligations to make reparation for injury,[56] loss or damage caused by an act, neglect or default. It was intended that this subsection should reflect the policy put forward by the Scottish Law Commission in its 1970 Report,[57] i.e. that where damage arising from an act, neglect or default is not immediately ascertainable, the starting point for the running of prescription should be the date when that damage is or could with reasonable diligence have been discovered by the claimant.

3.42 It has been noted that it is questionable whether or not subsection (3) accurately reflects this policy.[58] The dictum of Lord McDonald, in *Dunfermline District Council v Blyth and Blyth Associates*[59] offered a wider

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51 Schedule 1 to the Act lists the relevant obligations.

52 Law Commission, *op. cit.*, note 15 *supra*, at para. 10.10.

53 The Prescription and Limitation (Scotland) Act, 1973, S.6(3).

54 *Ibid.*, s.11.

55 *Dunlop v. McGowans and Others* 1979 SC 22 and 1980 SC(HL)73.

56 This does not include personal injury, which is governed by the amended sections 17 and 18 of the 1973 Act inserted by section 2 of the Prescription and Limitation (Scotland) Act 1984.

57 Scottish Law Commission, Report no.15: *Reform of the Law Relating to Prescription and Limitation of Actions* (1970), paras. 97-98.

58 Scottish Law Commission, Report no.122: *Prescription and Limitation of Actions (Latent Damage and Other Related Issues* (1989) para. 2-8.

59 1985 SLT 345.

interpretation of the terms of the subsection:

> "They mean loss, injury or damage caused not only by the act, neglect or default of someone, but also giving rise to an obligation to make reparation. In other words the creditor must not only know that he has suffered loss, but that this has occurred in circumstances giving rise to an obligation upon someone (who may not be immediately identifiable) to make reparation to him. From that date he has five years in which to identify the person concerned and bring his claim against him. Counsel were agreed that there was, so far, no authority on this matter and, although not essential to my decision, I offer this interpretation of s.11(1) and (3) of the 1973 Act for what it is worth."

3.43 It would seem from this interpretation that before time starts to run the pursuer must have actual or constructive knowledge of the damage sustained and the act, neglect or default which gave rise to the damage. Furthermore, the phrase "in circumstances giving rise to an obligation upon someone (who may not be immediately identifiable) to make reparation to him" connotes knowledge of the legal significance of the events, which in turn suggests some knowledge of the relevant law.[60] This can be contrasted with English law, where knowledge of the legal significance of the facts is not required.[61] Likewise such knowledge is not required in this jurisdiction in the case of personal injuries.[62] The Scottish position is obviously more favourable to the pursuer, in that the running of time will be delayed until he knows of the legal significance.

3.44 This advantage is off-set by the fact that knowledge of the defendant's identity is not relevant. This can similarly be contrasted with the English and Irish approaches.

3.45 Subsections (4) and (5) of section 6 provide that the running of the short negative prescription in relation to any obligation prescribable thereunder will be postponed or suspended for any period during which the claimant is induced to refrain from making a relevant claim because of the defender's fraudulent actings, or through error induced by his words or conduct (providing neither was discoverable with reasonable diligence by the claimant), or where the original claimant is under a legal disability.

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60 Law Commission, *op. cit.*, note 15 *supra*, para. 10.14.

61 *Limitation Act, 1980*, s.14(A)9.

62 The "knowledge" that is required to start time running for the limitation period is outlined in s.2 of the *Statute of Limitations (Amendment) Act, 1991.*

(c) Proposals for Reform by the Scottish Law Commission

3.46 In 1989, the Scottish Law Commission published a Report dealing with latent damage and related issues.[63] Whilst this Report has not yet been implemented, many recommendations were made in relation to the existing law governing the short negative prescription that merit some consideration.

3.47 Numerous recommendations were made in respect of the existing discoverability formula contained in section 6 of the 1973 Act.[64]

3.48 This discoverability formula includes knowledge of the damage sustained as a consequence of an act, neglect or default. As was previously pointed out by the Commission,[65] this formula fails to indicate the severity of damage required to be within the claimant's knowledge before time starts to run against him. Thus where, for example, minor cracks develop in a new construction followed years later by more serious defects, time will run when the minor defect is discovered, or could with reasonable diligence have been discovered.

3.49 In order to overcome this difficulty the Commission recommended that the discoverablility formula should provide that the damage within the claimant's actual or constructive knowledge must be sufficiently serious to justify his bringing an action for damages on the assumption that the defender does not dispute liability and is able to satisfy a decree.[66] Such a provision is to be found in the *Latent Damage Act, 1986*, the difficulties of which have already been outlined. The issues arising from the *obiter* opinion of Lord McDonald in the *Dunfermline District Council* case were also considered by the Commission. Following on from the learned judge's opinion it appears that knowledge of the cause of action sustained already forms part of the discoverability formula under section 11(3) of the 1973 Act. The Commission favoured placing this matter beyond doubt.[67] Knowledge of the cause of damage already forms part of the discoverability formula applicable to the second and third schemes outlined above. In order to minimise fragmentation in this area of law (and to place Lord McDonald's interpretation on a statutory footing), it recommended that knowledge that the loss, injury or damage was attributable in whole or in part to an act or omission[68] should be included in the discoverability formula.[69]

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63 *op. cit.*, note 58 *supra*.

64 *ibid.*, paras 2.17-2.80.

65 Consultative Memorandum on Prescription and Limitation of Actions (Latent Damage) No.74, para. 4.7.

66 *op. cit.*, note 58 *supra*, at para. 2.25. A similar formula is adopted under s.17(2)(b)(i) of the 1973 Act for personal injury claims. Since the Commission was "concerned to discourage further fragmentation in the rules of prescription/limitation where practicable", the similar approach was favoured; para. 2.24.

67 Para. 2.32.

68 It was recommended that the words "act, neglect or default" be replaced by the words "act or omission" which are consistent with the limitation rules applicable to personal injury claims arising under s.17 of the 1973 Act, thus again helping to minimise fragmentation, para. 2.15.

69 Para. 2.36.

3.50 As mentioned above, knowledge of the defender's identity is not relevant under the existing law. The Commission recommended that this knowledge be included in the discoverability formula.[70] It justified this approach by referring to the problems of identification which had arisen previously in court actions involving personal injury claims[71] instituted before knowledge of the defender's identity formed part of the discoverability formula in fixing the start of the three-year limitation period.[72] Such problems were particularly apparent where the responsible party was one of a number of linked companies. For example, in *Comer v. James Scott & Co. (Electrical Engineers) Ltd.*[73] the evidence disclosed that there were no less than seven companies registered with the Registrar of Companies whose name began with James Scott. The Commission were of the opinion that the problem of linked companies was just as likely to arise where the reparation claim involved damage to property.[74]

3.51 The Commission also recommended that knowledge of whether an action lies in law in respect of an act or omission should be expressed to be irrelevant.[75]

3.52 In relation to the test for imputing knowledge, the Commission considered that any new legislation should not contain any reference to seeking expert advice.[76] Instead it considered that the courts should be relied upon to decide in particular cases what knowledge can be reasonably imputed to the claimant.

3.53 There is at present no judicial discretion to extend or disapply the short negative prescription period. In its Report of 1989, the Commission expressed the view that the exercise of such a discretion would give rise to an unacceptable degree of uncertainty as to the period during which the defender is at risk, with a possible adverse effect on the insurance facilities available to cover such risk, and accordingly the option of a discretion was rejected.[77]

3.54 Scots law also contains a long negative prescription, introduced by section 7 of 1973 Act. Section 7(1) provides that if, after the date when any obligation to which that section applies has become enforceable, the obligation has subsisted for a continuous period of twenty years without any relevant claim having been made in relation to the obligation and without the obligation having

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70 Para. 2.44.

71 See *Love v. Haran Sealant Services Ltd.* 1979 SC 279; *Kerr v. JA Stewart(Plant) Ltd. & Another* 1976 SC 120; and *Comer v. James Scott & Co. (Electrical Engineers) Ltd.* 1978 SLT 235.

72 S. 17(2)(b)(iii) of the 1973 Act introduced by s.2 of the 1984 Act.

73 1978 SLT 235.

74 *op. cit.*, note 58 *supra*, at para. 2.38.

75 *ibid.*, paras. 2.52-2.55.

76 *ibid.*, para. 2.64. *Cf.* s.2 of the Statute of Limitations (Amendment) Act 1991; s.14A(10)(b) of the *Limitations Act, 1980* [England and Wales].

77 *ibid.*, 2.81-2.83.

been relevantly acknowledged, then as from the expiration of that period the obligation shall be extinguished. This section expressly applies to claims which are subject to the five-year short negative prescription period.[78]

3.55 Although in most cases an obligation to make reparation - prescribable under the five-year period - will have been extinguished long before the expiry of the twenty-year period, the long period will come into operation in relation to such an obligation where the short negative prescription only starts to run in the last five years of the long negative prescription i.e. where latent damage has occurred. In such a situation, the short negative prescription might still be running when the long negative prescription expires, in which case the long negative prescription will extinguish the claim, effectively acting as a 'long stop'. No judicial discretion exists to extend or disapply the prescription period, and the Scottish Law Commission has supported the continuation of this state of affairs, citing in its favour the greater certainty as to the defender's period of risk and the avoidance of stale claims.[79]

3.56 The long prescriptive period runs (a) from the date of occurrence of damage (whether or not discoverable at that time) as a consequence of some act, neglect or default or (b) where, as a result of a continuing act, neglect or default, damage has occurred before the cessation of that act, neglect or default, from the date that act, neglect or default ceases.[80] With the date of damage as starting point, an arbitrary distinction is made between those defenders who are able to take advantage of the long negative prescription in undiscoverable damage occurs, and those, where the occurrence of damage is delayed, who are not.[81] The Scottish Law Commission identified three possible options for the starting point - the date of the act, neglect or default, the date when damage occurs, or the date of 'completion' - and although it favoured the adoption of only one starting point for the long negative prescription, so as to avoid unnecessary complication, the Commission also considered the option of operating one starting point for claims involving latent damage to property, and a different starting point for other latent damage claims.[82] The date of completion as starting point was rejected on the basis that it would most probably prove problematic to apply concepts such as 'delivery' or 'completion' to situations involving latent damage which arise outside the context of the construction or engineering industries.[83]

3.57 Whilst the selection of the date of the act, neglect or default as the starting point was considered to offer fewer evidential problems than the selection of the date when damage occurs, the Commission acknowledged that

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78 *Prescription and Limitation (Scotland) Act, 1973*, s.7(2).

79 *op. cit.*, note 58 *supra*, at para. 3.13.

80 Section 11 of the 1973 Act.

81 See Jones, *op. cit.*, note 15 *supra*, at p.573.

82 *op. cit*, note 58 *supra*, at para. 3.21.

83 ibid., paras 3.22-3.29.

the long negative prescription could start to run, and might even expire, before the obligation to make reparation has become enforceable.[84]

3.58 Ultimately the Commission favoured the view that if the long negative prescription is to remain a prescription of obligations at all, it should not be able to extinguish an obligation before it has become enforceable[85] and accordingly recommended that the date of damage should be retained as the starting point.

3.59 The twenty-year prescription is not suspended to take account of any time during which the claimant is induced to refrain from making a relevant claim because of the defender's fraudulent actings, or through error induced by his words or conduct, or during the claimant's legal disability.[86] The possibility of suspending the long negative prescription period for disability was rejected by the Commission in its Report. Such a rejection was linked to the view that the twenty-year period was too long,[87] and should be replaced by a period of fifteen years. This offered a degree of certainty as to the defender's period of risk. (If a shorter period was favoured (such as ten years) then this *would* have been subject to postponement or suspension).[88]

3.60 Finally, the question of the accrual of actions to subsequent purchasers was discussed by the Commission in its Consultative Memorandum[89] but no final recommendation was ultimately put forward.[90] In the course of their discussion the Commission indicated a preference for the type of reform adopted in the (UK) *Latent Damage Act, 1986*. It was provisionally proposed that time should begin to run against subsequent purchasers from the date all the relevant facts became discoverable rather than when they acquired an interest in the property in question.[91]

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84 *Ibid.*, paras 3.30-3.31. *Cf.* S.14B of the *Limitations Act, 1980.*

85 *Ibid.*, para. 3.33.

86 Ss. 7 and 14(1)(b) of the 1973 Act.

87 The Commission referred to the Report on Limitations which was published for discussion in 1986 by the Institute of Law Research and Reform of Edmonton, Alberta. This Report recommended a long stop provision not exceeding 10 years; see paras 2.194-2.198.

88 *op. cit*, note 58 *supra*, paras. 3.43-3.45.

89 Consultative Memorandum No. 74; See Scottish Law Commission, *Prescription and Limitation of Actions (Latent Damage)* (1987), paras. 4.89-4.100.

90 Report No. 122(1989) paras 2.84-2.86.

91 Consultative Memorandum No. 74, para. 4.100.

Canada

3.61 As the English Law Commission has recently noted,[92] nearly all the common law Canadian jurisdictions now have some form of rule which prevents the limitation period running when the cause of action is not capable of being discovered, although this has come about in a variety of ways.

(a) British Columbia

3.62 The law relating to limitations in British Colombia is contained in the *Limitation Act, RSBC 1979.* Section 3 provides for three basic fixed-year limitation periods and a fourth period of indefinite duration. All actions covered by the Act are assigned a particular period. Section 3(1)(a) provides that in relation to actions for damages in respect of injury to person or property, including economic loss arising from such injury, whether based on contract, tort or statutory duty, a person shall not commence proceedings after the expiration of two years after the date on which the right to do so arose. However, actions for professional negligence or negligent misrepresentation which do not result in physical injury to person or property are subject to a six-year limitation period laid down in section 3(4) which applies to all actions not specifically provided for in the Act. As Mullany has noted,[93] this distinction would appear to be undesirable. An action against a building professional whose negligence caused a building to deteriorate or collapse is subject to a two-year limitation period, whilst an action against a solicitor who negligently fails to lodge a caveat so that title to the building is lost can be commenced up to six years after the event causing the loss. The legislation creates what would appear to be an unnecessary distinction between physical damage and economic loss.

3.63 In any event, these limitation periods must be read in the light of section 6(3) of the Act which states that time does not begin to run (in respect of claims arising from damage to property and professional negligence) until:

> "the identity of the defendant is known to [the plaintiff] 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

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92 *op. cit.*, note 15 *supra*, at para. 10.90.

93 *op. cit.*, note 15 *supra*, at p.363.

ought, in his own interests and taking his circumstances into account, to be able to bring an action."

3.64 For the purposes of section 6(3), "facts" are deemed to 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."[94]

3.65 Thus if a claimant becomes aware of his claim after the accrual date, section 6 introduces a discoverability test in his favour. However the postponement of actions in negligence for purely economic loss until the cause of action is discovered or reasonably discoverable is only permitted for actions regarding professional negligence.[95] This anomaly could be clarified by deleting the words "professional negligence" in s.6(3) and substituting "for economic loss arising from breach of a duty of care, whether the duty arises in tort or contract or by statute".[96]

3.66 The legislation also attempts to deal with the problem of subsequent purchasers. Section 6(4)(c) attributes the knowledge or means of knowledge of a predecessor in title to a subsequent owner where the subsequent owner "claims through" a predecessor. In the case of *City of Kamloops v. Nielsen*,[97] the City sought to utilise this provision by arguing that the original owner's knowledge could be imputed to the plaintiffs who were accordingly statute-barred due to the original owner's failure to litigate. Wilson J. rejected this argument on the basis that the plaintiff was not "claiming through" the original owners, who had been fully aware of the structural defects in the house and had ignored a 'stop work' order issued by the City.[98] The learned judge was of the opinion that a subsequent purchaser had a separate cause of action unless a prior owner could have taken action against the defendant.[99]

3.67 A general 'long stop' provision is contained in section 8 of the Act. Section 8(1) provides:

> "no action to which this Act applies shall be brought after the

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94 *Limitation Act, RSBC 1979*, s.6(4)(b).

95 This is so because only those actions referred to in s.6(3) are subject to the discoverability principle. These are actions: for personal injury; for damage to property; for professional negligence; based on fraud or deceit; in which material facts relating to the cause of action have been wilfully concealed; for relief from the consequences of a mistake; brought under the Family Compensation Act; or for breach of trust not within subsection(1).

96 Mullany, *op. cit.*, note 15 *supra*, at p.364.

97 (1984) 10 DLR (4th) 641.

98 *ibid.*, at 686-687

99 *ibid.*

expiration of 30 years from the date on which the right to do so arose..."

3.68 This is subject to an exception in medical negligence cases, where the long-stop period is six years. Such a provision is problematic because this period runs from when the right to bring an action arises. However, the fact that a discoverability test now exists (as confirmed by the *Kamloops* decision[100]) means that plaintiffs may have as long as 30 years after the damage is first discovered to bring their actions.[101] This possible scenario led the Law Reform Commission of British Columbia to recommend that the long-stop limitation period should be reduced to ten years, or 30 years in cases of fraud.[102]

(b) Alberta

3.69 The *Limitations Act, 1996* introduces a discoverability test for all actions in Alberta. The Act incorporates the recommendations of the Alberta Law Reform Institute.[103] Section 3(1) of the Act provides:

> "Subject to section 11, if a claimant does not seek a remedial order within
>
> (a) 10 years after the date on which the claimant first knew, or in his circumstances ought to have known,
>
> (i) that the injury[104] for which he seeks a remedial order had occurred,
> (ii) that the injury was attributable to conduct of the defendant, and
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> (b) 10 years after the claim arose,
>
> whichever period expires first,
>
> the defendant, upon pleading this Act as a defence, is entitled to immunity from liability in respect of the claim."[105]

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100 See also *Consumer Glass Co Ltd. v. Foundation Co of Canada* (1985) 20 DLR (4th) 126 (Ont CA), *Central Trustee Co. of Canada* 1987 31 DLR (4th) 481 (SC).

101 See *Bera v. Marr* (1986) 3 WWR442 (BCCA).

102 LRC 112: *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (1990).

103 Report No. 55: *Limitations* (1989).

104 Defined to include personal injuries, property damage, economic loss, non-performance of an obligation and the breach of a duty; section 1(f).

105 Based on the recommendations of the Alberta Law Reform Institute: *Limitations*, Report No.55(1989) pp.33-35.

3.70 The commencement of the period depends exclusively on the notion of discoverability, thus greatly reducing the problems associated with accrual rules.[106]

3.71 All forms of loss are covered by the Act: "injury" is defined as including "personal injury, property damage and economic loss".[107] As Mullany has noted,[108] if this approach had not been adopted, claims not subject to the discoverability rule would have had to be governed by fixed limitation periods beginning with the accrual of the particular claim, thus presenting the difficulties encountered in the past.

3.72 This part of the legislation has much to commend it. The simplicity of the requirements necessary to trigger the running of the discoverability period is attractive. The claimant must be aware that an injury had occurred, that it was attributable to the defendant, and that this injury warranted him suing. The claimant is fixed with knowledge which "in his circumstances" he ought to have had: the standard of the reasonable man applies.

3.73 In contrast to the position under s.3(1) where the claimant's knowledge starts the discoverability time period to run, s.3(2)(a) states that time can run against a successive owner if a predecessor had acquired or ought to have acquired the knowledge prescribed in s.3(1)(a). The Institute justified this approach in its Report by viewing it as the responsibility of the claimant to "ensure that he has obtained any knowledge possessed by his predecessor or obtained appropriate guidelines".[109] The concerns of Lord Fraser in *Pirelli* relating to subsequent purchasers would appear to arise again. It is questionable whether this approach will deal with the matter in a satisfactory manner.

3.74 The second of the two limitation periods, the ten-year ultimate period, runs from the accrual of the claim ("when the claim arose"). Section 3(3) specifies when the ultimate limitation period begins for five types of claims for which the accrual rules have been particularly troublesome in the past. S.3(3)(a) states that:

> "a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions arises when the conduct terminates or the last act or omission occurs."

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106 The courts in Alberta refused to apply a discoverability test until one was enacted by the Legislature: see *Costigan v. Ruzicka*(1985), 13 DLR(4th) 368 (Alta CA).

107 *Limitations Act, 1996*, s.1(f).

108 Mullany, *op. cit.*, note 15 *supra*, at p.370.

109 Alberta Law Reform Institute, Report No. 55 (1989): *Limitations*, p. 67.

3.75 Thus the concept of a "continuing breach" which has caused difficulty in England[110] is legislated for, and accordingly a "breach of duty" test can operate effectively under the Alberta scheme.

(c) Newfoundland

3.76 The Newfoundland Law Reform Commission, in its *Report on Limitation of Actions* (1986),[111] proposed that in a wide range of actions, including personal injury, property damage and professional negligence, 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".[112] 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."

3.77 These recommendations were implemented by the *Limitations Act, 1995*. It is interesting to note that the elements of knowledge required to start the limitation period are not defined, but must include knowledge that the plaintiff had a cause of action as a matter of law.[113] A two-year limitation period applies in relation to actions involving personal injury, property damage or professional negligence.[114] The legislation also contains a double 'long stop'. As mentioned above, the first of these is a period of ten years from the relevant act or omission, and applies only to actions to which the discoverability provisions apply.[115] This may be overridden by postponing factors such as disability. The second 'long stop' is thirty years from the date of the event giving rise to the cause of action. This applies to all claims and cannot be overridden.[116]

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110 See *Midland Bank Trust Co. Ltd. v. Hett Stubbs and Kemp* [1979] Ch. 384.

111 NLRC-R1, p.7. 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.

112 NLRC - R1, p.7. The other proposed actions governed by the discoverability test were actions for relief from the consequences of a mistake, actions under the *Fatal Accidents Act*, and actions for non-fraudulent breaches of trust. These are now contained in s.14(1) of the *Limitations Act, 1995*.

113 *Cf. Limitation Act, 1980* (UK), s.14A(9).

114 Based on the recommendations contained in NLRC-R1, p.4. See also NLRC-WP1, pp. 63-64.

115 *Limitations Act, 1995*, s.14(3).

116 *ibid.*, s.22.

(d) Ontario

3.78 A comprehensive research project on the law on limitation of actions was initiated by the Ontario Law Reform Commission in 1965 and culminated in a Report (1969).[117] It recommended that a limitation period of two years should apply to actions in tort and contract relating to personal injury, property damage and professional negligence. In cases where the claimant was unaware that he had a cause of action an extension procedure was recommended. The extension would be granted where a potential plaintiff was unaware of the material facts which - if he were a reasonable person knowing those facts and having obtained appropriate advice with respect to them - would indicate a reasonable prospect of success and of an award of damages sufficient to justify bringing it.[118] The Commission recommended that applications for extension should be made to the court having 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.[119]

3.79 A Bill to revise the *Limitations Act, RSO 1960* was introduced in 1983 by the Attorney General into the Ontario Parliament.[120] Ultimately the Bill did not receive the necessary parliamentary support. The Bill drew heavily on the British Columbian *Limitation Act, RSBC 1979*. 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 from the date on which the cause of action arose.

3.80 Section 10 of the Bill 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;[121]
> (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

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117 Ontario Law Reform Commission, Report on Limitation of Actions (1969).

118 *Ibid.*, p. 108.

119 *Ibid.*

120 See Ontario Bill 160, *An Act to Revise the Limitation Act.* The text is contained in NLRC-WP1, *Working Paper on Limitation of Actions*, (1985) pp. 432-450.

121 Section 9 refers to fraud or fraudulent breach of trust to which the trustee was a party or of which he had knowledge.

(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 had 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 Bill did not provide for any 'long stop' period.

3.81 Whilst the recommendations of the Law Reform Commission have never been implemented,[122] the Canadian Bar Association - Ontario (CBAO) submitted a Report in 1989 suggesting that the current Act be repealed and new legislation enacted.[123] This proposed:

- a general two-year "catch-all" limitation period running from the date the cause of action arose;
- a discoverability rule applicable to this period providing that an action will not be barred if the claimant proves on the balance of probabilities that he commenced an action within two years of the date that he discovered or ought to have discovered the facts giving rise to the cause of action; and
- an ultimate limitation period or 'long stop' not shorter than twenty years and not longer than thirty.

Thus far, these recommendations have not been implemented.[124]

3.82 Thus, whilst a discoverability test has not been incorporated into the statutory law of Ontario, the Courts have nevertheless applied one, construing a reference to the date when a cause of action accrued as a reference to the date when the cause of action was reasonably discoverable.[125]

(e) Saskatchewan

3.83 The Saskatchewan Law Reform Commission recommended in 1989 that the basic limitation period for all contractual and tortious actions (except for those actions in debt and for conversion or detention of property) should be two

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122 The Commission closed down in December 1996 due to Government cutbacks.

123 CBAO, *Submission to the Attorney General for Ontario Re: Preliminary Report on the Reform of the Law of Limitations of Actions*, (1989).

124 Bill 99 of 1992 was a further unsuccessful attempt to reform the law.

125 *Consumers Glass Co. Ltd. v. Foundation Co. of Canada Ltd.* (1985) 20 DLR (4th) 126 (Ont CA).

years commencing at the date on which the right to bring the action arose.[126] A discoverability test was also recommended. Section 1(1) of the proposed Act states:

> "(1) The running of time with respect to the limitation period fixed by this Act for an action to which this section applies is postponed and does not commence to run against a plaintiff until he knows, or in all the circumstances of the case he ought to know:
>
> (a) the identity of the defendant;
> (b) the facts upon which his action is founded; and
> (c) that the injury suffered was significant."[127]

3.84 An injury is deemed to be significant if a person would reasonably have considered it sufficiently serious to justify instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.[128] The difficulties of such a construction have previously been considered in discussion of the (UK) *Latent Damage Act, 1986.*

3.85 The Commission also recommended an ultimate limitation period of thirty years, deemed to run from the date on which the right to bring the action arises.[129] The Commission appears to have paid little regard to the decision of the British Columbian Court of Appeal in *Bera v. Marr*[130] where it was held that this means "the date upon which the cause of action was complete; the date upon which all the elements of the cause of action had come into existence". When this is read in conjunction with a discoverability rule, plaintiffs may have the entire length of the ultimate limitation period within which to bring their action. These recommendations have not yet been acted upon by the Legislature.

(f) Other Canadian Jurisdictions

3.86 In Nova Scotia, by virtue of s.3(2) of the *Limitation of Actions Act, RSNS 1989*, the court has a discretion to disapply the limitation period in actions for contract or tort if it appears to be equitable to do so having regard to the degree to which the limitation period prejudices the plaintiff and the degree to which a decision to disapply would prejudice the defendant. The court must take certain stated factors into account.[131] There is no 'long stop', but the

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126 Saskatchewan Law Reform Commission, *Proposals for a New Limitation of Actions Act: Report to the Minister for Justice* (1989) p.65.

127 *ibid.*, p.70.

128 *ibid.*, p.71 (s.10(3)).

129 *ibid.*, p.73 (s.12(1)).

130 (1986) 3 WWR442.

131 *Limitation of Actions Act, RSNS 1989*, s.3(4).

discretion to disapply may not be exercised where the limitation period is ten years or longer.

3.87 In Manitoba the court has a discretion to grant the plaintiff leave to proceed out of time if it is satisfied that not more than twelve months have elapsed between the date on which the applicant first knew or ought to have known of all the material facts of a decisive character upon which the action is based and the date of the application for leave.[132]

The United States of America

(a) Overview of Accrual and Discoverability under US Law

3.88 Limitation periods in the United States are stipulated by both state and federal legislation. Historically the limitation period for actions founded on contract has been six years, but this has been shortened in many states.[133] The limitation period will usually commence on the date of the breach rather than on the date of any damage consequent on the breach.[134] In tort, time will not generally run against a plaintiff until a cause of action has accrued.[135] It follows that the statute of limitations is generally not held to run for the purposes of a negligence action until some damage has occurred.[136] As Keeton has noted,[137] real difficulties have resulted where, as is frequently the case in actions for medical malpractice and in products liability actions involving toxic drugs or chemicals, the statute has run before the plaintiff discovers that he has suffered injury, and sometimes even before the plaintiff has suffered the injury.

3.89 The older approach to cases of latent damage was a literal application of the statute to bar actions; the accepted rationale was the protection of potential defendants, not only against fictitious claims, but against the difficulty of obtaining evidence after the lapse of time even in genuine cases, the hardship upon the plaintiff being regarded as merely part of the price to be paid for such protection.[138] Accordingly, the undiscoverability of a cause of action would not prevent a limitation period from running.[139]

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132 *Limitation of Actions Act, RSM 1989*, s.14(1).

133 *Williston on Contracts*, 3rd ed. (1978), para. 2020.

134 *ibid.*, para. 2021A.

135 American Law Institute, *Second Restatement of the Law - Torts* (1979) vol. 4 para. 899.

136 See, eg, *White v. Schnoebelen*, (1941) 91 N.H. 273, 18 A 2d 185; *Cannon v. Sears, Roebuck & Co*, (1978) 374 Mass 739, 374 NE 2d 582; *Locke v. Johns-Manville Corp.*, 275 SE 2d 900 (Va.1981).

137 *Prosser and Keeton on Torts*, 5th ed. (1984), p.165.

138 *Hawks v. De Hart* (1966) 296 Va. 810, 146 SE 2d 187; *Vaughn v. Langmack* (1964) 236 Or. 542, 390 P 2d 142; *Pasquale v. Chandler* (1966) 350 Mass. 450, 215 NE 2d 319.

139 See, eg, *Faulkner v. Huie* 168 SW 2d 839 (Ark 1943).

3.90 The decision of the Supreme Court in *Urie v. Thompson*[140] began a trend towards the recognition of a discoverability test. In this case the court applied the discoverability test under the *Federal Employer's Liability Act*, in respect of the plaintiff's contracting of silicosis. Judge Rutledge, delivering the opinion of the court, wrote:

> "If [the plaintiff] 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 [him] 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."[141]

3.91 There is no uniform approach in the US in relation to the general problem of latent damage.[142] The lack of uniformity is evident among jurisdictions, or within some jurisdictions, across the range of possible tortious claims.[143] A few states have a general statutory discoverability test.[144] For example in Missouri:

> "[a] cause of action [in tort or contract] shall not be deemed to accrue when the wrong is done or when the technical breach of duty occurs, but when the damage resulting therefrom is substantial and is capable of ascertainment...so that all resulting damage may be recovered and complete relief obtained."[145]

3.92 Although the courts have been willing to introduce discoverability and accordingly postpone the running of limitation periods until plaintiffs have been able to discover the damage which they had suffered, they have been unwilling

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140 337 US 163 (1949).

141 *ibid.*, at 169-170.

142 American Law Institute, *Second Restatement of the Law - Tort* (1979) vol. 4, para. 899, comment (e).

143 See Law Commission, *op. cit.*, note 15 *supra*, para. 10.109.

144 *ibid.*

145 RSMo 1986, s.516.100.

to do so where a plaintiff, though aware of the damage, has been unaware of the existence of a claim in law. This was the decision reached in *United States v. Kubrick*.[146]

3.93 In this case, the Supreme Court confronted the question of the time of the accrual of a cause of action for medical malpractice. In April 1968, the plaintiff had been given an antibiotic, neomycin, by Veteran's 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. He applied unsuccessfully for an increase in his government disability, the Veteran's Administration stating (in September 1969) that his case had been proper. In June 1971, a doctor specifically told him that neomycin had been improperly administered and was the cause of his disability. The Veteran's Administration turned down his appeal in August 1972.

3.95 The plaintiff took legal proceedings. He was successful in federal district court and on appeal to the Third Circuit Court of Appeals, but the Supreme Court reversed. The majority view was that since 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.

3.96 In relation to professional negligence, there has been a growing recognition of a discoverability rule. Whilst the development of the rule was initiated in the medical malpractice area,[147] the applicability of the rule has now spread to negligence actions against accountants,[148] architects and builders[149] and lawyers,[150] to name but a few.

3.97 The traditional approach to limitation in negligence cases concerning product liability has been for the limitation period to commence when the cause of action accrues, that is when injury occurs to the plaintiff.[151] But there has

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146 444 US 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 WNew 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 UL Rev 1428 (1980).

147 See e.g. *Toth v. Lenk* 330 NE 2d 336 (Ind 1975).

148 See e.g. *Safo v. Van Denburgh* 599 P 2d 181 (Ariz 1979).

149 See *Chrischilles v. Griswold* 150 NW 2d 94 (Iowa 1967).

150 See e.g. *Skidmore & Hall v. Rottmann* 450 NE 2d 684 (Ohio 1983), *Hendrickson v. Sears* 310 NE 2d 131 (Mass 1974). See also John & Higgins, *The New Legal Malpractice Statute of Repose and Pre-existing Claims* (1993) 81 Illinois Bar J. 522, Koffler, *Legal Malpractice Statutes of Limitation: A Critical Analysis of a Burgeoning Crisis* (1986) 20 Akron L. Rev. 209.

151 *Cannon v. Sears, Roebuck & Co. 374 NE 2d 582 (Mass 1978).*

been an increasing tendency for the courts to apply discoverability.[152] Where an action has been brought on the basis of a breach of warranty, the cause of action accrues when the goods are delivered, and the Uniform Commercial Code provides for a limitation period, for breach of warranty, of four years from the date of delivery.[153] But some courts have also applied a discoverability test to breaches of warranty and held that the cause of action accrues when the plaintiff knew, or ought to have known, of the breach.[154]

(b) Statutes of Repose ('Long Stop' Provisions) in the US

3.98 The widening acceptance of the discoverability rule has not been without cost, however, since the rule leaves defendants open to suit indefinitely. The great majority of states have enacted legislation placing an outer time-limit on negligence and related claims. These statutes, known as 'statutes of repose' are 'long stop' legislative provisions that can cut short the operation of the discoverability rule. The periods range broadly from five years to twelve years.[155] Many of the statutes contain an absolute time limit, regardless of when the plaintiff discovers his cause of action. Other statutes "embody a flexible outer time 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."[156]

3.99 Statutes of repose affecting architects and other similar professionals[157] are more widespread than those relating to product liability.[158] Indeed, by 1985, almost every jurisdiction in the United States (save Arizona, Iowa, Kansas and Vermont) had enacted special statutes of repose for those involved in designing and building real property.[159]

3.100 In the context of an Irish comparison, it is interesting to note that

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152 See e.g. *Franzen v. Deere & Co.* 334 NW2d 730 (Iowa 1983); *Yuskick v. Eli Lily & Co.* 573 F Supp 1558 (US Dist Ct 1983); *Anthony v. Abbott Laboratories* 490 A 2d 43 (RI 1985). See also Reynolds, *Statute of Limitations Problems in Product Liability Cases - Exercises in Privity, Symmetry and Repose* (1985) 38 Okla. L. Rev. 667, Birnhaum, *"First Breath's Last Gasp": The Discovery Rule in Products Liability Cases* (1977) 13 Forum 279.

153 Paras. 2-725(1) and (2).

154 *Parrish v. BF Goodrich Co* 207 NW2d 422 (Mich 1972). *Cf. Everhart v. Rich's Inc* 194 SE 2d 425 (Ga 1972).

155 See LRC-21 *op. cit.*, note 15 *supra*, at p.31.

156 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. and Commerce 449, at 458 (1981).

157 See Vardaro, *Statutes of Repose - The Design Professional's Defence to Perpetual Liability* 10 St John's J. of Legal Commentary 697 (1995).

158 Randell, *Comment: Due Process Challenges to Statutes of Repose* 40 Southwestern LJ 997 (1986). See also Werber, *The Constitutional Dimension of a National Products Liability Statute of Repose* 40 Villanova L. Rev. 985 (1995), O'Connor, *The Product Liability Statute of Repose: A Case of Premature Burial* 66 The Florida Bar Journal 9 (1992), Winograd, *Products Liability: A Critical Analysis of the Statute of Repose* 63 NY State Bar J. 14 (1991).

159 *Ibid.*, at 1000.

statutes of repose have provoked constitutional challenge in the US on a number of fronts, principally that they offend against guarantees of equal protection,[160] due process[161] and access to the courts[162].

3.101 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 builder lose his right of action when he would not do so if some other category of defendant were involved?

3.102 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 such as preventing the assertion of claims involving stale evidence and protecting the defendant from open-ended liability, as well as keeping down insurance rates.[163]

3.103 As regards the argument based on access to the courts, most of these claims have been unsuccessful. They have been rejected on the following grounds:

- that the right to bring an action is not a vested right and legislatures have the power to abrogate a non-vested right;
- that open court provisions guarantee access only for "legal injuries" and plaintiffs injured after the expiration of the statutory period have no cognizable injuries; and
- that open court provisions are mandates to the judiciary rather than the legislature.[164]

However, it has been noted that:

> "A growing number of courts has found that statutes of repose violate open court 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."[165]

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160 *Cf.* e.g. *Heath v. Sears, Roebuck & Co.* 123 NH 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).

161 Randell, *Comment: Due Process Challenges to Statutes of Repose*, (1986) 40 Southwestern LJ 997.

162 See Sullivan, *Note, Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts*, (1983) 63 Neb. L.Rev. 150, *Neagle v. Nelson*, 685 SW 2d 11 (Tex. Sup. Ct. 1983), noted by Holbrook, *Reaffirming the Discovery Rule in Medical Malpracitice Actions*, (1985) 28 S. Tex. L. Rev. 139.

163 See Herring Hicks, *Note, The Constitutionality of Statutes of Repose: Federalism Reigns*, (1985) 38 Van. L. Rev. 627, at 637, 642-643.

164 *ibid.*, at 645.

165 *ibid.*, at 646.

Australia

3.105 Each Australian State and Territory has its own specific limitations legislation. It has been noted that most of the current legislation in Australia is based on the early English legislation.[166] For example, Victoria, Queensland and Tasmania adopted the reforms put in place in England by the *Limitation Act, 1939*. Up to recently, the law relating to limitation had not been the subject of much consideration by the various Law Reform Commissions in Australia. However this has changed with several analyses having been undertaken in recent years.

3.106 The law in Australia is characterised by an absence of any discoverability provisions in relation to latent defects. There is a limited discoverability rule in relation to personal injuries.

(a) South Australia

3.107 The *Limitation Act, 1935* contains the law relating to limitation of actions in South Australia. The limitation period for actions for breach of contract and tort is six years running from the date on which the cause of action accrues.[167] Two exceptions exist in relation to limitation periods in tort. A period of three years from the date of accrual of the cause of action is applied to actions for personal injuries,[168] while a two-year period applies to actions for slander.[169]

3.108 In 1970, the Law Reform Committee of South Australia recommended "that the power to extend time be given in relation to any cause of action arising in any jurisdiction of the court".[170] This recommendation was implemented by s.48 which authorises the court to extend a limitation period beginning at accrual to such an extent and upon such terms as the justice of the case may require if it is satisfied that one or other of the preconditions in s.48(3)(b) exist. It must be shown:

> (i) that the facts material to the plaintiff's case were not ascertained by him until some point of time occurring within twelve months before the expiration of that period and that the action was instituted within twelve months after the ascertainment of those facts by the plaintiff; or

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166 See Law Commission, *op. cit.*, note 15 *supra*, at para. 10.53

167 *South Australia Limitation Act, 1935*, s.35(a) and (c). Where a contract is by way of deed, the limitation period is twelve years.

168 *ibid.*, s.36(1).

169 *ibid.*, s.37.

170 Law Reform Committee of South Australia, *Twelfth Report - Law Relating to Limitation of Time for Bringing Actions* (1970) p.3

(ii) that the plaintiff's failure to institute the action within the period of limitation resulted from representations or conduct of the defendant, or a person whom the plaintiff reasonably believed to be acting on behalf of the defendant, and was reasonable in view of those representations or that conduct and any other relevant circumstances;

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

3.109 In cases of defective building work, a ten-year limitation period exists beyond which no action may be brought.[171]

(b) Australian Capital Territory

3.110 By virtue of s.11(1) of the *Limitation Ordinance, 1985*, the limitation period for most actions in contract and tort is six years running from the date on which the cause of action accrues.

3.111 The Attorney General's Department recommended in 1984 that the courts of the ACT should be given a residual discretion to override a limitation period if it is just to do so.[172] This was implemented by s.40(1) of the *Limitation Ordinance, 1985* which provides that:

> "Subject to sub-section (2), where a person has a cause of action for latent damage to property or for economic loss in respect of such damage to property, the court may
>
> (a) if the court considers it just and reasonable to do so;
> (b) whether or not the limitation period applicable to that cause of action has expired; and
> (c) whether or not an action for such damage or loss has commenced;
>
> extend the limitation period in respect of which an action on that cause of action may be brought for such further period not exceeding 15 years from the day on which the act or omission that gave rise to the cause of action occurred as the court thinks fit."

3.112 Sub-section (2) directs the courts, when exercising their discretion, to have regard to all the circumstances of the case including a specific list of guidelines.

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171 *South Australia Development Act, 1993*, s.73

172 See Attorney General's Department, *Proposals for the Reform and Modernisation of the Laws of Limitation in the Australian Capital Territory*, Working Paper (1984) p.38

(c) Western Australia

3.113 By virtue of s.38(1)(c) of the *Limitation Act, 1935* the limitation period for actions based on breach of contract or damages in tort is six years from the date on which the cause of action accrues. A discoverability test was introduced for asbestos-related personal injury claims by virtue of the Acts Amendment (Asbestos Related Diseases) Act 1983,[173] following on from the recommendations made by the Law Reform Commission of Western Australia in its 1982 Report dealing with latent injury and disease.[174]

3.114 A report on the law relating to the limitation and notice of actions was tabled in Parliament in May 1997.[175] In this report the Commission recommended that all claims (with the exception of actions for recovery of land, actions in respect of mortgages of land and actions for recovery of tax) should be subject to two general limitation periods:

(i) a three-year discovery period, which begins to run when the damage becomes discoverable; and
(ii) a fifteen-year ultimate limitation period, which runs from the date on which the claim arose.

3.115 The Commission recognised that the two limitation periods will not always achieve a fair result in every case, noting that some forms of damage tend (e.g., sexual abuse or asbestos-related disease) have a long latency period. Accordingly it recommended that the courts should be able to order that either the discovery period or the ultimate limitation period be extended in the interests of justice, but that such orders should be made only in exceptional circumstances, where the prejudice to the defendant in having to defend an action after the normal litigation period has expired, and the general public interest in the finality of litigation, are outweighed by other factors. In exercising this discretion, the court would be able to take all the circumstances of the case into account, including a number of circumstances specifically listed in the report. Such proposals are a rare example of a 'long stop' being recommended together with a judicial discretion to extend this ultimate limitation period. The proposals have not yet been implemented by Parliament.

(d) Queensland

3.116 Section 10 of the *Limitation of Actions Act, 1974* states that the limitation period for actions based on breach of contract or damages in tort is six years from the date on which the cause of action accrues. A period of three years from the date of accrual of the cause of action applies to actions for

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173 *Limitation Act, 1935*, s38A

174 Part I Report (1982)

175 *Report on Limitation and Notice of Actions* Project No 36-Part II (1997).

personal injuries.[176] In addition, in personal injury actions, if any material fact of a decisive character is only discoverable after the beginning of the final year of the limitation period, the court may order that the limitation period be extended to a date one year after the date of discoverability.

3.117 The Queensland Law Reform Commission has recently published a discussion paper relating to this Act.[177] The Commission made a preliminary recommendation that the the general principle, that the limitation period commences on the date when the cause of action accrues, be replaced.[178]

(e) Northern Territory

3.118 Limitation of actions in the Northern Territory is governed by the *Limitation Act, 1981.* The limitation period for actions for breach of contract and most actions in tort is three years, rather than the more common six years.[179] There is provision for an extended limitation period in cases of latent damage to such an extent and upon such terms as the court thinks fit, where the plaintiff becomes aware of material facts only after the date twelve months before the expiration of the limitation period, and commences proceedings within twelve months of his or her discovery of the relevant facts.[180] Whilst a 'long stop' is not used, there is a limit on the extent to which disability can suspend the running of the limitation period.[181]

(f) Tasmania

3.119 The *Limitation Act, 1974* contains the law relating to limitation periods in Tasmania. The limitation period for actions for breach of contract and most actions in tort is six years.[182] A limitation period of three years exists for actions in respect of personal injuries.[183] The court may extend the limitation period of three years applicable to personal injury actions for a period of no more than a further three years if it is considered just and reasonable to do so. Where disability suspends the running of the limitation period in relation to land-related claims, there is a 30-year ultimate limitation period running from the date of accrual.[184]

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176 *Limitation of Actions Act, 1974*, s.11.

177 QLRC, Discussion Paper WP No 50, *Review of the Limitation of Actions Act 1974 (QLD).*

178 *ibid.*, p.44.

179 *Limitation Act, 1981*, s.12(1).

180 *ibid.*, s.44.

181 *ibid.*, s.36(4).

182 *Limitation Act, 1974*, s.4.

183 *ibid.*, s5(1).

184 ibid., s.26(4).

(g) New South Wales

3.120 In New South Wales the standard limitation period is again six years from the date of the accrual of the cause of action.[185] The court has discretion to extend the limitation period in cases of latent damage where it is just and reasonable to do so, but this is confined to personal injury claims. The court may extend the period for such time as it thinks fit, providing that an application is made by the plaintiff within three years of his or her knowledge of the nature or extent of the injury, or of the connection between the injury and the defendant's act or omission.[186]

(h) Victoria

3.121 Again the limitation period is six years from the date of accrual of the cause of action in actions for breach of contract and damages in tort.[187] A period of three years applies to actions for personal injuries.[188] The court can extend this three-year period if it is just and equitable to do so.

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185 *Limitation Act, 1969*, s.14(1).

186 *ibid.*, ss. 60G, 60I(1).

187 *Limitation of Actions Act, 1958*, s.5(1)(a).

188 *ibid.*, s.5(1A).

New Zealand

3.122 The relevant legislation in New Zealand is the *Limitation Act, 1950*, which is based on the English *Limitation Act, 1939*. The limitation period for an action founded on simple contract is six years from the date on which the cause of action accrued, that is from the date of the breach.[189] The period for an action in tort (other than actions in respect of personal injuries or defamation) is also six years from the date of the accrual of the cause of action.[190] As in other common law jurisdictions, a tort actionable on proof of damage, such as negligence, accrues when the plaintiff suffers damage, rather than when the act or omission takes place.

3.123 The issue of latent damage has posed serious problems in New Zealand. The New Zealand Law Commission has noted that latent damage "has been the subject of much judicial and academic controversy" and was "at least indirectly responsible" for the ministerial reference to them on the law of limitation.[191] Prior to the Commission's considerations, the area of latent damage received considerable attention in the courts.

3.124 In relation to building defects, the New Zealand Court of Appeal moved towards a discoverability test in the case of *Mount Albert Borough Council v. Johnson*.[192] The building in question was completed in 1966 following the issue of a building permit by the Council and an inspection by the Council inspector. A flat in the building was sold in 1966 and remedial work was done in 1967 after the initial purchaser complained of cracks. In 1968 the flat was sold to an intermediate purchaser who sold to the claimant in 1970. The claimant noticed cracks from about the end of 1970 and the defects worsened during the 1971-1973 period at the end of which a consulting engineer inspected the premises and recommended $10,000NZ worth of remedial work. At the end of 1973, the claimant sued the Council. In affirming the Supreme Court's decision to award damages, the Court of Appeal held that there was separate and distinct damage in 1967 and then again in 1970, and that a limitation defence in respect of the 1970 damage could not succeed because the cause of action and negligence arose when the defect became apparent or manifest.

3.125 After the decision in *Pirelli* the High Court, in cases such as *Askin v. Knox*,[193] followed the English law. However in *Paaske v. Sydney Construction*[194] (a case based on very similar facts to *Johnson*) it was held that the *Pirelli* decision was applicable to the cause of action against the builder, but that the *Johnson* decision should prevail in relation to the cause of action against

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189 *Limitation Act, 1950*, s.4(1)(a).

190 *ibid.*

191 Report No 6, *Limitation Defences in Civil Proceedings*, NZLC R6 (1988) para. 62.

192 [1979] 2 NZLR 234.

193 Unreported, Dunedin, 3 March 1986.

194 Unreported, Auckland, 24 June 1983.

the builder.[195] At the appeal stage of *Askin*[196], the Court of Appeal declined to decide which direction New Zealand law should take, although the judgment indicates that the reasoning in *Pirelli* may not be "irresistible" and notes the "obviously unjust" results produced by that decision.

3.126 In the case of *Invercargill City Council v. Hamlin*, a discoverability test was applied in relation to economic loss caused by the negligent approval of the foundations of a house by a local authority, first by a majority of the New Zealand Court of Appeal,[197] and then by the Privy Council.[198] The facts of that case were as follows. In 1972 the plaintiff entered into a contract with a builder under which the plaintiff bought a plot of land and the builder contracted to build a house on it. The negligent inspection took place later the same year. The foundations were defective but the plaintiff did not discover this fact until 1989, when an engineer advised him. The plaintiff commenced proceedings in 1990. It was held by the Court of Appeal and the Privy Council that the limitation period started in 1989, since it had been found that the plaintiff could not reasonably be expected to have discovered the defect sooner. In reaching this decision, the courts refused to follow *Pirelli*. The scope of the Privy Council decision was expressly limited to latent defects in buildings,[199] and it was recognised that application of a discoverability rule was especially logical where a plaintiff was recovering damages for economic loss because the loss did not actually occur until it had become discoverable.[200]

3.127 As a result of the growth in construction litigation the New Zealand Parliament enacted s.91 of the *Building Act, 1991*, which introduced a 'long stop' of ten years from the date of the act or omission on which the claim is based, in respect of proceedings arising from building work in the construction, alteration, demolition or removal of buildings, or the exercise of building control functions in relation thereto.

3.128 The Court of Appeal's pleas for legislative reform in *Askin* have not yet been implemented. As noted above, the New Zealand Law Commission has recently recommended the introduction of a new limitation scheme, the three central features of which are:

(i) a standard three-year limitation period commencing on the date of the act or omission which is the subject of the claim;
(ii) this period to be extended in certain circumstances, in particular where the claimant shows absence of knowledge of relevant matters of fact;

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195 See Report No 6: *Limitation Defences In Civil Proceedings*, NZLC R6 (1988), para. 76.

196 Reported at [1989] 1 NZLR 248.

197 [1994] 3 NZLR 513.

198 [1996] AC 624.

199 [1996] AC 624, 644.

200 [1996] AC 624, 648.

(iii) a 'long stop' limitation period of fifteen years measured from the date of the act or omission and overriding postponements or extensions of the standard period.

3.129 As is the case with the new legislation in Alberta, the proposal to introduce one uniform period is attractive in that the need to differentiate between types of actions is avoided, as is the need to allot different fixed limitation periods to each type.

3.130 However, a difficulty arises in relation to the suggested limitation period commencing on the date of the act or omission which is the subject of the claim. This commencement date will be earlier than the date of accrual of the cause of action in respect of, for example, torts actionable only on proof of damage (negligence being the prime example) when the damage does not coincide with the defendant's act or omission. As the English Law Commission has pointed out,[201] it seems anomalous that a limitation period should start running before the plaintiff can recover damages. The problem of the "continuing breach" is not solved by the recommendations.

3.131 In relation to subsequent purchasers, the Commission approached the problem by placing emphasis on the fact that the ultimate protection for a potential defendant is the fifteen-year 'long stop', but did not consider fully the complexities of this issue.

3.132 No discretion to extend the ultimate limitation period of fifteen years was recommended by the Commission.

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201 *op. cit.*, note 15 *supra*, at para. 10.68, fn. 195.

B: CIVIL LAW JURISDICTIONS

France[202]

3.133 French law uses a concept of prescription rather than limitation. The central features are contained in Articles 2219 to 2283 of the *Code Civil.*

3.134 Prescription exists in two forms; namely, extinctive and acquisitive. Extinctive prescription eliminates obligations through the non-exercise of rights for a certain period and performs the same function as does the law of limitation in common law jurisdictions.[203]

3.135 The basic period of prescription is 30 years.[204] Time starts to run from the date of enforceability of the cause of action.[205] However, time will not start to run against someone who is not capable of acting until the day when this impossibility has disappeared ("*Contra non valentem agere non currit praescriptio*"). This includes the situation where the interested party is not immediately aware of the facts on the basis of which the right arises.

3.136 Whilst the 30-year period remains the residual period for contractual and quasi-contractual actions, there are numerous exceptions. For example, a ten-year period is imposed for obligations incurred in the course of business transactions, unless a shorter period is provided for elsewhere.[206] A five-year period applies to actions for payment of periodic debts such as wages, rent, maintenance or interest.[207] A number of company law actions are subject to the three-year period.[208] Most actions founded on insurance contracts are subject to a two-year period.[209]

3.137 A special regime applies to construction contracts. In French construction law, acceptance terminates for most purposes the ordinary contractual obligations of the contractor.[210] Most obligations become covered by the three statutory guarantees specified in Article 1792 of the *Code Civil.*

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202 The following summary is drawn heavily from the Law Commission's Consultation Paper No 151, *Limitation of Actions*, paras 10.125 - 10.143. This is in turn drawn from V. Bandrac in E. H. Hondius (ed.), *Extinctive Prescription: On the Limitation of Actions, Reports to the XIVth Congress of the International Academy of Comparative Law* (1995) (hereafter '*Extinctive Prescription*').

203 Acquisitive prescription produces rights through the exercise of possession for a certain period eg. adverse possession.

204 Art 2262 c civ.

205 Cass civ, 21 oct 1908, S 1908, 1, 449; 11 déc 1918, S 1921, 1, 161.

206 Art 189 c com.

207 Art 2277 c civ.

208 J-Cl civil, arts 2270-2278.

209 Art L 114-1, c civ.

210 See P.D.V. Morris, *Comparative Contract Law: England, France, Germany* (1996), p.186.

These provide protection for the client as well as to subsequent purchasers.[211] They extend for periods of one, two or ten years,[212] which run from the date of the formal act of acceptance. Thus, the two-year period applies to claims in respect of hidden damage to items separate from the building, while the ten-year period applies to claims in respect of hidden damage to the structure and inseparable fittings which renders them unsuitable for their purpose.[213] In regard to hidden damage not covered by the guarantees, such as minor faults not affecting the solidity of the works or their suitability for what they were intended, or work which falls outside the classification of construction, such as renovation, a ten-year period applies.[214]

3.138 Most claims based on "*responsabilité extra-contractuelle*" (analagous to tort claims at common law) are statute-barred ten years after the damage in question becomes apparent.[215] Again, there are certain exceptions to this ten-year period.

3.139 No general reform of the relevant provisions of the *Code* has been made since 1804. Particular problems have been dealt with by a mass of specific legislation with the result that a large number of different prescription periods exist. As Bandrac has noted, tendencies in French law have been towards expansion of the areas covered by extinctive prescription accompanied by a shortening of the periods applied. This increasing restrictiveness has been counterbalanced by the relaxation of the conditions under which exceptions can be made. Thus, along with shorter time-limits, there has also been introduced a later starting date and the expansion of the grounds of interruption and suspension.[216]

Germany[217]

3.140 German law also uses a concept of prescription rather than limitation. In Germany extinctive prescription does not extinguish a claim but instead gives the person claimed to be liable a countervailing right to refuse performance.

3.141 Book One of the German Civil Code, the *Bundesgesetzbuch (BGB)* provides the general rules on prescription. Specific provisions are found in the other four books of the *BGB*, as well as the other statutes on private law.

3.142 As in France, the codificatory approach has produced a vast number

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211 *Ibid.*

212 Arts 1792-6, 2270 c civ.

213 Different rules apply in the case of works for public authorities, see PDV Marsh, *op. cit.*, p.186.

214 Art 2270 c civ.

215 Art 2270-1, c civ.

216 V. Bandrac in E.H. Hondius, *op. cit.*, note 204 *supra*, at pp.148-149.

217 Much of the following summary is based on R Zimmermann, E H Hondius (ed), *Extinctive Prescription.*

of narrowly defined individual causes of action. Consequently, a correspondingly wide variety of prescription periods have arisen.

3.143 The basic period of prescription for actions in contract is 30 years.[218] Time runs from the date when the claim becomes enforceable; in most contract cases, that is when performance is due.[219] It is irrelevant that the damage was not discoverable.[220] This period has been criticised as far too long and it has been stated that "it effectively constitutes an exemption from prescription".[221] It was the partial realisation that this period was excessive even at the time of the drafting of the *BGB* which, by way of reaction, led to the beginning of the diversification of prescriptive periods.[222] Accordingly the *BGB* prescribes a two-year period for claims founded upon a range of "everyday" transactions (such as claims against innkeepers, lawyers, notaries and medical practitioners).[223] Interestingly, time runs from the end of the calendar year in which the action accrues.[224] The rationale behind this is to avoid multiple prescription periods running in respect of a series of minor events. Thus business people are relieved from constantly scrutinising all their outstanding debts for prescription. This can instead be done at the year's end.[225]

3.144 Subsequent legislative action has created many further exceptions, and as a result the 30-year period is no longer the general period for most actions in contract.

3.145 In relation to construction contracts, they can either be covered by the special provisions laid down in Article 138 of the *BGB*, the general provisions of the *BGB*, or by the detailed provisions contained in the German Standard Conditions for Construction Works (*VOB*).[226] Use of the *VOB* is compulsory for public construction works and it may be applied by agreement in the private sector.[227] Time begins to run from the formal act of acceptance.

3.146 In relation to hidden defects, Article 638 of the *BGB* provides for prescription periods of one year for work on land, five years for buildings, and six months in all other cases of works contracts. With time running from acceptance, serious difficulties arise due to the absence of a discoverability provision combined with the relative brevity of the period. The perceived injustices of this have driven the courts to interpret Article 638 narrowly. This

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218 Art 195 BGB.

219 Art 198 I BGB.

220 This has been the subject of criticism; see R Zimmermann, *op. cit.*, pp.195-196.

221 *Ibid.*

222 See Law Commission, *op. cit.*, note 15 *supra*, para. 10.149.

223 Art 196 BGB.

224 Art 201 BGB.

225 See G. Dannemann, *Introduction to German Civil and Commercial Law* (1993), p.34.

226 *Verdiningsordung fur Bauleistungen.*

227 P.D.V. Marsh, *op. cit.*, note 210 *supra*, at p.222.

can result in arbitrary contrasts between the six-month period under Article 638 and the general thirty-year period under Article 195.

3.147 Claims for delict are barred three years from the date at which the injured party has knowledge of the injury and of the identity of the person bound to make compensation, and in other cases, in thirty years from the delict.[228] German law will usually prevent the use of a claim in tort to circumvent a contractual limitation period. The Commission for the Revision of the Law of Obligations has recently recommended that where claims are concurrent, the prescription period relating to the contractual claim should generally prevail.[229]

3.148 The Commission also proposed a greatly streamlined system of prescription which nonetheless retained considerable differentiation.[230] Interestingly, the Commission rejected the introduction of a subjective discoverability criterion for contractual claims in general. It recommended that the prescriptive regime for delict (including an element of discoverabilty) be extended to include contractual claims for compensation for death, personal injury or restriction of liberty.[231]

3.149 The original academic proposals for reform on which the Commission's work was based had recommended a more radical course, adopting a subjective discoverability criterion for commencement, and a period of two years for almost all actions.[232]

Italy[233]

3.150 Italian law distinguishes between *'decadenza'* (time limitation) and *'prescrizione'* (prescription). One has a case of *decadenza* when a certain act is not carried out by a certain date (e.g., as specified in a contract). One has a case of *prescrizione* when the holder of a right fails to exercise it within the time-period laid down by law. The ordinary term of prescription is ten years from the day on which *the right could have been exercised*, implying that time will not begin to run until the plaintiff is aware that he has a cause of action, thus eliminating the difficulties of latent damage. A twenty-year period applies in respect of rights over real property whilst shorter periods apply in respect of other rights such as claims for damages, payment of annuities and interest, and company matters. The time-limits for prescription can be suspended under certain exceptional conditions as set out in Articles 2941 - 2942.

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228 Article 852(1) BGB.

229 See ref. in Law Commission, *op. cit.*, note 15 *supra*, at para. 10.161.

230 See R. Zimmermann in E.H. Hondius, *op. cit.*, note 202 *supra*, at p.194.

231 Art 201 BGB-DC.

232 See R. Zimmermann in E.H. Hondius, *op. cit.*, note 202 *supra*, at p.174.

233 See Sheridan & Cameron, *EC Legal Systems: An Introductory Guide* (1992), Italy - p.25.

Austria[234]

3.151 The Austrian law of limitation is noteworthy because a discoverabilty test has been incorporated. Rules relating to limitation are laid down primarily in the limitation provisions of the substantive law, in particular ss.1451 *et seq.* of the Civil Code and in numerous special provisions under the substantive law. A tort action for damages can only be brought within three years from the date on which the identity of the defendant and the existence of the damage suffered became known to the claimant.

Norway[235]

3.152 Norwegian limitation law is also noteworthy in this context. The difficulties posed by latent defects or loss have been addressed by legislation. Whilst the general limitation period is three years from the earliest day due performance could have been claimed[236], the limitation period for claims in tort is the shorter of:

- twenty years after the damage was caused; or
- ten years after the damage appeared; or
- three years after the claimant should have been aware of the damage and who was responsible.

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234 *ibid.*, Austria - p.24.

235 *ibid.*, Norway - p.19..

236 Limitation Act - '*Foreldelseslovens*', arts 2-3.

C: CONCLUDING COMMENTS

3.153 It can be seen that the introduction of a discoverability test has been favoured in most jurisdictions where an evaluation of the law has been carried out. This discoverability test has been tempered by the requirement of a 'long stop' or ultimate limitation period generally varying between ten and fifteen years in length.

3.154 Whilst judicial discretion to extend the limitation period exists in various jurisdictions (mainly confined to those within Australia) it is apparent that such discretion exists primarily in jurisdictions where no discoverability test has been adopted, in order to temper the general limitation period running from the date of accrual.

3.155 Broadly, than, there are two approaches adopted. Either:

- the limitation period begins to run from the date of accrual of the cause of action, and there is a judicial discretion to extend the limitation period where the interests of justice so require it;

or

- the limitation period begins to run from the date of discoverability and is tempered by a 'long stop' or ultimate limitation period.

3.156 It is instructive to note the assertion of Mullany:

> "There is no existing Act or proposed Act or amendments which sufficiently disposes of every problem raised by the issue of limitation of action and latent damage. Thus, in the search for an adequate resolution, one is forced to adopt a piecemeal approach, extracting the most attractive aspects of the present and proposed reforms and discarding those elements which do not promote the objectives of fairness, comprehensibility, clarity, organisation and simplicity."[237]

3.157 Clearly, our existing law of limitation fails to deal adequately with the problem of latent defects, and accordingly one of the two approaches outlined above (or some blending of both) needs to be adopted.

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237 Mullany, *Reform of the Law of Latent Damage* (1991) 54 MLR 349, 381.

CHAPTER 4: AN EVALUATION OF THE OPTIONS FOR REFORM

1. Overview

(a) Introduction

4.01 The Commission is firmly of the opinion that the existing law is in urgent need of reform. At present, palpable injustice can and does occur in cases involving latent loss, where the cause of action is only discoverable after the limitation period has expired. It follows in our view that the law in relation to claims for non-personal injuries or damage in contract and tort does not achieve a fair balance between the rights of plaintiffs and defendants, and accordingly that greater latitude or flexibility should be introduced into the law to deal with meritorious claims. However, we are mindful of the fact that such latitude should only be introduced in a manner which will minimise any adverse consequences from the point of view of potential defendants. This is reflected in the provisional recommendations that follow.

(b) The Tension between the Quest for a Solution on this Topic and the Need to Ensure Coherence of Reform Across the Broader Field of the Law of Limitations

4.02 It has become apparent in the course of our research and deliberations that many of the options which we provisionally favour in relation to reform of the law bear no similarities with existing law on limitation particularly with respect to personal injuries. To hew to the model of reform eventually adopted by the Oireachtas in the context of personal injuries has the merit of consistency but falls short of what is required in the specific context of non-personal injuries. A conflict therefore arises between, on the one hand, the best approach to adopt in attempting to reform the law of limitation with respect to personal injuries and, on the other hand, the need to ensure that any recommendations are also consistent with the amendments already introduced by the *Statute of Limitations (Amendment) Act, 1991.*

4.03 In opting to identify the best solution to the problem at issue, we are mindful of the fact that many of our favoured approaches to reform of the law as it relates to latent damage may serve to fragment still further the existing law with respect to personal injury and other kinds of damage. Nevertheless, we are firmly of the opinion that all recommendations for law reform should be pitched at the highest possible level, even if this produces the unfortunate result that the consistency of legislation is sacrificed.

4.04 Our provisional recommendations in this Consultation Paper are

made solely with a view to ensuring that the law in this specific area is reformed as effectively as possible. However, we emphasise that effective law reform should not be carried out in a piecemeal manner. Standing apart from this reference, we would advocate a general review of the entire law in this area in order to obviate any fragmentation in the law which is a real concern in the context of the specific provisional recommendations we make relating to latent damage. This would ensure that the entire law on limitations could be examined (a task which is clearly outside our immediate terms of reference) with a view to formulating proposals for a core limitation regime, as has recently been proposed by the Law Commission of England and Wales.[1] Such a review would address the difficulties of latent damage as highlighted in this Consultation Paper, as well as other specific concerns with the existing law that have recently been raised.[2]

(c) Scope of Proposed Reform to Cover All Actions in Tort and Contract other than Actions in respect of Personal Injuries

4.05 Whilst it is apparent that the lack of an effective mechanism to deal with latent loss or damage is most acute in the tort of negligence, it can also arise in relation to other torts and in contract law. The English *Latent Damage Act, 1986* is expressly confined to negligence actions. We are of the provisional opinion that the justification for such a restriction is dubious. Furthermore, we interpret our terms of reference as including that branch of the law relating to restitution which is described as "quasi-contract" in the *Statute of Limitations, 1957.*

4.06 *We provisionally recommend that the scope of reform should extend to all actions in tort and contract in respect of damage other than personal injury.*

(d) Our Core Recommendation: The Need to Introduce a Discoverability Test in relation to the Limitation Period Applicable in Cases of Latent Damage other than Personal Injury

4.07 Having examined the operation of the *Statutes of Limitation, 1957 and 1991* we are of the opinion that the greatest difficulty that arises in cases of latent damage (other than personal injury) is posed by the limitation period running from the date of accrual of the cause of action. Where damage or loss is undiscovered or undiscoverable at this date, the claimant is placed at a disadvantage, and may be the victim of injustice when the limitation period expires prior to the discovery of a cause of action.

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1 Law Commission Consultation Paper No. 151, *Limitation of Actions* (1998) para 12.1 *et seq.*

2 See Nugent, *The Statute of Limitations in Sexual Abuse Cases* (1998) Vol. 3, The Bar Review, Issue 5, p.222.

4.08 *Accordingly, we provisionally recommend that a discoverability test should be introduced into Irish law to deal with cases in tort and contract where the loss or damage (other than personal injury) is latent.*

4.09 This recommendation would, if enacted, at least bring this aspect of the law on limitations into line with the position adopted in relation to personal injuries (*Statute of Limitations (Amendment) Act, 1991*) and defective products (*Liability for Defective Products Act, 1992*).

2. Parameters of the Recommended Discoverability Test

4.10 Several issues arise in the context of the proposed introduction of a discoverability test.

(a) Should the Date of Accrual Continue to Function as the Starting Point?

4.11 We must consider whether, with the introduction of date of discoverability as a starting point, the date of accrual should also be retained.

4.12 An approach based on discoverability only as the starting point for any limitation period has the advantage of simplicity, with the difficulties of interpretation relating to the accrual rules eliminated. Such an approach has recently been adopted in Alberta,[3] and its simplicity has been the subject of favourable academic comment.[4]

4.13 As we have seen, by virtue of section 11 of the 1957 Statute and section 3(1) of the 1991 Statute, accrual of a cause of action is deemed to be the starting-point of the limitation period. The latter provision is supplemented by a discoverability test in personal injuries cases.

4.14 *Two views exist within the Commission as to the retention of accrual as a starting point for the running of time in cases of latent damage (other than personal injury), along with the introduction of a discoverability test to temper its effects. Some Commissioners are of the provisional view that the abandonment of accrual as a starting point (and consequently an exclusive focus on discoverability) would be the better or neater solution, all things being equal. On the other hand, some Commissioners are of the provisional view that such a solution, no matter how justified in isolation, would only serve to accentuate the difference between the law of limitations in respect of personal injuries and that in respect of non-personal injuries and thus cause fragmentation in the law. On this view, accrual should be retained for the moment (tempered by discoverability) in order to avoid fragmentation and pending an overall reform of the law of limitation of actions.*

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3 *Limitations Act, RSA 1996*, s.3(1).

4 Mullany, *Reform of the Law of Latent Damage*, 54 MLR 349, 370.

Submissions as to whether accrual should be retained alongside discoverability are particularly welcome.

(b) How Long Should the Limitation Period Be Following Discoverability?

4.15 In attempting to decide upon an appropriate limitation period for the discoverability test, it is useful to look at the corresponding periods relating to personal injuries and defective products. A limitation period of three years from the date of discoverability applies to actions for damages related to the above. For reasons of parity, we are provisionally of the opinion that the appropriate limitation period in relation to latent defects in tort and contract for non-personal injuries or damage should also be three years.

4.16 *We provisionally recommend that a three-year limitation period should apply, running from the date of discoverability of the cause of action.*

4.17 In the case of limitation periods under existing law which run from the date of accrual rather than from the date of discoverability (i.e., where the damage is not latent), there does not appear to be any justification for amending the six-year period. Some practical examples may serve to highlight the effects of introducing the three-year discoverability period in cases in respect of latent damage other than personal injury (combined with the six-year period of limitation commencing from accrual):

- If discoverability occurs at the two-year point following accrual then the four remaining years of the normal six-year limitation period would continue to run.

- If discoverability occurs at the four-year point after accrual then the two remaining years of the six would run with one year added to make up the three-year discoverability period. In effect, the plaintiff would be allowed seven years within which to bring an action.

- If discoverability occurs after the six-year period following accrual then the discoverability period of three years would begin to run at the point of discoverability subject to an overall 'long stop' (see below).

(c) Should the Test of Discoverability Be Objective or Subjective or a Hybrid of the Two?

4.18 In attempting to decide what standard of reasonableness should be applied to the discoverability test, it is noteworthy that the *Statute of Limitations (Amendment) Act, 1991* contains an objective standard of reasonableness which also incorporates subjective elements.

4.19 Section 2(2) states:

> "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 expert advice which it is *reasonable for him* to seek." [emphasis added]

Section 2(3) states:

> "Notwithstanding subsection (2) of this section -
>
> (a) a person shall not be fixed under this section 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; and
>
> (b) a person injured shall not be fixed under this section with knowledge of a fact relevant to the injury which he has failed to acquire as a result of that injury."

4.20 Thus under this section reasonable diligence on the part of the plaintiff in establishing knowledge of the necessary facts is required. Unreasonable delay in consulting a doctor might leave a plaintiff fixed with date of knowledge earlier than the date on which he actually becomes aware of all the facts which constitute knowledge.

4.21 The Law Reform Commission previously opined (in the context of limitation law in cases involving latent personal injuries) that the test of reasonableness, whilst objective, "must take account of at least some aspects of the particular person's subjective experience."[5] Consequently, it was considered 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."[6]

4.22 A simple formulation has recently been introduced in Alberta. It represents an objective test containing a subjective element. Discoverability is

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5 LRC-21 (1987) *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries.*

6 *ibid.*

deemed to occur when the claimant first knew, or *in the circumstances* ought to have known, certain facts which set the limitation period running.[7]

4.23 On the other hand, an argument also exists for the elimination of any subjective element from the discoverability test. This argument is that the inclusion of any subjective element is justified only in the case of personal injuries, where the right of the plaintiff might be ascribed a greater weight than that of the defendant at least as an initial point of departure. Outside the realm of personal injuries, it can be argued that justification exists for the exclusion of any subjective element. The objective test is easily understood, and relatively certain. The addition of a subjective element may lead to more claims, and lengthier hearings. The introduction of a purely objective test is favoured by some of the Commissioners, who are of the opinion that no substantive injustice would result from such a test.

4.24 *Two views exist within the Commission as to the formulation of a test of discoverability. Some Commissioners provisionally favour a hybrid objective/subjective formulation along the lines of the Alberta Limitations Act, 1996 (whereby the discoverability period runs from the date when the claimant first knew or, in his circumstances, ought to have known, certain facts). However, some Commissioners provisionally favour the introduction of a purely objective test of discoverability. Submissions are particularly welcome as to whether the test of discoverability should be purely objective or objective with subjective elements and, if if the latter, as to which elements should be reckonable and how.*

(d) What Kind or Degree of Knowledge Should Trigger the Three-Year Limitation Period?

4.25 The definition of the knowledge required before time will start to run also requires consideration. The legislative precedent is contained in section 2 of the 1991 Statute. This section states that references to a person's date of knowledge are references to the date on which he first had knowledge of certain facts, namely:

> (a) that the person alleged to have been injured had been injured;
>
> (b) that the injury in question was significant;
>
> (c) 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;

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7 *Limitations Act, RSA 1996*, s.3(1) [emphasis added].

(d) the identity of the defendant; and

(e) 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 the action against the defendant.

4.26 This can be contrasted with a more straight-forward construction such as that found in the recent legislation adopted in Alberta.[8] Here time will not begin to run for the purpose of the limitation period applicable to the discoverability test until the claimant knows:

(i) that the injury for which he seeks a remedial order has occurred;

(ii) that the injury was attributable to the defendant; and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding.

Here "injury" is defined to include "personal injury, property damage or economic loss".

4.27 We are of the view that the present expression of knowledge relating to discoverability could be made clearer.

4.28 *Accordingly, we provisionally recommend the adoption of a straight-forward formulation of the facts, knowledge of which is necessary for time to start to run - along the lines of the formulation contained in the Alberta Limitations Act, 1996.*

3. Should the Three-Year Limitation Period Be Capped by a 'Long Stop' Provision?

4.30 We must now consider whether any new legislation should include a 'long stop' or ultimate limitation period, i.e. 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 cause of action.

4.31 It is important to note that the introduction of such a provision would not be without legislative precedent in this jurisdiction. As we have already noted, section 7(2)(a) of the *Liability for Defective Products Act, 1991* provides:

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8 *Cf.* note 3 *supra*.

"A right of action under this Act shall be extinguished upon the expiration of the 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."

That particular 'long stop' provision is, however, required by the terms of the EC Product Liability Directive and so is not, in itself, dispositive of the question at issue.

(a) The Case For a 'Long Stop'

4.32 The argument for the introduction of a 'long stop' or ultimate limitation period is centred on the principles of certainty and fairness - principles which justify orthodox limitation periods in the first instance. If a discoverability test is introduced, it may well be many years before a cause of action becomes discoverable. This is particularly the case where damage to property is concerned. Yet limitation periods are meant to ensure certainty, so that would-be defendants and their insurers can close the book on potential claims after a definite period of time. The ability to 'close the book' has the benefit of ensuring that insurance premia do not escalate excessively, as they might if defendants were exposed to the possibility of open-ended claims.[9]

4.33 The argument based on fairness is as follows. The introduction of a 'long stop' or ultimate limitation period would offset the obvious advantage that plaintiffs receive from a time- period which runs from the date of discoverability rather than the date of accrual. The presence of a 'long stop' would serve to balance the scales of justice more effectively.

(b) The Case Against a 'Long Stop'

4.34 The introduction of a 'long stop' provision in case of personal injury was previously considered by the Law Reform Commission in its report on latent personal injuries.[10] The Commission were of the opinion that the overriding objective of their other recommendations - to endeavour to prevent injustice arising from the absence of a "discoverability" test (as there then was) - could be frustrated in at least some cases if such a provision were to be introduced.[11] The Commission also pointed out that, however long or short the period settled on may be, it must of its nature be crude and arbitrary and have no regard to the

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9 For a discussion of insurance premia within tort law see Priest, *The Current Insurance Crisis and Modern Tort Law* (1987) 96 Yale L.J. 1521.

10 LRC-21, *op. cit.*, note 5 *supra.*

11 *ibid.*, p.48.

interests of justice as they arise in individual cases.[12]

4.35 It may well be that if a 'long stop' of X years is enacted, producers may be able to design a product with a planned obsolescence of (X + 1) years, thus defeating the purpose of the legislation. It is also important to stress that bodies corporate often change their corporate identity after a period of years, which again negatives the effect of any 'long stop'.

4.36 When it previously rejected the option of a 'long stop' in cases of latent personal injuries, the Commission pointed to the decision of the Supreme Court in *O' Domhnaill v. Merrick*[13] to the effect 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 proceedings as an abuse of the process of the Court, even where the limitation period has not expired.

4.37 The Commission again has occasion to acknowledge the validity of such arguments.

(c) Are There Any Constitutional Impediments with respect to the Introduction of a 'Long Stop'?

4.38 We are satisfied that the introduction of a 'long stop' would survive constitutional challenge. The concept of a discoverability test has already found favour with the judiciary as we have seen in Chapter 2. A 'long stop' which would counter-balance the discoverability provision would ensure that the constitutional rights of plaintiff and defendant are upheld equally.

4.39 The comments of the Supreme Court in *Touhy v. Courtney (No.2)*[14] are instructive in this regard. The Court was of the opinion that the Oireachtas, in legislating on limitation, was engaged in a balancing of constitutional rights and duties. In a challenge to the constitutional validity of any statute the role of the court was not to impose its own view of what the rights and duties should be; rather, the role of the court was:

> "to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights."[15]

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12 *ibid.*

13 [1984] IR 151. See also *Toal v. Duignan (No. 1)* [1991] ILRM 135.

14 [1994] 2 ILRM 503.

15 *ibid.*, at 514-515.

(d) On Balance We Favour the Arguments For a 'Long Stop'

4.40 The Commission is of the opinion that the arguments in favour of a 'long stop' outweigh those against it. Whilst the 'long stop' will undoubtedly result in a limited number of claims being defeated by its operation before the cause of action is discoverable, we view the overall balance that would be achieved by introducing a discoverability test tempered by a 'long stop' provision as far more favourable than that found under the existing law.

4.41 In favouring the introduction of such a provision, we note that this would differ from the provisions relating to latent personal injuries contained in the *Statute of Limitations (Amendment) Act, 1991* which does not similarly introduce a 'long stop' provision. We are nevertheless of the opinion that such a distinction can be justified on the basis that in cases of personal injury, the right of the plaintiff should be ascribed a greater weight than that of a defendant - at least as an initial point of departure.

4.42 While it is true that the Courts retain the jurisdiction under *O' Domhnaill v. Merrick* to strike out claims,[16] the introduction of a 'long stop' would provide an element of certainty that judicial discretion completely lacks. We have already noted in Chapter 1 that people should be entitled to have legal disputes resolved in a timely manner so that they can arrange their affairs in the knowledge that a claim can no longer be brought against them.

4.43 *We provisionally recommend the introduction of a 'long stop' or ultimate limitation period beyond which no action can lie, irrespective of whether or not the cause of action was discoverable at the expiration of this period.*

(e) How Long Should the 'Long Stop' Be?

4.44 It has been stated that the 'long stop' period "must not be so long that it has no useful effect and it must not be so short that it will cause injustice."[17]

4.45 The 'long stop' period applicable to actions relating to defective products is ten years.[18] A 'long stop' period of fifteen years applies to actions under the (UK) *Latent Damage Act, 1986.* On this question - albeit in the context of defective premises - it is instructive to note that the Law Reform Commission previously received representations from the Construction Industry Federation that no action should lie against a builder for defective building work

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16 See the comments of Hamilton CJ in *Primor v. Stokes Kennedy Crowley* [1996] 2 IR 459 concerning actions to dismiss for want of prosecution which are also relevant in this context.

17 24th Report, *Latent Damage* Cmnd. 9390 (1984) para. 4.13.

18 Liability for Defective Products Act 1991, section 7(2).

after a period of ten years had elapsed from the date of doing the work.[19]

4.46 We are of the opinion that a period of ten years is insufficient to cover many building cases, and in cases of professional advice, such as where a defective will or conveyance is at issue, the period is certainly too short.

4.47 Accordingly *we provisionally recommend that a 'long stop' of fifteen years should be introduced. Submissions are invited as to the length of the 'long stop' period.*

(f) When Should the 'Long Stop' Run From?

4.48 The question arises as to when the 'long stop' should run from. In England, by virtue of section 14(B) of the *Limitation Act, 1980*, time begins to run for the purpose of the 'long stop' when the defendant's breach of duty takes place. In *Midland Bank Trust Co. Ltd v. Hett, Stubbs and Kemp*,[20] the concept of a continuing breach was enunciated by Oliver J., whereby if a defendant is in a position to remedy the consequences of his negligence before damage occurs he could be regarded as being in continuing breach of duty, up to the point at which he ceases to have such control. This will usually be at the date when damage or loss occurs. As Jones has noted:

> "It would clearly be arbitrary that certain types of negligence should fall outside the terms of the 'long stop' but, more significantly, by creating a category of exceptions to the objectives of certainty and finality the concept of continuing breach would undermine the whole purpose of the 'long stop'."[21]

4.49 The difficulties raised by the *Midland Bank* decision could, it has been noted,[22] be resolved by skilful drafting, perhaps by deeming the breach of duty to have occurred when, but for the defendant's negligence, the duty should have been performed.

4.50 The alternative option is to deem the 'long stop' to commence when the cause of action accrues, which in the case of negligence is when damage occurs. This is the approach adopted in Scotland where ss. 7 and 11 of the *Prescription and Limitation (Scotland) Act, 1973* sets a twenty-year 'long stop' which runs from the date of damage. This construction is open to the criticism that it produces an arbitrary distinction between cases of latent damage, where the defendant may avail of the 'long stop', and certain cases of delayed damage, where the defendant may not.

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19 LRC-3 (1982) *Report on Defective Premises*, p.10.

20 [1979] Ch. 384.

21 Jones, *Latent Damage - Squaring the Circle?* 48 MLR 564, 572.

22 *ibid.*, at 574.

4.51 In Alberta, the 'long stop' commences "when the claim arose",[23] but specific provision is made for various types of claim, the question of the accrual of which has caused difficulty in the past,[24] such as continuing breaches.

4.52 We favour the approach adopted in Alberta. Accordingly *we provisionally recommend that, as a general rule, the 'long stop' should run from the date of accrual of the cause of action.*

4.53 *More specifically, in relation to construction cases, it should be provided that the 'long stop' commences to run from the date of completion or purported completion of the building or other work.*[25] As Mullany has noted, in the context of a building contract, a breach may occur:

(1) when the building was incorrectly designed;
(2) when the building, although correctly designed, was incorrectly drawn on the relevant plans;
(3) when plans, either incorrectly designed or incorrectly drawn, were submitted for the contractor's tender;
(4) when the defective building was constructed;
(5) when the building or that part of it containing the defect was improperly inspected; or
(6) when the building, while in a defective state, was handed over on completion.[26]

4.54 We recognise that the phenomenon of a continuing breach may cause particular difficulties with respect to the commencement of the 'long stop'. The normal rule would (and should) be that where a claim or a number of claims is based on a number of breaches of contract or torts resulting from a continuing course of conduct or a series of connected acts or omissions, the 'long stop' for each claim, like the ordinary period of limitations, should run from when the act or omission giving rise to it occurs. However we are concerned lest all colourable 'continuing breaches' extend the starting-date and therefore the effective period of the 'long stop' almost indefinitely.

4.55 The first type of case to be considered concerns torts actionable only upon proof of damage, e.g. the tort of negligence. The phenomenon of continuing breach would not appear to present a difficulty here, as the cause of action accrues upon the occurrence of damage. In the *Midland Bank* case,[27] for example, the cause of action in negligence did not accrue at all until the date when the damage occurred (i.e. the date when it became impossible to register the option before a third party acquired an interest in the land).

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23 *Limitations Act, RSA 1986*, s.3(1).

24 *ibid.*, s.3(3).

25 See the (UK) *Defective Premises Act, 1972*, s.1(5).

26 Mullany, *op. cit.*, note 4 *supra*, at p.354.

27 *op. cit.*, note 20 *supra*.

4.56 The second type of case to be considered concerns torts actionable *per se* (e.g. trespass, and nuisance in respect of interference with an easement or profit à prendre), where the cause of action accrues upon commission of the tort. In the case of trespass or nuisance[28] it appears to be settled law that where there is a continuing tort, such as where A places a heap of stones upon B's land, or where A falsely imprisons B for a number of days, a fresh cause of action arises *de die in diem*.[29] Although one can envisage such cases where the effective period of the 'long stop' may extend for a very long time, this situation would seem to be unavoidable, in particular as the accrual of successive causes of action, and therewith the initial limitation period, may likewise extend for a very long time.

4.57 The third type of case arising for consideration concerns breaches of contract, where the cause of action accrues upon the breach.

4.58 The question of accrual in contract cases really depends upon construction of the contract. There may be express or implied terms as to the date by which the contractual duty must be performed; where the duty is not performed, a cause of action will accrue on, but not before, that date. For example, in the *Midland Bank* case, there was a continuing obligation on the defendant solicitors to register the option, but this did not mean that a cause of action in contract existed throughout the period of their continuing omission. As Oliver J. explained:

> "No doubt a normally careful practitioner would fulfil that obligation as soon as is reasonably practicable. ...But if he fails to do so and an effective registration can still be and is effected, his client can have no complaint except the purely technical one that he has been a bit careless and might have done it sooner."[30]

4.59 The question of accrual will also depend on whether or not there has been repudiation. For example, in the *Midland Bank* case, the solicitors were under a continuing contractual duty *inter alia* because they had never treated themselves as *functi officio* in relation to the option. In that case, Oliver J. explained the law by reference to the following hypothetical case:

> "If I employ a carpenter to supply and put up a good quality oak shelf for me, the acceptance by him of that employment involves the assumption of a number of contractual duties. ...If he fixes the brackets but fails to supply the shelf or if he supplies and fixes a shelf of unseasoned pine, my complaint against him is not that he has failed to exercise reasonable care and skill in carrying out the work

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28 This rule would appear to apply to all forms of nuisance, most of which are not actionable *per se*. However, only forms of nuisance which are actionable *per se* are included within the second category of cases under consideration at para. 4.56.

29 *Cf.* MacMahon, B.E. and Binchy, W., *Irish Law of Torts* (1990), p.825.

30 *op. cit.*, note 20 *supra*, at p.611.

but that he has failed to supply what was contracted for. He may fix the brackets and then go away for six months, but unless and until I accept that conduct as a repudiation, his obligation to complete the work remains."[31]

4.60 We had doubted whether a mere passive failure, without more, to remedy the original breach of contract or tort, after such breach or tort has become actionable (and not involving any fresh, separate act, default or omission distinct from the original wrongful act, default or omission) should be regarded as giving rise to a fresh cause of action for the purposes of the running of the 'long stop' period.[32] On the other hand, to attempt to provide a special definition of "accrual" for the purposes of the running of the 'long stop' might well create more problems than it would solve; in particular as it could lead to anomalies whereby the 'long stop' could expire before the cause of action even accrues. Exceptionally careful drafting may be required to deal with the issue of continuing breach. *Submissions on this point are particularly welcome.*

(g) Should Legislation Provide for Judicial Discretion to Extend or Disapply the Limitation Period following Discoverability or the 'Long Stop'?

4.61 The question of whether the courts should have a (statutory) discretion to extend the **initial limitation period** does not arise for our consideration, as we have already provisionally recommended the introduction of a discoverability test.

4.62 We must now consider whether the courts should have a statutory discretion (as distinct from an inherent discretion) to extend the **limitation period following discoverability**. The advantage of including a discretion to extend a limitation period is that it allows flexibility. It enables the court to take into account factors other than those allowed for in the definition of the "date of knowledge" which have prevented the plaintiff from bringing proceedings before the expiry of the limitation period. The existence of a discretion enables the court to prevent injustice occurring to plaintiffs in such a position.

4.63 The primary disadvantages of judicial discretion are that any discretion will to some extent subvert the purposes of the limitation system; there will no longer be certainty on the length of a particular limitation period. No potential defendant or his insurers would be able to rely on the expiry of limitation periods to prevent proceedings.

4.64 In relation to the possibility of introducing guidelines for the exercise of such discretion, it is instructive to note that such an option was introduced by

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31 *ibid.*

32 See Limitations Act RSA 1996, s.3(3)(a).

virtue of section 33 of the *Limitation Act, 1980* in England which lists a number of factors to be borne in mind in exercising a discretion to disapply time limits for actions in respect of personal injury or death.

4.65 The Law Reform Commission previously considered but rejected the option of a statutory judicial discretion (in cases of personal injuries) to extend or disapply the limitation period (running from discoverability), saying that such a discretion would either have to be drawn in broad and unfettered terms, introducing uncertainty, or with more qualifications, like that available under section 33, "whose subsequent history does not suggest it a desirable model".[33] The present Commission agrees with such a view.

4.66 We must also consider whether the courts should have a statutory discretion to extend the '**long stop**'. It has been argued that the introduction of a judicial discretion to extend the 'long stop' period in certain cases would offset possible difficulties in the operation of the 'long stop'. Although the purpose of a 'long stop' is to offset the advantage conferred on the plaintiff by the discoverability rule, the possibility exists that this ultimate period for the bringing of a claim may expire before the damage is discoverable. This difficulty has been viewed as "inescapable because there is no feasible alternative consistent with limitation policy".[34] It has also been argued that a discretion to extend the 'long stop', permitted only in certain circumstances and delimited by the incorporation of strict guidelines, would avoid the erosion of certainty.[35]

4.67 We are not convinced by such arguments. For the same reasons as we reject the option of a statutory discretion to extend the limitation period, we likewise reject the option of such a discretion in respect of the 'long stop'.

4.68 *We provisionally recommend that there should be no (statutory) judicial discretion to extend or disapply any of the limitation periods including the 'long stop'.*

(h) Factors That May Suspend the Running of Time for the Limitation Period and the 'Long Stop'

4.69 Consideration must be given to the factors which may have the effect of extending the limitation period by suspending the running of time.

4.70 The general principle is that once time has started to run it continues

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33 LRC-21 *op. cit.*, note 5 *supra*, at p.46. The English Law Commission has recently drawn attention to the difficulties of the section, noting that the ability to ask a court to exercise its discretion or the Court of Appeal to review the exercise of the discretion by the court of first instance means a huge drain on court resources (as well as the costs for defendants in resisting such applications). There have, for example, been over 115 appellate decisions on section 33 of the 1980 Act reported on LEXIS; Law Commission Consultation Paper No 151, *Limitation of Actions* (1998) para. 12.194.

34 Alberta Law Reform Institute, *Limitations* (1989) p.70.

35 Mullany, *op. cit.*, note 4 *supra*, at p.372.

to do so until proceedings are commenced or the claim is barred.

> "The principle, if any is possible in so technical a matter, is that a plaintiff who is in a position to commence proceedings, and neglects to do so, accepts the risk that some unexpected subsequent event will prevent him from doing so within the statutory period."[36]

However, the plaintiff must be in a position to commence proceedings when time begins to run.

i. Legal Incapacity

4.71 The operation of the normal six-year limitation period commencing from accrual is modified by disability. At present, section 49 of the Statute of 1957 provides for extending the limitation period in the case of persons under a disability so that time does not begin to run until the person concerned ceases to be under the disability. Specifically, if, on the date when any cause of action for which a period of limitation is prescribed by the Statute, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years (three years in personal injuries cases) from the date when the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation has expired.[37]

4.72 A similar position obtains with respect to the three-year limitation period for personal injuries. Section 5(1) of the Statute of 1991 has the effect that if a person, having the right to bring an action, was under a disability either at the time when the right accrued or on the date of knowledge (as defined in section 2), the three-year limitation period will not start to run until he ceases to be under a disability or dies (whichever occurs first). In effect, the discoverability period as set out under the 1991 Act is held in suspension pending the cesser of disability or death - whichever comes first.

4.73 "Disability" is not, as such, defined by the *Statute of Limitations, 1957*. However, section 48(1) of the 1957 Act deems the following persons to be under a disability for the purposes of the Act: minors, persons of unsound mind, or convicts subject to the *Forfeiture Act, 1870* (in whose case no administrator or curator has been appointed under that Act).

4.74 The term "unsound mind" is, in turn, left undefined by the 1957 Act. Section 48(2) of the Act merely provides that, without prejudice to the generality of the section, a person is conclusively presumed to be of unsound mind while he is detained in pursuance of any order authorising the detention of persons of unsound mind, or criminal lunatics. Parenthetically, in attempting to ascertain

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36 *Chitty on Contracts* (25th ed., 1983), para. 1857.

37 Section 49(1)(a).

whether a person is of unsound mind, a test of "ability to manage his own affairs" was applied by Barron J. in *Rohan v. Bord na Móna.*[38] It has recently been noted that "of unsound mind" is not a phrase with which any medical practitioner today is comfortable.[39]

4.75 The Commission is of the opinion that "disability" is an inappropriate term and instead favours the adoption of the term "legal incapacity". This would encompass both minority and mental incapacity. Minority is presently governed by the *Age of Majority Act, 1985*, s.2(1) of which reduced the age of majority from 21 to 18. Mental incapacity is at present defined for the purposes of the *Powers of Attorney Act, 1996* as (in relation to an individual) incapacity by reason of a mental condition to manage and administer his or her own property and affairs. Such a definition is in keeping with that expounded by Barron J. in *Rohan* above. Such a definition could also be adopted for limitation purposes.

4.76 Two net questions arise on this issue for the purposes of this Consultation Paper.

4.77 First, should the discoverability period which we provisionally recommend also be suspended on account of legal incapacity? We believe that it should. This would serve to bring the law which we recommend in respect of non-personal injury or damage into alignment with that obtaining in respect of personal injury.

4.78 Secondly, a question arises as to whether or not legal incapacity should override the running of the 'long stop'. Under section 28 of the (UK) *Limitations Act, 1980*, provision is made for the extension of the limitation period when the right of action has accrued to a person suffering from a disability ("prior disability"). Section 28A (as inserted by the *Latent Damage Act, 1986*) ensures that similar provision is made when the person is under a disability at the date of discoverability ("subsequent disability"), but in contrast to cases where the disability exists at the date of accrual, here the presence of a disability at the date of discoverability will not override the 'long stop' period.

4.79 This creates an arbitrary distinction between (a) plaintiffs under a disability when the damage occurs, who benefit from the non-application of the 'long stop', and (b) plaintiffs under a disability when the damage was discovered but not when it occurred, who do not so benefit. As Jones has noted, this distinction seems unfair when the rationale for the special extension of the limitation period is to give plaintiffs a fair opportunity to bring an action.[40]

4.80 Under the *Liability for Defective Products Act, 1991*, disability will not

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38 [1990] 2 IR 425, [1991] ILRM 122.

39 Nugent, *op. cit.*, note 2 *supra.*

40 Jones, *Latent Damage - Squaring the Circle?* (1985) 48 MLR 564, 574.

override the ten-year 'long stop'.[41]

4.81 *We provisionally recommend that the operation of the primary limitation period, whether running from the date of accrual (if retained) or the date of discoverability, should be suspended from running against a person who is legally incapacitated (whether due to mental incapacity or to minority) on the date of accrual (if retained) or the date of discoverability. The relevant period should begin to run from the cesser of incapacity or from death, whichever occurs first.*

4.82 Furthermore, *we provisionally recommend that, where the claimant is legally incapacitated (whether due to mental incapacity or to minority) at the date of accrual (if retained) or the date of discoverability, the normal fifteen-year 'long stop' which we recommend should be extended by a further fifteen years to 30 years in all. This 'long stop', like the normal 'long stop', should commence running from the date of accrual of the cause of action.*

4.83 We recognise that suspension of the limitation period or extension of the 'long stop' will work against the overall effectiveness of the limitation system as a means of protecting the defendant from late claims. Accordingly, *we provisionally recommend that in cases of legal incapacity (whether due to mental incapacity or to minority) the burden of proving that the limitation period was suspended and/or that the 'long stop' was extended, as the case may be, should lie with the person claiming the benefit of the suspension or extension.*

4.84 The practical effects of this would be as follows. If the legal incapacity existed at the time of discoverability then the three-year period which we recommend would be suspended until the disability ceases or death occurs. If the cesser of disability occurs after the normal 'long stop' which we provisionally recommend to stand at fifteen years then the extended 'long stop' of 30 years comes into play. This would benefit someone who had a disability at the point of discoverability but who only emerged from disability at year 27 provided they took action before year 30. The extended 'long stop' would, however, cut off other claimants where the disability ceases at year 29 but no action is taken until year 31.

ii. Fraud

4.85 Section 71(1) of the Statute of 1957 provides that where (a) the action is based on the fraud of the defendant, or his agent, or of any person through whom he claims or his agent, or (b) the right of action is concealed by the fraud of any such person, time shall not begin to run until the plaintiff has discovered the fraud, or could, with reasonable diligence, have discovered it.

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41 S. 7(2)(b). *Cf.* Article 10(2) of the Directive, which states: "The Laws of Member States regulating suspension or interruption of the limitation period shall not be affected by this Directive."

4.86 The question arises as to whether fraudulent concealment - as mentioned in the context of section 71(1)(b) above - should suspend the running of the limitation periods under our proposals. No difficulty exists in relation to the period running from the date of discoverability, for if concealment has taken place, discovery will not be reasonably possible, so the running of the period will be suspended even in the absence of any specific legislative provision.

4.87 The difficulty lies in attempting to ascertain whether or not fraudulent concealment should also suspend the running of the 'long stop'. We are of the provisional opinion that it should, based on the argument that plaintiffs should be given a fair opportunity to bring an action. Such a view is consistent with the existing section 71 where no ultimate limitation period is applied to fraudulent concealment.

4.88 An action based on fraud (as outlined at (a) above) would not of itself override the 'long stop', although the fraud may frequently - perhaps usually - include an element of fraudulent concealment which would have this effect.

4.89 *We provisionally recommend that fraudulent concealment by the defendant of a right of action of the plaintiff should suspend the running of the 'long stop'.*[42]

4.90 We recognise that such a suspension, in attempting to ensure that plaintiffs have a fair opportunity to bring an action, will further undermine certainty. *Accordingly, we provisionally recommend that in cases of fraudulent concealment the burden of proving that the 'long stop' was suspended should lie with the person claiming the benefit of the suspension.*

iii. Mistake

4.91 Section 72(1) of the Statute of 1957 provides that where, in the case of any action for which a limitation period is fixed by the Statute, the action is one for relief from the consequences of a mistake, time does not begin to run until the plaintiff has discovered his mistake or could have discovered it with reasonable diligence.

4.92 *We do not recommend any change in this regard.*

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42 See *Limitation Act, RSA 1996*, s.4.

4. Miscellaneous Issues

(a) Subsequent Purchasers

4.93 The subsequent purchase of defective premises creates a difficulty for the law of limitation which stems from the proposition that a person cannot have an action in respect of damage to property before he has any rights in the property.[43] The earliest point in time at which the action can accrue is the date at which he acquires an interest in the property. The argument also exists that when a cause of action accrues in relation to defective premises, subsequent purchasers are prevented from acquiring a cause of action in respect of the same or related damage.[44]

4.94 Section 3 of the (UK) *Latent Damage Act, 1986* was introduced to deal with this very problem. Subsequent purchasers are now able to claim against the person who negligence has caused the damage even if the purchaser had no interest in the property at the date the damage occurred, provided that certain material facts had not become known, before such a person acquired his interest, to a person who at the time has an interest (the previous owner).

4.95 Section 3(2) stipulates that the cause of action acquired by the purchaser is treated as based upon a breach of duty owed to the original owner, and that for limitation purposes, the cause of action shall be treated as having accrued to the original owner. This latter provision is based on the dictum of Lord Fraser in *Pirelli*, who stated that once time begins to run against one owner it runs against all his successors in title. Yet this conflicts with the axiom of common law that time cannot run against a person lacking a proprietary interest.

4.96 It has been suggested that a more favourable solution to the problem would be to recognise that the loss suffered is economic arising upon the discovery (or discoverability) of defects. Thus no cause of action would accrue to subsequent purchasers if defects had become apparent before the property had been sold. Although there may at first be some difficulty with the notion that a crack in a wall is economic rather than physical damage, it must be remembered that it is the nature of the loss suffered rather than the reason why a plaintiff brings a claim that is the focal point in the classification of damage.[45]

4.97 In our view the difficulty is overstated, because nowadays it is reasonable to expect a person purchasing a house to employ a consulting engineer. If the consulting engineer fails to discover a defect which was present, a cause of action will lie against him in respect of his professional negligence.

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43 Jones, *op. cit.*, note 34 *supra*, at p.575.

44 See Spenser, *A House Built on Sand...*, [1976] CLJ 222, Street, *Damage By Subsidence: The Conveyancing Problem* [1979] Conv. 241.

45 Mullany, *Limitation of Actions and Latent Damage - An Australian Perspective* (1991) 54 MLR 216, 229.

4.98 *We provisionally recommend that no specific reference to subsequent purchasers should be included in any amending legislation.*

(b) Survival of Actions

4.99 Section 7(1) of the *Civil Liability Act, 1961* states that on the death of a person all causes of action vested in him shall survive for the benefit of his estate. The limitation period is not affected by the injured person's death. Section 4 of the *Statute of Limitations, 1991* contains an important related provision, concerned with the survival of causes of action where the injured person dies within the limitation period. This section implements the recommendation of the Law Reform Commission that, in cases where the victim dies within three years of the discoverability date, the limitation period should not begin to run until the deceased's personal representative has had a reasonable opportunity of investigating the position and, where appropriate, taking proceedings.[46]

4.100 Section 4 provides that where an injured person dies before the expiration of the limitation period specified, the three-year period will run from either the date of death or the date of knowledge of the deceased's personal representative.

4.101 *We provisionally recommend that a provision similar to that contained in section 4 of the Statute of Limitations (Amendment) Act, 1991 should be introduced for all actions in tort and contract.*

(c) Possible Implications of the 'One Suit' Rule for our Recommendations

4.102 With regard to claims for breach of contract (which are actionable *per se* without proof of loss or damage) and those torts which are actionable *per se* (e.g. trespass, or nuisance in respect of interference with an easement or profit à prendre), not only does time begin to run for the purposes of the Statute of Limitations as soon as the fault occurs but compensation or other relief for all the damage or loss must be recovered in one single suit. Our recommendation for the introduction of a disoverability rule will apply to such cases. Thus, if damage became discoverable only after an interval of time which was outside the normal six-year period of limitation, our proposed discoverability rule would apply to such a case; the plaintiff would be able to claim relief within three years of the onset of discoverability even if this brought the claim outside the normal six-year period. However, if the plaintiff had already sued and had already brought his suit to a conclusion or had settled it (perhaps on the basis of other damages which had become apparent within the six-year period) no further suit could be brought on the basis of other damages on the basis of our proposed

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46 LRC-21, *op. cit.*, note 5 *supra*, at p.49.

discoverability rule in respect of the damage which only became discoverable later. The "one suit rule" would prevent this and would effectively block the application of our discoverability rule to the latent damage.

4.103 It may be argued that the scope of this problem is limited since most of the cases which are likely to arise in this context will be based on negligence. A cause of action in negligence does not arise until damage has been suffered. There is authority in England to the effect that where as a result of the same act of negligence, separate damage arises on separate occasions, such separate damage can give rise to separate causes of action. It is not clear whether this accurately represents that law in Ireland. On the whole it is most likely that it does but there is a possibility that it does not. If it does represent the law in Ireland then, whatever about torts or breaches of contract which are actionable *per se*, the discoverability test will not be disrupted by a "one suit rule" where genuinely separate heads of damage arise at different times from the same tort of negligence. If it does not represent the law in Ireland (so that a "one suit rule" applies in negligence as it does for breaches of contract or those torts which are actionable *per se*) then the problem arises in negligence actions also.

4.104 In a nutshell the problem is that a "one suit rule" is capable, in cases to which it applies, of effectively negativing the discoverability rule which we are provisionally recommending in this Consultation Paper.

4.105 The Commission has decided not to make any provisional recommendation to address this issue, since it is one which (insofar as it arises) arises from the general law rather than in the sphere of limitation of actions.

CHAPTER 5: SUMMARY OF PROVISIONAL RECOMMENDATIONS

Scope of Reform

1. We provisionally recommend that the scope of reform should extend to all actions in tort and contract in respect of damage other than personal injury. [para. 4.06]

The Need for a Discoverability Test and Provisional Recommendations as to its Content

The Need for a Discoverability Test

2. We provisionally recommend that a discoverability test should be introduced into Irish law to deal with cases in tort and contract where the loss or damage (other than personal injury) is latent. [para. 4.08]

Should Accrual Be Retained?

3. Two views exist within the Commission as to the retention of accrual as a starting point for the running of time in cases of latent damage (other than personal injury), along with the introduction of a discoverability test to temper its effects. Some Commissioners are of the provisional view that the abandonment of accrual as a starting point (and consequently an exclusive focus on discoverability) would be the better or neater solution, all things being equal. On the other hand, some Commissioners are of the provisional view that such a solution, no matter how justified in isolation, would only serve to accentuate the difference between the law of limitations in respect of personal injuries and that in respect of non-personal injuries and cause fragmentation in the law. On this view, accrual should be retained for the moment (tempered by discoverability) in order to avoid fragmentation and pending an overall reform of the law of limitation of actions. Submissions as to whether accrual should be retained alongside discoverability are particularly welcome. [para. 4.14]

How Long Should the Period of Discoverability Be?

4. We provisionally recommend that a three-year limitation period should apply, running from the date of discoverability of the cause of action. [para. 4.16]

Should the Test of Discoverability Be Objective or Subjective or a Hybrid of the Two?

5. Two views exist within the Commission as to the formulation of a test of discoverability. Some Commissioners provisionally favour a hybrid

objective/subjective formulation along the lines of the Alberta *Limitations Act, 1996*. However, some Commissioners provisionally favour the introduction of a purely objective test of discoverability. Submissions are particularly welcome as to whether the test of discoverability should be purely objective or objective with subjective elements and, if the latter, which elements should be reckonable and how. [para. 4.24]

What Knowledge Should Trigger the Three-Year Limitation Period?

6. We provisionally recommend the adoption of a straight-forward formulation of the facts, knowledge of which is necessary for time to start to run - along the lines of the formulation contained in the Alberta *Limitations Act, 1996*. [para. 4.28]

The Need for a 'Long Stop' Provision to Cap the Three-Year Limitation Period

The Need for a 'Long Stop'

7. We provisionally recommend the introduction of a 'long stop' or ultimate limitation period beyond which no action can lie, irrespective of whether or not the cause of action was discoverable at the expiration of this period. [para. 4.43]

How Long Should the 'Long Stop' Be?

8. We provisionally recommend that a 'long stop' of fifteen years should be introduced. Submissions are invited as to the length of the 'long stop'. [para. 4.47]

When Should the 'Long Stop' Run From?

9. We provisionally recommend that, as a general rule, the 'long stop' should run from the date of accrual of the cause of action. [para. 4.52]

11. We provisionally recommend that in construction cases, the 'long stop' should commence to run from the date of completion of the building or purported completion of the building or other work. [para. 4.53]

12. We welcome submissions on the application to cases of continuing torts or continuing breaches of contract of our provisional proposal that the 'long stop' should run from the date of accrual of the cause of action. [para. 4.60]

Whether Legislation should Provide for for Judicial Discretion to Extend or Disapply the Limitation Period following Discoverability or the 'Long Stop'

13. We provisionally recommend that there should be no (statutory) judicial discretion to extend or disapply any of the limitation periods including the 'long stop'. [para. 4.68]

Factors that May Legitimately Suspend the Running of Time

Legal Incapacity

14. We provisionally recommend that the operation of the primary limitation period, whether running from the date of accrual (if retained) or the date of discoverability, should be suspended from running against a person who is legally incapacitated (whether due to mental incapacity or to minority) on the date of accrual (if retained) or the date of discoverability. The relevant period should begin to run from the cesser of incapacity or from death, whichever occurs first. [para. 4.81]

15. We provisionally recommend that, where the plaintiff is legally incapacitated (whether due to mental incapacity or to minority) at the date of accrual (if retained) or the date of discoverability, the normal fifteen-year 'long stop' which we recommend should be extended by a further fifteen years to 30 years in all. This 'long stop', like the normal 'long stop', should commence running from the date of accrual of the cause of action. [para. 4.82]

16. We provisionally recommend that in cases of legal incapacity (whether due to mental incapacity or to minority) the burden of proving that the limitation period was suspended and/or that the 'long stop' was extended, as the case may be, should lie with the person claiming the benefit of the suspension or extension. [para. 4.83]

Fraud

17. We provisionally recommend that fraudulent concealment by the defendant of a right of action of the plaintiff should suspend the running of the 'long stop'. [para. 4.89]

18. We provisionally recommend that in cases of fraudulent concealment the burden of proving that the 'long stop' was suspended should lie with the person claiming the benefit of the suspension. [para. 4.90]

The Situation of Subsequent Purchasers

19. We provisionally recommend that no specific reference to subsequent purchasers should be included in any amending legislation. [para. 4.98]

The Survival of Actions

20. We provisionally recommend that a provision similar to that contained in section 4 of the *Statute of Limitations (Amendment) Act, 1991* should be introduced to cover all actions in tort and contract. [para. 4.101]

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