

# LIMITATION PERIODS: A STATE-BY-STATE ROUND-UP

## ACT

By Steven Hausfeld and Dan Shillington

Unless otherwise indicated, section numbers are references to the *Limitation Act 1985*.

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION POSSIBLE?	COMMENT
Common law workplace injuries (including motor vehicle accidents) covered by <i>Workers Compensation Act 1951</i> .	6 years if injury before 1 July 2002: s16A, s11  3 years if injury on or after 1 July 2002: s16A, ss32 – 34 <i>Workers Compensation Act 1951</i>	Yes: ss35 – 36 (since 5 April 2004 amendment)	If <i>Safety, Rehabilitation and Compensation Act 1988</i> (Comcare) applies, then injury dealt with under s16B.
Other personal injuries (including motor vehicle accidents) – if cause of action accrued before 9 Sept 2003.	6 years: s11, s100	Yes: ss35 – 36	Failure to follow notification procedures could prevent proceedings generally: s51 <i>Civil Law (Wrongs) Act 2002</i> ; s181, s190 <i>Road Transport (General) Act 1999</i> .
Other personal injuries (including motor vehicle accidents) – if cause of action accrues on or after 9 Sept 2003.	3 years: s16B	No: s36(5)(a). See also <i>DJ v RHS &amp; JF</i> [2004] ACTSC 12 (2 April 2004).	See comment immediately above.
Children injured by provision of health service by an accident on or after 9 Sept 2003.	6 years: s30B(2)	No: s36(6)	For injuries before 9 Sept 2003, 6 years from majority, although notice provisions in s30A apply.
Children injured by provision of health service by disease or disorder on or after 9 Sept 2003.	Shorter of 12 years or 6 years from actual or deemed knowledge: s30B(3)	Yes: ss35 – 36	See comment immediately above.
Workers' compensation injury after 1 July 2002.	3 years from injury, death or knowledge of injury: s120(1)(b) <i>Workers Compensation Act 1951</i>	Yes: s120(2), s120A, s124 <i>Workers Compensation Act 1951</i>	Can't make a permanent injury claim until 2 years after injury, unless the court grants leave or the injury stabilises: s121 <i>Workers Compensation Act 1951</i> .
Compensation to relatives.	The later of 6 years from the wrongful act or 3 years from the death: s16	Yes: s39, but with a maximum extension of time to 6 years from death.	

**WHAT STOPS THE LIMITATION CLOCK RUNNING?**

The clock stops while the plaintiff is under a legal disability: s30. If the disability arises from mental incapacity or war conditions, then it must be for a continuous period of 28 days: s8(3). Generally, the limitation is extended for at least three years from the end of the legal disability: s30. For disabilities other than minority, the defendant can give a notice to proceed to an appointed guardian, which restarts the clock: s31.

For injured children, there are additional obligations on their parents or guardians to notify the proposed defendant within six years, and the defendant can require proceedings to be commenced: s30A. Failure to comply can, subject to court discretion, preclude recovery of costs, out-of-pocket expenses and *Griffiths v Kerkemeyer* damages incurred prior to commencing proceedings: s30A(7).

The clock stops if there is fraud, deceit or deliberate concealment of a relevant fact until the plaintiff discovers or should have discovered the fraud, deceit or concealment: s33.

The clock stops if there is a cause of action for relief from a mistake until the plaintiff discovers or should have discovered the mistake: s34. This does not apply to action against a *bona fide* purchaser for value: s34(3).

The clock can be restarted, with the limitation period beginning again, by confirmation of the cause of action by the defendant: s32.

**EXTENDING TIME**

Time can be extended by application to a court, which can extend time if it is 'just and reasonable to do so': s36. An extension may only be required if the defendant pleads a limitation period in its defence and does not have to be pleaded from the beginning by the plaintiff.

There is no special time limit for bringing an extension of time application: s36(4).

The court has a broad discretion but considers factors including: length of delay and reasons for it; prejudice to the defendant; conduct of the defendant; any disability of the plaintiff; the plaintiff's promptness once the cause of action is identified; and steps taken by plaintiff to get relevant expert advice: s36(3).

There is an additional power to extend time for damages for personal injury to a deceased person for up to six years from death if 'just and reasonable', with similar considerations to those under s36(3): s38.

Where an action arises from latent damage to property, there is court discretion to extend for up to 15 years from the act or omission giving rise to cause of action if 'just and reasonable', with similar considerations to those under s36(3): s40.

It is not possible to extend time against the estate of a deceased person beyond the proper distribution of estate, unless the estate is to be indemnified: s37.

**NEW SOUTH WALES**

By Andrew Combe

The *Limitation Act 1969* (NSW) (LA) provides time limits for commencing actions. Those time limits run from the date a cause of action accrues. 'Accrues' is not defined by the LA. In the common law, a cause of action accrues when all facts necessary to succeed in an action have occurred.<sup>1</sup>

Section 14 of the LA provides that an action in contract (not founded on a deed), tort, enforcement of a recognisance and recovery of a sum of money by an enactment, other than a penalty, is not maintainable if brought more than six years after accrual of the action. Under ss55 and 56 of the LA, this time period may be extended to take fraud and mistake into account.

Section 14B of the LA has been inserted by the *Defamation Act 2005*. The limitation period for beginning an action for defamation is now one year from the date of publication.

Section 18A of the LA provides that an action for personal injury cannot be brought more than three years after accrual, where the cause of action accrued after 1 September 1990.

Section 19 of the LA provides that a claim under the *Compensation to Relatives Act 1897* cannot be maintained more than six years after the date of death where the cause of action accrued before 1 September 1990, or more than three years from the date of death where the cause of action accrued after 1 September 1990.

In respect of a cause of action for personal injury that accrued on or after 1 September 1990, the limitation period for an 'ordinary action' may be extended under s60C of the LA for a period of not more than five years (the 'secondary limitation' period). Under s60D of the LA, a similar extension may be granted for causes of actions under the *Compensation to Relatives Act 1897*.

The time limitation for commencing an action in respect of a cause of action that accrued on or after 1 September 1990 for a 'latent' personal injury may be extended under s60G of the LA where it is 'just and reasonable to do so', and for such a period as the court determines. Section 60H contains similar provisions in respect of 'latent' causes of action under the *Compensation to Relatives Act 1897*. Sections 60E and 60I of the LA detail the matters to be considered by the court in determining an application to extend a limitation period: whether the plaintiff knew of the personal injury; was unaware of the nature or extent of injury; or was unaware of the nexus between the injury and the negligent act or omission. The plaintiff must bring the application for extension with three years of the time when s/he became aware or ought to have become aware of these factors.

The time limitations for causes of actions for personal injury or death accruing on or after 6 December 2002 are dictated by division 6 of part 2 of the LA. This introduced two limitations periods: the 'post discoverability' limitation period and the 'long-stop' limitation period.

Under s50C of the LA, an action for personal injury can not be maintained if brought more than three years after the 'post discoverability' period; that is, three years from the date on which the cause of action was first discoverable by the plaintiff. Nor can the action be maintained if brought after the 12-year 'long-stop' limitation period; that is, 12 years from the time of the act or omission that allegedly resulted in injury or death. Whichever of the two limitation periods expires first will be the relevant limitation.

Section 50D of the LA defines a cause of action as 'discoverable' when the plaintiff knows or ought to have known each of the following: that the death or injury occurred; that the injury or death was the fault of the defendant; and that the injury was sufficiently serious to justify bringing an action.

The 12-year 'long-stop' limitation period may be extended under s62A of the LA. Section 62B requires the court to have regard to all the circumstances of the case and, in particular, the length and reasons

for any delay; prejudice to the defendant; the nature and extent of the plaintiff's loss; the conduct of the defendant that induced the delay; the steps taken by the plaintiff to obtain expert advice and the nature of that advice; and when the cause of action was discoverable. There is no provision in the LA permitting the extension of the 'post discoverability period'.

It should be noted that the limitation periods for bringing claims for personal injuries arising from motor vehicle accidents are determined by the *Motor Accidents Compensation Act 1999*. There is a specific and complex regime under that Act which should not be confused with the LA.

**Note:** 1 *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234.

## NORTHERN TERRITORY

By Jacqueline Nicholls

In the Northern Territory, the primary source of limitations on claims is the *Limitation Act* (NT) (the Act). The Act does not apply to any action for which a period of limitation is prescribed by any other Act.

Where more than one limitation period applies, the shortest of them is taken to be the limitation (s11). Actions at common law cannot be commenced after three years from the date on which the cause of action first arose (s12).

Actions to recover money due under a judgment of a court are limited to twelve years from the date on which judgment becomes enforceable (s15).

### EXCEPTIONS UNDER THE LIMITATION ACT

#### Disability

The limitation periods fixed by the Act are suspended if the plaintiff suffers from a disability (s4). However, the suspension of the limitation period is for the duration of the disability and is capped at 30 years (s36).

#### Infants

In actions where the plaintiff is an infant, the putative defendant may serve a notice on the parent or guardian of the infant, requiring them to bring an action within six months.

### EXTENSION OF LIMITATION PERIODS UNDER THE ACT

Except in defamation claims, an application for the extension of a limitation period may be granted if the court is satisfied that:

- facts material to the plaintiff's case were ascertained by him or her within the last 12 months of the limitation period; or, if the limitation period has expired, within 12 months of the plaintiff becoming aware of the facts;
- the plaintiff did not start proceedings based on the representations or conduct of the defendant; or
- in the circumstances of the case, an extension is just.

Extensions of time in defamation claims may be granted if it was unreasonable for the plaintiff to have commenced an action within one year of the date of publication. If so, an extension of up to three years from the date of publication may be granted.

An extension of a limitation period can be made even if the limitation period has expired (s44C).

### METAL ROOFING & CLADDING PTY LTD v EIRE PTY LTD [1999] NTSCA 104

The cause of action in *Metal Roofing & Cladding v Eire* accrued in November 1990. However, the plaintiff did not commence proceedings until February 1995, well outside the three-year limitation period.

At first instance, the plaintiff sought an extension of time to begin proceedings under s44 of the Act. The trial judge was satisfied that material facts (an accountant's report identifying loss) were provided to the plaintiff only after the limitation period, so he granted the extension.

The Supreme Court of the Northern Territory confirmed the trial judge's decision on appeal, holding that he had not erred in exercising his discretion. It went on to confirm the position taken in *Sola Optical Australia v Mills* (1987) 163 CLR 628, likening the medical report in *Sola Optical* to the accountant's report.

In *Sola Optical*, the court held that the emergence of the material fact need not have anything to do with the plaintiff's decision to sue. It also held that a fact is 'material' to a plaintiff's case if it is relevant to the issue and is likely to have a bearing on the case.

## QUEENSLAND

By Chris Newton

In Queensland, an action for damages for negligence, trespass, nuisance or breach of duty in which damages claimed by the plaintiff include those relating to personal injury or death, must be brought within three years of the date on which the cause of action arose.<sup>1</sup>

The LAA prescribes methods of extending this period. Section 29 provides that, if the claimant was under a disability on the date on which the right of action accrued, the action may be brought before the expiry of three years from the date on which the person ceased to be under a disability, or died. Section 31 sets out the usual extension of time provisions where the applicant was unaware of a significant material fact relating to the right of action until a date within the last year of the limitation period.<sup>2</sup>

Of course, these limitations have been complicated by tort reform legislation, all of which contains somewhat variable pre-court procedures and creates problems from a limitation of actions point of view. In part, this is because the regimes generally require a notice of claim to be given, which can create its own limitation issues. Whatever else is clear, one must try to issue a complying notice of claim within the limitation period to ensure that the three-year limitation period is protected. The following is a very brief summary.

### PERSONAL INJURIES PROCEEDINGS ACT 2002 (PIPA)

A notice of claim has to be given within nine months of the incident occurring, or within a month of the claimant first seeing a lawyer. This requirement has created its own legal history as to what is a reasonable excuse where the limitation is not strictly complied with, as the obligation to give notice is a continuing obligation and therefore failure is not fatal.<sup>3</sup> Rather than being a limitation, this prevents constructive advancement of the claim prior to either waiver by the respondent,<sup>4</sup> or authorisation for the claim to proceed despite non-compliance – which requires a court application.<sup>5</sup>

Failing all else, PIPA provides that leave can be granted under s43 where there is a need for urgent proceedings, even if the limitation period has expired.<sup>6</sup>

Section 59 of PIPA allows proceedings to be commenced even though the three-year limitation period has ended, provided that a complying notice of claim<sup>7</sup> has been given before the end of the period; and proceedings are commenced within six months of the notice being given; or leave to start proceedings within a longer period has been granted by a court. It would seem that the court does have the power to alter the limitation period under s59(2)(b) PIPA after the limitation period has in fact expired, so long as there was a complying notice within the period.<sup>8</sup>

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**MOTOR ACCIDENT INSURANCE ACT 1994 (MAIA)**

Under MAIA, there are variable obligations to notify.<sup>9</sup> The s37 notice of claim has to be given within nine months of the accident, for accidents occurring on or before 30 September 2000, or nine months from the first appearance of symptoms of injury.<sup>10</sup> For accidents from 1 October 2000 onwards, notice must be given within the earlier of nine months after the accident; or, if symptoms are not immediately apparent, from the first appearance of symptoms of the injury; or one month after first consulting a lawyer about the possibility of making the claim. MAIA imposes specific obligations to commence proceedings within 60 days after the conclusion of the compulsory conference, or another period as agreed, or as fixed by the court.

In one sense, it makes a mockery of the general three-year rule since an action can be started after that 60-day period, subject only to a cost penalty (unless the insurer brings an application to fix a time for commencing proceedings). One might well get a different result if one let the three-year period pass without obtaining leave to commence proceedings.<sup>11</sup> Section 57 MAIA provides for the alteration of the limitation period. A claim may be brought after the limitation ends if it is brought within six months after the notice is given or leave to bring the proceedings is granted, or if a longer period is allowed by the court.<sup>12</sup>

**WORKCOVER**

Proceedings for workers' compensation must commence within 60 days of the compulsory conference if the three-year limitation period has expired or if the claimant will be statute-barred with no ground for relief.<sup>13</sup>

**Notes:** 1 *Limitation of Actions Act 1974 (LAA)*, s11. 2 *State of Queensland v Stephenson* (2006) HCA 20 (17 May 2006). 3 *Taylor v Stratford* (2004) 2 Qd R 224. The same considerations apply under s37(3) of the *Motor Accident Insurance Act 1994 (MAIA)*: *Perdis v Nominal Defendant* [2004] 2 Qd R 64; *Piper v Nominal Defendant* [2004] 2 Qd R 85 and *Miller v Nominal Defendant* [2003] 38 MVR 416. 4 Sections 12(2)(b) and 18(b). 5 Section 18(1)(c)(ii) PIPA. This does not even require that a reasonable excuse for delay be demonstrated (*Gillam v Queensland* [2004] 2 Qd R 251). 6 *SG v Queensland* [2004] QCA 461; *Davison v State of Queensland* [2006] HCA 21 (17 May 2006). 7 See PIPA, part 1. 8 *Haley v Roma Town Council* [2005] QCA 003. This can be contrasted with s302 of the *Workers Compensation and Rehabilitation Act 2003* and s308 of the *WorkCover Queensland Act 1996* (repealed) which allow a 60-day period after compulsory conference for proceedings to be instituted. The court does not have power to extend that limitation period, and failure to institute within 60 days of the conference (after the three-year limitation period has expired) is fatal: *Narayan v S-Pak Pty Ltd* (2003) 2 Qd R 387. 9 Under s34, from 1 January 1994 to 30 September 2000, one had to notify the insurer within one month of first consulting a legal representative regarding the possibility of the claim (s34(1)(b)). Since 1 October 2000, notice of the accident must be given to a police officer rather than to the CTP insurer. 10 Section 37(1), but note that there are special considerations where the Nominal Defendant is involved: s37(2). 11 Section 51D MAIA. 12 Section 57(2) MAIA. 13 See note 8, above.

**SOUTH AUSTRALIA**

By Richard Yates

Many a good lawyer has come unstuck by missing a time limit on a claim. Quirky variations in limits make it imperative to check carefully every time. To assume is to risk far more than embarrassment. For example, a unique time limit applies to aircraft injuries, as the *Civil Aviation (Carriers' Liability) Act 1959 (Cth)* limits time to two years.

The statute of limitations in South Australia is the *Limitation of Actions Act 1936*. The time limits contained therein include:

Cause of Action	Time Limit	Clock Starts when...	Extension Available?
Recovery of rent or land	15 years	action accrues.	Yes
Contract	6 years	action accrues.	Yes
Tort: not personal injury	6 years	action accrues.	Yes
Tort: personal injury	3 years	action accrues; or when injury comes to plaintiff's attention (latent injuries).	Yes
Defamation	1 year	publication.	Yes (extend to 3 years if not reasonable to commence within 12 months)
Money paid under mistake of fact or law	6 years	action accrues.	Yes
Tax paid under invalid law	6 Months	payment made.	NO

There are exceptions to the above:

- For contract, defamation and all torts: see s39 if the defendant is 'absent from the state' when the action accrues.
- The time limit for persons under a legal disability starts after the incapacity ceases to a maximum extension of 30 years.
- In the case of personal injury to children, notice must be given to the defendant and third-party insurer within six years of the action accruing.
- When the plaintiff dies, the time is extended by the length of time between death and probate or letters of administration to a maximum extension of 12 months.
- There is no exception merely because a plaintiff was imprisoned.

In addition to the above, applications can be sought for an extension of time. The grounds for such an extension are that:

1. The failure to institute proceedings was a reasonable result of representations or conduct of the defendant or its apparent agent. There is no time limit for bringing an application under this provision.
2. A material fact was not ascertained by the plaintiff until there was less than 12 months before the limit expired. After the 2004 lpp reforms, a material fact must form an essential element of

the cause of action or have major significance for the assessment of loss. The application for extension must be brought within 12 months of ascertaining the material facts.

Additionally, it must be in the interests of justice to grant the extension of time. This refers to justice as between the parties.<sup>1</sup>

Extension is not an automatic right and the court can refuse the application. Even if the application is granted, it may lead to an adverse costs order against the plaintiff. The costs of the application will normally be borne by the plaintiff in any event.

The method of seeking an extension of time is to endorse the summons. An accompanying affidavit is usually provided, setting out why the action was not lodged in time. The application will usually be heard at the same time as any opposing application to strike out the action.

It is important to issue the pre-action written notice of intention to claim to the defendant in accordance with court rules to avoid punitive costs orders. The rules require that this be done at least 21 days before filing the claim in the Magistrates Court, and 90 days in the District and Supreme Courts. It is important to factor in these dates when determining the time limit of an action.

Because of the severe consequences of missing a time limit, it is imperative that a good risk management office system be put in place. Small hassle now, no hassle later!

**Note:** 1 See *Calvaresi v Lawson* (1995) 184 LSJS 147.

## TASMANIA

By Craig Hobbs

In Tasmania, limitations of actions provisions are often included in a broad range of legislative enactments dealing with specific subject matters.

### LIMITATION ACT 1974

However, time limitations upon the commencement of civil proceedings are generally governed by the *Limitation Act 1974*.

The *Limitation Act 1974* most often arises in connection with claims in contract, tort and breach of statutory duty.

Section 4 provides that actions in contract, tort and breach of statutory duty (other than actions seeking damages for personal injury or death) 'shall not be brought after the expiration of six (6) years from the date on which the cause of action accrued'.

Where a claim in contract, tort or breach of statutory duty includes damages for personal injury or death, and where the cause of action accrued before 1 January 2005, s5 provides for a limitation period of three years commencing on the date the cause of action accrued. However, upon application, a judge has power to extend time for the commencement of the proceedings for a further period of three years. Personal injury is defined to 'include any disease and any impairment of physical or mental condition'.

Recent amendments to the legislation effective 1 January 2005 were enacted to accommodate actions seeking damages for personal injury, made by claimants whose symptoms do not become manifest until many years after the causal act or omission.

Under the amending legislation, s5A was inserted to provide limitation in claims in contract, tort and breach of statutory duty where the claim includes damages for personal injury or death and where the cause of action accrues after 1 January 2005.

The relevant limitation is detailed in s5A(3):

'An action for damages ... must not be brought after the expiration of whichever of the following periods of limitation is the earlier:

- (a) 3 years commencing on the date of discoverability;

- (b) 12 years commencing on the date of the act or omission it is alleged resulted in the personal injury or death that is the subject of the action.'

Section 5A(5) provides:

'A judge may extend the period of limitation referred to in subsection (3)(b) to the expiry of three (3) years commencing on the date of discoverability, having regard to the justice of the case...'

Section 2 defines the 'date of discoverability' as:

'the date when the plaintiff knew or ought to have known that personal injury or death:

- (a) had occurred; and
- (b) was attributable to the conduct of the defendant; and
- (c) in the case of personal injury, was sufficiently significant to warrant bringing proceedings.'

Section 5A(6) provides that for claims made by a personal representative of the deceased, the limitation periods referred to in ss5A(3)(a) and (b) are to commence at the earliest of the following times:

- '(a) the date when the deceased knew that personal injury:
  - (i) had occurred; and
  - (ii) was attributable to the conduct of the defendant; and
  - (iii) was sufficiently significant to warrant bringing proceedings;
- (b) the date when the personal representative was appointed, if he or she knew or ought to have known the date of discoverability at that time;
- (c) the date when the personal representative first knew or ought to have known the date of discoverability ... after being appointed.'

In summary, for causes of action accruing on or after 1 January 2005, an action must be instituted within three years of the 'date of discoverability', with an outer limit of twelve years from the date of the act or omission causing the injury or death. There is also a right to apply to a judge to extend time for an additional period of three years commencing on the 'date of discoverability'. After 15 years, a claim is statute barred.

Therefore, the amendments effective on 1 January 2005 offer greater protection than previously provided by s5 to those who may develop a medical condition that does not become apparent for several years after the act or omission that caused the condition: a maximum of 12 years from that date, with a right to apply to extend time up to 15 years. On the other hand, the period of limitation may be less for those who sustain immediate injury: three years, unless the claimant can successfully assert that further time ought be available under the criteria for determining the 'date of discoverability', in which case the 12- and 15-year time limits may potentially apply.

Finally, for a cause of action that accrued before 1 January 2005, there are savings and transitional provisions in s38A that provides for available extensions of time, upon application, beyond the limitations set out in s5. Whether these extensions are available depends upon the 'date of discoverability'.

### APPLICATION TO EXTEND TIME

An application to extend time can either be made by an originating application to a judge in chambers (rule 90 of the *Supreme Court Rules 2000*), seeking leave to institute the substantive action by writ, out of time, and within a specified time. Alternatively, the claimant can file a writ seeking substantive relief and, at the same time or subsequently, apply by interlocutory application for an order extending time up to the date the writ was filed. In practice, the latter course is the most appropriate for two reasons.

First, to make application by originating application involves significant additional cost and filing fees. Second, in those circumstances, the usual order will require the applicant to pay costs >>

incurred by the respondent of and incidental to the application. Those costs, once taxed, will be payable immediately.

On the other hand, if the extension of time is sought by interlocutory application, after a writ has been issued and as part of those primary proceedings, the cost involved will be less. While the applicant will generally be ordered to pay costs incurred by the respondent of and incidental to the application, in the event the application is successful, payment of the costs may be deferred until the claim is resolved.

For causes of action accruing before 1 January 2005, and where an extension is sought under s5(3), the relevant considerations have been outlined by the full court in *Hill v Illuka Corporation Ltd* [2002] TASSC 113. This case involved an application to extend time in respect of a cause of action accruing a little over one year after the expiration of the initial three-year limitation period under s5(1). The Court stated at paragraph 23:

'The *Limitation Act*, s5(3), requires that consideration be given to all the circumstances of the case. In most cases this means that regard must be paid to whether there is an arguable case, the length of the delay, the explanation for it and the degree of prejudice the delay has caused and/or will cause the defendant. All of these matters require weighing to determine whether it is just in the circumstances of the case, to extend time within which proceedings may be commenced.'

For causes of action accruing after 1 January 2005, the criteria for determining the 'date of discoverability' will obviously be relevant to ascertaining whether a limitation extension is available. Thereafter, under s5A(5) the jurisdiction to extend time is to be exercised:

- 'having regard to the justice of the case ... and in particular to:
- (a) whether the passage of time has prejudiced a fair trial of the action; and
  - (b) the nature and extent of the plaintiff's loss; and
  - (c) the nature of the defendant's conduct.'

Quite apart from the particular considerations outlined in the preceding paragraph, in 'having regard to the justice of the case', the general considerations outlined in *Hill v Illuka Corporation Ltd* will continue to be relevant.

## PERSONS UNDER DISABILITY

Section 26 makes special provisions for persons under disability, defined in s2(2) as infants and persons incapable by reason of mental disorder. In general, the limitation period runs from when the person ceases to be so disabled, providing they were not in the custody of a parent, who in turn was not under a disability, at the time when the cause of action accrued (ss26(1), (1A) and (6)).

Further, for actions accruing on or after 1 January 2005, if the parent or a person with whom the parent is in 'a close relationship' (the criteria for determining this are detailed in ss26(8)(a) and (8)(b)), is the intended defendant, the period of limitation is three years commencing on the date when the plaintiff attains 25 years of age (s26(7)). There is also provision to enable a judge to extend the time provided for in s26(7) to three years commencing on the 'date of discoverability'.

Prisoners were included as persons under disability when the *Limitation Act* 1974 was first enacted. However, the *Prisoners (Removal of Civil Disabilities) Act* 1991 now gives prisoners the right to take legal action, subject to leave in certain cases.

## ACKNOWLEDGMENT AND PART-PAYMENT

Sections 29 – 31 provide that an acknowledgment of a debt, including part-payment, and acknowledgment of various other actionable interests, will result in the cause of action accruing from the date of the acknowledgment.

## FRAUD AND MISTAKE

Section 32 provides that, in the event of fraud or mistake, the period of limitation will not run until the plaintiff has discovered the fraud or mistake.

## HAWKINS v CLAYTON; WILSON v HORNE

Notwithstanding the provisions of the *Limitation Act* 1974, if a situation exists whereby a plaintiff is unaware of the circumstances that amount to actionable conduct until after the expiration of the limitation period, he or she may still be entitled to maintain an action in certain circumstances, given the obiter dictum expressed by Deane J in *Hawkins v Clayton* (1998) 164 CLR 539 at 587, to which reference was made in *Wilson v Horne* [1999] TASSC 33 by Cox CJ and Evans J.

## VICTORIA

By Tim Tobin and Andrea Tsalamandris

The much-publicised public liability insurance 'crisis' in 2002 prompted governments throughout Australia to look for ways to limit personal injuries claims. In Victoria a simple change to ss5(1)(a) and 5(1A) meant that from November 2002, the limitation period was reduced from six to only three years.<sup>1</sup> Work injury and transport accident injuries were exempt, but otherwise this provision applied to all personal injury claims.

More radical changes to the limitations law were introduced in May 2003, based on the recommendations of the panel chaired by Justice Ipp.<sup>2</sup> While most attempts to restrict claims were made by amending the *Wrongs Act* 1958 (Vic), amendments were also made to the *Limitation of Actions Act* ('the Act').

Exceptions include industrial and transport accidents, dust diseases and tobacco injuries, and the *Civil Aviation (Carriers Liability) Act* 1959 (Commonwealth) and the *Trade Practices Act*. And in some Acts – for example, the *Accident Compensation Act* – there is discretion to extend the stipulated time limits (s135AC). This complexity means that it is very important for a practitioner to determine very early on the time limits that apply to any particular action.

## DATE OF DISCOVERABILITY CONCEPT

The limitations period in personal injury claims now runs from the 'date of discoverability', an entirely new concept introduced as a result of the Ipp Report.

It is defined in s27F as occurring when the plaintiff knows, or ought reasonably to have known, all of the following facts:

- the injury has occurred;
  - that the injury was caused by fault of the defendant; and
  - the injury was sufficiently serious to justify the bringing of a claim.<sup>4</sup>
- Justice Ipp recommended that the limitation period run from this date of discoverability rather than from when the cause of action accrued or when the damage occurred, as had previously been the case. It was fairer to give the plaintiff time to bring a claim, in circumstances where it may take 'many years for a plaintiff to discover that his or her condition was caused by the negligence of another.'<sup>5</sup>

This generosity in relation to the accrual of the limitation period was the basis for the recommendation that the limitation period be reduced from six to three years.<sup>6</sup>

Two cases have been decided in the County Court to date, both by coincidence heard by his Honour Judge Stott: *Dark v CFA*<sup>7</sup> and *Ilardi v Foster*.<sup>8</sup> In both, his Honour held that the requirement in s27F(1)(b) means merely knowledge 'of a causal nexus between the injury and the act or omission of the defendant'.<sup>9</sup> He expressly held that there was no additional requirement that the plaintiff know that the defendant's act or omission was negligent or wrongful.

As his Honour granted an extension of time to both plaintiffs, neither was prejudiced by his narrow construction of s27F and no appeals were lodged.

It is simply a matter of time before the issue is referred to the Court of Appeal to consider whether s27F(1) is being interpreted consistently with what Justice Ipp intended. A separate issue is how the subsection's reference to 'know or ought to have known' should be applied.

In the event that it is given the original meaning intended by Justice Ipp, advising plaintiffs with any certainty as to when the limitation period commences and when their claims become statute-barred will be much more difficult. What happens when a solicitor sends a client away on the basis that there is not considered to be any negligence? Arguably, the limitations period may not run until a different solicitor can obtain an opinion supporting an allegation based upon fault. This makes it very uncertain for plaintiffs and defendants alike and may mean that the time for bringing a claim will be much longer than the previous six-year period.

#### TIME PERIODS

Once the date for discoverability has occurred, an adult has three years in which to commence a claim for damages<sup>10</sup> and an infant with capable parents has six years.<sup>11</sup> A plaintiff sexually assaulted by a relative effectively has until his or her 37th birthday in which to bring a claim for damages.<sup>12</sup>

There is an overriding 12-year longstop period that runs from the date the cause of action first arose.<sup>13</sup> Therefore, if for whatever reason there has been no discovery of fault by the plaintiff, it is too late to bring a claim once 12 years after the negligence event have elapsed. Only if an extension of time application can be brought would the plaintiff still be entitled to recover damages.

#### EXTENSION OF TIME

The new provisions in relation to the extension of time (governed by s27K) are remarkably similar to the old s23A. There is no limit as to when the application for an extension of time can be made, and it can be made before the limitation period expires. In deciding whether to grant an extension, the key question is whether it is 'just and reasonable' in all the circumstances.

#### WORKCOVER AND TAC

None of the above amendments to the limitations law applies to work injury claims or transport accidents.<sup>14</sup> For such injuries, a six-year limitation period applies, which can be readily calculated based upon the date of the injury.<sup>15</sup>

#### DUST DISEASES AND TOBACCO INJURIES

These claims are still subject to s5(1A), and a three-year limitation period applies.

#### HIGH COURT AUTHORITY ON VICTORIAN LIMITATIONS LAW

Ironically, the recent High Court decision of *Stingel v Clark*<sup>16</sup> has come at least three years too late for most injured people in Victoria. This decision opened up the application of s5(1A) in a way that had not been permitted by the Victorian Court of Appeal. While the 5-2 decision has been hailed by some plaintiff lawyers as a landmark case, the amendments to the limitation law makes it more likely to be of legal importance only for historical or intellectual purposes.

**Notes:** 1 Section 3(3) of *Limitation of Actions (Amendment) Act 2002 (Vic)*. 2 Commonwealth of Australia, *Review of the Law of Negligence Report*, Canberra, 2002 ('Ipp Report'). 3 Page 90 of Ipp Report. 4 Section 27(1) of the *Limitation of Actions Act 1958* ('the Act'). 5 Page 91, para 6.24 of Ipp Report. 6 Page 91, para 6.26 of Ipp Report. 7 Unreported, 21 June 2005. 8 [2006] VCC 793. 9 This summary was given by his Honour in *Ilardi v Forster* [2006] VCC 793 para 16. 10 Section 27D of the Act. 11 Section 27E(2)(a). 12 Section 27I. 13 Section 27D(1)(b). 14 Section 27B(2). 15 Section 5(1)(a). 16 [2006] HCA 37.

## WESTERN AUSTRALIA

By Greg Burgess

#### RELEVANT TIME LIMITS AND EXCEPTIONS

The limitation period for most personal injury actions has now been reduced by the *Limitation Act 2005 (WA)* (LA) from six to three years from the date of the cause of action accruing.<sup>1</sup> This time period now applies to actions under the *Fatal Accidents Act 1959*, and to actions against the state and public authorities as a result of the *Limitation Amendment and Repeal Act 2005*.

The limitation periods under the LA only apply to causes of action accruing after the Act commenced, with the exception of childbirth cases.

Where the cause of action arose from an injury to a baby at childbirth that occurred prior to the Act commencing, the limitation period expires six years from the day of commencement.<sup>2</sup> Alternatively, the limitation period that would have applied but for s7 has expired – that is, no longer than 24 years from birth.

The limitation period for an infant under 15 years is six years, running from when the cause of action accrued.<sup>3</sup> For a person aged 15 to 18 when the cause of action accrued, the limitation period expires on their 21st birthday.<sup>4</sup> Time will not run against an infant if s/he did not have a guardian. Nonetheless, an action cannot be commenced after s/he reaches 21.<sup>5</sup>

When a cause of action accrues for an infant and during any time after the accrual, but before the infant reaches 18 years, the defendant is a 'person in a close personal relationship' with the infant, an action cannot be commenced after their 25th birthday.<sup>6</sup>

The usual limitation period will not run during any period in which a person suffering a mental disability is without a guardian. In such a case, the action expires 12 years after the cause of action accrues.<sup>7</sup> However, where the person suffering a mental disability claims against a 'person in a close relationship', the limitation period is extended to 30 years.<sup>8</sup>

When a cause of action accrues for an infant, who subsequently suffers a mental disability, different limitation periods may apply.<sup>9</sup> In this case, the limitation period is the longer of the relevant limitation periods.<sup>10</sup>

#### ACCRUAL OF CAUSE OF ACTION

A cause of action for personal injury accrues on the earliest of the following dates:<sup>11</sup>

1. When the person becomes aware that s/he has sustained a not insignificant personal injury.
2. When the first symptom, clinical sign or other manifestation of personal injury appears, which is consistent with the person having sustained a not insignificant personal injury.

The terms 'not insignificant personal injury' and 'manifestation' are not defined. This is different to the previous *Limitation Act*, and makes the limitation period start when there is a clinical sign or other manifestation of personal injury, even if the injured person is unaware of it.

Section 56 replicates the previous laws on personal injury attributable to asbestos. However, there are no allowances made for other latent diseases or injuries arising from gradual exposure to harmful conditions.

#### EXTENSIONS OF TIME

If the failure to commence the action was attributable to fraudulent or other improper conduct of the defendant or a person for whom the defendant is vicariously liable, a court may extend the limitation period by up to three years. This extension runs from when the action ought reasonably to have been commenced.<sup>12</sup>

A claim for damages under the *Fatal Accidents Act 1959* may be

extended by an order of the court.<sup>13</sup>

Upon application to the court, a limitation period may be extended if the court is satisfied that when the period expired, the plaintiff was not aware of the cause of the death or injury; was not aware that the death or injury was attributable to another person's conduct; or was not able to establish the defendant's identity.<sup>14</sup>

There is no time limit for bringing an application to extend time, but the court must only extend the limitation period for three years from when the person became aware, or ought to have become aware, of the relevant matters.<sup>15</sup>

Section 44 requires that the court hearing an application to extend time have regard to whether the delay in commencing the action would unacceptably diminish the prospects of a fair trial. The court must also consider whether extending time would significantly prejudice the defendant.

**Notes:** 1 LA, s14 2 LA, s7. 3 LA, s30. 4 LA, s31. 5 LA, s32. 6 LA, s33. 7 LA, s35. 8 LA, s36. 9 LA, s7 applies to childbirth; division 1 or 2 apply to extending time for claims of infants or for persons under mental disability. 10 LA, s52. 11 LA, s55. 12 LA, s38. 13 LA, s39. 14 LA, s39. 15 LA, s39(4).

With acknowledgment to Geoff Hancy, Barrister, Francis Burt Chambers, Perth for his paper 'Limitations Bill 2005' delivered to the Australian Lawyers Alliance Western Australian Conference 2005.

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