

Review of the Law of Negligence Final Report

September 2002

- (ii) was attributable to negligent conduct of the defendant; and
- (iii) in the case of personal injury, was sufficiently significant to warrant bringing proceedings.
- (c) The limitation period is 3 years from the date of discoverability.
- (d) Subject to (e), claims become statute-barred on the expiry of the earlier of :
 - (i) the limitation period; and
 - (ii) a long-stop period of 12 years after the events on which the claim is based ("the long-stop period").
- (e) The court has a discretion at any time to extend the long-stop period to the expiry of a period of 3 years from the date of discoverability.
- (f) In exercising its discretion, the court must have regard to the justice of the case, and in particular:
 - (i) whether the passage of time has prejudiced a fair trial of the claim.
 - (ii) the nature and extent of the plaintiff's loss.
 - (iii) the nature of the defendant's conduct.

Suspension of the limitation period: minors and incapacitated persons

6.41 The Panel has heard persuasive evidence from several sources about difficulties that are experienced by reason of the rule that limitation periods do not run against minors and mentally incapacitated persons. We shall give two examples of categories of persons who experience such difficulties.

6.42 The first is public liability and professional indemnity insurers. Their problems are caused by uncertainty in forecasting claims by minors and incapacitated persons. They emphasise the phenomenon that the older the claim, the more likely it is that the law will have changed substantially since the time the risk was underwritten. This gives rise to major difficulties in

assessing premiums. This, in turn, gives rise to problems for defendants and, hence, is a consideration the Panel is required to take into account.

6.43 The second affected group consists of persons whose business or profession it is to deal with young children or incapacitated persons. Obstetricians are the obvious example of persons who fall into this category. The main problem for obstetricians is the possibility of being faced with claims, sometimes 20 years or more after the relevant event. Claims may be made years after the obstetrician has retired. The Panel was told, on the basis of anecdotal evidence, that this has led to shortage of obstetricians in some areas as a result of some ceasing to practise as such.

6.44 The Panel is not in a position to verify this assertion, but many people clearly perceive it to be correct. We have also been told that this perception is adversely affecting the availability of insurance at reasonable premiums. Having regard to our Terms of Reference, the Panel is required to take account of the perception.

6.45 One view, reflected in the limitation legislation in most jurisdictions, is that it is unjust to provide for the running of limitation periods against children and incapacitated persons. Generally, limitation periods are suspended in favour of minors and incapacitated persons.

6.46 Another view that has been expressed to the Panel is that society can reasonably expect parents and guardians, and those who care for incapacitated persons, to take necessary steps on behalf of their charges to initiate claims within the time limits imposed on the rest of the community.

6.47 Existing legislation in some jurisdictions is consistent with this view. Limitation periods run against minors in Tasmania⁶ and against minors and the mentally incapacitated under the *Motor Accident Compensation Act 1999* (NSW). The TPA has been construed⁷ to mean that the limitation period in s 82 of the Act runs against minors and incapacitated persons.

6.48 After giving the issue careful consideration,⁸ the Panel is satisfied that it is in the overall interests of the community as a whole that, as a general rule, the limitation period should run against minors and incapacitated persons. The Panel is accordingly of the view that the limitation and long-stop periods

⁶ Limitation Act 1974 (Tas) s 26.

⁷ TPA s 82 see *Re: Vink And: Schering Pty Ltd* (1991) ATPR 41-073.

⁸ The Panel has relied heavily in this respect on the work of the Western Australian Law Reform Commission in its *Report on Limitation and Notice of Actions* (1997), paras 17.45-17.65.

should run against minors except for periods when the minor is not in the custody of a parent or guardian, and against incapacitated persons except for periods during which no administrator has been appointed in respect of the person.

6.49 Minors who are not in the custody of a parent or guardian, minors who are in the custody of parents or guardians who are themselves under a disability, and incapacitated persons in respect of whom an administrator has not been appointed, should be regarded as persons under a disability. In those instances, the limitation period should not run against the minor or incapacitated person.

6.50 In cases where the plaintiff becomes a person under a disability after time has commenced running, the limitation period should be suspended for any period during which the plaintiff is under a disability.

6.51 In cases where a minor or incapacitated person is not under a disability, for the purposes of determining when the limitation period commences, the relevant knowledge would be that of the parent, guardian or administrator, as the case may be, and not that of the minor or incapacitated person.

6.52 There will also be cases where a parent or guardian of a minor, or a person in a close relationship with the parent or guardian, is the potential defendant. A close relationship is a relationship such that

- (a) the parent or guardian might be influenced by the potential defendant not to bring a claim on behalf of the minor against the potential defendant; or
- (b) the minor might be unwilling to disclose to the parent or guardian the nature of the actions that allegedly caused the damage.

6.53 Special rules should be laid down for such cases.

6.54 In cases where the parent, guardian, or a person in a close relationship with the parent or guardian, is the potential defendant, the Panel recommends that the limitation period commence only when the plaintiff turns 25 years of age. This will give plaintiffs a reasonable time to be free of the influence of the parent, guardian or potential defendant (as the case may be) before having to commence proceedings. The Panel also recommends that the limitation period in such cases (which will be referred to as 'the close-relationship limitation period') should be 3 years.

6.55 In some cases of this sort, the date of discoverability may not occur until after the expiry of the close-relationship limitation period. Therefore, the Panel recommends that in such cases the court should have a discretion, exercisable at any time, to extend the close-relationship limitation period to the expiry of a period of 3 years from the date of discoverability.

6.56 In most limitation statutes, the limitation period is suspended where the plaintiff is prevented from knowing of the claim by reason of fraud or concealment on the part of the defendant. Such a provision is unnecessary under the system proposed as the principle of time running from the date of discoverability caters for this.

Recommendation 25

The Proposed Act should embody the following principles:

- (a) The running of the limitation period is suspended during any period of time during which the plaintiff is a person under a disability.
- (b) 'Person under a disability' means:
 - (i) a minor who is not in the custody of a parent or guardian;
 - (ii) an incapacitated person (such as a person who is unable, by reason of mental disorder, intellectual handicap or other mental disability to make reasonable judgments in respect of his or her affairs) in respect of whom no administrator has been appointed.⁹
 - (iii) a minor whose custodial parent or guardian is a person under a disability.

⁹ Recommendation 25 is based on recommendation 69 of the Western Australian Law Reform Commission *Report on Limitation and Notice of Actions* (1997), discussed in paras 22.17-22.24.

- (c) In the case of minors and incapacitated persons who are not persons under a disability, the relevant knowledge for the purpose of determining the date of discoverability is that of the parent, guardian or appointed administrator, as the case may be.
- (d) Where the parent or guardian of a minor is the potential defendant or is in a close relationship with the potential defendant, the limitation period (called 'the close-relationship limitation period') runs for 3 years from the date the plaintiff turns 25 years of age.
- (e) A close relationship is a relationship such that:
 - (i) the parent or guardian might be influenced by the potential defendant not to bring a claim on behalf of the minor against the potential defendant; or
 - (ii) the minor might be unwilling to disclose to the parent or guardian the conduct or events on which the claim would be based.
- (f) In cases dealt with in (d), the court has a discretion at any time to extend the close-relationship limitation period to the expiry of a period of 3 years from the date of discoverability.

Survival of actions¹⁰

Recommendation 26

The Proposed Act should embody the following principles:

¹⁰ Recommendation 26 is based on paragraph 22.23 of the Law Reform Commission of Western Australia Report.

- (a) Subject to sub-para (b), the limitation principles contained in Recommendations 24 and 25 should apply to an action brought by the personal representative of a deceased person acting as such.
- (b) In such a case, the limitation period should begin at the earliest of the following times:
 - (i) when the deceased first knew or should have known of the date of discoverability, if that knowledge was acquired more than 3 years before death;
 - (ii) when the personal representative was appointed, if he or she had the necessary knowledge at that time;
 - (iii) when the personal representative first acquired or ought to have acquired that knowledge, if he or she acquired that knowledge after being appointed.

Contribution between tortfeasors

Recommendation 27

The Proposed Act should provide for limitation periods in regard to contribution between tortfeasors.

Early notification system

6.57 The Panel received submissions about a system for early notification of claims. Such systems currently exist in virtually all motor accident and workers compensation schemes in Australia, and in particular the *Personal Injuries Proceedings Act 2002* (Qld). The Panel has been informed that early notification systems are beneficial for effective injury-management and early resolution of claims. Given the time constraints on the Panel, it is not able to comment on these systems. The Panel does suggest, however, that this is an issue that warrants further investigation.