

## LIMITATION OF ACTIONS AND TORT REFORM

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'Tort reform' may be the panacea for which the nation is waiting to cure the current liability insurance crisis, or it may simply prove to be an irrelevance. On this, opinions will differ, and various points of view will be expressed in this *Forum*. But tort reform may come at a cost. Currently, the principles of the law of negligence are uniform throughout Australia. This is because they have been the product of judicial development, with the High Court exercising a controlling influence over the courts of the States. Though there are a number of statutory differences between the jurisdictions, as a result of legislation such as the *Motor Accidents Compensation Act 1998* (NSW), and no-fault compensation schemes in Victoria, Tasmania and the Northern Territory, they have hitherto been fairly minor and do not affect the general pattern of uniformity. All this may be about to change. As a result of the clamour for tort reform, something like 30 Bills are presently before State and Territory Parliaments, and some have already made it onto the statute book. The result may be that the law of negligence — and in particular the measure of damages awardable — will henceforth differ considerably from State to State. However, on 2 July 2002 the Commonwealth Government announced the terms of reference of a Review of the Law of Negligence, to be conducted by a panel chaired by Justice David Ipp ('Ipp Panel'), and the Panel's Report was published in September 2002. The Commonwealth urges all States and Territories to adopt its recommendations. The future uniformity of the Australian law of negligence may depend on whether the States are prepared to adopt the Commonwealth proposals in preference to their own.

There is one area of reform, however, where the opposite process is taking place: an area where the present picture is one of disunity, and the result of the reform process may well be to bring about greater harmony. This is the law relating to limitation periods. At present, because the law is statutory, there is considerable diversity. The limitation period for a personal injury claim is three years in New South Wales ('NSW'), the Northern Territory ('NT'), Queensland, South Australia ('SA') and Tasmania,<sup>1</sup> but six years in the Australian Capital

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1 *Limitation Act 1969* (NSW) s 18A; *Limitation Act 1981* (NT) s 12(1)(b); *Limitation of Actions Act 1974* (Qld) s 11; *Limitation of Actions Act 1936* (SA) s 36; *Limitation Act 1974* (Tas) s 5(1).

Territory ('ACT'), Victoria and Western Australia ('WA')<sup>2</sup> — although in WA there are much shorter limitation periods which apply in actions against the Crown and public authorities.<sup>3</sup> On application to the court, the ordinary limitation period can be extended for a potentially unlimited period in the ACT, provided it is just and reasonable;<sup>4</sup> for a period not exceeding five years in NSW, unless the plaintiff is unaware of the nature or extent of the injury, when the period is unlimited;<sup>5</sup> and for a maximum period of three years in Tasmania.<sup>6</sup> In Victoria the position is generally similar to the ACT, but in cases of latent injury there is an additional limitation period running from the date on which the injury became discoverable.<sup>7</sup> In Queensland, the plaintiff must demonstrate that a material fact of a decisive character was not within the plaintiff's means of knowledge until the final year of the limitation period,<sup>8</sup> and in SA and the NT there are somewhat similar provisions which are not limited to personal injury but apply to all actions.<sup>9</sup> In WA, no extension of the ordinary period is possible except in cases involving asbestos-related diseases.<sup>10</sup>

This jumble of differing provisions means that the rights of plaintiffs vary considerably from one jurisdiction to another. Though there have been occasional reforms in particular States, until now there has been no impetus for unification. The Ipp Panel's recommendations may change all this. The Panel's terms of reference required it to develop and evaluate options for a three year limitation period, and the accompanying media release suggested that the Panel would be seeking 'options to limit claims of negligence to within three years of an event (ie reducing the statute of limitations)'.<sup>11</sup> If the final recommendation had taken this form, it would have considerably curtailed the rights of plaintiffs under the present law, even under the most draconian of the above provisions — even more so if the 'event' in question were interpreted as the breach of duty, rather than the resulting damage which is the point at which time begins to run under the present law. Fortunately, the Ipp Panel's recommendation is a much more reasonable one. It recommends that all claims should be governed by two limitation periods: a three year period running from the date of discoverability (that is, when the plaintiff knew or ought to have known of it), and a 12 year 'long stop' period running from the date of the events on which the claim is based. The court would have a discretion to extend the long stop period to a point three years after the date of discoverability. The action would be barred

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2 *Limitation Act 1985* (ACT) s 11; *Limitation of Actions Act 1958* (Vic) s 5(1)(a); *Limitation Act 1935* (WA) s 38(1)(c)(vi).

3 *Crown Suits Act 1947* (WA) s 6; *Limitation Act 1935* (WA) s 47A.

4 *Limitation Act 1935* (ACT) s 36.

5 *Limitation Act 1969* (NSW) pt III div 3.

6 *Limitation Act 1974* (Tas) s 5(3).

7 *Limitation of Actions Act 1958* (Vic) ss 23A, 5(1A).

8 *Limitation of Actions Act 1974* (Qld) s 31.

9 *Limitation of Actions Act 1936* (SA) s 48; *Limitation Act 1981* (NT) s 44.

10 *Limitation Act 1935* (WA) s 38A.

11 Senator Helen Coonan, 'Minister Announces Review Panel' (Press Release, 2 July 2002), <<http://assistant.treasurer.gov.au/atr/content/pressreleases/2002/076.asp>> at 21 November 2002.

once either period expired.<sup>12</sup> Though this may not solve all the problems — for example, under the present law in jurisdictions such as NSW, a court may decide that it is just and reasonable to extend the period for reasons other than non-discoverability<sup>13</sup> — the result is a reasonable compromise. Since the current State Bills do not seek to reform limitation laws, the Ipp Panel's recommendations provide a real opportunity for bringing about uniform law where presently it does not exist.

Part of the reason why the current limitation laws of the eight Australian jurisdictions differ so much — not only in the personal injury sphere, but in other respects also — is that they belong to different eras. An examination of their archaeology reveals that Victoria, Queensland and Tasmania enacted legislation based on the English *Limitation Act 1939*, which implemented the reforms recommended by the Law Revision Committee in 1936;<sup>14</sup> that NSW, the NT and the ACT — which has the most modern statute — adopted improvements to the English legislation which resulted from the recommendations of the New South Wales Law Reform Commission in 1967;<sup>15</sup> but that WA and (in most respects) SA still have Acts based on the unreformed English legislation of the 19<sup>th</sup> century (or earlier).<sup>16</sup>

All these Acts are traditional limitation statutes, in that they enact a variety of different limitation periods for different causes of action. But the reform of limitation of actions law is now proceeding in a different direction. Commencing with the work of the Alberta Law Reform Institute in the 1980s, all recent reform recommendations suggest scrapping the plethora of fixed periods for different kinds of action and replacing them by two general limitation periods: a period of either two or three years running from the time when the claim becomes discoverable, and an ultimate or long stop period of between 10 and 15 years usually running from the date of the breach of contract, breach of duty or other event on which the claim is based.<sup>17</sup> The original Alberta recommendations (now enacted in Alberta and Newfoundland)<sup>18</sup> did not permit the extension of either period. The same is true of the Bill currently before the Ontario Parliament.<sup>19</sup> However, the recent recommendations of the Western Australian and Queensland Law Reform Commissions deal with difficult cases by giving the courts a narrowly circumscribed power to extend either limitation period in exceptional circumstances where the interests of justice demand, and the English Law Commission, initially reluctant to open the door to requests for extension,

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12 Panel of Eminent Persons, *Review of the Law of Negligence Final Report* (2002) Recommendation 24.

13 See, eg, *PD v Australian Red Cross Society* (1993) Aust Torts Reports ¶81-205.

14 Law Revision Committee, *Fifth Interim Report (Statutes of Limitation)*, Cmd 5334 (1936).

15 New South Wales Law Reform Commission, *First Report on the Limitation of Actions*, Report No 3 (1967).

16 See Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions*, Project No 36 Part II (1997) [2.1]–[2.10].

17 See Alberta Law Reform Institute, *Limitations*, Report No 55 (1989); Law Reform Commission of Western Australia, *ibid*; Queensland Law Reform Commission, *Review of the Limitation of Actions Act 1974 (Qld)*, Report No 53 (1998); Law Commission, *Limitation of Actions*, Report No 270 (2001) (UK).

18 *Limitations Act 1996* (Alberta); *Limitations Act 1995* (Newfoundland).

19 *Limitations Bill 2000* (Ontario).

ultimately compromised by recommending extension provisions limited to personal injury cases.

In this context, the Ipp Panel's recommendations have been informed by and endorse the thinking of law reform bodies in three continents which conducted thoroughgoing inquiries conducted over periods of several years — rather than the three months which was all that was available to the Panel — and which dealt with the whole range of civil actions, rather than being confined to negligence actions for personal injury. Given the differences of view about whether or not courts should have a power to extend the two general periods, the Ipp Panel's solution — to allow the extension of the long stop period only — is a worthwhile compromise and one which might still any doubts in WA or Queensland about whether or not the recommendations should be implemented. In this context, it should be noted that the Western Australian Attorney-General recently published a paper<sup>20</sup> rejecting the central recommendations of that State's Law Reform Commission on the ground that they 'would be productive of enormous uncertainty, which will be translated into significantly increased litigation and insurance premiums, and carry with it significant economic cost', and also expressing dissatisfaction with the proposed judicial discretion. Instead it suggested two reforms limited to personal injury cases: first, in cases of latent injury and disease the cause of action should be deemed to have accrued when the injury or disease first manifested itself in a not insignificant form; secondly, the courts should be able to extend time for three years from when the victim knew or ought to have known the reasonable cause of the injury, or on being satisfied that the failure to commence proceedings was attributable to fraudulent or other conduct of the proposed defendant. These reforms, while a considerable advance on the present WA position, simply enact yet another variation on legislation already existing in other Australian jurisdictions. In the light of the Ipp Panel's recommendations, which are much closer to the spirit of the reform proposals recently developed in Canada, Australia and England, perhaps WA should think again.

The other limitation issue addressed by the Ipp Panel is the problem of minors and incapacitated persons. Under the present law, in an action by a minor the limitation period does not commence until the minor reaches adulthood, and in the case of incapacitated persons the period does not run during periods of incapacity (and so may never start running).<sup>21</sup> Thus in an action by a minor against a doctor for negligence during the birth process or in infancy there may be an effective limitation period of well over 20 years,<sup>22</sup> and the problems this causes for such defendants — for example, in maintaining insurance for long periods after ceasing practice — are readily apparent. On the other hand, the

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20 Attorney-General of Western Australia, *Limitations Law Reform* (2002).

21 *Limitation Act 1985* (ACT) s 30; *Limitation Act 1969* (NSW) s 52; *Limitation Act 1981* (NT) s 36; *Limitation of Actions Act 1974* (Qld) s 29; *Limitation of Actions Act 1936* (SA) s 45; *Limitation Act 1974* (Tas) s 26; *Limitation of Actions Act 1958* (Vic) s 23; *Limitation Act 1935* (WA) s 40.

22 See, eg, *Dissidomino v Newnham* (Unreported, Supreme Court of Western Australia, Kennedy, Franklyn and White JJ, 12 April 1994); *Harriton v Stephens* [2002] NSWSC 461 (Unreported, Studdert J, 12 June 2002).

devices found in existing legislation for overcoming this problem<sup>23</sup> may well not adequately safeguard the minor's interests. There is a large body of opinion which maintains that the rights of minors should not be curtailed by expecting them to take steps to sue during minority. On the other hand, given the current insurance crisis, this may be one area where the problem can be alleviated by shortening the limitation period, provided that minors' rights can be protected. The Ipp Panel turned to the *Report on Limitation and Notice of Actions* of the Law Reform Commission of Western Australia, which had made a recommendation to deal with this problem as part of a legislative scheme similar to that endorsed by the Ipp Panel.<sup>24</sup> The limitation period is to be suspended during any period during which the plaintiff is a person under disability, but 'person under disability' is defined to mean a minor who is not in the custody of a parent or guardian or an incapacitated person in respect of whom no administrator has been appointed, or a minor whose custodial parent is under disability. For the purpose of determining the date of discoverability, the relevant knowledge is that of the parent, guardian or administrator. Where the parent or guardian of the minor is the potential defendant or is in a close relationship with the potential defendant, the limitation period runs for three years from the date on which the plaintiff turns 25.<sup>25</sup>

Limitation reforms only address part of the perceived problem. It may be decided that it is necessary to change the laws governing liability in negligence, and to impose thresholds, caps and other limitations on the scope of the damages awarded. These changes may not necessarily be for the better, and they may or may not bring about the desired result. But the Ipp Panel's limitation proposals offer a unique opportunity to bring uniformity to Australia's limitation laws, modernising them in line with recent thinking, and replacing laws dating from the early 20<sup>th</sup> and in some cases the 19<sup>th</sup> century. Limitation laws are no longer merely a procedural matter. In conflict of laws situations, for example, the law of the place of the tort now applies and with it the local limitation rules.<sup>26</sup> Variations in limitation laws mean that an action which may be in time in one State has no chance of succeeding in another.<sup>27</sup> It is surely time that such arbitrary differences became a thing of the past.

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23 See, eg, notice to proceed provisions: *Limitation Act 1985* (ACT) s 31; *Limitation Act 1969* (NSW) s 53; *Limitation Act 1981* (NT) ss 37–40; *Limitation Act 1974* (Tas) s 27.

24 Law Reform Commission of Western Australia, above n 16, [17.45]–[17.65].

25 Panel of Eminent Persons, above n 12, Recommendation 25.

26 See *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

27 See, eg, *Reidy v Trustees of the Christian Brothers* (1994) 12 WAR 583.