

Preliminary Paper No. 3

THE LIMITATION ACT 1950

A discussion paper

The Law Commission seeks your response to the questions  
raised in this paper and welcomes your comments.

These should be forwarded to:  
The Director, Law Commission, P.O. Box 2590, Wellington  
by 30 October 1987

1987

Wellington, New Zealand

**Preliminary Paper/Law Commission Wellington, 1987**

**ISSN 0113-2245**

**This preliminary paper may be cited as: NZLC PP3**

# C O N T E N T S

	Para.	Page
PREFACE		(v)
INTRODUCTION		1
Ministerial Reference	2	1
General approach to review	3	1
Stages in the review	4	1
Purposes of paper	5	2
Scope of topic	6	2
Objectives for reform	11	3
Overseas law reform	12	4
Outline of paper	14	4
 I     THE PRESENT LAW AND PRACTICE		 6
Part I of the 1950 Act – limitation periods	19	6
Part II of the 1950 Act – postponement provisions	21	8
Equitable rules	23	9
Particular statutes	28	10
Survey of High Court files	30	11
 II    HISTORY OF THE 1950 ACT		 12
The Roman law	34	12
Statutes of limitation	35	12
The 1623 Act	38	12
The Wright Report	41	13
The English Act of 1939	47	14
The 1950 Act		15
General	50	15
Public authorities	52	15
Personal injury actions	56	17
 III   THE NEED FOR A LIMITATION STATUTE		 18
Arguments for and against	60	18
A preliminary opinion	63	20
The status quo	67	21
Judicial discretion	72	22
 IV    THE SCOPE OF A LIMITATION STATUTE		 24
Proceedings relating to land	85	25
Declaratory proceedings	91	26
Judicial review	95	27
Equitable relief	97	27

V	LIMITATION PERIODS: COMMENCEMENT, DURATION, EXTENSION		28
	The present position	100	28
	The Latent Damage Act 1986 (U.K.)	109	30
	A common limitation period	113	31
	Commencement of period	117	32
	Length of standard period	122	32
	Extension of the standard period	125	33
	The long-stop	135	35
	A new limitation regime	142	36
VI	LATENT DAMAGE: CASES, ISSUES, COMPARISONS		38
	The case law	146	38
	The changing law	151	41
	Areas of uncertainty	155	42
	Schematic comparison	156	43
	Present New Zealand law	156	43
	The United Kingdom Latent Damage Act 1986	156	44
	The Albertan proposal	156	44
	The Law Commission proposal	156	45
VII	THE ISSUES: A SUMMARY		46
	The broad questions	158	46
	Some specific issues	159	48
	Agreements to extend or reduce time	160	48
	Amendment of pleadings	162	49
	Burden of proof	163	49
	Contribution proceedings	164	49
	Crown proceedings	165	50
	Delay, discretion	166	50
	Extinction of rights	167	50
	Transitional provision	169	50
	Name of Act	171	51
	Appendix A – Limitation Act 1950		52
	Appendix B – Civil statutes with their own limitation provisions		65
	Appendix C – Selected bibliography		66
	Appendix D – Survey of cases filed in Court		68
	Appendix E – Latent Damage Act 1986 (U.K.)		84
	Appendix F – Draft Limitations Act (Alberta)		88

## PREFACE

Most New Zealanders would readily accept that justice includes having access to the courts to determine disputes which cannot otherwise be dealt with. It is something we take for granted. But most would also agree that (in the words used in an old English case) there is more of cruelty than of justice in the pursuit of stale claims – when memories have dimmed, people have moved on or perhaps died, and documents have been lost or destroyed. Statutes of Limitation – imposing time limits within which a civil claim may be taken to a court for determination – attempt to achieve a balance between these conflicting ideas.

In this discussion paper the Law Commission outlines the major issues involved in such statutes and suggests that there is scope for quite fundamental change in our limitation legislation.

Those suggestions are not conclusions although they fairly indicate the present state of thinking within the Commission. Conclusions and recommendations for legislative change will only be fixed after the Commission has considered the submissions and consultations which it hopes to trigger by publishing and circulating this paper.

Submissions from interested persons and organisations are thus very much encouraged. If those making submissions wish to meet with the Commission that should be indicated in a preliminary written response.

All submissions should be addressed to:

The Law Commission  
P.O. Box 2590  
Wellington (Telephone: (04) 733-453)

by 30 October 1987.

Enquiries should be directed to the project research officer, Janet McLean.



## INTRODUCTION

1. This paper represents an important stage in a review of the Limitation Act 1950, a general statute which limits the time within which certain civil proceedings can be commenced in the courts. Historically, at least, the primary reason for such a law has been that lawsuits should be brought within a reasonable time after the events in dispute. Thus, for example, the 1950 Act provides that a plaintiff generally has six years from the time a breach of contract takes place to file at the Court a statement of claim which seeks enforcement of the contract or relief from the consequences of the breach; after the six years has run out, there can generally be no recourse to the courts.

## MINISTERIAL REFERENCE

2. On 1 October 1986 the Minister of Justice wrote requesting that the Law Commission examine the Limitation Act 1950 and make recommendations on what, if any, changes are needed to it. He made specific reference to representations made to him regarding liability for latent defects (where damage either does not occur or is not discoverable for some years after the events which have caused it, as in building subsidence cases) but saw no great merit in examining only one aspect rather than the whole of the 1950 Act (which is reproduced in Appendix A).

## GENERAL APPROACH TO REVIEW

3. The Law Commission approaches this particular task mindful of its obligations under its own Act, the Law Commission Act 1985. Its general task, under that Act, is the systematic review, reform and development of the law of New Zealand. The statute emphasises the importance of clarity: in s.5 there is a reference to making the law "as understandable and accessible as practicable" as well as to "the desirability of simplifying the expression and content of the law, as far as that is practicable." Also, and importantly, there is a requirement that the Commission "take into account te ao Maori (the Maori dimension) and ... give consideration to the multi-cultural character of New Zealand society".

## STAGES IN THE REVIEW

4. The Commission is undertaking this review of the Limitation Act in stages as follows:

- (a) preliminary consultations and extensive research, including a review of overseas laws and relevant literature, and a file survey of existing practice in the High Court;
- (b) preparation and distribution of the present preliminary paper;
- (c) invitation and receipt of submissions on the discussion paper and related matters from interested persons and organisations;
- (d) submission of a final report to the Minister of Justice, including draft legislation, by the end of 1987.

## PURPOSES OF PAPER

5. The purposes of the present paper include the following:

- (a) to provide a necessarily brief introduction and background to the subject matter of the Commission's review;
- (b) to indicate areas where changes to the present law might be made and the possible directions for change;
- (c) to give some indication of the Commission's preliminary views on particular matters; and
- (d) to encourage responses from interested persons and organisations.

## SCOPE OF TOPIC

6. Although the Limitation Act 1950 is a general statute, it is by no means comprehensive. For example, it does not apply to claims of fraudulent breach of trust or applications for judicial review. Moreover, there are many statutes which provide limitation periods of their own. A preliminary list of such statutes is contained in Appendix B and the Commission invites advice as to the existence of other relevant statutory provisions not listed there.

7. The present review is not concerned with statutes or rules which subject a litigant to time restrictions after proceedings have been commenced, such as the limits on the time in which to take an appeal or the powers of courts to strike out proceedings for failure to pursue them. However, it may be noted that such statutes or



rules reflect general ideas of despatch and finality which are also relevant to limitation statutes.

8. Criminal law is another area which is not part of the present exercise. The 1950 Act does not prescribe time limits for prosecution of offences. The question of whether criminal prosecutions should be subject to a comprehensive limitation regime could become the subject of separate consideration by the Commission.

9. Nor is this review concerned with limitations on awards of damages. The Commission is aware of (and monitoring) representations from professional and other groups here and overseas seeking statutory ceilings on the amount of damages for which they are liable. Again, that is a separate question.

10. It should be acknowledged, however, that the subject of limitation touches on many aspects of the substantive law. Indeed some problems arising in the limitation area have been exacerbated by recent and rather dramatic changes to the general law, particularly in the areas of negligence liability, the boundary between tort and contract, and damages for economic loss, which have left several areas of uncertainty. Many of these are discussed in chapter VII. It is not within the immediate scope of this review to solve those problems, although the Commission notes that in *Curran v. Northern Ireland Co-ownership Housing Association Ltd* [1987] 2 All E.R. 13, 18 the House of Lords suggested that the whole subject of negligence liability might be referred to the English Law Commission.

## OBJECTIVES FOR REFORM

11. In preparing this paper the Law Commission has derived much assistance from the work of the Institute of Law Research and Reform, Edmonton, Alberta, which published an extensive discussion paper on limitations in September 1986 (hereafter referred to as "the Alberta report"), and it may be useful to record the general principles articulated in that paper:

"(1) Fairness. The Act should strike as fair a balance between the interests of claimants and defendants as is possible.

(2) Comprehensiveness. The primary element in the Alberta limitations system should be an Act which includes, in so far as feasible, all limitation provisions in force in Alberta.

(3) Comprehensibility. The Act should be as comprehensible as possible for all persons, laymen and lawyers, who will be affected by it.

(4) Unambiguous. Each provision of the Act should, in so far as possible, express its purpose, scope and method of operation clearly.

(5) Organisation. The provisions of the Act should be organised in a logical sequence in order to enhance their clarity and to eliminate redundancy.

(6) Plain language. The Act should be drafted in contemporary plain language.

(7) Simple. The Act should contain provisions expressing fundamental principles designed to be applicable in most cases, and it should not be burdened with technical solutions for rare cases."

## OVERSEAS LAW REFORM

12. The topic of limitation of the time within which civil proceedings may be commenced has been considered in many reports produced by law reform agencies in various parts of the world, from the Wright Report (U.K., 1936 – see Paras. 41–46 below) through to the Alberta (September 1986) and New South Wales Law Reform Commission (October 1986) reports. The Law Commission has been greatly assisted by those reports which are listed in a selected bibliography (see Appendix C).

13. Many of the overseas law reform agency reports have been principally or exclusively concerned with problems related to civil proceedings for personal injury. The replacement of such proceedings in New Zealand by the comprehensive accident compensation scheme means that the conclusions in the overseas reports are not necessarily directly applicable in this country, and may also mean that a relatively simple limitation statute could be introduced here.

## OUTLINE OF PAPER

14. The rest of this discussion paper begins with an outline of the present law and the history of the 1950 Act: where we are; and how we came to get here. The paper then proceeds to examine several fundamental issues:

- . the need for a limitation statute
- . the scope of a limitation statute
- . the commencement, duration and extension of limitation periods

15. In the course of considering those issues the paper suggests a new model for limitation legislation which might be suitable for New Zealand. It involves some major changes from the 1950 Act and is summarised in Para.142.

16. The difficult and important area of latent damage (situations where damage caused by some act or omission does not occur or cannot be discovered for some time) is then outlined and illustrates fairly recent changes in the substantive law. It also permits a graphic comparison of a range of present and possible limitation regimes.

## I THE PRESENT LAW AND PRACTICE

17. The current time limitations on enforcement of civil claims are to be found in the Limitation Act 1950, in equitable rules which operate independently of statute, and in specific sections of particular statutes. Those areas, as well as a survey of the commencement of civil claims in practice, are outlined in this chapter.

18. There are four important elements in any statutory scheme limiting the time within which a plaintiff has to commence litigation:

- (1) Type of action
- (2) Period of limitation
- (3) Start time for period
- (4) Factors preventing time running

Within the area it presently covers, the 1950 Act deals exhaustively with elements 1, 2, and 4, but specifies the start time for some areas only.

### PART I OF THE 1950 ACT – LIMITATION PERIODS

19. The Limitation Act regime (subject to the extension provisions) is set out in the table below:

Type of action	Limitation period (years)	Start time	
		Statutory	Non-Statutory
Tenancy at will (s.12(1))	1	Date at which matter arose	Damage Breach
Tenancy from year to year (s.12(2))	1		
Recovery of penalty by enactment (s.4(5))	2		
Recovery of money under enactment (s.4(1)(d))	6		
Bodily injury (s.4(7))	2-6		
Tort (s.4(1)(a))	6		
Simple contract (s.4(1)(a))	6		
Enforcement of award (s.4(1)(c))	6		
Action for account (s.4(2))	6		
Recognisance (s.4(1)(b))	6		
Seamen's wages (s.4(8))	6		

Type of action	Limitation period (years)	Start time	
		Statutory	Non-Statutory
Successive conversions (s.5)	6	Original conversion	
Will – arrears of interest, damages (s.22)	6	Date interest due	
Arrears of rent (s.19)	6	Date rent became due or reversion – date person wrongfully claiming received rent	
Arrears of interest on Judgment debt (s.4(4))	6	Date interest due	
Action on a trust (s.21)	6 (subject to s.21(1))		
Arrears of mortgage interest (s.20 (4))	6		
Recovery of mortgage principal (s.20 (1))	12		
Foreclosure on personal property (s.20(2))	12		
Deed (s.4(3))	12 (but see proviso s.4(3))		
Action upon a judgment (s.4(4))	12		
Will – capacity – (s.4(6))	12	Grant of probate	
Will – share or interest – (s.20)	12	Personal property: date of right to receive it	
		Land: date of death	
Recovery of land – other than by Crown(s.7(2))	12	Date of dis-possession or assurance or forfeiture or breach of condition	

Type of action	Limitation period (years)	Start time	
		Statutory	Non-Statutory
Recovery of land by the Crown (s.7(1))	60	Date of determination of previous estate	Date everything happened to entitle judgment for a sum of money
Recovery of future estate (other than by Crown) (s.9(12)(b))	6 or 12		
Recovery of future estate by the Crown (s.9(2)(a))	60		
Mortgagor cannot redeem after mortgage in possession (s.16)	12	Determined by nature of action	
Contribution (s.14)			

The table shows that periods of limitation range from 1 to 60 years – the most common period being six years – varying with the type of action. Whether that variety of periods is necessary, and whether their lengths are appropriate in this country at this time, is considered in later chapters.

20. In the absence of a special provision, time starts in accordance with common law rules as to the accrual (coming into existence) of a cause of action – when all the material facts exist which need to be proved for the plaintiff to succeed, and there is a defendant to sue. The requirements of what must be proved vary according to the elements of a particular cause of action. In a negligence action, for example, the plaintiff must prove that the defendant owed a duty of care, that it was breached, and that there is damage caused by that breach.

## PART II OF THE 1950 ACT – POSTPONEMENT PROVISIONS

21. Part II of the Act provides for the postponement or extension of limitation periods on the following grounds:

disability (including where the plaintiff is a minor or is mentally disabled) (s.24)

- . acknowledgment (e.g. of the existence of a debt) (ss.25–27)
- . part–payment (ss.25–27)
- . fraud (s.28)
- . mistake (s.28)

22. Part II is important. It can significantly lengthen the period during which a defendant may be sued by either deeming that time starts at a different point from that which either the statutory or common law rules would usually determine, or by suspending the actual period of limitation from running. Thus, for example, in a High Court case decided in December 1986, where the plaintiff alleged he had been negligently given a drug between 1962 and 1967 when he was an infant, the period of limitation (two years with a judicial discretion to extend it to six) did not start to run until he reached the age of majority in 1982 (*Connor v. Francis* M.739/86 Auckland Registry).

## EQUITABLE RULES

23. A body of equitable rules which may bar plaintiffs from obtaining a remedy (even where the 1950 Act does not) survives under s.31:

"Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise."

24. The application of equitable principles under this section is limited to refusals of relief. The doctrine applies when an action is subject to the Act and the court refuses to grant relief to a claim not already barred by the Act – effectively shortening the period. That is most likely to happen where there has been a short delay but serious prejudice to the defendant.

25. The equitable principles also survive in cases of breach of trust where trustees have been fraudulent or have converted trust property to their own use. In such cases the standard limitation period (six years: s.21(1) and (2)) set out in the 1950 Act does not apply.

26. The equitable principle is that a plaintiff is bound to pursue his or her claim without undue delay. Equity does not specify a fixed time after which claims are barred. The doctrine of laches looks at the circumstances of the case – in particular, acquiescence on the plaintiff's part and any change of position on the defendant's part.

27. An equitable defence is generally only available where the plaintiff knew or reasonably should have known of the existence of a cause of action and where that delay was actually prejudicial to the

defendant. Prejudice is the key notion: in the absence of prejudice, even a long delay will not bar an action; but a short delay with serious prejudice will certainly do so.

## PARTICULAR STATUTES

28. An exclusive though not exhaustive list of specific statutory time limits on commencement is set out in Appendix B. Not all work in the same way, and a small selection may be illustrative:

(a) Accident Compensation Act 1982, s.98

claims (in writing) for rehabilitation assistance or compensation must be made within twelve months of the injury or death, unless the Corporation is of the opinion that it has not been prejudiced by the failure or that the failure was due to a mistake of fact or law or any other reasonable cause;

(b) Carriage of Goods Act 1979, s.19

claims for loss of goods must be made within twelve months from the date the carriage should have been completed, except in cases of fraud by the carrier, or where the plaintiff obtains leave from the court (within six years) having established that the delay was due to a mistake of fact or law or other reasonable cause, and there would be no material prejudice to the intended defendant.

(c) Matrimonial Property Act 1976, s.24

applications must be made within twelve months of decree of dissolution or nullity of marriage, but this time may be extended by the court after hearing all persons with an interest in the property affected.

(d) Police Act 1958, s.60

actions against police members for anything done in pursuance of the Act must be commenced within twelve months of the act complained of and after the defendant has had one month's prior written notice – neither period being subject to any variation by a court;

(e) Public Works Act 1981, s.78

claims for compensation must be brought within two years after date of proclamation or declaration taking



land or of execution of public works complained of; two year period may be extended (to a maximum of six years) by the Minister of Works or the relevant local authority, with a right of appeal to the Planning Tribunal.

29. These and other statutory provisions differ from the Limitation Act regime in so far as they generally feature a shorter period combined with a provision for discretionary extension.

#### SURVEY OF HIGH COURT FILES

30. The Commission has undertaken a survey of civil claims filed in three High Court registries in the second quarter of 1986. The results and methodology are set out in Appendix D.

31. The central findings of the survey relevant to the question of limitations (the research is of more general interest as well) were that the great majority of claims were filed within two years of the incident or "wrong" complained of, but a few cases were filed towards the end of or possibly after the standard six year limitation period.

32. The volume of claims which might have been brought to court were it not for statutory limitation provisions cannot be measured, but the Commission would be interested to learn, perhaps from law practitioners and commercial organisations, how often such provisions result in decisions not to commence civil proceedings.

## II HISTORY OF THE 1950 ACT

33. As with much of our law, statutes of limitation are better understood in the context of their historical development. That is outlined in this chapter. Whether the present stage of that development leaves us with the best laws for the late-twentieth century is considered in later chapters.

### THE ROMAN LAW

34. The Limitation Act 1950 borrows heavily from 750 years of English legislation, but a limit on the time in which to bring actions to recover property is an even more ancient concept. It was established under Roman law by the rules of *usucapio*. Those rules made derivative titles to land indefeasible after a certain time and rendered them independent of all previous titles. After ten years had run, a person who had come into possession of land on lawful grounds and in good faith, and whose possession was continuous had a good defence. Dominant issues were the forceful dispossession, or illegal occupation of abandoned or unoccupied property. The Roman Law emphasis on land and the indefeasibility of title is still echoed in the 1950 Act.

### STATUTES OF LIMITATION

35. The first English statute of limitation was the Statute of Merton, 1235 (20 Hen.III, c 8). The 1235 Act removed the possibility of taking three different types of claims if they had arisen a long time in the past. The time periods were described in terms of significant historical events. For example, writs of right could not be taken if they arose prior to the coronation of Henry II in 1154. The purpose of the statute, as with the Roman Law, was to settle questions of ownership, to prevent the too rapid transfer of property rights (and the social rights and obligations which went with them), and to protect respectably old titles.

36. By 1275 the so-called "date of legal memory" was well over one hundred years past and the regnal date of Richard I (3 September 1189) was substituted for the 1154 date. By a writ of 1293 this limitation date was extended to proceedings against the Crown.

37. No further changes to the limitation periods were made for more than three centuries. Then in 1540 a new statute set out the limitation period for writs of right at sixty years. The opening words of that statute indicate that a motivating factor for the change to a

fixed time period was the avoidance of difficult questions of proof.

#### THE 1623 ACT

38. It was the English statute of 1623 (21 Jac 1 c.16 – Act for Limitation of Actions, and for Avoiding of Suits in Law) however, which formed the basis of limitations statutes throughout the common law world.

39. The purposes of the 1623 Act were to keep inconsequential cases out of the courts, to minimize hardship on poor defendants and to prohibit the removal of cases from local courts in certain small cases. It also had the avowed purpose (in its opening words) of "[Q]uieting ... Men's Estates, and avoiding ... Suits". The Act covered both real and personal actions and provided for extensions on the time period for both categories in the event of disability. Up until then, both under the early Roman and common law, personal actions in contract and tort were in theory perpetual although contemporary practical requirements (e.g. tort claims could not be pursued after the death of either the plaintiff or the defendant) made it unlikely that stale claims would be the subject of litigation.

40. The 1623 Act prescribed three basic periods which can be described broadly as twenty years for land actions, six years for contract and some tort actions and four years for torts affecting the person. There was provision in the Act for an extension of the time period where the plaintiff was under a disability. A plaintiff or his heirs had ten years after the disability ceased, in which to take a claim for land. Where the action was personal, once the disability ceased the relevant time period began. To qualify for the extension the plaintiff had to be a minor, a single woman, insane, imprisoned or beyond the seas.

#### THE WRIGHT REPORT 1936

41. When the English Law Revision Committee chaired by Lord Wright presented its Fifth Interim Report on Statutes of Limitations (Cmd. 5334) to Parliament in 1936 (the Wright Report) the 1623 Act still applied in England (and New Zealand). The Real Property Limitation Acts 1833 and 1874, the Statute of Frauds Amendment Act 1828, and other legislation contained provisions amending the 1623 Act. The Wright Committee's task was to incorporate all the different pieces of legislation governing limitation law into one act. Most of its proposals were later adopted in the English Limitation Act 1939.

42. Much of the Wright Committee's work involved consideration and incorporation of the land provisions in the old real property

legislation and the maintenance of the distinction between land and personal actions.

43. The committee considered whether there were any substantial reasons for preserving distinctions between different classes of common law actions and came to a compromise solution. It recommended that the same time period for actions in tort and simple contract be adopted. At the same time it recognised that evidential difficulties are less likely to present themselves where the transaction requires formal documentation (e.g. where there is a contract under seal) and so provided a longer time period for disputes arising out of such actions. Evidential difficulties under the English land title system were not discussed, although there was brief mention of the 60 year Crown action being based on a purchaser's ability to investigate the root of title.

44. The committee considered the operation of limitation law in hard cases, but did not recommend that there should be a general discretion in the court to extend the limitation period because "the fundamental benefit conferred by statutes of limitation namely the elimination of uncertainty would be prejudiced". The purpose of limitation statutes, it said, goes further than the prevention of dilatoriness on the part of the plaintiff. That certainty element is particularly important where title to property is concerned.

45. For those reasons the committee also declined to incorporate the equitable doctrine that the period runs from the time the plaintiff knows or ought to know of the existence of his or her claim. It did, however, recommend that the equitable doctrine be adopted in the event of fraudulent concealment of the cause of action by the defendant so that the time starts when the fraud is discovered and similarly upon the discovery of a mistake.

46. The committee's acknowledged desire for consistency and uniformity did not prompt more radical change. While it acknowledged that the different accrual dates for contract and tort actions could make a difference it said:

"On the whole we are of opinion that, if the time when the statute is to run is to be fixed by a more or less rigid objective test, the present test is the best. The law is well settled, and, generally, the application of the test to different types of action has had a sensible result. A certain amount of complication appears to be inevitable, and any attempt to produce a comprehensive statutory definition of time when a cause of action accrues would probably create more difficulties than it would solve."

#### THE ENGLISH ACT OF 1939

47. The 1939 Act (applicable to England and Wales only) was

largely based on the recommendations in the Wright Report. The debates on the Bill in the House of Commons did not focus on the Wright Report's concerns but rather concentrated on the provision which restricted the time in which actions could be taken against local authorities to one year (the limitation period had until this time been six months under the Public Authorities Protection Act 1893).

48. On the one hand it was argued that local authorities should have special protection (particularly in relation to personal injuries) because of the volume of accidents and claims made against them, the difficulty of documenting accidents for which their employees were responsible (particularly education boards), and the financial problems of varying rates and calculating financial commitments.

49. The counter argument was that public authorities were in no different position from any large corporation with a large number of employees and financial commitments. There was some evidence of abuse of this protection on the part of public authorities, moreover, by prolonging negotiations until the time had run out and then refusing to settle.

## THE 1950 ACT

### *General*

50. The New Zealand 1950 Act substantially followed the 1939 English Act and parliamentary and departmental discussion on the subject was similarly focussed. Before its enactment, New Zealand limitation law was to be found in the 1623 Act, the Civil Procedure Act 1833, the Crown Suits Act 1769, the Real Property Limitation Acts of 1833 and 1874 (English legislation in force here), and in the Judicature Act 1908, the Property Law Act 1908 and the Trustee Act 1908. The aim of the 1950 Act was to simplify and codify limitations law.

51. It differed from the English Act where there were problems special to New Zealand. Sections were added, for example, relating to Land Transfer land, Crown land and Maori customary land. The English provisions relating to advowsons, tithes and dower were omitted. Like the English Act, Part II extended limitation periods in the case of disability, acknowledgement, part payment, fraud and mistake.

### *Public Authorities*

52. The most controversial clauses (as with the English legislation) were those which provided special limitation periods governing suits against the Crown and local authorities and that the

defendant should be given notice of the intention to sue. At the time, each statute constituting a local authority had a special provision establishing the period in which it should be sued. This was generally three months where the suits were against harbour boards and six months for municipalities and counties.

53. The 1950 Act substituted a single uniform limitation period of one year for cases against the Crown and public authorities and required that the defendants be informed of the intention to sue within a month of the breach. Some attempt was made to assuage critics of an act preserving such privileges for central and local government by giving the Court power (in s.23(2)) to extend the period to six years –

"... if it thinks it is just to do so, ... subject to such conditions (if any) as it thinks it is just to impose, where it considers that the failure to give the notice or the delay in bringing the action, as the case may be, was occasioned by mistake or by any other reasonable cause or that the intended defendant was not materially prejudiced in his defence or otherwise by the failure or delay".

54. The Tucker Committee Report (Report of the Committee on the Limitation of Actions (Cmd. 7740) 1949) had recommended that the special limitation periods and notice provisions for public authorities be abolished. It also recommended special extensions to limitation periods in relation to tort actions against deceased persons' estates. Notwithstanding their consideration of that report and sympathy with many of the committee's objectives, the New Zealand legislators did not follow all of these recommendations. That was partly the result of a desire for uniformity between New Zealand and English Law, and of pressure from harbour boards and other public authorities.

55. Meanwhile the Tucker Committee Report was implemented in England in 1953. The New Zealand legislative response did not come until 1962 when it was thought time to remove the Crown and local authorities from their privileged position. The "Report by the Department of Justice – Limitation Act 1950" requested by the Law Revision Committee of New Zealand (LR175) states the reasons for repealing s.23 (as was done by the Limitation Amendment Act 1962):

"Where failure to give the required notice results in the claim being barred we think the provision unjust. There is no reason why public authorities should be handicapped by lack of notice of an intended claim ... But if there is any justification for keeping the provision we are of the opinion that all large business corporations should receive notice. However the difficulties that would follow from such a provision would be worse than exist under the present law."

## PERSONAL INJURY ACTIONS

56. The other area where the 1950 Act differed from the English legislation was in the limitation provision for personal injuries. In 1950 it adopted a discretionary provision similar to that governing local authorities (s.23 above). Instead of a six year period the legislators favoured two years with a discretion for it to be extended to six years, as was recommended by the Tucker Committee Report of 1949. The Committee was of the view that the court should be given a completely unfettered discretion to grant leave if it was reasonable in all the circumstances. Thus the original wording of s.4(7) went:

"... the Court may, if it thinks it is just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it is just to impose, where it considers that the delay in bringing the action was occasioned by mistake or by any other reasonable cause or that the intended defendant was not materially prejudiced in his defence or otherwise by the delay."

57. The case of *Silvius v. Feilding Borough Council* [1957] N.Z.L.R. 713 (brought under the parallel wording of s.23(2), above) established that a mistake of law did not constitute "mistake or reasonable cause" within the meaning of the section (and impliedly also within the meaning of s.4(7)). The 1962 Amendment to s.4(7) (s.23 was at the same time repealed) was in response to that case. It added after the word "mistake", the words "of fact or mistake of any matter of law other than the provisions of this subsection".

58. In 1970, s.4(7) was further amended to include an automatic extension of the two year period to six years if the intended defendant consented and to provide that the discretionary elements applied only where there was no such consent. This wording was to remove doubts about whether the Limitation Act had to be specifically pleaded in personal injury cases in New Zealand. It has not been fully tested in New Zealand with the advent of the Accident Compensation Scheme.

### III THE NEED FOR A LIMITATION STATUTE

59. The most fundamental question to be raised in a review of the Limitation Act 1950 is whether there is any need for such a statute. In other words, should the Act simply be repealed? Why should there be any fetter on the ability of persons to go to court at any time to seek enforcement of rights and remedies for wrongs?

#### ARGUMENTS FOR AND AGAINST

60. The main reasons for having statutes of limitation have been fairly consistently expressed in legal writing throughout this century:

(a) The Wright Committee (1936) stated –

"The Act of 1623 and its successors were, no doubt, passed in order to give more precise effect to the presumption, already made by law, that, after a long lapse of time, debts had been paid and rights satisfied ... The reasons both for the presumption of law and the statutes may be said to be twofold. In the first place it is desirable that there should be an end to litigation, and that people should not be exposed to the risk of "stale demands", of which they may be quite ignorant and – owing to changing circumstances unable to satisfy. Secondly, it may have become impossible, or very difficult, owing to the loss of receipts, or other documents, or the death of witnesses, for the defendant to prove his case." (para. 5).

(b) The Edmund Davies Committee (1962) said –

"We have constantly borne in mind what we conceive to be the accepted function of the law of limitations. In the first place, it is intended to protect defendants from being vexed by stale claims relating to long-past incidents about which their records may no longer be in existence and as to which their witnesses, even where they are still available, may well have no accurate recollection. Secondly, we apprehend that the law of limitation is designed to encourage plaintiffs not to go to sleep on their rights, but to institute proceedings as soon as it is reasonably possible for them to do so ... Thirdly, the law is intended to ensure that a person may with confidence feel that after a given time he may treat as being finally closed an incident which might have led to a claim against him." (para. 17).



- (c) A contemporary statement may be found in a recent Australian case, *Hawkins v. Clayton Utz* (1986) 5 N.S.W.L.R. 109, at 118, where Kirby P. referred to the several purposes typically fulfilled by limitation statutes –

"They include not only the encouragement of reasonable diligence in the pursuit of legal rights; but also the legitimate need in society to finalise the possibility of litigation where, years later, witnesses may have died or be unavailable, evidence may be destroyed, memory may have faded and businesses and property may have passed hands on the face of an immunity from old claims."

61. From those and other writings, contemporary reasons advanced in favour of a statute of limitation may be listed as follows:

- (a) achievement of peace and repose for potential defendants;
- (b) avoidance of evidential difficulties caused by the passage of time – the fading of memory, the death or disappearance of parties or witnesses, the loss or destruction of documents or exhibits;
- (c) relief of the courts from the burden of adjudicating claims rendered inconsequential or tenuous by the passage of time;
- (d) provision of a degree of certainty which enhances commercial activity in such areas as insurance cover, and security of title where property is transferred;
- (e) ensuring that disputes are judged by contemporary standards – as the Alberta Report (1986) suggests –

"It is often very difficult for a judge of a current generation to weigh the reasonableness of conduct which occurred many years ago as a judge of an earlier generation would have weighed it"; and

- (f) promotion of the general peace of society by preventing long dormant claims being brought before the courts.

62. On the other hand there are a number of powerful responses which might be advanced against those arguments, including:

- (a) any limitation period may be unfair to a particular

plaintiff, especially where a plaintiff is ignorant of the right to commence an action for some time either because the damage suffered is not immediately apparent, or poor advice has been received from a solicitor or some other person, or advice has not been sought on account of timidity, ignorance, poverty or fear of reprisals;

(b) in so far as any limitation period denies a plaintiff access to the courts for determination of claims of unlawful acts or omissions by a defendant, the law is (or may be) unenforced and perhaps eroded;

(c) the deterioration of evidence with the passage of time may affect a plaintiff no less than a defendant, or there may be no deterioration where the critical evidence is of a documentary nature, or the quality of evidence may actually improve (for example, where increased knowledge or information establishes a causative link between the actions complained of and the damage suffered);

(d) our empirical survey of claims brought in the High Court (see Appendix D) shows that most cases are brought well within the time limits provided by the 1950 Act, and suggests that plaintiffs have a direct interest in bringing proceedings promptly which operates more powerfully than the sanction in the Act;

(e) in the New Zealand context the idea of prohibiting old claims being brought to court may be a European approach, not necessarily shared by those in the Maori community, the approach of that community being a matter which the Commission will take active steps to identify.

## A PRELIMINARY OPINION

63. Thus there are powerful arguments on both sides of the fundamental issue. The Commission's preliminary view is that, on balance, there is a case for statutory limits on the periods within which proceedings may be brought to the courts. Such a preference involves a value judgment: that the advantages of relatively certain rules outweigh the disadvantages of unfairness to potential plaintiffs in a few cases.

64. The Commission is reinforced in this view by the knowledge that limitation statutes are a feature of all comparable legal systems, and that some of the most difficult problems created by the imposition of limitation periods may be alleviated by other provisions within a new act (for example, in relation to discoverability of latent damage, discussed in chapter VI). The Commission notes also the fairly consistent occurrence of limitation provisions in statutes which cover areas outside the scope of the 1950 Act (see Appendix B).

65. The Commission is also aware of the importance of insurance and its availability and cost in this context. In both the building damage and professional advice areas there have been many expressions of concern at the impact on insurance cover of recent extensions of tort liability. These extensions in scope and time have occurred – some are discussed in chapter VII, below – and the ability to obtain insurance has been explicitly recognised as a factor in the reasoning of the courts as to where losses should fall:

"In so far as an action in negligence may be viewed in social terms as a loss allocation mechanism there is much force in the argument that the costs of carelessness on the part of the solicitor causing foreseeable loss to innocent third parties should in such a case be borne by the professionals concerned for whom it is a business risk against which they can protect themselves by professional negligence insurance and so spread the risk, rather than be borne by the hapless individual third party." *Gartside v. Sheffield Young & Ellis* [1983] N.Z.L.R. 37, at 51 per Richardson J. (See also Para.153 below.)

66. Preliminary inquiries suggest that certainty of limitation periods is relevant to the availability and cost of insurance in areas where negligence claims are likely. The Commission is continuing its inquiries on this point and would welcome advice and submissions on it. But if the law is transferring losses on the basis of ability to insure it may be appropriate for the law to be structured to avoid any real risk of undermining that ability.

## THE STATUS QUO

67. If there is to be a statutory limitation regime, it must be asked whether there is any need to change the 1950 Act. On this point there is perhaps an onus on advocates for change given the well known principle that "if it ain't broke, don't fix it".

68. A first response to that principle relates to the passage of time. The 1950 Act has its intellectual origins in the Wright Report (1936), the product of another country and another era. The Wright Report was not produced against a legal background which includes, for example, a system of registered land titles, no-fault compensation for accidental injury, and the wide scale conferring of judicial discretion through statutes.

69. The passing of a half-century has also meant the introduction of new forms of communication and technology. Major litigation nowadays commonly involves the use of word processors, computer-assisted research, photocopiers, and facsimile transmission of documents. These developments, together with a

significant increase in the volume of information and commercial transactions in a modern industrialised society would seem to weigh in favour of encouraging litigation to be commenced more promptly than may have been the case a half century ago.

70. More specifically, modern changes in the substantive law of negligence (for example, recovery of damages for economic loss) and the overlapping of this with the law of contract, have highlighted problems under the present Act. In the important House of Lords case of *Pirelli General Cable Works Ltd v. Oscar Faber & Partners* [1983] 2 A.C. 1, the law was held to produce a result that was "unreasonable and contrary to principle" and there was an explicit invitation for remedial legislation to be enacted. The *Pirelli* case concerned the running of the limitation period while the damage (to a very high chimney) was not discoverable. This question of discoverability has prompted inquiries and suggestions for law reform involving a new balance between fairness to a potential defendant and fairness to a plaintiff, and especially in the areas of building construction and professional advice disputes, in many countries.

71. In summary, the case against simple retention of the 1950 Act is that the time limits it imposes are drawn from the pace of life in another era, that it can lead to unfair and unreasonable results, and that it might be made both fairer and simpler. The last matter also has relevance to the style of drafting of the Act which seems capable of significant improvement.

## JUDICIAL DISCRETION

72. If it is accepted that there must be change from the 1950 Act, there is a general question as to form: should a new Act continue to emphasise fixed and certain rules, or should there be a general judicial discretion to deal with cases where fixed rules may act unfairly.

73. The case against a judicial discretion in the statutory limitation regime was stated (and accepted) in the Wright Report (1936):

"The exercise of such a discretion would no doubt present difficult problems to the court, and it is not easy to foresee how it would operate. In so far as it came to be exercised along well-defined principles, its chief merit – flexibility – would tend to disappear. On the other hand, if it remained more or less impossible to predict from one case to another how the discretion of the court was going to be exercised, the fundamental benefit conferred by statutes of limitation, namely the elimination of uncertainty, would be prejudiced." (para. 7, p.11).

74. In the area of personal injury by accident, most, if not all, Commonwealth limitation laws were amended to introduce some degree of judicial discretion. In the 1950 Act, s.4(7) provided for a short two year limitation period for actions in respect of bodily injury to the person, but subject to a power to apply to the court for leave to bring such an action up to six years after accrual of that cause of action.

75. It will be recalled that a judicial discretion is a feature of most of the limitation provisions contained in specific statutes and noted in Para.28.

76. It may also be noted that the recent (October 1986) report of the N.S.W. Law Reform Commission on limitation of actions for personal injury claim recommended a basic three year limitation period (that is, from the date of accrual of the cause of action) but subject to extension at the discretion of the court which would have regard to a lengthy list of factors, many of them related to the time at which the plaintiff acquired various degrees of relevant knowledge.

77. There is room for a legitimate difference of opinion about the form of any new Limitation Act, but the preliminary view of the Commission is that, as a choice has to be made, the certainty factor outweighs the flexibility available under a discretionary regime.

78. In reaching that preliminary view, the Commission has had regard to the Scarman Committee Report (1984) which considered that law reform in this area should not fail in any significant respect in relation to three criteria:

- (a) that plaintiffs have a fair and sufficient opportunity of pursuing their remedy;
- (b) that defendants are entitled to be protected against stale claims; and
- (c) that uncertainty in the law is to be avoided wherever possible.

In other words, the Commission believes that it is possible to provide new legislation which generally satisfies those principles and does not feature a wide discretion to extend time limits prescribed in that legislation.

#### IV THE SCOPE OF A LIMITATION STATUTE

79. If, as the Commission is presently minded, there should be a statute which imposes a limit on the time within which a plaintiff must bring a civil claim to court, the next question is whether the statute should be comprehensive in relation to all civil proceedings. In other words should there be exceptions? If so, what should those be?

80. Under the 1950 Act the varieties of proceedings covered by that Act are defined by way of inclusion of causes of action – for example, in contract, in tort, to recover land, and for contribution or indemnity. Some matters are expressly excluded, such as specific performance of a contract or an injunction or other equitable relief (s.4(9) – but subject to the mysteriously worded proviso), and fraudulent breaches of trust or conversion of trust property (s.21(1)). Other types of civil proceedings are simply not mentioned in the Act, including admiralty, probate, and family law matters.

81. In considering this aspect of limitation statutes, it should also be remembered that there are specific statutes which impose limitation periods (for example, in estate and family law matters), and that the Act only applies if a defendant chooses to plead it as a specific defence.

82. The Commission's present view is that the same reasons which favour the existence of a general limitation statute also favour such a statute being as comprehensive in coverage as is possible. On that basis, the focus of inquiry is on whether a case can be made for exclusion of particular categories of civil proceedings from the scope of a new Act.

83. A convenient indication of a possible range of exceptions may be found in the Alberta Report (1986). In that report civil proceedings were classified as remedial, enforcement, and declaratory. The authors of the report concluded that the following were appropriate exceptions to a general limitation regime:

- (a) enforcement proceedings;
- (b) declaratory proceedings;
- (c) certain remedial proceedings –
  - (i) judicial review of statutory powers;
  - (ii) habeas corpus;
  - (iii) possession of real or personal property;
  - (iv) realisation of a security interest by a secured party in rightful possession;

- (v) redemption of collateral by a debtor;
- (vi) compliance with a duty based on an easement, restrictive covenant; or other incorporeal hereditament;
- (vii) revision of the land title register.

84. The Commission has considered each of those exceptions and is presently of the view that in the New Zealand context the only clearly justified exception would be for proceedings relating to certain aspects of land. On the question of excepting declaratory proceedings the Commission has not formed a preliminary view. Those topics as well as judicial review and equitable claims, are discussed below, and the Commission would welcome comment on these and other potential exceptions.

#### PROCEEDINGS RELATING TO LAND

85. As to land, the 1950 Act contains extensive provisions (ss.6–19). Section 7 provides a general limitation period of twelve years for actions to recover land (sixty years where the claimant is the Crown), but s.6 provides that the Act does not apply to:

- (a) Maori customary land;
- (b) the Land Transfer Act 1952 – which generally prohibits (subject to the 1963 Amendment) acquisition of title by adverse possession as against a registered proprietor;
- (c) land held for public works; and
- (d) the rights of the Crown to minerals.

86. In a 1986 *Saskatchewan Law Reform Report* there was criticism of the transplantation of English limitation statutes preoccupied with real property to a jurisdiction where there was a sophisticated land registration system:

"The striking feature of this transplant is the almost complete disregard of the predominant position of the Torrens system of land registration. This has created complex problems ... In some cases the interplay between the limitations law and land titles law have led to a 'state of limbo' in which one party is possessed of the land but cannot obtain title, or the other has title but cannot obtain possession."

87. The *Saskatchewan Report*, and the *Alberta Report* published later the same year, concluded that no limitation regime should apply to actions for the recovery of land, this being part of the abolition of the doctrine of adverse possession.

88. The Commission is presently inclined to think that the existence of our Land Transfer Amendment Act 1963 (providing a procedure for establishing a prescriptive title to land), together with the present requirement that the Limitation Act 1950 is subject to the Land Transfer Act 1952, means that the Saskatchewan and Alberta reasoning is not necessarily applicable in this country. Further, it would seem from the report on "Prescriptive Title for a Co-owner in Possession" by the Property Law and Equity Reform Committee (1986) which suggests that the 1963 Amendment and the 1950 Act be amended to make it possible for a co-owner in possession to obtain title by virtue of adverse possession, that there is no present reason or demand for repeal of the 1963 Amendment.

89. On the other hand, there are still some areas of land outside the Land Transfer Act regime, and it seems sensible for a comprehensive limitation statute to include provisions which cover disputes relating to such land.

90. Mindful of the particular sensitivities attaching to land and of its present view that existing limitation periods relating to land should be standardised (and shortened), discussed below, the Commission considers that the exclusions relating to land in s.6 of the 1950 Act could well be retained.

## DECLARATORY PROCEEDINGS

91. As to declaratory proceedings, the case for exclusion is set out in the Alberta Law Reform Report at para. 54:

"A declaration of rights and duties, legal relations or personal status has no creative effect. Rather, it reflects a judicial determination of what rights and duties, legal relations or personal status existed under the law before the declaration, albeit in dispute, and declares what they were and are. Properly understood, a declaration is not a judicial remedy for it remedies nothing; it does not order anyone to do, or to refrain from doing, anything."

92. There is also the further point that the granting of a declaration, whether under the Declaratory Judgments Act 1908 or at common law, is a matter in which the court has a wide discretion, with delay and staleness being among the grounds upon which a court might refuse to make any declaration.

93. Perhaps more importantly, our Declaratory Judgments Act 1908 provides that a declaration made by the courts shall bind the parties as if it were a judgment. This provision was clearly intended to ensure that a declaration was not an empty judicial remedy, and may undermine the applicability in this country of the reasoning in the Alberta Report.



94. In this state of affairs there is something of a dilemma in so far as it would be undesirable to prevent any person from obtaining a declaration as to, for example, paternity for the purposes of claiming a share in an estate; but, on the other hand, it would also be undesirable for declaratory relief to be used as an alternative to statute-barred substantive relief. As mentioned earlier, the Commission has not formed any view on this matter and would welcome submissions directed to it.

## JUDICIAL REVIEW

95. The Alberta Report proposed exclusion of judicial review of the exercise of statutory powers on the basis that such a review was akin to an appeal from a public decision-making authority, and that the elements relevant to any limitation system applying to judicial review might be different to those operating across all civil proceedings. On that basis, the report concluded that limitations on the time within which judicial review proceedings should be brought would be better located in rules of court or in a specialised statute.

96. The Commission's present view is that the application of the ordinary limitation regime to judicial review proceedings would not cause harm, and would reinforce the need for the prompt commencement of such proceedings. It is convenient to mention here that the Commission's present view is that any new limitation statute should expressly preserve the present power of the courts to treat delay as a factor in refusing discretionary relief.

## EQUITABLE RELIEF

97. The 1950 Act contains exceptions relating to claims for equitable relief, perhaps reflecting the ancient division between equity and the common law in English courts and jurisprudence. The Commission's present view is that the advantages of a general limitations regime apply to equitable claims as well as to others, although (again) this should not affect the present importance of delay as a factor in refusing discretionary relief in the court's equitable jurisdiction.

## V LIMITATION PERIODS: COMMENCEMENT, DURATION, EXTENSION

98. If it is accepted that there should be a comprehensive statutory limitation regime the next question is: what periods of time are appropriate to allow for the bringing of proceedings? That question is inextricably linked with questions of when such periods are to commence and the circumstances in which such periods might be suspended or extended.

99. Because of the linkage between the questions of commencement, duration, and extension, the discussion in this chapter is inevitably somewhat complex. It begins with an illustration of the situation as it is at present under the 1950 Act, before going on to consider the question of discoverability of damage and to note the development of English legislation on this point. There is then a discussion of such questions as a common period, a commencement point, the length of limitation periods, extensions or suspensions of such periods, and introduction of a "long-stop" period. The Commission's tentative answers to those questions lead to the outline of a new model for a limitation regime.

### THE PRESENT POSITION

100. The effect of the Limitation Act 1950 can perhaps best be illustrated with a hypothetical (but not unknown) example: the Owner of some land enters into a contract with a Builder to erect a building on it; in accordance with standard by-law provisions the foundations of the building are inspected by officers of the Council before the main building construction takes place; shortly after the building is completed it suffers major subsidence due to the inadequacy of the foundations in relation to the nature of the soil.

101. In those circumstances Owner might look to sue Builder to recover the cost of repairing the building. The traditional legal ground for complaint (the "cause of action") would be breach of a contractual obligation to erect a sound building. Under the Limitation Act 1950, Owner has six years (measured from the date of breach of the contractual obligation – that of completion of the building) to bring civil proceedings against Builder in a court. If for any reason those proceedings are filed more than six years after the date of breach then Builder is entitled to plead as a positive defence (which the court would have no discretion to refuse or reject) that the 1950 Act operates to prevent Owner's claim from succeeding.

102. If (as seems not uncommon in these cases) Builder happens to go bankrupt at about the same time as the building collapses then Owner might look to sue Council for negligent

inspection of the building foundations. There being no contract between Owner and Council, Owner's cause of action is the tort of negligence and (as a matter of historical legal development) it arises when damage occurs. In the limitation context the six years that Owner has to commence proceedings runs not from the date of inspection but from the date of occurrence of damage. Thus, if there is a delay between completion of the building and visible damage to it, Owner may have a longer period within which to sue Council in tort than in which to sue Builder in contract (although recent cases have held that Builder would be liable in tort as well as contract).

103. In most cases the limitation question is not complicated: the "wrong" (a breach of contract, or of a duty of care in negligence), the damage or injury, and the knowledge of both of these by the potential plaintiff are more or less simultaneous. However, complications occur when the "wrong", the damage, and the potential plaintiff's knowledge of these are spread over a period of time which may exceed the specified limitation period.

104. Some of these complications were illustrated in the House of Lords decision in *Cartledge v. E. Jopling & Sons Ltd* [1963] A.C. 758. In that case nine plaintiffs sought damages from an employer for pneumoconiosis in relation to inhalation of silica dust at their work place between 1939 and 1950; the proceedings were commenced late in 1956 and alleged negligence and breach of a statutory duty. The trial judge held that there were breaches of statutory duty by the employer and would have awarded damages to the plaintiffs but for the effect of the Limitation Act 1939 (U.K.). His decision was upheld by the House of Lords.

105. The present significance of the *Cartledge* decision is in the House of Lords' confirmation that damage can occur (for the purposes of the running of time in relation to causes of action in tort) before it can be discovered. It was held that, as the Limitation Act expressly provided for extensions of time by reason of fraud or mistake but not of ignorance, there could be no judicial gloss to the Act to provide a further extension on the grounds of ignorance or non-discovery of damage.

106. In *Pirelli General Cable Works Ltd v. Oscar Faber & Partners* [1983] 2 A.C. 1 the House of Lords applied the *Cartledge* reasoning to a case involving a latent building defect, holding that the date of accrual of the cause of action in negligence (for damage to the top of a high chimney) was the date when the damage came into existence and not when the damage was (or could, with reasonable diligence, have been) discovered. The House of Lords disapproved earlier English Court of Appeal decisions which suggested that the cause of action in negligence cases accrues only when damage is discoverable.

107. The impact of *Pirelli* as a precedent for the New Zealand

courts is not clear, the discoverability rule having received support in the earlier decision of our Court of Appeal in *Mount Albert Borough Council v. Johnson* [1979] 2 N.Z.L.R. 234 (see Para. 147). It may also be noted that the Supreme Court of Canada has adhered to a discoverability rule notwithstanding the *Pirelli* decision: see *City of Kamloops v. Neilson* (1984) 10 D.L.R. (4th) 641; and *Central Trust Co. v. Rafuse* [1986] 2 S.C.R. 147.

108. Questions involved in latent damage cases are considered further in chapter VII, but the present discussion illustrates some of the concepts and problems involved in the limitation context. It also provides a basis for understanding recent British legislation.

#### THE LATENT DAMAGE ACT 1986 (U.K.)

109. In the United Kingdom the problems illustrated by *Pirelli* were considered in the 1984 Report of the Law Reform Committee (chaired by Lord Scarman, one of the Judges who sat in the *Pirelli* case). The committee's recommendations found their way into the Latent Damage Act 1986 (U.K.) (reproduced in Appendix E), which came into force in September 1986. In general terms, that Act provides for:

- (a) a limitation period of six years from the date on which the cause of action accrued; or
- (b) a limitation period of three years from "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 the right to bring such action"; and
- (c) a long-stop limitation period of fifteen years from the date on which there occurred any act or omission which constituted negligence or caused the damage in respect of which damages are claimed.

110. A somewhat similar approach was recommended in the Alberta Report (1986) which suggested that a claim requesting a remedial order should be brought within two years of the date of knowledge or ten years from the date of the "wrong". The draft legislative proposals from that report are reproduced in Appendix F.

111. On the difficult question of what matters must be known by a potential plaintiff, the 1986 U.K. Act declares knowledge of matters of law to be irrelevant, and also that:

"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 ... 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."

112. It is the Commission's tentative view that the 1986 U.K. Act and the Alberta proposals provide signposts toward a simpler, fairer and more comprehensive limitation regime than our 1950 Act as well as a valuable background for consideration of the issues relating to limitation periods.

#### A COMMON LIMITATION PERIOD

113. Perhaps the first of the broad questions to be asked in relation to the commencement, duration, and extension of limitation periods is whether there should be a single period for all civil proceedings or, as at present, a variety of periods applying to different causes of action. As illustrated in the table set out in para 19, above, the 1950 Act provides for limitation periods which range between one and sixty years, although the bulk of civil proceedings relate to simple contract or tort claims and are subject to a six year limitation period. The longer periods generally relate to matters affecting land and reflect old English rather than modern New Zealand land laws.

114. Given those considerations, as well as the desirability of simplicity, comprehensibility, and comprehensiveness, the Commission's present view is that there should be a single limitation period which applies to all civil proceedings covered by a new limitation statute. This would mean a considerable reduction in the maximum limitation period which presently applies in relation to certain land law matters, and there would be a difficult issue as to whether to protect existing expectations by including in any new Act transitional provisions which prevented retrospective application of new and reduced limitation periods.

115. This proposal has only the Alberta report as a precedent but, although far-reaching, it would greatly simplify the law. The Commission would be particularly interested to receive submissions on whether or not there is a case for treating land-related matters and actions on deeds in a separate manner with a different and longer limitation period.

116. The Commission's present view on this point extends to specific limitation provisions in other statutes which might (except in cases where persuasive policy reasons dictate otherwise) be repealed in favour of a new general statute of limitations.

## COMMENCEMENT OF PERIOD

117. The 1950 Act provides for a variety of formulae for the commencement of limitation periods (Para.19). In relation to contract and tort, for example, the statute uses the phrase "date on which the cause of action accrued" which is not especially meaningful to those without legal training.

118. In most cases the date from which any limitation period should run will be related to the essence of the claim and be obvious: in relation to complaints of breach of contract, it should be from the breach; for debt, from the date on which the debt should have been paid but was not. In these and many other instances the focus will be on the date of an act or omission by the intended defendant.

119. However the present law on negligence claims is that time runs from the occurrence of damage. As discussed earlier this may be some time after the act or omission by the defendant.

120. Nevertheless, the Commission's present view is that the question of delay between a negligent act and consequential damage can be dealt with by providing for extension or suspension of the limitation period. Simplicity and certainty would favour the standard commencement date being that of the act or omission complained of irrespective of whether the cause of action is in tort or contract.

121. In some special areas it may be more appropriate for the limitation period to run from a date which does not reflect an act or omission by the intended defendant. For example, in testamentary matters the date of grant of probate or letters of administration may prove to be more convenient. But, subject to such instances (which could be identified in a new limitation statute), it is the Commission's present opinion that the standard limitation period (itself subject to extension or postponement – see below) should commence from the date of the act or omission by the defendant of which the plaintiff complains, not from the date of damage.

## LENGTH OF THE STANDARD PERIOD

122. As stated earlier, the limitation question is not complicated in most cases where the "wrong", the damage or injury, and the knowledge of both of these by a plaintiff are more or less simultaneous. In those cases, the standard six year limitation period provided by s.4 of the 1950 Act would seem to be overly generous. Given the general level of literacy of the population, advanced communications and technology (Para.67), and the availability of professional advice, it would not seem unreasonable for a potential

plaintiff who has suffered a "wrong" to decide to press the claim, seek and obtain professional advice, and exhaust the possibilities for a negotiated settlement within half of that period.

123. Further, anticipating what is written below in relation to discoverability, if the standard limitation period is in effect to follow the potential plaintiff's acquisition of relevant knowledge, then the Commission's present view is that that period should be significantly shorter than six years and might well be either two or three years. The first of those periods was proposed in the Alberta Report (1986), and the latter is provided for in the Latent Damage Act 1986 (U.K.).

124. The Commission's present view favours adoption of a standard three year limitation period subject to extension or suspension and long-stop provisions to be discussed below. Whether this period should be able to be reduced by agreement of the parties is debatable (see further Para.161).

#### EXTENSION OF THE STANDARD PERIOD

125. Part II of the 1950 Act provides for the extension of limitation periods in cases of disability (infancy, or unsoundness of mind), acknowledgement, part payment, fraud, and mistake. Other grounds for extension (or suspension – where the object is to postpone the standard limitation period until a state of affairs has ceased to exist, as in relation to infancy) may be absence of relevant knowledge, and agreement.

126. Absence of knowledge of the occurrence of damage was the central feature in both the *Cartledge* and *Pirelli* cases and led members of the House of Lords to recommend that the law be changed by Parliament. The Commission agrees that it is unfair that a limitation period can run against a plaintiff who does not (or could not reasonably) have knowledge of latent damage or latent defects which would subsequently lead to damage. On that basis, it is the Commission's present view that the standard limitation period should not commence to run (i.e. its commencement should be postponed) until a plaintiff has (or reasonably ought to have) knowledge of:

- (a) the act or omission or damage which is complained of, and/or
- (b) the identity of the person responsible for such act or omission.

However, this extension would be subject to the overall long-stop provision discussed below. It should also be noted that this would apply generally and thus further reduce distinctions between causes of action in contract and tort in the limitation context.

127. There is a question as to the test for constructive knowledge: what a plaintiff ought to have known. Should it be objective, measured against a hypothetical reasonable plaintiff in the circumstances? Or should the abilities of the particular plaintiff be relevant (e.g. blindness, or lack of proficiency in English)? The former appears in the Latent Damage Act (U.K.) (see Para.111), while the latter is favoured in the Alberta report (1986) (see Appendix F, s.3(1)(a)). The Commission is presently inclined to the latter, but would welcome submissions on the point.

128. There is also a question relating to knowledge and successive owners, particularly in relation to land and buildings. The Latent Damage Act 1986 (U.K.) provides that limitation periods run against owners as a class; in other words, sale of a building by a vendor to a purchaser does not trigger a completely new limitation period.

129. In most cases there is no difficulty with this approach. If the damage had already become discoverable (on an objective test) to the vendor it would be similarly discoverable to the purchaser and would normally be reflected in the purchase price. If it is not discoverable then the absence of knowledge extension would operate in favour of the purchaser.

130. However, there may be a case for a different approach where the vendor has concealed the evidence of damage. Although a purchaser would have a claim for misrepresentation (and may be able to cancel under the Contractual Remedies Act 1979) the Commission is presently unsure whether that is a sufficient remedy or whether the limitation period for the purchaser should be extended during (or even revived after) the period of concealment. Submissions directed to this point would be particularly welcomed.

131. It may conveniently be mentioned here that the Commission's present view is that the onus of proof of expiry of a standard limitation period would rest on a defendant, but that for extensions the onus would shift to a plaintiff.

132. Disability (defined to include infancy and unsoundness of mind) has been a traditional ground for suspension of the running of a limitation period. The effect can be to postpone the commencement of litigation for a very long period and thus erode the central thrust of a limitations statute. Further, in most cases the infant or the mentally unsound will have some person who can sue on their behalf. But there undoubtedly is scope for unfairness if time runs during such disabilities, and the Commission's present inclination is to retain these as grounds for extension of the standard limitation period but subject to the long-stop provision – itself not applicable to situations concealed by fraud (Para.141).

133. A further existing ground for extension of the standard limitation period (also subject to a long-stop provision) presently



accepted by the Commission is in relation to mistake by the plaintiff, thus retaining the effect of the mistake provisions presently found in s.28 of the 1950 Act.

134. The Commission is also presently of the view that acknowledgement, part payment, and fraud should be grounds for extension or suspension of the standard limitation period, as they are under the 1950 Act, and that express agreements to extend the standard limitation period should also be effective.

### THE LONG-STOP

135. The Commission sees extension of limitation periods on the ground of non-discoverability as enhancing fairness, although at some cost to the object of certainty. The interests of certainty can, however, be promoted by a "long-stop" or ultimate limitation period – an overall limit measured from the date of the act or omission alleged against the defendant.

136. A long-stop is not a traditional feature of English limitation law or that of the English-influenced Commonwealth jurisdictions. However, a twenty year prescription period has been a feature of Scottish law, and similar provisions are in force in many non-Commonwealth countries as is indicated in the table below:

N. Dakota	10 yrs.	Real Property actions
N. Carolina	10 yrs.	Negligence actions
Austria	30 yrs.	All actions
Belgium	30 yrs.	All actions
France	30 yrs.	All actions*
Germany	30 yrs.	All Actions
Holland	30 yrs.	All Actions
S Africa	30 yrs.	All Actions
Egypt	15 yrs.	All actions
Italy	10 yrs.	All actions
Japan	10 yrs.	All actions
Mexico	10 yrs.	All actions
Sweden	10 yrs.	All Actions
Switzerland	10 yrs.	All Actions
Romania	3 yrs.	All Actions
USSR**	3 yrs.	All Actions

\* From when the damage is apparent; the other jurisdictions provide that the time runs from the date of the wrongful act.

\*\* The period is not quite as short as it seems. Although the limitation period is applied by the court independent of any pleading of it, the court will examine the claim after the period has expired if it is satisfied there is a valid reason why the period was allowed to expire before the action was begun.

137. It may also be noted that s.14(e) of the 1950 Act effectively provides a 30 year long-stop on claims to recover land or money charged on land, notwithstanding that the claimant may have been under a disability which would otherwise extend the limitation period.

138. It will be recalled that the Latent Damage Act (U.K.) has provided for a fifteen year long-stop period, and that the Alberta Report has recommended a ten year long-stop period.

139. The Commission's present thinking is that a long-stop period of fifteen years may be appropriate. As with the fixing of other time limits, selection of a particular period is a somewhat arbitrary exercise, and similar reasoning might support the selection of either a shorter or longer period. The Scarman Committee report (1984) dealt with the length of a longstop period as follows:

"We have considered periods of twelve, fifteen years and twenty years. We have come to the conclusion that a period of twelve years, although it would probably work satisfactorily in most cases, might also bar some worthy claims. At the other extreme we think that a twenty year period might permit some very stale claims and expose many defendants to the risk of litigation for an unreasonable length of time. We have concluded that a fifteen year period strikes the right balance between justice for plaintiffs and certainty for defendants and we so recommend."

140. The question of whether any of the grounds for extension of the standard period – fraud, or express agreement, for example – should override the long-stop provision is one on which there is scope for reasoned differences of opinion. The present inclination of the Commission is that the long-stop should apply in all cases except where there has been deliberate concealment of the act or omission or the damage by the defendant.

141. The application of a "long-stop" that is less than the age of majority (twenty years: see Age of Majority Act 1970) means that a limitation period may expire during a plaintiff's minority. The Commission's present view is that this is less significant in New Zealand where common law actions for personal injury have been replaced by the accident compensation scheme, and the minor should be sufficiently protected by the ability of a parent or guardian to commence civil proceedings on his or her behalf together with the overriding extension where some right of action has been concealed by fraud.

## A NEW LIMITATION REGIME

142. In summary then, the tentative proposal advanced by the Law Commission is for replacement of the present limitation periods with

a new regime including the following features:

- (a) a standard three year limitation period;
- (b) the standard period commencing from the date of the act or omission complained of;
- (c) the standard period to be postponed in the event of:
  - (i) absence of knowledge of occurrence of the act or omission or the damage;
  - (ii) absence of knowledge of the identity of the defendant;
  - (iii) infancy;
  - (iv) unsoundness of mind;
  - (v) mistake;
  - (vi) fraud;
  - (vii) agreement;
  - (viii) acknowledgement;
  - (ix) part payment.
- (d) an overall long-stop limitation period of fifteen years, except that this would not apply to extension by reason of fraud.

## VI LATENT DAMAGE: CASES, ISSUES, COMPARISONS

143. This chapter focusses on latent damage – where the acts of a defendant do not manifest damage to a plaintiff for some significant time – and, in particular, on building cases. This area has given rise to some controversy and at least indirectly the Minister's reference of the Limitation Act 1950 to this Commission for review. The area also illustrates many of the matters with which a limitation regime must be concerned.

144. Latent damage is not confined to building cases and is equally applicable to, for example, professional advice cases – another growth area in the field of common law litigation. It may be noted that the Canadian law appears to require discoverability of damage before a limitation period runs in relation to professional advice (see *Central Trust Co. v. Rafuse* [1986] 2 S.C.R. 147). In New Zealand the situation is complicated by the present survival of a rule that where a client has a contractual relationship with a professional adviser there is no concurrent tortious liability: see *McLaren Maycroft v. Fletcher Development* [1973] 2 N.Z.L.R. 100. However, the survival of that rule is very much in doubt: see *Rowe v. Turner Hopkins* [1982] 1 N.Z.L.R. 178, and *Day v. Mead* (unreported, Court of Appeal, CA.90/86; judgment 31 July 1987).

145. Latent damage can also occur in the occupational disease field, as was illustrated in the *Cartledge* case (pneumoconiosis). The New South Wales and Western Australia law reform agencies have recommended extending standard limitation provisions for such situations. In New Zealand, where there is a no-fault accident compensation system and a consequential abolition of common law rights of action in relation to personal injury by accident (including occupational diseases), it seems obvious that such diseases should be dealt with by that system and not by reintroduction of employer–employee common law litigation. In so far as present incapacity may be related to pre-accident compensation era exposure to asbestos or other risk and subsequent latent damage to the body, the substantive law would seem to be that laid down by the House of Lords in *Cartledge* (1963) and thus employers are presently protected by the provisions of the Limitation Act 1950. This situation is of relevance to the question of whether changes to a statutory limitation regime should have some retrospective effect but, as earlier indicated, the Commission's present view is against any such effect.

### THE CASE LAW

146. The case which led to local authorities facing liability for

negligent inspection of building foundations where buildings later suffered from structural damage was *Dutton v. Bognor Regis Urban District Council* [1972] 1 Q.B. 373. That case arose from the purchase by a developer of land which included a filled in rubbish tip. The developer sub-divided the land and obtained planning permission from the local council in 1958. Before the building in question was erected, the Council's officers inspected the trenches dug for foundations. The house was completed in 1959, sold to a Mr Clark early in 1960 and sold by him to a Mrs Dutton later that year. Shortly after she moved in she noticed that the walls and ceiling were cracking, the staircase slipped, and doors and windows would not close. It transpired that these problems were due to internal subsidence and in 1964 Mrs Dutton issued proceedings claiming £2,240 for the cost of repairs and £500 for permanent diminution in value of her property. Mrs Dutton settled her claim against the developer for £625 (apparently on the basis of the then rule that an owner-builder owes no contractual duty to a purchaser of a house). But Mrs Dutton was awarded £2,115 (the balance of her claim) against the local council on the basis of a breach of a duty to take reasonable care in inspecting the building foundations. The Court of Appeal confirmed the judgment in favour of Mrs Dutton.

147. The leading decision of the New Zealand Court of Appeal in this area is *Mount Albert Borough Council v. Johnson* [1979] 2 N.Z.L.R. 234. That case related to a sub-division in Begbie Place, Mount Albert, which has become somewhat infamous by reason of the subsidence which has occurred on the previous landfill site. The particular building in question in this case was completed in 1966 following the issue of a building permit by the Council and an inspection of the piles by a Council inspector. Flat 3 of the building was sold in 1966 and remedial work was done in 1967 after the initial purchaser complained of cracks. In 1968 Flat 3 was sold to an intermediate purchaser who sold to the plaintiff, Johnson, in 1970. Johnson observed cracks from the about the end of 1970 and the defects worsened during the 1971-1973 period at the end of which a consulting engineering inspected the premises and recommended \$10,000 worth of remedial work. At the end of 1973 Johnson sued the Council. In confirming the Supreme Court's decision awarding damages to Johnson, 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. The developer was also sued, held to be responsible for Johnson's loss on a 50:50 basis with the Council, but later proved insolvent (which meant that the Council was liable for the whole of Johnson's loss).

148. As discussed earlier, the House of Lords' decision in *Pirelli* came after the Court of Appeal's decision in *Johnson* and the relationship between the two decisions has not yet been clarified at appellate level. In *Paaske v. Sydney Construction* (unreported,

Auckland, A.387/74; judgment 24 June 1983), another Begbie Place case, Thorp J. held that in relation to the plaintiffs' cause of action against the builder, the *Pirelli* decision was directly in point and must be applied, but that in relation to the cause of action against the Council, the *Johnson* decision should prevail. In *Askin v. Knox* (unreported, Dunedin, A.14/84; judgment 3 March 1986), where a limitation defence succeeded (there was also a finding of absence of negligence), Holland J was of the view that the distinction drawn between the New Zealand and United Kingdom limitation statutes in *Paaske* "appears to me to be a distinction with very little difference".

149. In *Williams v. Mount Eden Borough Council* (unreported, Auckland, A.360/85; judgment 2 April 1986), where the negligence had resulted in the likelihood of the local body issuing a requisition to bring the building up to earthquake standard (although there was not serious structural damage or imminent danger to occupants), Casey J. held that the damage complained of would only crystallise on the issue of the local body requisition and thus the cause of action in negligence had not accrued, although he was prepared to grant declaratory relief. But he observed that "after *Pirelli* the limitation question is in some disarray". Most recently in *Gillespie v. Mount Albert City Council* (unreported, Auckland A.1162/81; judgment 18 June 1987), Thorp J. reaffirmed the conclusions on issues he had previously canvassed in *Paaske*.

150. A perusal of the leading English and New Zealand cases from *Dutton* onwards shows a wide range in the period between construction of a building and the signs of damage becoming manifest. That information is set out in the table which follows:

Case	Number of years between construction of building and signs of damage
Dutton [1972] 1 Q.B. 373, CA	2
Gabolinscy [1975] 1 N.Z.L.R. 150	10
Sparham-Souter [1976] Q.B. 858, CA	4
Bowen [1977] 1 N.Z.L.R. 394	2
Anns [1978] A.C. 728, HL	8
Batty [1978] Q.B. 554, CA	3
Johnson [1979] 2 N.Z.L.R. 234	6-8
Acrecrest [1983] Q.B. 260, CA	1
Dennis [1983] Q.B. 409	21
Pirelli [1983] 2 A.C. 1	9
Askin (1986) unreported	10
Williams (1986) unreported	11

## THE CHANGING LAW

151. The substantive judge-made law applying to defective buildings has changed significantly during the period covered by the cases listed in the preceding paragraph. The most significant changes which have occurred (and been reflected) in those cases include:

- (a) local bodies have been held liable in tort for negligent approval of by-laws and negligent inspection of foundations relating to buildings which have subsequently shown signs of damage – the local body was required to pay damages in *Dutton, Bowen, Anns, Batty, Johnson, Acrecrest*, and *Paaske*;
- (b) this liability of local bodies has been extended to original owners (e.g. *Acrecrest*) and to successive owners;
- (c) The traditional immunity of owner-builders selling premises was ended (see *Dutton, Anns* and *Johnson*);
- (d) It was accepted that contractual liability could run alongside tortious liability (e.g. *Batty*);
- (e) It was also accepted that damages could be awarded for economic loss as opposed to physical damage (see *Williams* and, more recently, *Stieller v. Porirua City* [1986] 1 NZ.L.R. 84;
- (f) It was accepted that there could be successive actions for negligence arising from the same originating act (see *Johnson* and *Gillespie*, but contrast with *Cartledge* and *Askin*).

152. A feature of a number of the local government cases has been the absence of the builder as a party in the litigation, often because of the insolvency of the builder – leaving the local body as the only worthwhile defendant: this occurred in the Mount Albert litigation (see *Paaske*); and was commented on in *Dennis*, where Lawton LJ. made reference to the desirability of some compulsory insurance scheme for builders.

153. The question of insurance has been specifically addressed in some of the cases, in particular *Dutton* (per Lord Denning at p.398) and in *Bowen* where Woodhouse J. said (at p.419):

"There is the further consideration that the practical effect of accepting that there is a duty of care owed by one class to another is usually not limited to shifting individual losses from each innocent plaintiff to the negligent defendant. By the conventional use of insurance it becomes possible for the

losses to be widely spread and thereby a double social purpose is served. On the one hand, the serious strains that can arise if the random losses were left to lie where they fall are removed for the unfortunate and innocent victims. On the other, the opportunity for their wide distribution through insurance encourages savings in the form of premium reserves which can be used for the important purpose of supporting the economy generally. And in this regard third party insurance by the building industry would seem to be entirely feasible while any general system of first party insurance by purchasers would not."

154. It may also be noted that, in *Bowen*, Richmond P. referred to the limitation period as one of the factors which would prevent an extended liability for local bodies in tort from becoming infinite; however, the idea of successive causes of action and the need for discoverability means, as was recognised by Geoffrey Lane LJ. in *Sparham-Souter*, that the limitation period may be extended indefinitely.

#### AREAS OF UNCERTAINTY

155. In addition to the uncertainty surrounding the different approaches taken in the *Pirelli* and *Bowen* cases, there are several other areas where the law is not completely clear at present. These include the following:

- (a) the position of a successive owner recovering damages, but failing to repair before on-selling (Paras.128-130);
- (b) the measure of damages - to render the building habitable (*Anns*), to compensate for diminution in value (*Bowen*), or restoration of the building to its proper state;
- (c) the uncertain scope and effect of opportunities for intermediate examination of the premises - whether a purchaser liable to make a closer inspection than an existing owner (see *Pirelli*), and when an expert engineer should be called in (as opposed to a builder) (see *Dennis*);
- (d) the concept of buildings which are "doomed from the start" - as mentioned in *Pirelli*, and perhaps exemplified in *Batty* (house built on sliding hillside);
- (e) the higher standard of duty owed by a builder to a subsequent purchaser, as opposed to the original owner, and the effect of the original terms of a building contract on the duty owed to later owners (as discussed by Richmond P. in *Bowen*);



- (f) The impact of the Fair Trading Act 1986 on the sale of buildings.

## SCHEMATIC COMPARISON

156. To test some of the difficulties with our present law and some of the proposed solutions it is useful to apply a specific example, based loosely on the facts in *Johnson* outlined at 147, to the different regimes. The regimes considered are:

- . the present New Zealand law
- . the U.K. Latent Damages Act 1986
- . the Albertan proposal
- . the Commission's tentative proposal

(1) *Present New Zealand law.* Diagram A1 illustrates the rather arbitrary distinctions which arise under the present system and some of the doubt which has been generated over the applicability of the *Pirelli* decision. Each time period is subject to indefinite extension (if the provisions of Part II of the Limitation Act 1950 apply). Diagram A2 continues where diagram A1 leaves off and illustrates the position under present law where a local authority takes a successful contribution action against the builder. In this example the builder has been exposed to liability for twenty-seven years.

Diagram A1

### PRESENT LAW

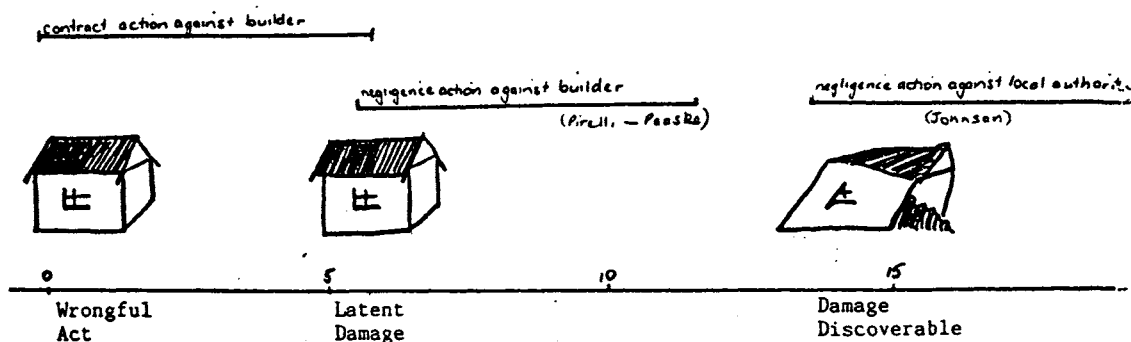
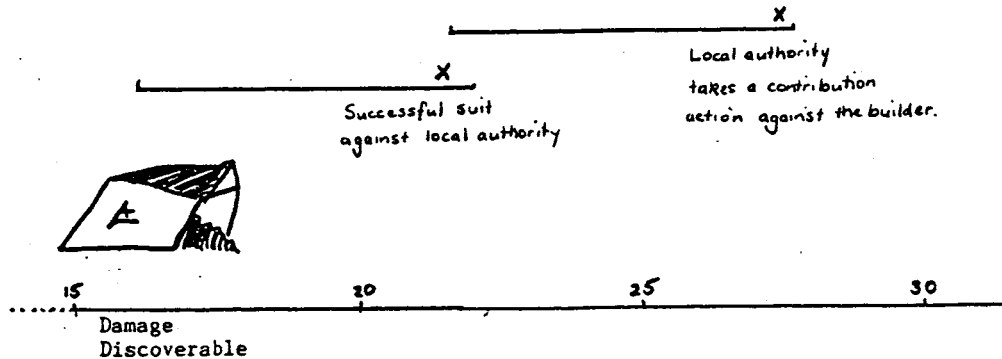


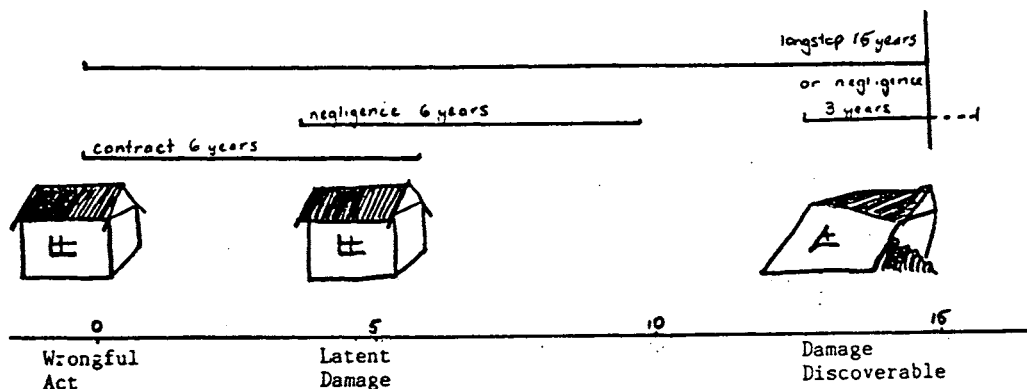
Diagram A2



(2) *The United Kingdom Latent Damage Act 1986*. This Act only applies to latent defects in buildings. Diagram B presumes that the distinction between contract and tort cases is maintained. The plaintiff may sue in negligence up to three years after damage occurs or after it is discoverable. This is subject to a long stop so that (in the example) time expires before the three years from discovery because fifteen years has run from the date of the wrongful act.

Diagram B

## LATENT DAMAGE ACT 1986

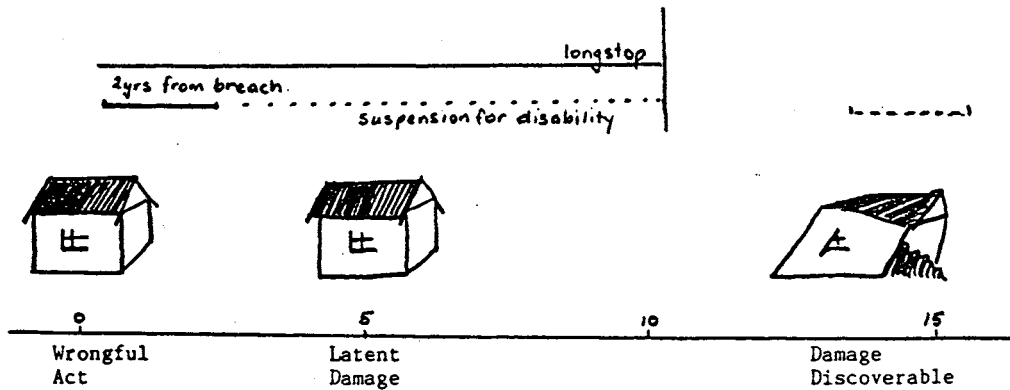


(3) *The Albertan proposal*. The Albertan proposal (diagram C) gives the plaintiff in a negligence action two years after the breach of duty or two years from discoverability to take a claim.

The extension for lack of knowledge, and all extensions for disability, are subject to a ten year longstop.

Diagram C

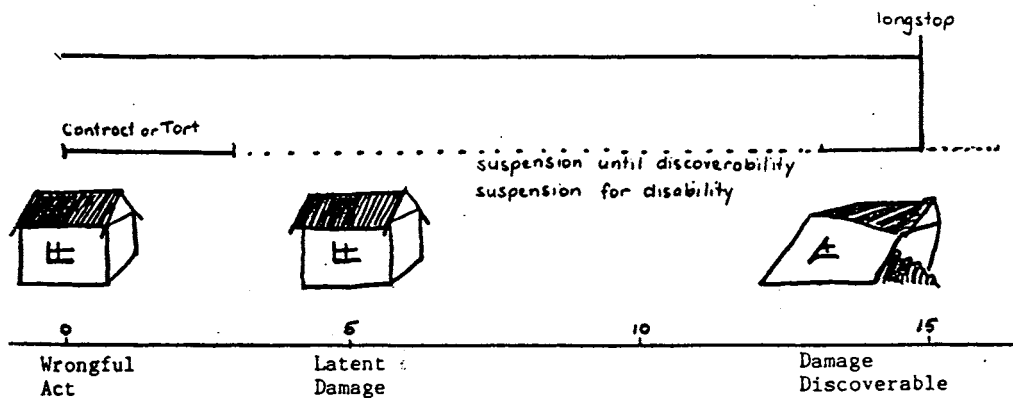
### ALBERTAN PROPOSAL



(4) *The Law Commission proposal.* The Law Commission proposal (diagram D) has much the same effect although more generous time periods are suggested. There is an extension for lack of knowledge and other disabilities up until the time of the longstop (fifteen years). There are possible extensions beyond this point in the event of fraud, acknowledgement or part-payment by the defendant.

Diagram D

### LAW COMMISSION PROPOSAL



## VII THE ISSUES: A SUMMARY

157. This chapter begins with a summary of the broad questions discussed in this paper, indicates the Commission's tentative views on such questions, and provides a cross reference to the discussion in the earlier chapters. It then proceeds to identify a number of narrower but nonetheless important issues.

### THE BROAD QUESTIONS

158. The broad questions which the Commission has identified thus far are as follows:

- A. Should there be any general statute limiting the time within which civil proceedings may be commenced?**

Tentative View: Yes

Discussion: Paras. 59 to 64.

- B. Should the Limitation Act 1950 be retained in its present form?**

Tentative View: No

Discussion: Paras. 65 to 69.

- C. If there is to be a new Act, should a broad judicial discretion be a feature of it?**

Tentative View: No

Discussion: Paras. 70 to 77.

- D. Should a new Act have the same scope as the 1950 Act?**

Tentative View: A new Act should be fully comprehensive in relation to all civil proceedings except for a very few specified exceptions; see also K, below.

Discussion: Paras. 79 to 82.

**E. What exceptions (if any) might be made from the scope of a new Act?**

Tentative Views: Certain aspects of land law, and (perhaps) declaratory proceedings; see also K, below.

Discussion: Paras. 83 to 97.

**F. Should there be different limitation periods for various matters (for example, those relating to land, actions on deeds, and for enforcement of judgments)?**

Tentative View: No.

Discussion: Paras. 113 to 116.

**G. What should the length of a standard limitation period be?**

Tentative View: Three years.

Discussion: Paras. 122 to 124.

**H. When should a standard limitation period commence to run?**

Tentative View: Generally from the date of act or omission by a defendant which is complained of by the plaintiff; in testamentary matters, from the date of grant of probate or letters of administration.

Discussion: Paras. 117 to 121.

**I. On what grounds (if any) should the running of the standard limitation period be extended or suspended?**

Tentative Views: Agreement, acknowledgement, part payment, fraud, mistake, minority, mental incapacity, and (importantly) non-discoverability of damage and/or the identity of persons responsible for damage.

**N.B.** The issues relating to constructive knowledge (Para.126) and successive owners (Para.130) deserve particular consideration.

Discussion: Paras. 125 to 134.

- J. Should there be a "long-stop" or ultimate limitation period? If so, how long and how comprehensive should it be?**

Tentative Views: Yes. Fifteen years, but not where there is fraudulent concealment by a defendant.

**N.B.** The position of infants (Para.141) deserves particular attention.

Discussion: Paras. 135 to 141.

- K. Should a new limitation statute supersede the limitation periods specified in particular statutes (such as those listed in Appendix B)?**

Tentative Views: Yes, unless there are very strong policy reasons to retain a separate limitation provision.

Discussion: Para. 116.

- L. Would a new limitations statute have retrospective effect?**

Tentative Views: None settled.

Discussion: Paras. 169, 170.

## **SOME SPECIFIC ISSUES**

159. In addition to the broad issues listed above there are several narrower but nonetheless important issues to be considered. The discussion of those in this chapter is short, but includes tentative views presently held by the Commission (subject to change in the light of further information and submissions received).

### ***Agreements to extend or reduce time***

160. As discussed above (Para.134) the Commission's present view is that any agreement to extend the standard limitation period should be given effect to. There is considerable room for debate as to whether this should be the case with the long-stop period, as this might lead to very stale claims being brought before a court eventually for determination, contrary to the general thrust of a limitation regime. On the other hand there may be a need for, say, long warranties in civil engineering or building work which ought not to be precluded by a limitation statute.

161. There is also a very real question as to whether it should be possible to reduce limitation periods by agreement. On the one hand, such reduction would accord with the purpose of limitation statutes in reducing the risk of stale claims coming before the court; but, on the other hand, there is the risk that one party with superior bargaining power may be able to impose a very short contractual limitation period which goes some distance to remove the other party's normal rights of access to the court for resolution of disputes under the contract. The courts do have powers to reject agreements which purport to oust their jurisdiction as being contrary to public policy, but it may be appropriate to deal with this point specifically in a new Act. A possible compromise would be to permit reductions down to a minimum period of (say) six months.

#### *Amendment of pleadings*

162. The Commission's present view is that the thrust of the statutory limitation regime would not be impaired if there was power to allow amendment after a limitation period had expired in proceedings commenced before such expiry. This could be stated in a new Act – a course in accord with proposals for reform in Ontario, Alberta and elsewhere.

#### *Burden of proof*

163. As discussed earlier (Para.131), it is the Commission's present view that the burden of proving the passage of the standard limitation period (three years from the "wrong") or the ultimate limitation period (fifteen years from the "wrong") should rest with a defendant. On the other hand, the onus of proving that either of those periods should be extended or suspended for any reason (for example, absence of knowledge of occurrence of damage) seems appropriate to be proved by a plaintiff.

#### *Contribution Proceedings*

164. Under the present 1950 Act it is possible for proceedings to become very stale where A sues B towards the end of a limitation period applying to that litigation, and then B has the whole of a separate limitation period (which normally commences when A obtains judgment against B) to seek contribution from C under the Law Reform Act 1936. This situation resulted in an amendment to English legislation to provide that contribution claims must be brought within a special limitation period of two years. Given the Commission's present favouring of a standard three year limitation period, there would seem to be little to be gained by any special provision relating to contribution proceedings, notwithstanding that there may be scope for cumulative proceedings.

### *Crown proceedings*

165. The Commission's present view is that the Crown should continue to be subject to the statutory limitation regime as if it were an ordinary litigant, although the proposals for a standard three year limitation period mean that, subject to transitional provisions, the Crown's ability to recover land will be significantly affected. However, there may be some issues involving the Crown which have implications for the Treaty of Waitangi and its principles in this context.

### *Delay, Discretion*

166. As mentioned earlier (Paras.96-97) the Commission's present view is that a new Act should contain a specific provision stating that the provisions of the Act are not intended to affect any jurisdiction which the courts presently have to refuse relief as a matter of discretion on the grounds of delay, acquiescence or otherwise. In other words, where a court would have refused to grant relief as a matter of discretion because in the circumstances the litigation should have been commenced earlier (this may be particularly relevant to judicial review proceedings), even though the proceedings have been commenced within the standard limitation period, the power to refuse relief would continue and is not to be replaced by the new and shorter limitation regime.

### *Extinction of rights*

167. Under New Zealand and English law the expiry of a limitation period is regarded as procedural (barring the remedy) rather than substantive (extinguishing the right). In most situations this distinction is meaningless: a right which cannot be enforced is without value. But the Wright Report (1936) considered there were nine legal situations where the distinction was of significance; for example, where a debtor pays money on account of several debts generally the creditor may apply such money to statute-barred debts.

168. A major review of limitation law by the New South Wales Law Reform Commission (LRC3, 1967) reviewed those nine situations (and one other) and concluded that retention of a right after removal of the remedy was an unnecessary complication which the law could do without. The Ontario Law Reform Commission report (1969) agreed. At present the Law Commission is also inclined to follow the New South Wales approach.

### *Transitional provisions*

169. As discussed earlier (Para.114) there is a serious issue as to whether a new Act should contain a provision which preserves the



limitation position applying at the date of commencement of the new regime and avoid any retrospective application of a new Act. In other words, if one year of a present six year limitation period has passed at the date of commencement of a new Act which prescribes a three year limitation period, should the intending plaintiff be able to proceed before the end of the six year period and not merely the three year period before having to face a plea of statutory limitation. The situation is more extreme where existing limitation periods are longer.

170. The idea of a very long transitional era is not immediately attractive as it postpones the beneficial impact of a new regime. On the other hand, there is an almost equal lack of attraction in legislating so as to unnecessarily alter existing arrangements and expectations. A compromise transitional regime might retain existing 6 year limitation periods but scale down those that are longer. At this time the Commission has not formed any tentative view and merely invites submissions directed to this point.

#### *Name of Act*

171. Finally there is a question of nomenclature. The word "limitation" on its own may carry connotations of a ceiling on quantum rather than time limits, and does not emphasise the restriction of these to civil proceedings. But, although the "Civil Proceedings (Time Limits for Commencement) Act" may be a more informative title, it is far from elegant; and the existing title has been around for a long time. There is also an argument that limitation provisions might conveniently be included as a self-contained part in legislation which establishes courts – the Judicature, District Courts, and Small Claims Tribunals Acts.



## REPRINTED ACT

[WITH AMENDMENTS INCORPORATED]

## LIMITATION

REPRINTED AS ON 1 NOVEMBER 1980

NOTE: Except where otherwise indicated, all references to money in decimal currency in square brackets were substituted for references to money in the former currency by s. 7 of the Decimal Currency Act 1964, all references to Her Majesty in square brackets have been updated from references to His Majesty, and all references to the High Court in square brackets were substituted for references to the Supreme Court by s. 12 of the Judicature Amendment Act 1979.

INDEX	Page
Limitation Act 1950	2
Property Law Act 1952: s. 155 (2)	24 (n)
Land Transfer Act 1952: s. 245	24 (n)
Municipal Corporations Act 1954: s. 413 (1)	24 (n)
Trustee Act 1956:	
S. 89 (1)	24 (n)
S. 89 (2)	10 (n)
Summary Proceedings Act 1957: s. 214 (1)	24 (n)
Limitation Amendment Act 1962	25
State Insurance Act 1963: s. 38 (1)	24 (n)
Limitation Amendment Act 1963	25
Decimal Currency Act 1964: s. 7	1 (n)
Milk Act 1967: s. 71 (1)	24 (n)
Limitation Amendment Act 1970	26
Gaming and Lotteries Act 1977: s. 142 (1)	24 (n)
Judicature Amendment Act 1979: s. 12	1 (n)

In this index "(n)" after a page number indicates that the enactment is referred to in a note on that page.

## ANALYSIS

Title	7. Limitation of actions to recover land
1. Short Title and commencement	8. Accrual of right of action in case of present interests in land
2. Interpretation	9. Accrual of right of action in case of future interests
PART I	10. Provisions in case of settled land and land held on trust
PERIODS OF LIMITATION FOR DIFFERENT CLASSES OF ACTION	11. Accrual of right of action in case of forfeiture or breach of condition
3. Part I to be subject to provisions of Part II relating to disability, acknowledgment, fraud, etc.	12. Accrual of right of action in case of certain tenancies
Actions of Contract and Tort and Certain Other Actions	13. Right of action not to accrue or continue unless there is adverse possession
4. Limitation of actions of contract and tort, and certain other actions	14. Accrual of cause of action on claim for contribution or indemnity
5. Limitation in case of successive conversions, and extinction of title of owner of converted goods	15. Cure of defective disentailing assurance
Actions to Recover Land and Rent, and Accrual of Rights and Causes of Action	16. Limitation of redemption actions
6. Application of Act to land of the Crown, Maori customary land, and land subject to the Land Transfer Act	17. No right of action to be preserved by formal entry or continual claim
	18. Extinction of title after expiration of period
	19. Limitation of actions to recover rent

Actions to Recover Money Secured by a Mortgage or Charge or to Recover Proceeds of the Sale of Land

20. Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land

Actions in Respect of Trust Property or the Personal Estate of Deceased Persons

21. Limitation of actions in respect of trust property

22. Limitation of actions claiming personal estate of a deceased person

23. Repealed

## PART II

EXTENSION OF LIMITATION PERIODS IN CASE OF DISABILITY, ACKNOWLEDGMENT, PART PAYMENT, FRAUD, AND MISTAKE

## Disability

24. Extension of limitation period in case of disability

## Acknowledgment and Part Payment

25. Fresh accrual of action on acknowledgment or part payment

26. Formal provisions as to acknowledgments and part payments

27. Effect of acknowledgment or part payment on persons other than the maker or recipient

## Fraud and Mistake

28. Postponement of limitation period in case of fraud or mistake

## PART III

## GENERAL

29. Application of Act and other limitation enactments to arbitrations

30. Provisions as to set-off or counterclaim

31. Acquiescence

32. Application to the Crown

33. Savings for other limitation enactments

34. Provisions as to actions already barred and pending actions

35. Repeals and amendments Schedules

## THE LIMITATION ACT 1950

1950, No. 65

An Act to consolidate and amend certain enactments relating to the limitation of actions and arbitrations

[1 December 1950]

**1. Short Title and commencement**—This Act may be cited as the Limitation Act 1950, and shall come into force on the 1st day of January 1952.

The law of the Cook Islands and of Niue as to limitations is the same as the law in force for the time being in New Zealand. See s. 641 of the Cook Islands Act 1913, and s. 706 of the Niue Act 1966.

**2. Interpretation**—(1) In this Act, unless the context otherwise requires,—

“Action” means any proceeding in a Court of law other than a criminal proceeding;

“Arbitration”, “award”, and “submission” have the same meanings respectively as in the Arbitration Act 1908;

“Land” includes corporeal hereditaments and rent-charges, and any legal or equitable estate or interest therein, including an interest in the proceeds of the sale of land held upon trust for sale, but save as aforesaid does not include any incorporeal hereditament;

"Parent" has the same meaning as in [the Deaths by Accidents Compensation Act 1952] as for the time being extended by any other enactment:

"Personal estate" and "personal property" do not include chattels real:

"Rent" includes a rentcharge and a rent service:

"Rentcharge" means any annuity or periodical sum of money charged upon or payable out of land, except a rent service or interest on a mortgage on land:

"Ship" includes every description of vessel used in navigation not propelled by oars:

"Trust" and "trustee" have the same meanings respectively as in [the Trustee Act 1956] as for the time being extended by any other enactment.

(2) For the purposes of this Act, a person shall be deemed to be under a disability while he is an infant or of unsound mind.

(3) For the purposes of the last preceding subsection but without prejudice to the generality thereof, a person shall be conclusively presumed to be of unsound mind while he is detained or kept in custody (otherwise than as a voluntary boarder) under any provision of [the Mental Health Act 1969].

(4) A person shall be deemed to claim through another person if he became entitled by, through, under, or by the act of that other person to the right claimed, and any person whose estate or interest might have been barred by a person entitled to an entailed interest in possession shall be deemed to claim through the person so entitled:

Provided that a person becoming entitled to any estate or interest by virtue of a special power of appointment shall not be deemed to claim through the appointor.

(5) References in this Act to a right of action to recover land shall include references to a right to enter into possession of the land or, in the case of rentcharges, to distrain for arrears of rent; and references to the bringing of such an action shall include references to the making of such an entry or distress.

(6) References in this Act to the possession of land shall, in the case of rentcharges, be construed as references to the receipt of rent; and references to the date of dispossession or discontinuance of possession of land shall, in the case of rentcharges, be construed as references to the date of the last receipt of rent.

(7) In Part II of this Act references to a right of action shall include references to a cause of action and to a right to receive

money secured by a mortgage or charge on any property or to recover proceeds of the sale of land, and to a right to receive a share or interest in the personal estate of a deceased person; and references to the date of the accrual of a right of action shall—

(a) In the case of an action for an account, be construed as references to the date on which the matter arose in respect of which an account is claimed:

(b) In the case of an action upon a judgment, be construed as references to the date on which the judgment became enforceable:

(c) In the case of an action to recover arrears of rent or interest, or damages in respect thereof, be construed as references to the date on which the rent or interest became due.

(8) For the purposes of this Act a period of limitation which is prescribed by any of the enactments mentioned in the Second Schedule to this Act (as amended by this Act) shall not be deemed to be prescribed by this Act.

Cf. Limitation Act 1939, s. 31 (U.K.)

In subs. (1) the Deaths by Accidents Compensation Act 1952 and the Trustee Act 1956, being the corresponding enactments in force at the date of this reprint, have been substituted for the repealed Deaths by Accident Compensation Act 1908 and the repealed Trustee Act 1908.

In subs. (3) the Mental Health Act 1969, being the corresponding enactment in force at the date of this reprint, has been substituted for the repealed Mental Health Act 1911.

## PART I

### PERIODS OF LIMITATION FOR DIFFERENT CLASSES OF ACTION

**3. Part I to be subject to provisions of Part II relating to disability, acknowledgment, fraud, etc.**—The provisions of this Part of this Act shall have effect subject to the provisions of Part II of this Act, which provide for the extension of the periods of limitation in the case of disability, acknowledgment, part payment, fraud, and mistake.

Cf. Limitation Act 1939, s. 1 (U.K.)

#### *Actions of Contract and Tort and Certain Other Actions*

**4. Limitation of actions of contract and tort, and certain other actions**—(1) Except as otherwise provided in this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say,—

(a) Actions founded on simple contract or on tort:

(b) Actions to enforce a recognisance:

(c) Actions to enforce an award, where the submission is not by a deed:

(d) Actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.

(2) An action for an account shall not be brought in respect of any matter which arose more than 6 years before the commencement of the action.

(3) An action upon a deed shall not be brought after the expiration of 12 years from the date on which the cause of action accrued:

Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

(4) An action shall not be brought upon any judgment which has been obtained subsequent to the commencement of this Act after the expiration of 12 years from the date on which the judgment became enforceable or on any judgment which has been obtained before the commencement of this Act after the expiration of 20 years from the date on which the judgment became enforceable; and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of 6 years from the date on which the interest became due.

(5) An action to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any enactment shall not be brought after the expiration of 2 years from the date on which the cause of action accrued:

Provided that for the purposes of this subsection the expression "penalty" shall not include a fine to which any person is liable on conviction of a criminal offence.

(6) An action to have any will of which probate has been granted, or in respect of which letters of administration with the will annexed have been granted, declared or adjudicated to be invalid on the ground of want of testamentary capacity in the testator or on the ground of undue influence shall not be brought after the expiration of 12 years from the date of the granting of the probate or letters of administration.

[(7) An action in respect of the bodily injury to any person shall not be brought after the expiration of 2 years from the date on which the cause of action accrued unless the action is brought with the consent of the intended defendant before the expiration of 6 years from that date:

Provided that if the intended defendant does not consent, application may be made to the Court, after notice to the intended defendant, for leave to bring such an action at any time within 6 years from the date on which the cause of action

accrued; and the Court may, if it thinks it is just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it is just to impose, where it considers that the delay in bringing the action was occasioned by mistake of fact or mistake of any matter of law other than the provisions of this subsection or by any other reasonable cause or that the intended defendant was not materially prejudiced in his defence or otherwise by the delay.]

(8) Subject to the provisions of [section 76 of the Shipping and Seamen Act 1952], subsection (1) of this section shall apply to an action to recover seamen's wages, but save as aforesaid this section shall not apply to any cause of action within the Admiralty jurisdiction of the [High Court] which is enforceable *in rem*.

(9) This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any provision thereof may be applied by the Court by analogy in like manner as the corresponding enactment repealed or amended by this Act, or ceasing to have effect by virtue of this Act, has heretofore been applied.

Cf. Limitation Act 1939, s. 2 (U.K.); 1908, No. 89, s. 95

Subs. (7) was substituted for the original subs. (7) (as amended by s. 2 of the Limitation Amendment Act 1962), by s. 2 (1) of the Limitation Amendment Act 1970.

In subs. (8), s. 76 of the Shipping and Seamen Act 1952, being the corresponding enactment in force at the date of this reprint, has been substituted for s. 4 of the repealed Shipping and Seamen Amendment Act 1948.

Subs. (4): As to the enforcement of District Courts judgments more than 6 years old, see s. 80 of the District Courts Act 1947, reprinted 1980, R.S. Vol. 5, p. 1.

## 5. Limitation in case of successive conversions, and extinction of title of owner of converted goods—

(1) Where any cause of action in respect of the conversion or wrongful detention of a chattel has accrued to any person and, before he recovers possession of the chattel, a further conversion or wrongful detention takes place, no action shall be brought in respect of the further conversion or detention after the expiration of 6 years from the accrual of the cause of action in respect of the original conversion or detention.

(2) Where any such cause of action has accrued to any person and the period prescribed for bringing that action and for bringing any action in respect of such a further conversion or wrongful detention as aforesaid expires without his having commenced action to recover possession of the chattel, the title of that person to the chattel shall be extinguished.

(3) Nothing in this section shall affect the provisions of subsection (1) of section 26 of the Sale of Goods Act 1908.

Cf. Limitation Act 1939, s. 3 (U.K.)

As to the effect of this section in relation to infringement of copyright by infringing copies, see s. 25 of the Copyright Act 1962.

*Actions to Recover Land and Rent, and Accrual of Rights and Causes of Action*

**6. Application of Act to land of the Crown, Maori customary land, and land subject to the Land Transfer Act—**(1) Subject to the provisions of the next succeeding subsection, nothing in this Act shall apply to any Maori land which is customary land within the meaning of [the Maori Affairs Act 1953].

(2) This Act shall be subject to [the Land Transfer Act 1952], the Land Act 1948, [subsection (2) of section 157 and section 458 of the Maori Affairs Act 1953], and section 12 of the Public Works Amendment Act 1935, so far as it is inconsistent with anything contained in those enactments.

(3) Nothing in this Act shall affect the right of [Her Majesty] to any minerals (including uranium, petroleum, and coal).

In subs. (1) the Maori Affairs Act 1953, being the corresponding enactment in force at the date of this reprint, has been substituted for the repealed Maori Land Act 1931.

In subs. (2) the Land Transfer Act 1952, being the corresponding enactment in force at the date of this reprint, has been substituted for the repealed Land Transfer Act 1915; and ss. 157 (2) and 458 of the Maori Affairs Act 1953, being the corresponding enactments in force at the date of this reprint, have been substituted for ss. 115 and 554 of the repealed Maori Land Act 1931.

As to the Land Transfer Act 1952, see ss. 197 and 199 (3).

**7. Limitation of actions to recover land—**(1) No action shall be brought by the Crown to recover any land after the expiration of 60 years from the date on which the right of action accrued to the Crown or to some person through whom the Crown claims.

(2) No action shall be brought by any other person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or to some person through whom he claims:

Provided that, if the right of action first accrued to the Crown, the action may be brought at any time before the expiration of the period during which the action could have been brought by the Crown, or of 12 years from the date on which the right of action accrued to some person other than the Crown, whichever period first expires.

Cf. Limitation Act 1939, s. 4 (U.K.)

As to the extinguishment after 12 years of interests excepted from limited certificates of title, see s. 204 of the Land Transfer Act 1952.

**8. Accrual of right of action in case of present interests in land—**(1) Where the person bringing an action to recover land, or some person through whom he claims, has been in possession thereof, and has while entitled thereto been dispossessed or discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.

(2) Where any person brings an action to recover any land of a deceased person, whether under a will or on intestacy, and the deceased person was on the date of his death in possession of the land or, in the case of a rentcharge created by will or taking effect upon his death, in possession of the land charged, and was the last person entitled to the land to be in possession thereof, the right of action shall be deemed to have accrued on the date of his death.

(3) Where any person brings an action to recover land, being an estate or interest in possession assured otherwise than by will to him, or to some person through whom he claims, by a person who, at the date when the assurance took effect, was in possession of the land or, in the case of a rentcharge created by the assurance, in possession of the land charged, and no person has been in possession of the land by virtue of the assurance, the right of action shall be deemed to have accrued on the date when the assurance took effect.

Cf. Limitation Act 1939, s. 5 (U.K.)

**9. Accrual of right of action in case of future interests—**(1) Subject as hereafter in this section provided, the right of action to recover any land shall, in a case where the estate or interest claimed was an estate or interest in reversion or remainder or any other future estate or interest and no person has taken possession of the land by virtue of the estate or interest claimed, be deemed to have accrued on the date on which the estate or interest fell into possession by the determination of the preceding estate or interest or otherwise.

(2) If the person entitled to the preceding estate or interest was not in possession of the land on the date of the determination thereof, no action shall be brought by the person entitled to the succeeding estate or interest—

(a) After the expiration of 60 years from the date on which the right of action accrued to the Crown where the Crown is entitled to the succeeding estate or interest; or

(b) In any other case, after the expiration of 12 years from the date on which the right of action accrued to the

person entitled to the preceding estate or interest, or 6 years from the date on which the right of action accrued to the person entitled to the succeeding estate or interest, whichever period last expires.

(3) The foregoing provisions of this section shall not apply where the preceding estate or interest is a leasehold interest other than one which is determinable with life or lives or with the cesser of a determinable life interest.

(4) The foregoing provisions of this section shall not apply to any estate or interest which falls into possession on the determination of an entailed interest and which might have been barred by the person entitled to the entailed interest.

(5) No person shall bring an action to recover any estate or interest in land under an assurance taking effect after the right of action to recover the land had accrued to the person by whom the assurance was made or some person through whom he claimed or some person entitled to a preceding estate or interest, unless the action is brought within the period during which the person by whom the assurance was made could have brought such an action.

(6) Where any person is entitled to any estate or interest in land in possession and, while so entitled, is also entitled to any future estate or interest in that land, and his right to recover the estate or interest in possession is barred under this Act, no action shall be brought by that person, or by any person claiming through him, in respect of the future estate or interest, unless in the meantime possession of the land has been recovered by a person entitled to an intermediate estate or interest.

Cf. Limitation Act 1939, s. 6 (U.K.).

**10. Provisions in case of settled land and land held on trust—**(1) Subject to the provisions of subsection (1) of section 21 of this Act, the provisions of this Act shall apply to equitable interests in land, including interests in the proceeds of the sale of land held upon trust for sale, in like manner as they apply to legal estates, and accordingly a right of action to recover the land shall, for the purposes of this Act but not otherwise, be deemed to accrue to a person entitled in possession to such an equitable interest in the like manner and circumstances and on the same date as it would accrue if his interest were a legal estate in the land.

(2) Where any land is held by any trustee (including a trustee who is also tenant for life . . . ) upon trust, including a trust for sale, and the period prescribed by this Act for the

bringing of an action to recover the land by the trustee has expired, the estate of the trustee shall not be extinguished if and so long as the right of action to recover the land of any person entitled to a beneficial interest in the land or in the proceeds of sale either has not accrued or has not been barred by this Act, but if and when every such right of action has been so barred, the estate of the trustee shall be extinguished.

(3) Where any settled land is vested in a tenant for life or a person having the statutory powers of a tenant for life or any land is held upon trust, including a trust for sale, an action to recover the land may be brought by the tenant for life or person having the powers of a tenant for life or trustees on behalf of any person entitled to a beneficial interest in possession in the land or in the proceeds of sale whose right of action has not been barred by this Act, notwithstanding that the right of action of the tenant for life or person having the powers of a tenant for life or trustees would, apart from this provision, have been barred by this Act.

(4) Where any settled land or any land held on trust for sale is in the possession of a person entitled to a beneficial interest in the land or in the proceeds of sale, not being a person solely and absolutely entitled thereto, no right of action to recover the land shall be deemed for the purposes of this Act to accrue during such possession to any person in whom the land is vested as tenant for life, person having the powers of a tenant for life, or trustee, or to any person entitled to a beneficial interest in the land or the proceeds of sale.

Cf. Limitation Act 1939, s. 7 (U.K.).

In subs. (2) the words "or who, by virtue of the Settled Land Act 1908, has also the powers of a tenant for life" were omitted by s. 89 (2) of the Trustee Act 1956.

**11. Accrual of right of action in case of forfeiture or breach of condition—**A right of action to recover land by virtue of a forfeiture or breach of condition shall be deemed to have accrued on the date on which the forfeiture was incurred or the condition broken:

Provided that, if such a right has accrued to a person entitled to an estate or interest in reversion or remainder and the land was not recovered by virtue thereof, the right of action to recover the land shall not be deemed to have accrued to that person until his estate or interest fell into possession.

Cf. Limitation Act 1939, s. 8 (U.K.).

**12. Accrual of right of action in case of certain tenancies**—(1) A tenancy at will or a tenancy determinable at the will of either of the parties by one month's notice in writing shall, for the purposes of this Act, be deemed to be determined at the expiration of a period of one year from the commencement thereof, unless it has previously been determined, and accordingly the right of action of the person entitled to the land subject to the tenancy shall be deemed to have accrued on the date on which it is determined or deemed to be determined as aforesaid:

Provided that, where any rent has subsequently been received in respect of the tenancy, the right of action shall be deemed to have accrued on the date of the last receipt of rent.

(2) A tenancy from year to year or other period without a lease in writing (but not a tenancy to which the last preceding subsection applies) shall, for the purposes of this Act, be deemed to be determined at the expiration of the first year or other period, and accordingly the right of action of the person entitled to the land subject to the tenancy shall be deemed to have accrued at the date of such determination:

Provided that, where any rent has subsequently been received in respect of the tenancy, the right of action shall be deemed to have accrued on the date of the last receipt of rent.

(3) Where any person is in possession of land by virtue of a lease in writing by which a rent at a rate of not less than [£2] a year is reserved, and the rent is received by some person wrongfully claiming to be entitled to the land in reversion immediately expectant on the determination of the lease, and no rent is subsequently received by the person rightfully so entitled, the right of action of the last-mentioned person to recover the land shall be deemed to have accrued at the date when the rent was first received by the person wrongfully claiming as aforesaid and not at the date of the determination of the lease.

(4) Subsections (1) and (3) of this section shall not apply to any tenancy at will or lease granted by the Crown.

Cf. Limitation Act 1939, s. 9 (U.K.)

**13. Right of action not to accrue or continue unless there is adverse possession**—(1) No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as adverse possession), and, where under the foregoing provisions of this Act any such right of action is deemed to

accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land.

(2) Where a right of action to recover land has accrued, and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be deemed to have accrued and no fresh right of action shall be deemed to accrue unless and until the land is again taken into adverse possession.

(3) For the purposes of this section,—

(a) Possession of any land subject to a rentcharge by a person (other than the person entitled to the rentcharge) who does not pay the rent shall be deemed to be adverse possession of the rentcharge; and

(b) Receipt of rent under a lease by a person wrongfully claiming, as mentioned in subsection (3) of the last preceding section, the land in reversion shall be deemed to be adverse possession of the land.

Cf. Limitation Act 1939, s. 10 (U.K.)

As to this section, see ss. 197 and 199 (3) of the Land Transfer Act 1952.

**14. Accrual of cause of action on claim for contribution or indemnity**—For the purposes of any claim for a sum of money by way of contribution or indemnity, however the right to contribution or indemnity arises, the cause of action in respect of the claim shall be deemed to have accrued at the first point of time when everything has happened which would have to be proved to enable judgment to be obtained for a sum of money in respect of the claim.

**15. Cure of defective disentailing assurance**—Where a person entitled in remainder to an entailed interest in any land has made an assurance thereof which fails to bar the issue in tail or the estates and interests taking effect on the determination of the entailed interest, or fails to bar the last-mentioned estates and interests only, and any person takes possession of the land by virtue of the assurance, and that person or any other person whatsoever (other than a person entitled to possession by virtue of the settlement) is in possession of the land for a period of 12 years from the commencement of the time at which the assurance, if it had then been executed by the person entitled to the entailed interest, would have operated, without the consent of any



other person, to bar the issue in tail and such estates and interests as aforesaid, then, at the expiration of that period, the assurance shall operate, and be deemed always to have operated, to bar the issue in tail and those estates and interests.

Cf. Limitation Act 1939, s. 11 (U.K.)

**16. Limitation of redemption actions**—(1) Notwithstanding anything contained in [section 81 of the Property Law Act 1952], or in any other enactment, when a mortgagee of land has been in possession of any of the mortgaged land for a period of 12 years, no action to redeem the land of which the mortgagee has been so in possession shall thereafter be brought by the mortgagor or any person claiming through him.

(2) This section shall not apply in respect of any land that is subject to [the Land Transfer Act 1952].

Cf. Limitation Act 1939, s. 12 (U.K.)

In subs. (1), s. 81 of the Property Law Act 1952, being the corresponding enactment in force at the date of this reprint, has been substituted for s. 70 of the repealed Property Law Act 1908.

In subs. (2) the Land Transfer Act 1952, being the corresponding enactment in force at the date of this reprint, has been substituted for the repealed Land Transfer Act 1915.

**17. No right of action to be preserved by formal entry or continual claim**—For the purposes of this Act, no person shall be deemed to have been in possession of any land by reason only of having made a formal entry thereon, and no continual or other claim upon or near any land shall preserve any right of action to recover the land.

Cf. Limitation Act 1939, s. 13 (U.K.)

**18. Extinction of title after expiration of period**—Subject to the provisions of section 10 of this Act, at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished.

Cf. Limitation Act 1939, s. 16 (U.K.)

**19. Limitation of actions to recover rent**—No action shall be brought, or distress made, to recover arrears of rent or damages in respect thereof, after the expiration of 6 years from the date on which the arrears became due.

Cf. Limitation Act 1939, s. 17

*Actions to Recover Money Secured by a Mortgage or Charge or to Recover Proceeds of the Sale of Land*

**20. Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land**—(1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover proceeds of the sale of land (not being the proceeds of the sale of land held upon trust for sale), after the expiration of 12 years from the date when the right to receive the money accrued.

(2) No foreclosure action in respect of mortgaged personal property shall be brought after the expiration of 12 years from the date on which the right to foreclose accrued:

Provided that, if after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in his possession shall not, for the purposes of this subsection, be deemed to have accrued until the date on which his possession discontinued.

(3) The right to receive any principal sum of money secured by a mortgage or other charge and the right to foreclose on any personal property subject to the mortgage or charge shall not be deemed to accrue so long as the property subject to the mortgage or charge comprises any future interest or any life insurance policy which has not matured or been determined.

(4) No action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears, shall be brought after the expiration of 6 years from the date on which the interest became due:

Provided that—

(a) Where a prior mortgagee or other encumbrancer has been in possession of the property charged, and an action is brought within one year of the discontinuance of that possession by the subsequent encumbrancer, he may recover by that action all the arrears of interest which fell due during the period of possession by the prior encumbrancer or damages in respect thereof, notwithstanding that the period exceeded 6 years:

(b) Where the property subject to the mortgage or charge comprises any future interest or life insurance policy and it is a term of the mortgage or charge that

arrears of interest shall be treated as part of the principal sum of money secured by the mortgage or charge, interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued.

(5) This section shall not apply to any mortgage or charge on a ship.

Cf. Limitation Act 1939, s. 18 (U.K.).

As to the discharge of a registered mortgage where the remedies thereunder are statute barred, see s. 112 of the Land Transfer Act 1952.

By s. 447A (5) of the Maori Affairs Act 1953 the enforcement of a charge under that section is not restricted by this section. S. 80 of the Rating Act 1967 makes a charging order issued on a judgment for rates subject to this section.

As to charging orders for rates on Maori land, see s. 153 (9) of the Rating Act 1967.

### *Actions in Respect of Trust Property or the Personal Estate of Deceased Persons*

#### **21. Limitation of actions in respect of trust property—**

(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—

- (a) In respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
- (b) To recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

(2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued:

Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.

(3) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.

Cf. Limitation Act 1939, s. 19 (U.K.); 1908, No. 200, s. 94

#### **22. Limitation of actions claiming personal estate of a deceased person—**Subject to the provisions of subsection

(1) of the last preceding section, no action in respect of any

claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of 12 years from the date when the right to receive the share or interest accrued, and no action to recover arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiration of 6 years from the date on which the interest became due.

Cf. Limitation Act 1939, s. 20 (U.K.).

### **23. Repealed by s. 3 (1) of the Limitation Amendment Act 1962.**

## **PART II**

### **EXTENSION OF LIMITATION PERIODS IN CASE OF DISABILITY, ACKNOWLEDGMENT, PART PAYMENT, FRAUD, AND MISTAKE**

#### *Disability*

**24. Extension of limitation period in case of disability—**If, on the date when any right of action accrued for which a period of limitation is prescribed by or may be prescribed under this Act the person to whom it accrued was under a disability,—

- (a) In the case of any action . . . in respect of the death of or bodily injury to any person, or of any action to recover a penalty or forfeiture or sum by way thereof by virtue of any enactment where the action is brought by an aggrieved party, the right of action shall be deemed to have accrued on the date when the person ceased to be under a disability or died, whichever event first occurred; or
- (b) In any other case the action may be brought before the expiration of 6 years from the date when the person ceased to be under a disability or died, whichever event first occurred,—

notwithstanding that, in any case to which either of the foregoing paragraphs of this section applies, the period of limitation has expired:

Provided that—

- (c) This section shall not affect any case where the right of action first accrued to some person (not under a disability) through whom the person under a disability claims;
- (d) When a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to another

person under a disability, no further extension of time shall be allowed by reason of the disability of the second person;

- (e) No action to recover land or money charged on land shall be brought by virtue of this section by any person after the expiration of 30 years from the date on which the right of action accrued to that person or some person through whom he claims; [and]
- (f) *Repealed by s. 2 (c) of the Limitation Amendment Act 1963.*
- (g) This section shall not apply to any action to recover a penalty or forfeiture, or sum by way thereof, by virtue of any enactment, except where the action is brought by an aggrieved party.

Cf. Limitation Act 1939, s. 22 (U.K.)

In para. (a) the words "to which section twenty-three of this Act applies, or of any other action" were omitted by s. 2 (a) of the Limitation Amendment Act 1963.

In para. (e) the word "and" was added by s. 2 (b) of the Limitation Amendment Act 1963.

#### *Acknowledgment and Part Payment*

**25. Fresh accrual of action on acknowledgment or part payment—**(1) Where there has accrued any right of action to recover land or any right of a mortgagee of personal property to bring a foreclosure action in respect of the property, and—

- (a) The person in possession of the land or personal property acknowledges the title of the person to whom the right of action has accrued; or
- (b) In the case of a foreclosure or other action by a mortgagee, the person in possession as aforesaid or the person liable for the mortgage debt makes any payment in respect thereof, whether of principal or interest,—

the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment.

(2) The last preceding subsection shall apply to a right of action to recover land accrued to a person entitled to an estate or interest taking effect on the determination of an entailed interest against whom time is running under section 15 of this Act, and on the making of the acknowledgment that section shall cease to apply to the land.

(3) Where a mortgagee is by virtue of the mortgage in possession of any mortgaged land which is not subject to [the Land Transfer Act 1952], and either receives any sum in respect of the principal or interest of the mortgage debt or acknowledges the title of the mortgagor, or his equity of redemption, an action to redeem the land in his possession

may be brought at any time before the expiration of 12 years from the date of the payment or acknowledgment.

(4) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:

Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder then due, but any payment of interest shall be treated as a payment in respect of the principal debt.

Cf. Limitation Act 1939, s. 23 (U.K.)

In subs. (3) the Land Transfer Act 1952, being the corresponding enactment in force at the date of this reprint, has been substituted for the repealed Land Transfer Act 1913.

**26. Formal provisions as to acknowledgments and part payments—**(1) Every such acknowledgment as aforesaid shall be in writing and signed by the person making the acknowledgment.

(2) Any such acknowledgment or payment as aforesaid may be made by the agent of the person by whom it is required to be made under the last preceding section, and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.

Cf. Limitation Act 1939, s. 24 (U.K.)

**27. Effect of acknowledgment or part payment on persons other than the maker or recipient—**(1) An acknowledgment of the title to any land or mortgaged property by any person in possession thereof shall bind all other persons in possession during the ensuing period of limitation.

(2) A payment in respect of a mortgage debt by the mortgagor or any person in possession of the mortgaged property shall, so far as any right of the mortgagee to foreclose or otherwise to recover the property is concerned, bind all other persons in possession of the mortgaged property during the ensuing period of limitation.

(3) Where 2 or more mortgagees are by virtue of the mortgage in possession of the mortgaged land, an acknowledgment of the mortgagor's title or of his equity of redemption by one of the mortgagees shall bind only him and

his successors and shall not bind any other mortgagee or his successors, and, where the mortgagee by whom the acknowledgment is given is entitled to a part of the mortgaged land and not to any ascertained part of the mortgage debt, the mortgagor shall be entitled to redeem that part of the land on payment, with interest, of the part of the mortgage debt which bears the same proportion to the whole of the debt as the value of the part of the land bears to the whole of the mortgaged land.

(4) Where there are 2 or more mortgagors, and the title or right to redemption of one of the mortgagors is acknowledged as aforesaid, the acknowledgment shall be deemed to have been made to all the mortgagors.

(5) An acknowledgment of any debt or other liquidated pecuniary claim shall bind the acknowledgor and his successors but not any other person:

Provided that an acknowledgment made after the expiration of the period of limitation prescribed for the bringing of an action to recover the debt or other claim shall not bind any successor on whom the liability devolves on the determination of a preceding estate or interest in property under a settlement taking effect before the date of the acknowledgment.

(6) A payment made in respect of any debt or other liquidated pecuniary claim shall bind all persons liable in respect thereof:

Provided that a payment made after the expiration of the period of limitation prescribed for the bringing of an action to recover the debt or other claim shall not bind any person other than the person making the payment and his successors, and shall not bind any successor on whom the liability devolves on the determination of a preceding estate or interest in property under a settlement taking effect before the date of the payment.

(7) An acknowledgment by one of several personal representatives of any claim to the personal estate of a deceased person, or to any share or interest therein, or a payment by one of several personal representatives in respect of any such claim shall bind the estate of the deceased person.

(8) In this section the expression "successor" in relation to any mortgagee or person liable in respect of any debt or claim means his personal representatives and any other person on whom the rights under the mortgage or, as the case may be, the liability in respect of the debt or claim devolve, whether on death or bankruptcy or the disposition of property or the

determination of a limited estate or interest in settled property or otherwise.

Cf. Limitation Act 1939, s. 25 (U.K.)

### *Fraud and Mistake*

**28. Postponement of limitation period in case of fraud or mistake**—Where, in the case of any action for which a period of limitation is prescribed by this Act, either—

- (a) The action is based upon 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 as aforesaid; or
- (c) The action is for relief from the consequences of a mistake,—

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which—

- (d) In the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
- (e) In the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

Cf. Limitation Act 1939, s. 26 (U.K.)

## PART III

### GENERAL

**29. Application of Act and other limitation enactments to arbitrations**—(1) This Act and any other enactment relating to the limitation of actions shall apply to arbitrations as they apply to actions.

(2) Notwithstanding any term in a submission to the effect that no cause of action shall accrue in respect of any matter required by the submission to be referred until an award is made under the submission, the cause of action shall, for the purposes of this Act and of any other such enactment

(whether in their applications to arbitrations or to other proceedings), be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the submission.

(3) For the purposes of this Act and of any such enactment as aforesaid, an arbitration shall be deemed to be commenced when one party to the arbitration serves on the other party or parties a notice requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator, or, where the submission provides that the reference shall be to a person named or designated in the submission, requiring him or them to submit the dispute to the person so named or designated.

(4) Any such notice as aforesaid may be served either—

- (a) By delivering it to the person on whom it is to be served; or
- (b) By leaving it at the usual or last known place of abode in New Zealand of that person; or
- (c) By sending it by post in a registered letter addressed to that person at his usual or last known place of abode in New Zealand,—

as well as in any other manner provided in the submission; and, where a notice is sent by post in manner prescribed by paragraph (c) of this subsection, service thereof shall be deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of post.

(5) Where the [High Court] orders that an award be set aside, or orders, after the commencement of an arbitration, that the arbitration shall cease to have effect with respect to the dispute referred, the Court may further order that the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by this Act or any such enactment as aforesaid for the commencement of proceedings (including arbitration) with respect to the dispute referred.

(6) This section shall apply to an arbitration under an Act of Parliament as well as to an arbitration pursuant to a submission, and subsections (3) and (4) of this section shall have effect, in relation to an arbitration under an Act, as if for the references to the submission there were substituted references to such of the provisions of the Act or of any order, scheme, rules, regulations, or bylaws made thereunder as relate to the arbitration.

Cf. Limitation Act 1939, s. 27 (U.K.); 1938, No. 6, s. 18

Subss. (3) and (4) of this section are applied by s. 11 (3) of the Carriage by Air Act 1967 to arbitrations under s. 11 of that Act.

**30. Provisions as to set-off or counterclaim**—For the purposes of this Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.

Cf. Limitation Act 1939, s. 28 (U.K.)

**31. Acquiescence**—Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.

Cf. Limitation Act 1939, s. 29 (U.K.)

**32. Application to the Crown**—Save as in this Act otherwise expressly provided and without prejudice to the provisions of section 33 thereof, this Act shall apply to proceedings by or against the Crown in like manner as it applies to proceedings between subjects:

Provided that this Act shall not apply to any proceedings by the Crown for the recovery of any tax or duty or interest thereon or to any forfeiture proceedings under the Customs Acts within the meaning of [section 3 of the Customs Act 1966], as from time to time extended by any other enactment, or to any proceedings in respect of the forfeiture of a ship.

Cf. Limitation Act 1939, s. 30 (U.K.)

The provisions of the Crown Proceedings Act 1950 are subject to the provisions of this Act, and of any other Act which limits the time within which proceedings may be brought by or against the Crown; see s. 4 of that Act.

S. 3 of the Customs Act 1966, being the corresponding enactment in force at the date of this reprint, has been substituted for s. 3 of the repealed Customs Act 1913.

**33. Savings for other limitation enactments**—(1) This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by any other enactment, or to any action or arbitration to which the Crown is a party and for which, if it were between subjects, a period of limitation would be prescribed by any other enactment.

(2) Any reference in any enactment to any of the enactments specified in the First Schedule to this Act or to any provision of any such enactment shall be construed as a reference to the corresponding provision of this Act.

Cf. Limitation Act 1939, s. 32 (U.K.)

Other limitation enactments are—

Public Works Act 1928: s. 45.

District Courts Act 1947: s. 80.

Law Reform (Testamentary Promises) Act 1949: s. 6.

Deaths by Accidents Compensation Act 1952: s. 10.

Shipping and Seamen Act 1952: ss. 111 (2) and 471.

Property Law Act 1952: s. 121.

Patents Act 1953: s. 85 (3).  
Companies Act 1955: s. 432.  
Family Protection Act 1955: s. 9.  
Workers' Compensation Act 1956: s. 53.  
Rating Act 1967: ss. 79 and 153 (2).  
Domestic Proceedings Act 1968: s. 53 (3).  
Armed Forces Discipline Act 1971: s. 20.  
Industrial Relations Act 1973: s. 157.  
Land Tax Act 1976: s. 61.  
Income Tax Act 1976: s. 406.

### 34. Provisions as to actions already barred and pending actions—Nothing in this Act shall—

- (a) Enable any action to be brought which was barred before the commencement of this Act by an enactment repealed or amended by this Act or ceasing to have effect by virtue of this Act, except in so far as the cause of action or right of action may be revived by an acknowledgment or part payment made in accordance with the provisions of this Act; or
- (b) Affect any action or arbitration commenced before the commencement of this Act or the title to any property which is the subject of any such action or arbitration.

Cf. Limitation Act 1939, s. 33 (U.K.)

**35. Repeals and amendments—**(1) The enactments specified in the First Schedule to this Act shall at the commencement of this Act cease to have effect in New Zealand.

(2) The enactments specified in the Second Schedule to this Act are hereby amended in the manner indicated in that Schedule.

Cf. Limitation Act 1939, s. 34 (4) (U.K.)

## SCHEDULES

### FIRST SCHEDULE

Section 35 (1)

#### UNITED KINGDOM ENACTMENTS CEASING TO HAVE EFFECT IN NEW ZEALAND

- 31 Eliz., c. 5—An Act Concerning Informers.  
21 Jas. I, c. 16—The Limitation Act 1623.  
4 and 5 Anne, c. 3—An Act for the amendment of the Law and the better Advancement of Justice: Sections 17 to 19.  
9 Geo. III, c. 16—The Crown Suits Act 1769.  
9 Geo. IV, c. 14—The Statute of Frauds Amendment Act 1828: Sections 1 to 4.  
3 and 4 Will. IV, c. 27—The Real Property Limitation Act 1833.  
3 and 4 Will. IV, c. 42—The Civil Procedure Act 1833: Sections 3 to 7.

Section 35 (2)

## SECOND SCHEDULE NEW ZEALAND ENACTMENTS AMENDED

Title of Act	Number of Section Affected	Nature of Amendment
1902 (Local), No. 15— The Dunedin District Drainage and Sewerage Act 1900 Amendment Act 1902	Sections 30 and 31 ...	By repealing these sections.
1907 (Local), No. 30— The Christchurch District Drainage Act 1907	Sections 75 and 76 ...	By repealing these sections.
1914, No. 32— The Local Railways Act 1914 (1931 Reprint, Vol. VII, p. 967)	Section 99 ...	By repealing this section.
1920 (Local), No. 15— The Christchurch Tramway District Act 1920	Section 51 ...	By repealing paragraphs (b) and (c).
1928, No. 44— The Auckland Transport Board Act 1928	Section 74 ...	By repealing this section
1941 (Local), No. 7— The Auckland Centennial Memorial Park Act 1941	Section 51 ...	By repealing this section.
1944 (Local), No. 7— The Hawke's Bay Crematorium Act 1944	Section 37 ...	By repealing this section.
1944 (Local), No. 8— The Auckland Metropolitan Drainage Act 1944	Section 67 ...	By repealing this section.

Parts of this Schedule were repealed by the following enactments:

- S. 155 (2) of the Property Law Act 1952.  
S. 89 (1) of the Trustee Act 1956.  
S. 245 of the Land Transfer Act 1952.  
S. 413 (1) of the Municipal Corporations Act 1954.  
S. 214 (1) of the Summary Proceedings Act 1957.  
S. 38 (1) of the State Insurance Act 1963.  
S. 71 (1) of the Milk Act 1967.  
S. 142 (1) of the Gaming and Lotteries Act 1977.

Parts of this Schedule relating to the Crown Suits Act 1908, the Auckland Electric Power Board Act 1921-22, the Counties Amendment Act 1927, the Post and Telegraph Act 1928, the Hospitals Amendment Act 1936, and the Hutt Valley Drainage Act 1948 have been omitted, as those Acts were repealed by s. 34 (1) of the Crown Proceedings Act 1950, s. 111 of the Auckland Electric Power Board Act 1978, s. 453 (1) of the Counties Act 1956, s. 250 (1) of the Post Office Act 1959, s. 158 (1) of the Hospitals Act 1957, and s. 88 (1) (a) of the Hutt Valley Drainage Act 1967 respectively.

Other amendments specified in this Schedule have been incorporated in the enactments affected, where they appear in the latest reprint.

**THE LIMITATION AMENDMENT ACT 1962****1962, No. 112****An Act to amend the Limitation Act 1950**

[6 December 1962]

**1. Short Title**—This Act may be cited as the Limitation Amendment Act 1962, and shall be read together with and deemed part of the Limitation Act 1950 (hereinafter referred to as the principal Act).

**2. (1)** *Repealed by s. 2 (2) of the Limitation Amendment Act 1970.*

(2) In respect of any cause of action in respect of which an action or arbitration has been commenced before the passing of this Act, the said proviso shall apply as if this section had not been passed.

(3) In respect of any other cause of action which accrued before the passing of this Act, the said proviso shall apply as if this section had come into force before that cause of action accrued.

**3. Protection of person acting in execution of statutory or other public duty**—(1) Section 23 of the principal Act is hereby repealed.

(2) In respect of any cause of action which accrued more than one year before the passing of this Act, and any other cause of action in respect of which an action or arbitration has been commenced before the passing of this Act, the provisions of the principal Act shall apply as if the said section 23 continued in force.

(3) In respect of any other cause of action which accrued before the passing of this Act, the provisions of the principal Act shall apply as if the said section 23 had been repealed before that cause of action accrued.

**THE LIMITATION AMENDMENT ACT 1963****1963, No. 96****An Act to amend the Limitation Act 1950**

[23 October 1963]

**1. Short Title**—This Act may be cited as the Limitation Amendment Act 1963, and shall be read together with and

deemed part of the Limitation Act 1950 (hereinafter referred to as the principal Act).

**2. (a), (b), (c)** *These paragraphs amended s. 24 (a), (e), and (f) respectively of the principal Act.*

**THE LIMITATION AMENDMENT ACT 1970****1970, No. 78****An Act to amend the Limitation Act 1950**

[27 November 1970]

**1. Short Title**—This Act may be cited as the Limitation Amendment Act 1970, and shall be read together with and deemed part of the Limitation Act 1950 (hereinafter referred to as the principal Act).

**2. (1)** *This subsection substituted a new subsection for subs. (7) of s. 4 of the principal Act.*

(2) Subsection (1) of section 2 of the Limitation Amendment Act 1962 is hereby repealed.

The Limitation Act 1950 is administered in the Department of Justice.

## APPENDIX B

## CIVIL STATUTES WITH THEIR OWN LIMITATION PROVISIONS

- Accident Compensation Act 1982 s.98  
(12 months)
- Deaths by Accidents Compensation Act 1952 s.10  
(2–6 years)
- Defamation Act 1955 s.9  
(notice provision)
- District Courts Act 1947 s.80  
(6 years enforcement of judgment)
- Domestic Actions Act 1975 s.8  
(12 months with discretion)
- Family Proceedings Act 1980 s.49  
(6 years paternity orders)
- Family Proceedings Act 1980 s.71  
(12 months with discretion for maintenance of spouse after dissolution)
- Family Protection Act 1955 s.9  
(12 months/2 years)
- Harbours Act 1950 s.262A  
(notice provision)
- Hire Purchase Act 1971 s.26  
(notice of default)
- Income Tax Act 1976 s.406  
(limitation Acts do not apply)
- Land Tax Act (applying Income Tax Act 1976)  
(limitation Acts do not apply)
- Law Reform (Testamentary Promises) Act 1949 s.6  
(12 months)
- Law Reform Act 1936 s.3
- Mental Health Act 1969 s.124(4)  
(6 months)
- Patents Act 1953 s.85(3)  
(notice provision)
- Patents Act 1953 s.85(2)  
(6 months after giving of notice)
- Police Act 1958 s.60  
(Clause 41, Police Complaints & Miscellaneous Amendments  
Bill would repeal this provision)
- Property Law Act 1956 s.121  
(3 months)
- Public Works Act 1981 s.78  
(2 years)
- Rating Act 1967 ss. 79 and 153(2)
- Shipping and Seamen Act 1952 ss.111(2) and 471
- Trustee Act 1956 s.75  
(3 months from service of notice against the trustee)
- Workers' Compensation Act 1956 s.53  
(12 months)



## APPENDIX C

## SELECTED BIBLIOGRAPHY

## Reference:

**England**

Law Revision Committee, Fifth Interim Report (Statutes of Limitation)  
(Cmnd. 5534, 1936) Wright Report

Report of the Committee on the Limitation of Actions  
(Cmnd. 7740, 1949) Tucker Report

Report of the Committee on Limitation of Actions in Cases of Personal Injury  
(Cmnd. 1829, 1962)

Law Reform Committee, Twentieth Report (Interim Report on Limitation of Actions: In Personal Injury Claims)  
(Cmnd. 5630, 1974)

Law Reform Committee, Twenty-First Report (Final Report on Limitation of Actions)  
(Cmnd. 6923, 1977)

Law Reform Committee, Twenty-Fourth Report (Latent Damage)  
(Cmnd. 9390, 1984)

**Scotland**

Scottish Law Commission, Reform of the Law Relating to Prescription and Limitation of Actions  
(Scot. Law Com. No. 15, 1970)

**Alberta**

Institute of Law Research and Reform, Report for Discussion No. 4  
*Limitations* September 1986.

**British Columbia**

Law Reform Commission of British Columbia, Report on Limitations;  
Part 2 General (L.R.C. 15, 1974).

## Ontario

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

Department of the Attorney General, Discussion Paper on Proposed Limitations Act (1977)

## Saskatchewan

Law Reform Commission of Saskatchewan "Tentative Proposals for Changes in Limitations Legislation" Part II: *The Limitation of Actions Act*, May 1986.

## New South Wales

Law Reform Commission, First Report on the Limitation of Actions (L.R.C. 3, 1967)

Law Reform Commission, Ninth Report on Limitation Actions for Personal Injury Claims (L.R.C. 1986)

## General

Dale, *Legislative Drafting – a New Approach*  
Chapter 9: Limitation of Actions

Andrew Grubb, "A Case for Recognising Economic Loss in Defective Building Cases"  
(1984) 43 Cambridge L.J. 111

The Law Commission (England) "Civil Liability of Vendors and Lessors for Defective Premises"  
1970 Cmnd. 184 (LAWCOM No. 40)

Epstein, "The Temporal Dimension in Tort Law"  
The University of Chicago Law Review (1986) 53:(1175)

"Developments in the Law: Statutes of Limitations"  
(1950) 63 Harv. L.R. 1177

Smillie, "Liability of Builders for Negligence"  
8 N.Z.U.L.R. 109

## APPENDIX D

### LIMITATION ACT REVIEW

#### SURVEY OF CASES FILED IN COURT

#### CONTENTS

1. Introduction
2. General Description of Cases
3. Proceedings filed outside the limitation period
4. How long does it take to file claims?
5. Conclusion

Addendum - Methodological details

## 1. INTRODUCTION

### 1.1 Purpose

The purpose of this survey of cases filed in court is to help ascertain how limits as prescribed in the Limitation Act 1950 operate in practice.

The survey serves two basic enquiries:

- (i) Although it is assumed that most cases where limitation is an issue are never filed in court, the number of cases where a defence of Limitation Act is pleaded is a small but basic piece of information in appreciating the scope of the problem.
- (ii) More importantly, this survey provides useful information for delineating optional limitation periods and for presenting scenarios using different limitation periods for various categories of proceedings. In order to do this we need to know how long it is between the event that causes a claim and the filing of the statement of claim. The ramifications are particularly important if most cases are filed towards the limits, though this is not expected to be the case.

### 1.2 Objectives

- (i) To ascertain the incidence of pleadings of Limitation Act defences;
- (ii) To analyze the time it takes to file a statement of claim after the cause of action for cases where the Limitation Act applies.

### 1.3 Methodology

In 1986 4213 civil proceedings were commenced in the High Court in New Zealand.\* Of these, three courts and 3 months were selected for further study to give an indication of how long it takes to file proceedings in court after actions accrue. The three courts selected were Auckland and Wellington because of their high workloads, and Dunedin, being an example of a small and a South Island court. The 3 month period chosen was 1 April to 30 June 1986.

All cases filed in the courts' "civil proceedings"

\* Source: Annual Court Returns to Department of Justice

registers over this period were sampled in the first instance. Taking every case from Wellington and Dunedin and every third case from Auckland provided an initial sample of 334 cases. Some types of cases were then culled out for two reasons:

- (i) To exclude cases to which the Limitation Act does not expressly apply and for which limitation considerations are barely relevant. For example, applications for declaratory judgment and for judicial review.
- (ii) To ensure comparability between the courts. For example, Auckland's register did not include applications in relation to testamentary promises and the Family Protection Act, whereas Wellington's and Dunedin's did.

The adjusted sample consisted of 290 cases: 144 from Auckland, 116 from Wellington and 30 from Dunedin. The sampling details are given in the addendum to this report.

The types of cases that eventuated in the sample are described in more detail in section 2.

There were no significant differences between the three courts as to the frequency of type of case filed, frequency of defences filed, amounts claimed, or the time taken between the breach and filing a claim. Therefore the three courts are added together and treated as one group for further analysis. Before answering the specific research questions the sample is described in a general way in section 2.

## 2. GENERAL DESCRIPTION OF CASES

### 2.1 Type and number of causes

Up to 3 causes of action were recorded for each claim. The 290 claims included 347 causes, i.e. an average of 1.2 each. 242 claims had one cause only, 39 had two causes and 9 had three or more causes. Nearly all the following analyses relate to the total number of causes (347) as opposed to the 290 claims or claimants.

Table 1 shows the type of action involved in the 347 causes and the predominance of claims based on contract.

Table 1 - Type of Action

Type of action	No.	%
contract	210	60
tort	56	16
land disposition	48	14
intellectual property	9	3
equity	7	2
enforcement of judgments	14	4
other	3	1
Total	347	100

Where there was more than one cause, some were additional in that they related to different facts, though most were framed as alternatives. On 10 occasions, the claimant pleaded breach of contract for one cause and tort for an alternative.

## 2.2 Amount of claim

A monetary remedy was claimed and specified in 278 causes. The amount claimed ranged from \$500 to \$4,605,661 with the median claim falling at \$30,231.

## 2.3 Other remedies sought

Section 4(9) of the Limitation Act extends by analogy the Act to equitable remedies. 39 (11%) of the causes sought an injunction and 13(4%) sought specific performance.

## 2.4 Defended claims

In 48% of the total 290 claims the defendant filed a statement of defence. Taking the first cause listed in the statement of claim as the index, 58% of land disposition claims, 42% of contracts and 86% of tort claims were defended.

## 3. PROCEEDINGS FILED OUTSIDE THE LIMITATION PERIOD

In 2 cases, the Limitation Act was pleaded as a

defence. A brief description of the type of case and dates for each are:

#### Case 1

Filed June 1986, claiming breach of partnership agreement. 3 alternative causes were claimed:

- (i) First defendant (partner): breach of agreement. Partner demanded money and therefore breached the agreement in September 1979. Transfers of interests from plaintiff to defendant were made on 24 June 1980 and 21 July 1980.
- (ii) Second defendant (firm of solicitors): breach of fiduciary duty on 4 September 1979.
- (iii) Third defendant (solicitor): negligent advice given between 4 September 1979 and 21 July 1980. Presumably the damage of the most recent negligent advice was discovered on 21 July 1980.

Both the first and second defendants pleaded that the proceedings were commenced outside the limitation period. The third defendant filed a statement of defence but not on this basis, presumably because advice given on 21 July 1980 was less than 6 years before filing (23 June 1986). The question of date of discovery is not, therefore, an issue.

#### Case 2

Filed 25 June 1986. There were 2 plaintiffs. Both bought properties from the first defendant, a property developer. The land was excavated by the third defendant. The second defendant, a local authority, will not issue building permits. The following causes were filed:

- (i) First defendant (property developer): creation of a legal nuisance some time prior to November 1976; negligence or breach of a duty of care for events from before November 1976 to March 1977; breach of sale agreement: properties purchased in November 1976 and March 1977.
- (ii) Second defendant (local authority): creation of a legal nuisance some time prior to November 1976; negligence or breach of a duty of care for events (e.g. permitting trenches to be

cut; zoned for residential development) prior to November 1976; approved subdivision on 26 February 1976.

- (iii) Third defendant (excavators): creation of a legal nuisance by earthworks during 1977 and 1978; negligence or breach of duty of care by earthworks during 1977 and 1978.

The second defendant refused both plaintiffs building permits on 1 July 1980 and notified them on 7 July 1980. The first and second defendants pleaded that the proceedings arose more than 6 years before commencement. If it is a case of latent damage and if discovery is the relevant accrual date, this would presumably be 7 July 1980, less than 6 years prior to filing.

#### 4. HOW LONG DOES IT TAKE TO FILE CLAIMS?

This section describes how long it actually takes different sorts of claims to be filed in court, taking into account the prescribed statutory limits where applicable.

Different types of action have different limitation periods and they also accrue from different dates. Some of these periods and accrual dates are stipulated in the Limitation Act, others in common law. Normally accrual starts when everything that needs to be proved for an action has happened. In many cases, including tort, this is when the damage has occurred. In the case of contract, however, it is necessary to show breach but not necessarily damage. An all encompassing word used here to describe these accrual dates is "breach of obligation" and the different types of action are analyzed on this basis. As well, tortious claims are analyzed in relation to the date the damage was discovered.

A number of cases are missing from the following analyses, cases where the relevant information was not given in the court documents.

##### 4.1 Time from breach of obligation to statement of claim

Table 2 summarizes the time taken to file a claim after the breach of the obligation. The table shows the shortest and longest times taken as well as the



Table 2  
Time between breach of obligation and statement of claim

Time elapsed (years)	contract	tort	land disposition	intellectual property	equity	enforcement of judgment
0 - 1	147	28	33	5	4	13
1 - 2	16	7	7	-	1	-
2 - 3	5	1	-	-	-	1
3 - 4	1	2	1	-	-	-
4 - 5	3	-	-	-	-	-
5 - 6	3	4	-	-	-	-
6 - 7	1	1	-	-	1	-
7 - 8	-	1	-	-	0	-
8 - 9	-	-	1	-	1	-
10 - 11	-	1	-	-	-	-
11 - 12	-	1	-	-	-	-
12 - 13	-	1	-	-	-	-
Total	176	45	47	5	7	14
shortest	same day*	same day	1 day	same day	4 days	1 day
median	3m	8m 2w	6m 2w	26 days	4m 9d	4m 1w
longest	6y 9m	12y 5m 2w	8y 6m 2w	7m 2w	8y 1m 2w	2y 1m 2w

\* Statements of claim filed on the same day as the breach usually refer to cases where the breach was a continuing one

Table 3  
Comparison of time from breach and from discovery  
for cases that took more than 6 years from breach

Case No.	Type of action	Time from breach	Time from discovery	Circumstances
1	contract equity tort	6y 9m 6y 8m 3w 5y 11m	same as breach not given not given but possibly 5y 11m	Limitation Act pleaded
2	tort tort	12y 5m 2w 11y 5m 3w	1y 1m 1y 1m	Involved latent damage
3	tort tort tort	10y 4m 7y 5m 6y 6m	not given not given not given but possibly 5y 11m 3w	Limitation Act pleaded. In- volved latent damage
4	land dis- position	8y 6m 2w	2y 2w	Mistake with caveat. Not known till property sold
5	equity	8y 1m 2w	not given	Fraudulent, therefore no limitation

median. In all instances the distribution is heavily skewed towards the earlier periods. On average all cases were brought well within 8 months of the breach. The only categories which registered a significantly longer or shorter average period were torts and contract (MWU,  $z = 3.7525$ ,  $p < 0.05$ ).

The cases that took more than 6 years to come to court are listed in table 3. This table compares the time from breach and the time from discovery and gives a short explanation of the circumstances. Where one claim involved multiple causes and/or defendants, the causes have been grouped together.

#### Contract

The statutory limit stipulated for simple contracts is 6 years which starts accruing at the time of the breach. In practice half the cases were filed within 3 months of the breach. Table 2 shows one case took longer than the 6 allowable years, this being "case 1" referred to in section 3 above where a limitation defence was pleaded, but which also had an alternative tort pleading, possibly within the 6 year period.

One sub-group amongst these contract claims was tenancies. There were 11 claims in relation to tenancies which were filed from the same day as the breach to a maximum of 4 months 3 weeks after the breach. The median time taken to file was 3 weeks after the breach.

#### Tort

The statutory limit stipulated for actions based on tort is 6 years. The accrual date is when the damage occurred though there are some case law exceptions where the date the damage was or ought to have been discovered is the relevant date.

Tort actions tended to take longer to come to court than other actions but still the median time of 8½ months was early on in the 6 year period. Table 2 shows that 5 of the 47 causes were filed more than 6 years from the damage. In all these 5 causes latent damage was a potential issue and it was less than 6 years from the date of discovery (see table 3). Section 4.2 reanalyzes all the tort cases in terms of date of discovery.

### Land Disposition

The sorts of cases included under this heading were claims to an interest in property based on tenancy in common or constructive trust, breaches of mortgages, and claims involving the validity and consequences of caveats.

The statutory limitation period for claims relating to land transactions and mortgages ranges from 6 years to 12 years to 60 years, and accrual dates differ too.

Only 2 of the 42 claims which provided the necessary information took longer than 2 years to come to court. The one which took more than 6 years involved a mistake in relation to a caveat approximately 8½ years previously but which was only discovered 2 years 2 weeks before filing.

### Intellectual property

The few cases involving breaches of copyright, trademark and/or patent in this survey were brought to court relatively quickly, the median time being 26 days after the breach.

### Equity

The Limitation Act applies when a plaintiff seeks an equitable remedy if the Act refers explicitly or implicitly to the proceedings in question or if it applies by analogy.

There were not many claims based on equity in the survey, but there was a large range in the time they took to come to court from the breach. Half of them were filed within 4 months 9 days. 2 cases took longer than 6 years. One was filed as an alternative to a contract or tort claim. The other which took over 8 years to come to court claimed a fraudulent action in relation to trust property and therefore is not subject to any limitation period (s.21(1)).

### Enforcement of judgments

The Limitation Act stipulates that actions seeking enforcement of a judgment must be brought within 12 years from the date the judgment became enforceable. 13 of the 14 cases in this survey were filed within one year and the other taking a little over 2 years.

#### 4.2 Time from discovery of damage to filing statement of claim

The time one discovers damage as opposed to the time the breach occurred is an alternative possible time to start counting a limitation period. This is particularly pertinent in tortious claims, and the law is in a state of flux about when this obtains and when not. For this reason all claims based on tort in this survey are reanalyzed using discovery as the base date. Table 4 gives the details. Half the cases were filed within 5 months from the date the damage was discovered and none extended beyond the 6 year limit.

Table 4  
Time between discovery of damage and  
statement of claim for tort claims

Time elapsed (years)	Tort Claims
0 - 1	24
1 - 2	6
2 - 3	-
3 - 4	1
4 - 5	-
5 - 6	3
total	34
shortest	same day
median	5m
longest	5y 4m 2w

#### 4.3 Time from breach to statement of claim in relation to amount of claim

It can be hypothesized that the greater the amount at stake in a claim, the longer it may take to come to court. The 236 cases where there was positive information about the amount claimed and the time from breach to proceedings were examined only to show that

there was no correlation between these factors: amount of claim and time taken to file ( $r_s = 0.026$ , n.s.).

## 5. CONCLUSION

As expected, very few cases where a limitation defence is a real possibility proceed as far as the court system. There were only 2 in this survey and each had an alternative cause framed in a way which could bring the case within the 6 year limit - one from breach and one from discovery.

More useful results were forthcoming in relation to the time it takes cases to come to court. Overwhelmingly cases are brought earlier rather than later with the overall average being 4 months 1 week from breach and 79% being filed within a year.

And filing in court at a relatively early date held for all the various types of action. The only significant time difference was that between torts and contracts. Although torts took significantly longer, on average they still only took  $8\frac{1}{2}$  months from breach and 5 months from discovery.

An additional conclusion became evident when working out the most cogent organization for writing the results on the time taken to file claims. This exercise reinforced the historical and legal assessments of the piecemeal nature of the Limitation Act, particularly the apparent lack of structure or logic in the variable lengths of limitation periods and accrual dates.

These results will be useful in assessing alternative lengths for limitation periods. But the limitations of this survey must also be recognised and two warnings are due. First, most cases where limitation periods are a real issue are not filed in court and so this survey cannot represent their interests in any way. Secondly, limitation requirements, almost by definition, are relevant only to extraordinary cases, not the statistically normal ones on which this analysis, by definition, concentrates.

## **ADDENDUM**

### **METHODOLOGICAL DETAILS**

#### **1. Survey objectives**

- (i) To ascertain the incidence of pleadings of Limitation Act defences;
- (ii) To analyze the time it takes to file a statement of claim after the cause of action for cases where the Limitation Act applies.

#### **2. Design**

Simple, descriptive information is required.

Objective (i) requires an estimate of the frequency. It is expected that the incidence will be very small indeed and too few to make comparisons between categories. Cases that occur will be used as case study examples.

One approach in pursuing objective (ii) will be to investigate the possibility that some sorts of actions are filed significantly later than others.

The extreme cases as well as the average cases will be investigated. The information will be categorized according to the categories of type of action in the Act and their associated dates of accrual.

#### **3. Survey population and sampling**

The idea of the survey is to give an indication of how limitation periods work with cases that proceed to court. And although we are ideally interested in the total New Zealand situation, the indicative nature of the information and the time constraints dictate a purposeful selection of courts rather than a random selection of cases or a representative selection of courts. Although at the design stage there was no reason to believe there were regional differences, the courts were selected to cover north and south islands and large and small cities.

In 1986 4213 civil proceedings were commenced in the High Court in New Zealand.\* Of these, 3 courts and 3 months were selected for further study to give an indication of how long it takes to file proceedings in

\* Source: Annual Court Returns to Department of Justice

court after actions accrue. The 3 courts selected were Auckland and Wellington because of their high workloads, and Dunedin, being an example of a small and a South Island court. The 3 month period chosen was 1 April to 30 June 1986.

The "civil proceedings" register was the sampling frame. Each case filed in Wellington and Dunedin, and every third case filed in Auckland during the sampling period was selected into the sample, giving an initial sample of 334 cases. The sample was then culled for two reasons:

- (i) To exclude cases to which the Limitation Act does not expressly apply and for which limitation considerations are barely relevant. For example, applications for declaratory judgment and for judicial review.
- (ii) To ensure comparability between the courts. For example, Auckland's register did not include applications in relation to testamentary promises and the Family Protection Act, whereas Wellington's and Dunedin's did.

The final adjusted sample was 290 cases. Sampling details are given in table A.

Table A  
Sampling details for survey of court files  
for Limitation Act Review

COURT	CIVIL PROCEEDINGS CLAIMS				
	Filed 1986	Filed 4/4/86-	Sampling ratio 30/6/86	Sample size	Adjusted sample size
Auckland	1716	454	1:3	147	144
Wellington	619	149	1:1	144	116
Dunedin	127	43	1:1	43	30
Total Sample	2462	646	n.a.	334	290
New Zealand	4213	1080 (est)	n.a.	n.a.	n.a.



#### 4. Analysis

Courts were tested to see if there were any differences between them as regards the main variables: type of action filed, frequency of defence filed, amount claimed, time taken between breach and filing a claim. No significant differences were found, therefore the information from the three courts were treated as a total block of information.

The main statistical measures used were frequency distributions and medians. The chi-square test was used to compare the difference between proportions and the Mann Whitney-U test was used to compare medians. Spearman ( $r_s$ ) was used to measure correlation. The accepted level of significance was set at  $p < 0.05$ .

#### 5. Data sources and collection

There were two sources of information:

- (i) The Civil Proceedings Register was used as the sampling frame and as a check on dates and events.
- (ii) The court file was the main source of information. Each claim filed in court has its own file on which all papers relevant to the case are kept. The files are filed in a consecutive sequence according to the date filed. The documents referred to most regularly were the statement of claim made by the plaintiff and the statement of defence made by the defendant.

#### 6. Data definitions

Claim: refers to the statement of claim which initiates proceedings and corresponds with a file in the court system.

Cause of action: each claim may involve more than one cause of action on which the proceedings are based. This unit was the basis of most of the analyses. A maximum of 3 causes was recorded for each claim if the causes were materially different in terms of type of action, amount claimed or date of breach or discovery.

Type of action: causes were grouped together into categories, each of which was a type of action. The categories and examples of causes within them were:

- . contract: breach of contracts, agreements including tenancy disputes
- . tort
- . land disposition: tenants in common; constructive trust; caveat; mortgage matters

- . intellectual property: copyright, patents, trademarks
- . equity
- . enforcement of judgments
- . other: company law; charging orders; procedural applications

Types of action that were explicitly excluded were: family protection and testamentary promise matters; applications for judicial review of administrative decisions;

Amount of claim: unspecified amounts of interest and costs incidental to the proceedings were not included.

Date of breach of obligation: fairly evident for most types of action. For cases seeking enforcement of judgment, the date of the judgment was taken.

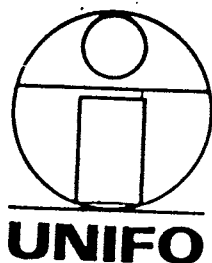
If breaches of obligation occurred on more than one date the most recent one was coded.

If a month but no day was given, the date recorded was the last day of the month. Similarly if only a year was stipulated, this was coded as the 31 December of that year.

If a breach was a continuing one the date of the statement of claim was recorded.

Date of discovery: if more than one date of discovery was involved, the most recent was recorded.

If a month but not a day was given, the last day of the month was recorded. If year but no month was given, then 31 December was coded.



# Latent Damage Act 1986

CHAPTER 37

## ARRANGEMENT OF SECTIONS

*Time limits for negligence actions in respect of latent damage not involving personal injuries*

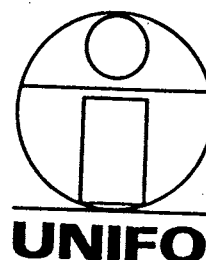
- Section
1. Time limits for negligence actions in respect of latent damage not involving personal injuries.
  2. Provisions consequential on section 1.

*Accrual of cause of action to successive owners in respect of latent damage to property*

3. Accrual of cause of action to successive owners in respect of latent damage to property.

*Supplementary*

4. Transitional provisions.
5. Citation, interpretation, commencement and extent.



# Latent Damage Act 1986

1986 CHAPTER 37

An Act to amend the law about 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 the property occurring before he takes that interest. [18th July 1986]

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

*Time limits for negligence actions in respect of latent damage not involving personal injuries*

1. The following sections shall be inserted in the Limitation Act 1980 (referred to below in this Act as the 1980 Act) immediately after section 14 (date of knowledge for purposes of special time limits for actions in respect of personal injuries or death)—

*"Actions in respect of latent damage not involving personal injuries"*

Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual.

14A.—(1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.

(2) Section 2 of this Act shall not apply to an action to which this section applies.

Time limits for negligence actions in respect of latent damage not involving personal injuries. 1980 c. 58.

APPENDIX E

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.

(4) That period is either—

(a) six years from the date on which the cause of action accrued; or

(b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.

(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above 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.

(6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both—

(a) of the material facts about the damage in respect of which damages are claimed; and

(b) of the other facts relevant to the current action mentioned in subsection (8) below.

(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage 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.

(8) The other facts referred to in subsection (6)(b) above are—

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

(b) the identity of the defendant; and

(c) 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.

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.

Overriding time limit for negligence actions not involving personal injuries.

(10) 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.

14B.—(1) An action for damages for negligence, other than one to which section 11 of this Act applies, shall not be brought after the expiration of fifteen years from the date (or, if more than one, from the last of the dates) on which there occurred any act or omission—

(a) which is alleged to constitute negligence; and

(b) to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part).

(2) This section bars the right of action in a case to which subsection (1) above applies notwithstanding that—

(a) the cause of action has not yet accrued; or

(b) where section 14A of this Act applies to the action, the date which is for the purposes of that section the starting date for reckoning the period mentioned in subsection (4)(b) of that section has not yet occurred;

before the end of the period of limitation prescribed by this section."

2.—(1) The following section shall be inserted in the 1980 Act immediately after section 28 (extension of limitation period in case of disability on date of accrual of cause of action)—

" Extension for cases where the limitation period is the period under section 14A(4)(b).

28A.—(1) Subject to subsection (2) below, if in the case of any action for which a period of limitation is prescribed by section 14A of this Act—

(a) the period applicable in accordance with subsection (4) of that section is the period mentioned in paragraph (b) of that subsection;

Provisions consequential on section 1.

(b) on the date which is for the purposes of that section the starting date for reckoning that period the person by reference to whose knowledge that date fell to be determined under subsection (5) of that section was under a disability; and

(c) section 28 of this Act does not apply to the action;

the action may be brought at any time before the expiration of three years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period mentioned above has expired.

(2) An action may not be brought by virtue of subsection (1) above after the end of the period of limitation prescribed by section 14B of this Act."

(2) In section 32 of the 1980 Act (postponement of limitation period in case of fraud, concealment or mistake), at the end there shall be added the following subsection—

"(5) Sections 14A and 14B of this Act shall not apply to any action to which subsection (1)(b) above applies (and accordingly the period of limitation referred to in that subsection, in any case to which either of those sections would otherwise apply, is the period applicable under section 2 of this Act)."

*Accrual of cause of action to successive owners in respect of latent damage to property*

Accrual of cause of action to successive owners in respect of latent damage to property.

3.—(1) Subject to the following provisions of this section, where—

(a) a cause of action ("the original cause of action") has accrued to any person in respect of any negligence to which damage to any property in which he has an interest is attributable (in whole or in part); and

(b) another person acquires an interest in that property after the date on which the original cause of action accrued but before the material facts about the damage have become known to any person who, at the time when he first has knowledge of those facts, has any interest in the property;

a fresh cause of action in respect of that negligence shall accrue to that other person on the date on which he acquires his interest in the property.

(2) A cause of action accruing to any person by virtue of subsection (1) above—

(a) shall be treated as if based on breach of a duty of care at common law owed to the person to whom it accrues; and

(b) shall be treated for the purposes of section 14A of the 1980 Act (special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual) as having accrued on the date on which the original cause of action accrued.

(3) Section 28 of the 1980 Act (extension of limitation period in case of disability) shall not apply in relation to any such cause of action.

(4) Subsection (1) above shall not apply in any case where the person acquiring an interest in the damaged property is either—

(a) a person in whom the original cause of action vests by operation of law; or

(b) a person in whom the interest in that property vests by virtue of any order made by a court under section 538 of the Companies Act 1985 (vesting of company property in liquidator).

(5) For the purposes of subsection (1)(b) above, the material facts about the damage are 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 become 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.

(6) 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 ascertained 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 by him 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.

(7) This section shall bind the Crown, but as regards the Crown's liability in tort shall not bind the Crown further than the Crown is made liable in tort by the Crown Proceedings Act 1947 c. 44. 1947.

*Supplementary*

Transitional provisions.

1939 c. 21.

4.—(1) Nothing in section 1 or 2 of this Act shall—

- (a) enable any action to be brought which was barred by the 1980 Act or (as the case may be) by the Limitation Act 1939 before this Act comes into force; or
- (b) affect any action commenced before this Act comes into force.

(2) Subject to subsection (1) above, sections 1 and 2 of this Act shall have effect in relation to causes of action accruing before, as well as in relation to causes of action accruing after, this Act comes into force.

(3) Section 3 of this Act shall only apply in cases where an interest in damaged property is acquired after this Act comes into force but shall so apply, subject to subsection (4) below, irrespective of whether the original cause of action accrued before or after this Act comes into force.

(4) Where—

- (a) a person acquires an interest in damaged property in circumstances to which section 3 would apart from this subsection apply; but

- (b) the original cause of action accrued more than six years before this Act comes into force;

a cause of action shall not accrue to that person by virtue of subsection (1) of that section unless section 32(1)(b) of the 1980 Act (postponement of limitation period in case of deliberate concealment of relevant facts) would apply to any action founded on the original cause of action.

Citation, interpretation, commencement and extent.

5.—(1) This Act may be cited as the Latent Damage Act 1986.

(2) In this Act—

- “the 1980 Act” has the meaning given by section 1; and
- “action” includes any proceeding in a court of law, an arbitration and any new claim within the meaning of section 35 of the 1980 Act (new claims in pending actions).

(3) This Act shall come into force at the end of the period of two months beginning with the date on which it is passed.

(4) This Act extends to England and Wales only.



INSTITUTE OF LAW RESEARCH AND REFORM  
EDMONTON, ALBERTA

# LIMITATIONS

Report For Discussion No. 4  
September 1986

341

## PART IV. DRAFT LIMITATIONS ACT

We have assembled our recommendations into a Draft Limitations Act in order to demonstrate that a limitations statute based on these recommendations could be comprehensive and concise.

We emphasize, however, that this is *not* a Proposed Limitations Act, for two important reasons. (1) Because this is a Report for Discussion, all of our recommendations are merely tentative. It would, therefore, be premature for us to issue a Proposed Act. (2) The Draft Act is merely an assemblage of our recommendations. As these recommendations were neither written nor reviewed by a trained legislative draftsman, it would not be appropriate for us to label a collection of them as a Proposed Act.

In order to give the Draft Act the form of a statute, we have added section 1 (definitions), section 9 (transitional) and section 10 (interpretation). Because the eventual content of these sections will depend to a large extent on the acceptance of our tentative recommendations, we have made no recommendations supporting these three sections.

APPENDIX F

## DRAFT LIMITATIONS ACT

## Definitions

1 In this Act,

- (a) "claimant" means the person who brings a claim;
- (b) "collateral" means property that is subject to a security interest;
- (c) "defendant" means the defendant under a claim;
- (d) "enforcement order" means an order or writ made by a court for the enforcement of a remedial order;
- (e) "injury" means
  - (i) personal injury,
  - (ii) property damage,
  - (iii) economic loss, or
  - (iv) in the absence of any of the above, the breach of a duty;
- (f) "law" means the law in force in the Province, and includes
  - (i) legislative enactments,
  - (ii) judicial precedents, both legal and equitable, and
  - (iii) regulations;
- (g) "person under disability" means
  - (i) a minor, or
  - (ii) an adult for whom a trusteeship order could be made under the provisions of the Dependent Adults Act;
- (h) "remedial order" means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right;
- (i) "right" means any right under the law and "duty" has a correlative meaning;
- (j) "security interest" means an interest in collateral that secures the payment or other performance of an obligation.

## Application

2(1) Except as provided in subsection (2), this Act is applicable to any civil judicial claim requesting a remedial order, including a claim to which this Act can apply arising under any law that is subject to the legislative jurisdiction of the Parliament of Canada, if the claim either

- (a) is brought before a court created by the Province, or
- (b) arose within the Province and is brought before a court created by the Parliament of Canada.

2(2) This Act is not applicable to

- (a) a claim requesting a declaration of rights and duties, legal relations or personal status,
- (b) a claim requesting the enforcement of a remedial order,
- (c) a claim requesting judicial review with respect to the exercise of statutory powers,
- (d) a claim requesting habeas corpus,
- (e) a claim requesting a remedial order
  - (i) for the possession of real or personal property,
  - (ii) for the realization of a security interest by a secured party in rightful possession of the collateral,
  - (iii) for the redemption of collateral by a debtor,
  - (iv) requiring a defendant to comply with a duty based on an easement, a *profit a prendre*, a utility interest, or a restrictive covenant,
  - (v) for the revision of a register under the Land Titles Act, and
- (f) a claim which is subject to a limitation provision in any other enactment of the Province.

2(3) The Crown is bound by this Act.

## Limitation Periods

3(1) Subject to subsections (2) and (3), if a claim requesting a remedial order is not brought within

- (a) two years after the date on which the claimant first knew, or in his circumstances and with his abilities ought to have known,

(i) that the injury for which he claims a remedial order had occurred,



(ii) that the injury was to some degree attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, was sufficiently serious to have warranted bringing an action, or

(b) ten years after the claim arose.

whichever period expires first, the defendant, upon pleading this Act as a defence, is entitled to immunity from liability under the claim.

3(2) The limitation period provided by clause (1)(a) begins

(a) against a successor owner of a claim when either a predecessor owner or the successor owner of the claim first acquired or ought to have acquired the knowledge prescribed in clause (1)(a),

(b) against a principal when either

(i) the principal first acquired or ought to have acquired the knowledge prescribed in clause (1)(a), or

(ii) an agent with a duty to communicate the knowledge prescribed in clause (1)(a) to the principal first actually acquired that knowledge, and

(c) against a personal representative of a deceased person as a successor owner of a claim, at the earliest of the following times:

(i) when the deceased owner first acquired or ought to have acquired the knowledge prescribed in clause (1)(a), if more than two years before his death,

(ii) when the representative was appointed, if he had the knowledge prescribed in clause (1)(a) at that time, or

(iii) when the representative first acquired or ought to have acquired the knowledge prescribed in clause (1)(a), if after his appointment.

3(3) For the following claims the limitation period provided by clause (1)(b) begins at the times prescribed in this subsection:

(a) a claim based on a breach of a duty of care, when the careless conduct occurred;

(b) 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, when the conduct terminated or the last act or omission occurred;

(c) a claim based on a demand obligation, when a default in performance occurred after a demand for performance was

made;

(d) a claim under the Fatal Accidents Act, when the conduct which caused the death, upon which the claim is based, occurred;

(e) a claim for contribution, when the claimant for contribution was made a defendant under, or incurred a liability through the settlement of, a claim seeking to impose a liability upon which the claim for contribution could be based.

3(4) Under this section,

(a) if the defendant pleads this Act as a defence, the claimant has the burden of proving that a claim was brought within the limitation period provided by clause (1)(a), and

(b) the defendant has the burden of proving that a claim was not brought within the limitation period provided by clause (1)(b).

3(5) Nothing in this Act precludes a court from granting a defendant immunity from liability to an equitable remedy, under the equitable doctrines of acquiescence or laches, notwithstanding that the defendant would not be entitled to immunity pursuant to this Act.

#### Conflict of Laws

4 The limitations law of the Province shall be applied to any claim brought in the Province, notwithstanding that, in accordance with the principles of private international law, the claim will be adjudicated under the substantive law of another jurisdiction.

#### Claims Added to a Proceeding

5(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through new pleadings or an amendment to pleadings, the defendant is not entitled to immunity from liability under the added claim if the requirements of either subsection (2), (3) or (4) are satisfied.

(2) When the added claim does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued, the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.

(3) When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,

(a) the added claim must be related to the conduct, transaction or events described in the original pleading in

the proceeding,

(b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that he will not be prejudiced in maintaining a defence to it on the merits, and

(c) the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.

(4) When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued, the requirements of clauses (3)(a) and (b) must be satisfied.

(5) Under this section,

(a) if the defendant pleads this Act as a defence, the claimant has the burden of proving

(i) that the added claim is related to the conduct, transaction or events described in the original pleading in the proceeding, and

(ii) that the requirement of clause (3)(c), if in issue, has been satisfied,

and,

(b) the defendant has the burden of proving that the requirement of clause (3)(b), if in issue, was not satisfied.

#### Persons under Disability

6(1) Subject to subsection (2), the operation of the limitation periods provided by this Act is suspended during any period of time that the claimant was a person under disability.

(2) The operation of the limitation period provided by clause 3(1)(b) cannot be suspended under subsection (1) for a total period of time in excess of ten years.

(3) Under this section, if the defendant pleads this Act as a defence, the claimant has the burden of proving that the operation of the limitation periods provided by this Act was suspended.

#### Concealment

7(1) The operation of the limitation period provided by clause 3(1)(b) is suspended during any period of time that the defendant knowingly and wilfully concealed the fact

(a) that the injury for which a remedial order is claimed had occurred,

(b) that the injury was to some degree attributable to his conduct, or

(c) that the injury, assuming liability on his part, was sufficiently serious to have warranted the claimant's bringing an action.

(2) Under this section, if the defendant pleads this Act as a defence, the claimant has the burden of proving that the operation of the limitation period provided by clause 3(1)(b) was suspended.

#### Agreement; Acknowledgment and Part Payment

8(1) The limitation periods provided by this Act may be reduced or extended under an agreement, and may be renewed by an acknowledgment or a part payment, in accordance with this section.

(2) If an agreement provides for the reduction or extension of the limitation period applicable to a claim, the limitation period is altered in accordance with the agreement.

(3) If a person liable under a claim acknowledges the claim, or makes a part payment under the claim, before the expiration of the limitation period applicable to the claim, the operation of the limitation periods begins anew at the time of the acknowledgment or part payment.

(4) A claim may be acknowledged, or a part payment made under it, only if the claim is for the recovery, through the realization of a security interest or otherwise, of an accrued liquidated pecuniary sum, including, but not limited to: a principal debt; rents; income; a share of estate property; and interest on any of the foregoing.

(5) A claim may be acknowledged only by an admission of the person liable under it that the sum claimed is due and unpaid, but an acknowledgment is effective

(a) whether or not a promise to pay can be implied from it, and

(b) whether or not it is accompanied by a refusal to pay.

(6) When a claim is for the recovery of both a primary sum and interest thereon, an acknowledgment of either obligation, or a part payment under either obligation, is an acknowledgment of, or a part payment under, the other obligation.

(7) An agreement and an acknowledgment must be in writing and signed by the person adversely affected.

(8) (a) An agreement made by or with an agent

has the same effect as if made by or with the principal, and

(b) an acknowledgment or a part payment made by or to an agent has the same effect as if made by or to the principal.

(9) A person has the benefit of an agreement, an acknowledgment or a part payment only if it is made

(a) with or to him,

(b) with or to a person through whom he claims, or

(c) in the course of proceedings or a transaction purporting to be pursuant to the Bankruptcy Act (Canada).

(10) A person is bound by an agreement, an acknowledgment or a part payment only if

(a) he is a maker of it, or

(b) he is liable under a claim

(i) as a successor of a maker, or

(ii) through the acquisition of an interest in property from or through a maker

who was liable under the claim.

#### Transitional

9(1) Notwithstanding this Act, if a claim which arose before this Act came into force is commenced in time to satisfy either

(a) the provisions of law governing the commencement of actions which would have been applicable but for this Act, or

(b) the provisions of this Act,

whichever time is later, the defendant is not entitled to immunity from liability under the claim.

(2) Nothing in this Act

(a) deprives a defendant of entitlement to immunity from liability under a claim, or

(b) deprives one of rights in property.

if the entitlement to immunity or the rights in property existed at the time this Act came into force and arose under provisions of law governing the commencement of actions which would have been applicable but for this Act.

#### Interpretation

10 In ascertaining the meaning of any provision of this Act,

(a) the court may consider Report No. . Limitations, issued by the Institute of Law Research and Reform, in addition to those matters which it could otherwise consider, and

(b) the court shall adopt an interpretation which promotes the general legislative purpose of this Act.

