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LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Report 61

Tidying the Limitation Act

July 2000
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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12 July 2000

Dear Minister

I am pleased to submit to you Report 61 of the Law Commission *Tidying the Limitation Act*.

Yours sincerely

The Hon Justice Baragwanath
President

The Hon Phil Goff
Minister of Justice
Parliament Buildings
Wellington

Tidying the Limitation Act

INTRODUCTORY MATTERS

1 THE PURPOSE OF THE LAW as to limitation of actions is to lay down rules for determining the cut-off dates after which it is too late for an intending plaintiff to bring a civil claim. There is a public interest in protecting potential defendants from stale claims. The effluxion of time (in its effect on witness memory for example) may make trials slower and therefore more expensive to the state as provider of the dispute resolution mechanism. The adverse economic effect on defendants of having potential claims lying round too long can harm the health of the commercial sector generally. Despite this public interest element, the task of devising a fair limitations law is best approached as one of holding the balance between what is fair to intending plaintiffs, and what is fair to intended defendants. If that balance can be properly struck, then the public interest will usually be found to have been taken care of.

2 Current New Zealand law is to be found in the Limitations Act 1950 and in the judicial decisions interpreting that statute. (There are in addition some equitable rules to which it will be necessary to refer and some specific provisions in other statutes to only two of which, the Fair Trading Act 1986 section 43(5) and the Building Act 1991 section 91, we will refer.) In October 1988, the Law Commission published a report (*Limitation Defences in Civil Proceedings* NZLC R6) recommending the complete repeal of the 1950 Act and its replacement by a new statute containing different rules and employing a different vocabulary. That recommendation has never been acted on. In the intervening years the problems of the existing law have grown no less. A root and branch approach having found no favour, we have in this report confined our recommendations to urgently needed changes expressed as amendments to the existing statute. This report was preceded by a discussion paper (*Limitation of Civil Actions* NZLC PP39).

FAIRNESS TO INTENDING PLAINTIFFS

3 Propositions we would advance as to the need for special provisions in special cases in order to achieve fairness for intending plaintiffs are:

- That time should not run against an intending plaintiff until discovery of the fraud or concealment where the right of action is concealed by the intended defendant's fraud. In New Zealand this matter has been taken care of by section 28(b) of the 1950 Act and will not be discussed further in this report. Note that fraud in that provision is not confined to actual fraud.[1]
- That where, for reasons other than fraudulent concealment by the intended defendant, the existence of the grounds for a claim is neither known to or reasonably discoverable by the intending plaintiff, time should be extended to the extent that this is possible without unfairness to the intended defendant. The 1950 Act by section 28(a) deals with non-discovery where the claim is based on fraud and by section 28(c) where the claim seeks relief from the consequences of mistake, but otherwise is silent on this issue. It will be discussed and our proposals for a solution advanced in paragraphs 8–14 below.
- That time should not run against an intending plaintiff while the intending plaintiff is under a disability. In New Zealand this matter is dealt with by section 24 of the 1950 Act (note the definition of disability in section 2(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"). It will be necessary to consider in paragraph 22 whether the term "disability" as so defined is sufficiently wide to include all the circumstances in respect of which a suspension of the running of time is appropriate.

FAIRNESS TO INTENDED DEFENDANTS

4 If a limitations statute is to be fair to an intended defendant, it must provide:

- a certain cut-off date;
- that the limitation period is not so long as to disadvantage the intended defendant in the respects to be discussed; and

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[1] *Inca Ltd v Autoscript (New Zealand) Ltd* [1979] 2 NZLR 700; *OA of Collier v Creighton* [1993] 2 NZLR 534.

- that the different varieties of civil claims are dealt with as comprehensively as possible.

These three propositions will be discussed in the three succeeding paragraphs.

5 The reason it is desirable for prospective defendants to have a cut-off date that is certain is so they know where they stand. They need to know, for example, when they can destroy records or (in the case of retired professionals to whom the only available professional negligence cover is on a claims made basis) when insurance cover can safely cease to be renewed. This desirability of certainty affects the technique to be employed in defining the limitation period. It precludes discretionary extensions of time. It will need to be kept firmly in mind when, in paragraphs 8–14, we discuss the problem of the situation in which the existence of the claim is neither known to, nor reasonably discoverable by, the intending plaintiff. An intended defendant's entitlement to a limitation period that is objectively determinable in advance is not satisfied by a provision without more that time runs from when the claim is reasonably discoverable.

6 We did not propose in the discussion paper which preceded this report, and with one exception (that of third party claims) do not in this report propose, any change to the limitation periods prescribed by the 1950 Act (in most cases six years). This is because any proposal for change is likely to be contentious, because there is no one right answer, and because it seemed more important to advocate reform in relation to the various issues in obvious need of urgent attention, than to risk the Commission's proposals again becoming bogged down in disputes as to what the limitation periods should be. But even without any discussion of limitation periods, it will be necessary to keep in mind the respects in which defendants are prejudiced by delay. Memories can dim. Witnesses can die or disappear. Records can be disposed of. Changes (in land values for example, or professional standards) can make it very difficult for expert witnesses to take their minds back to what the situation was some years previously. It can be difficult or impossible for civil engineers (for example) to assess the position if land or chattels are no longer available either in the state they were in at the relevant time or at all.

7 It is desirable that a limitation statute should be comprehensive. It will be necessary for us to discuss the exclusion of equitable claims by section 4(9), and we do so in paragraphs 23–26.

UNDISCOVERED CLAIMS

8 We turn then to the first issue identified in paragraph 3 as requiring attention. By virtue of section 4(1) of the 1950 Act, the six year limitation period for the most common classes of claim, those founded on simple contract or on tort, runs from "the date on which the cause of action accrued". The orthodox view is that the cause of action accrues, in the case of tort claims in negligence, when the loss occurs and, in the case of breach of contract claims, at the time of the breach. The effect of this can be that the time for an intending plaintiff to commence proceedings expires before the plaintiff is aware of anything amiss. Examples include personal injury attributable to an industrial disease and latent (hidden) defects in buildings.

9 Because of the obvious unfairness of this situation and in the absence of legislative reform, the New Zealand Court of Appeal in *Hamlin's* case took the bit between its teeth and ruled that where the defect in the construction of a building on which a negligence claim is based is latent, the cause of action does not accrue until the damage is either discovered or reasonably discoverable.[2] The Privy Council chose not to interfere with that decision.[3] Subsequently, the Court of Appeal has applied the reasoning in *Hamlin* to a claim for bodily injury.[4]

10 These developments leave the law in an unsatisfactory state in two respects in particular:

- There is some uncertainty as to whether the rule is confined to economic loss caused by defective buildings and to bodily injury, or whether it applies across the board.[5] The judgment of the Court of Appeal in *GD Searle & Co v Gunn* (although it contains the proposition that the words in section 4 "the date on which the cause of action accrued" must "be given a consistent meaning which is applicable to differing factual situations"),[6] seems carefully to go no further than to extend the *Hamlin* reasoning to bodily injury. Although the Court seems to have believed that a discoverability test would have assisted the plaintiff in the

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2 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513.

3 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513.

4 *S v G* [1995] 3 NZLR 681; *GD Searle & Co v Gunn* [1996] 2 NZLR 129.

5 S Todd *The Law of Torts in New Zealand* (2 ed, Brooker's Limited, Wellington, 1997) 1281.

6 [1996] 2 NZLR 129, 132.

professional negligence case of *Gilbert v Shanahan*,[7] there was no suggestion in the Court of Appeal's judgment that *Hamlin* or *Searle v Gunn* had any relevance. There are, however, dicta suggesting that *Hamlin* does lay down a general principle.[8] It is desirable that this uncertainty be put to rest.

- While a reasonable discoverability test is favourable to the plaintiff, its open-endedness puts a defendant at a considerable disadvantage unless the defendant is able to invoke the Building Act 1991 section 91. That section provides that civil proceedings relating to any building work (which means "work for or in connection with the construction, alteration, demolition, or removal of a building; and includes site work" (section 2)) may not be brought against any person 10 years or more after the date of the act or omission on which the proceedings are based. In this report we refer to such provisions as section 91 as "long-stop" provisions.

11 Fairness to intending plaintiffs seems plainly to require a recognition that if the starting point for the limitation period is the accrual of the cause of the action, then there can be circumstances in which, without any fault on the plaintiff's part, a limitation period may expire or a substantial part of it go by before such plaintiff becomes aware of the existence of facts on which a claim could be based. A solution based in some way on the discovery or reasonable discoverability of the facts supporting the claim is appropriate and would build on the Court of Appeal decisions already referred to. There are two ways of going about reform. One is to define the commencement date of the limitation period by substituting for the date the cause of action arose, the date by which the plaintiff either knew or ought reasonably to have discovered the facts on which the claim is based. This, in the circumstances to which they apply, is the effect of the Court of Appeal judgments already referred to, is the solution adopted by the Limitations Act 1996 of Alberta, and is the solution recommended in 1997 by the Law Reform Commission of Western Australia.[9] The second, which we prefer (consistently with the view expressed in paragraph 168 of our 1988 report), is a solution that squarely places on the intending plaintiff the onus of establishing that the relevant facts were neither known or reasonably discoverable by the plaintiff for the period asserted. If

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7 [1998] 3 NZLR 528.

8 For example *D v Attorney-General* (1997) 11 PRNZ 118, 120 per Grieg J.

9 Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions – Project 36 Part II* (Perth, 1997) para 7.40.

the primary commencement date is defined on the basis of discovery, the onus of establishing discovery or discoverability is on the defendant.[10] But the facts to support the plaintiff's assertion that the plaintiff neither knew of the facts on which the claim is based nor could reasonably have discovered them, will be within the plaintiff's knowledge, not that of the defendant. It is only by chance that a defendant is likely in a great many cases to be in a position to adduce evidence of what the plaintiff knew or ought to have known at any particular time. So what we recommend is that time should continue to run from when the cause of action arose, but that time should not run during any period in respect of which the plaintiff establishes that the plaintiff was unaware of the facts on which the claim is based and that such facts were not reasonably discoverable.

12 This solution, which we advanced in our preliminary paper, has been criticised because "it perpetuates the irrational distinction between those causes of action where proof of damage is an element, and those where it is not".[11] In fact, of course, it is inherent in the existence of different causes of action that they should have different elements, and it scarcely advances discussion of limitation problems to complain that these differences are irrational. It is in our view important that in respect of the primary limitation period, the onus being on the defendant to show that the plaintiff is out of time, the date from which time runs should be defined in terms that are as certain and objectively ascertainable as possible, and that in relation to matters turning on the knowledge or potential knowledge of the plaintiff, it is on the plaintiff that the onus should lie.

13 If, as we propose, a plaintiff becomes entitled to an extension of time in respect of any period when the plaintiff neither knew nor ought to have known of the grounds of the plaintiff's claim, then there is a theoretical possibility that a defendant could be faced with a claim long after he or she could reasonably have assumed that the matter is at an end. Such a result would breach the requirements for a code that is fair to defendants that we discuss in each of paragraphs 5 (certainty) and 6 (a limitation period that is not excessively long) of this report. The obvious solution is a long-stop provision, and we recommend that there should be an ultimate cut-off point 10 years after the date on which the cause of action arose. Arriving at an appropriate long-

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[10] See the careful and lengthy consideration of the authorities by Tipping J in *Humphrey v Fairweather* [1993] 3 NZLR 91.

[11] A Beck "Limitation: Time for Change" [2000] NZLJ 109, 110; the New Zealand Law Society made the same point in its submission.

stop date cannot be a matter of exactitude. We have decided to recommend the adoption of the Building Act's 10 years.

14 We propose that a new section 28A be inserted in the Limitation Act 1950 along the following lines:

> 28A Where in the case of any action for which a period of limitation is prescribed by this Act the plaintiff establishes that immediately after the cause of action arose the plaintiff neither knew or ought to have known the following facts namely—
>
> (a) That the loss, injury or damage for which the plaintiff seeks a remedy had occurred; or
>
> (b) That such loss, injury or damage was attributable to the defendant,—
>
> the period of limitation shall not begin to run until the plaintiff discovers such facts or could with reasonable diligence have discovered them, but an action seeking a remedy for such loss, injury or damage may not be brought against any person 10 years or more after the date on which the cause of action accrued.

Because the meaning of the expression "the date on which the cause of action accrued" has been muddied by the decisions referred to in paragraphs 9 and 10, it will in addition be necessary to insert a new subsection 2(9) along the lines:

> In sections 4 and 28A of this Act, references to the date of accrual of a right of action mean the date when all facts necessary to establish the claim are in existence whether or not their existence is known to the plaintiff.

THE FAIR TRADING ACT LIMITATION PROVISION

15 The Fair Trading Act 1986 section 43(5) provides:

> An application under subsection 1 of this section may be made at any time within 3 years from the time when the matter giving rise to the application occurred.

This provision suffers from the same defect as the Limitation Act 1950 section 4(1), namely that by its terms the claim may be barred by effluxion of time before a potential applicant becomes aware of the existence of the facts on which an application might be made. It should, however, be noted that the consequences of a time bar are unlikely to be as serious as the consequences of a Limitation Act time bar, because the Fair Trading Act sits on top of the general law and a claimant out of time for a Fair Trading Act claim may well be in time for a claim under the general law. In *Murray v Eliza Jane Holdings Ltd* (1993) 5 TCLR 272, the Court of Appeal rejected an

argument that section 43(5) should be so interpreted as to provide that the limitation period ran from the time of reasonable discoverability. The effect of the Court of Appeal's decision was that time runs from the date of the wrongdoing. This interpretation by the Court of Appeal was based on the wording of the section, but it is important to note the policy considerations that in the Court's view led to the same conclusion:

> The Fair Trading Act has the potential, subject to its terms, to circumvent the ordinary rules of contractual privity, tortious duty of care, and corporate structure. The Act regulates conduct of people in trade, as that expression is widely defined, in the interests of those with whom they deal.
>
> It is to be noted, however, that in spite of the Act's consumer orientation the ordinary limitation period of 6 years for contract and tort claims has been reduced to 3 years and the conventional starting point of accrual of the cause of action has been replaced with the concept of occurrence of the matter giving rise to the application. Both indicate an intention on the part of Parliament to shorten and confine the limitation period. That approach appears to have been a counterweight against the potential width and reach of the Act for the purpose of giving to those engaged in trade some reasonable certainty as to when their potential liability under the Act will come to an end. Although the Act is consumer orientated Parliament has endeavoured to strike a balance between the concepts of protecting and compensating consumers and long exposure of traders to the risk of litigation . . . . On a cost/benefit approach it seems to us that Parliament has taken the view that the benefits to those involved in trade of a clear and easily defined starting point outweigh the possible disadvantages to the very occasional consumer who may lose his rights before becoming aware of them. (pp 279–280)

16 To change the situation referred to in the previous paragraph a Government bill, the Business Law Reform Bill 1999, would by clause 20 substitute for section 43(5) the following:

> An application under subsection (1) may be made at any time within 3 years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered.

This proposal suffers from the defect of open-endedness. If there is no discovery for say 20 years, the defendant may find himself sued up to 23 years after the transaction.

17 It is desirable that in this respect the Fair Trading Act should march more or less in step with the Limitation Act, but because of the difference in language between the two statutes it is impracticable to make them verbally identical. Issues of onus are likely to be of less

practical significance in the Fair Trading Act context, and it is probably sufficient to provide for a long-stop, which just as the Fair Trading Act limitation period is 3 years rather than the Limitation Act's 6 years, should perhaps be 5 years rather than the 10 years we propose for the Limitation Act. On this basis the proposed new section 43(5) would read:

> An application under subsection (1) may be made—
> (a) Within five years from the time when the matter giving rise to the application occurred; or
> (b) Within three years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered,—
> whichever period expires first.

18 In a written submission to the Law Commission, the Ministry of Consumer Affairs opposed the proposal for a long-stop. In its submission the Ministry makes three basic points:

- It says that there are products in relation to which applicants will be disadvantaged by claims being barred, and instances superannuation and saving schemes, insurance, building and land products (it instances the case of *Gosper v Re Licensing (NZ) Ltd* (1998) 8 TCLR 292 relating to valuations obtained by Fletcher Homes) and long-term guarantees. But the whole purpose of any limitation provision is to bar stale claims. The policy considerations in favour of the long-stop proposed are those identified by the Court of Appeal in the excerpt from *Murray v Eliza Jane Holdings Ltd* quoted in paragraph 15. Where the claim is based on a failure to do what has been promised under a superannuation scheme or an insurance policy or a consumer guarantee, the loss or damage occurs at the time of such failure and that is the date from which time runs. It is not correct as the Ministry submits that our proposal "effectively turns a 'lifetime' guarantee into a three year guarantee".

- It says that:

  > The Courts have a range of remedies available to protect defendants from unfair or stale claims. It can be expected that if a claim was made many years after the event, the defendant would argue for a strike-out on the basis of "abuse of process". Matters that might lead a court to make a strike-out include unfairness to the defendant and natural justice concerns, as well as poor quality evidence.

The law is not as the Ministry seems to believe it to be. The Courts have no general discretion to strike out claims on the grounds suggested.

- It says that the enforcement powers of the Commerce Commission would be inhibited. Most proceedings launched by the Commerce Commission are criminal proceedings, in relation to which section 40(3) already provides a time bar of three years from the contravening conduct, a provision that the Business Law Reform Bill does not seek to alter. The Ministry submits that the Commerce Commission has standing to bring civil proceedings seeking a declaration that a defendant has breached the statute. The Commerce Commission undoubtedly has power under section 43 to seek relief on behalf of an injured party, but there seems no reason why rules should apply that are any different to those that apply to an applicant seeking redress for himself. The Commission undoubtedly has power under section 41 in civil proceedings to seek an injunction, but such an application by its very nature (because it will relate to current conduct) is unlikely to give rise to any issue relating to limitations.

CLAIMS FOR EXEMPLARY DAMAGES FOR PERSONAL INJURY

19 In *Donselaar v Donselaar* [1982] 1 NZLR 97 the Court of Appeal held that a claim for exemplary damages was not barred by the accident compensation legislation. The same court held in *Daniels v Thompson* [1998] 3 NZLR 22 that because of the punitive element in such damages, such a remedy was barred where the defendant had been either convicted or acquitted on criminal charges founded on the same acts as the civil claim. The effect of *Daniels v Thompson* was reversed by the Accident Insurance Act 1998 section 396, which increases the likelihood of further claims for exemplary damages by victims of sexual abuse.

20 In relation to such claims limitation problems arise. As the law now stands, a limitation period of two years which may as a matter of discretion be extended by the court to six years (section 4(7)) commences to run against an intending plaintiff abused as a child when the plaintiff attains the age of 20 years and in other cases from the date of the act complained of. In framing the provision we propose in section 28A, we have by adopting the approach of the Alberta statute and using the words "that such loss, injury or damage was attributable to the defendant" taken into account the claim by many such plaintiffs that post-traumatic stress disorders attributable to such abuse can stand in the way of a realisation of the extent of the psychological harm suffered. But while what we propose in relation to undiscovered claims will be of help to some plaintiffs,

others will be unassisted by this change. The question then is whether our proposals should go further and make some sort of special provision for such claimants.

21 Before discussing that matter, some general points need to be made. Considerations which apply to sexually abused females apply equally to sexually abused males. They apply equally to males and females who have been physically abused other than sexually. Our criminal courts are all too familiar with instances of children cruelly and persistently beaten and otherwise assaulted. And there are circumstances other than deliberate assaults in which a claim for exemplary damages for personal physical harm may lie. Consider a tobacco manufacturer continuing to market his product well knowing its addictive properties and likely effect on the health of users. The authorities contemplate actions for exemplary damages founded on negligence.[12] Belief in the vileness of sexual molesters should not shut our eyes to the need for our law to be principled evenly. We should be wary of such sentiments as that the perpetrators of sexual abuse are not entitled to the repose that a limitation statute brings,[13] if only because an intended defendant is prior to trial usually no more than an alleged perpetrator,[14] as entitled as any other defendant to have taken into account the difficulties resulting from dimmed memory and lost witnesses. Moreover, even if the passing of time bars a plaintiff's claim for a pecuniary solatium, the repose of such an alleged perpetrator can be disturbed by criminal prosecution.

22 Claims to a greater than usual limitation period based on assertion of fiduciary duty would not survive the recommendations made later in this report. There are perhaps circumstances in which an extension of time would be available on the ground of concealed fraud, as where a child was deceived as to the nature of the act of abuse, but such situations are likely to be rare. It seems to the Commission that the best solution is the one put forward in our preliminary paper. It received support in the submissions made to us. That solution was the insertion in the statute of a new section 24A as follows:

> 24A For the purposes of section 24, a person is under a disability if that person is unable, by reason of some or all of the matters on

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[12] *Green v Matheson* [1989] 3 NZLR 564; *McKenzie v Attorney-General* [1992] 2 NZLR 14.

[13] See the observations in *M(K) v M(H)* (1992) 96 DLR (4th) 289, 302 which Thomas J found persuasive in *W v Attorney-General* [1999] 2 NZLR 709, 729.

[14] The exception is if the perpetrator has already been criminally convicted.

which an action is founded, to make reasonable judgments in respect of matters relating to the bringing of such action.

It seems entirely fair to both plaintiffs and defendants that the statute should make it clear that its definition of disability covers the situation where the abuse complained of has been causative of such absence of resolution as has left the plaintiff out of time for bringing a claim.

EQUITABLE CLAIMS

23 Section 28 provides:

> 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:

Section 28(c) is, as discussed by the House of Lords in relation to the comparable United Kingdom provision in *Kleinwort Benson Ltd v Lincoln City Council & Ors*,[15] a completely open-ended provision. As Lord Browne-Wilkinson put it:

> On every occasion in which a higher court changed the law by judicial decision, all those who had made payments on the basis that the old law was correct (however long ago such payments were made) would have six years in which to bring a claim to recover money paid under a mistake of law. All your Lordships accept that this position cannot be cured save by primary legislation altering the relevant limitation period.[16]

It seems to us that because we are proposing a general provision for undiscovered claims the special provisions in sections 28(a) and (c) are no longer needed. There seems no reason why the proposed long-stop should not apply to actions based on fraud and actions seeking relief from the consequences of a mistake. However, section

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[15] [1999] 2 AC 349.

[16] Above n 15, 364.

28(b) relating to the situation where a right of action is concealed by fraud should remain. The long-stop should not assist a defendant who has fraudulently concealed the existence of the right of action.

24 Section 4(9) of the 1950 Act provides as follows:

> 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.

An example of the application of the statutory rules by analogy is the case of *Matai Industries Ltd v Jensen*[17] in which a plaintiff brought a claim out of time alleging negligence by a receiver and a largely identical claim based on breach of fiduciary duty, and the latter claim was held to be barred.

25 In paragraph 337 of its 1988 Report, this Commission observed:

> Further, we subscribe to the view that any attempts to keep equity and its remedies separate from the common-law and its remedies more than a century after the fusion of common-law and equity are unhelpful.

This remains the Commission's view.

26 We therefore recommend that the various references to fraud (as distinct from fraudulent concealment) and to mistake be deleted from section 28, that section 4(9) of the 1950 Act be repealed, and that there be inserted at the end of section 4(1) the following:

> (e) any other civil claim for which no other provision is made by this Act.

THIRD PARTY CLAIMS

27 Section 14 of the 1950 Act provides as follows:

> 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.

[17] [1989] 1 NZLR 525.

Because there are many circumstances in which "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" is the obtaining of a judgment against the claimant to contribution or indemnity,[18] such claims can in practice be brought and if need be litigated a very long time after the occurrence of many of the events on which they turn. We recommend that there be added to section 14 some such words as:

> and such a claim shall not be brought after the expiration of 2 years from the date on which the cause of action accrued.

SUMMARY OF RECOMMENDATIONS

28 Accordingly we recommend:

- that the Limitation Act 1950 be amended:
  - by inserting a new section 28A along the following lines:

    28A Where in the case of any action for which a period of limitation is prescribed by this Act the plaintiff establishes that immediately after the cause of action arose the plaintiff neither knew or ought to have known the following facts namely—
    (a) That the loss, injury or damage for which the plaintiff seeks a remedy had occurred; or
    (b) That such loss, injury or damage was attributable to the defendant,—
    the period of limitation shall not begin to run until the plaintiff discovers such facts or could with reasonable diligence have discovered them, but an action seeking a remedy for such loss, injury or damage may not be brought against any person 10 years or more after the date on which the cause of action accrued.

  - by inserting a new subsection 2(9) along the following lines:

    In sections 4 and 28A of this Act, references to the date of accrual of a right of action mean the date when all facts necessary to establish the claim are in existence whether or not their existence is known to the plaintiff.

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[18] For example this is the position under common policy wordings where there is a disputed claim by an insured against his or her insurer under an indemnity policy.

– by inserting a new section 24A as follows:

24A For the purposes of section 24, a person is under a disability if that person is unable, by reason of some or all of the matters on which an action is founded, to make reasonable judgments in respect of matters relating to the bringing of such action.

– by repealing section 4(9).

– by inserting at the end of section 4(1) the following:

(e) any other civil claim for which no other provision is made by this Act.

– by adding to section 14 some such words as:

and such a claim shall not be brought after the expiration of 2 years from the date on which the cause of action accrued.

- that the Fair Trading Act 1986 be amended by substituting for the existing subsection 43(5) the following:

An application under subsection (1) may be made—

(a) Within 5 years from the time when the matter giving rise to the application occurred; or

(b) Within 3 years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered,—

whichever period expires first.

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