SUBMISSION

TO

THE QUEENSLAND LAW REFORM COMMISSION

REVIEW OF THE *LIMITATIONS OF ACTIONS ACT 1974 (QUEENSLAND)*

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1. INTRODUCTION

[1.01] The importance of ensuring that litigation is prosecuted expeditiously has long been a major concern to those involved in the administration of justice. The guiding principle is reflected in the maxim, *interest reipublicae ut sit finis litium* ("it is in the public interest that there be an end to litigation"), and the related maxim *vigilantibus, et non dormientibus, jura subveniunt* ("the law assist those who are vigilant, not those who sleep over their rights").

[1.02] However, a rigorous application of those maxims could result in one injustice being superseded by a greater injustice, in the event that a person with a legitimate claim is precluded, through no fault of his or her own, from litigating the claim. Like most policy issues in the law, limitations of actions necessarily involves a balance between two competing considerations:

> **[1.02.01]** On the one hand, the legitimate expectation of persons and corporations not to be vexed with stale claims, especially after witnesses have died or become unavailable, memories have faded, or relevant documentary evidence has disappeared; and
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> **[1.02.02]** On the other hand, the legitimate expectation of a person who has suffered loss or damage to obtain recourse in the courts of law, despite delays for which he or she is not responsible.

[1.03] The difficulty with statutes of limitations, generally speaking, is that they create arbitrary deadlines which, whilst accommodating the legitimate interests of potential defendants, are capable of operating harshly and oppressively in respect of potential plaintiffs. One consequence is that the courts have become very pro-active in inventing mechanisms to circumvent statutes of limitations, of which one obvious example is the High Court's decision in *Hawkins v. Clayton*, (1988) 164 C.L.R. 539.

[1.04] Judicial reform of the law relating to limitations of actions is undesirable, for a variety of reasons. Such reforms are necessarily *ad hoc*, since it is beyond the competence of the judiciary to amend or repeal statutes of limitations. The process results in a situation of profound complexity, where there is a general rule (expressed in the relevant statutes) overwritten with a series of judicially devised exceptions. These exceptions, whilst offering a just outcome in the peculiar circumstances of the particular cases from which they emerge, seldom prove in practice to be any more satisfactory than the statutory provisions upon which they operate as a gloss: generally speaking, the exceptions are no less arbitrary than the rule.

[1.05] In my submission, it is desirable that the law relating to limitations of action should be codified (or re-codified), so that it is apparent from the language of the statute whether or not a cause of action is barred, without recourse to the often difficult process of applying judicial decisions in order to see whether the circumstances of a particular case may be brought within the parameters of a judicially pronounced exception to the operation of the statue. At the same time, there is a growing number of anomalies in the law relating to limitations of action, and it is desirable that those anomalies be remedied.

2. LIMITATION PERIODS

[2.01] Broadly speaking, the present Queensland legislation provides for a range of limitation periods, depending on the nature of a plaintiff's claim. The major limitation periods include:

[2.01.01] One year in respect of "an action to recover an amount paid as tax that is recoverable because of the invalidity of an Act or a provision of an Act";

[2.01.02] Two years in respect of actions to recover a penalty or forfeiture;

[2.01.03] Three years in respect of actions for damages for personal injuries;

[2.01.04] Six years in respect of other common law causes of action; and

[2.01.05] Twelve years in respect of actions "upon a specialty", in respect of actions "brought upon a judgment", and in respect of actions to recover land.

[2.02] There is very little rational unity to the range of limitation periods prescribed in the present legislation. For example, it is difficult to see why a person who claims to have suffered injury to his or her reputation has six years within which to bring an action for damages for defamation, but a person who claims to have suffered bodily

injury must sue within three years. The most common civil litigation in this State is that arising out of motor vehicle collisions; and it is difficult to justify a legislative regime which has the effect that an action for property damage (such as the cost of repairing a motor vehicle) may be brought within six years, but an action in respect of personal injuries must be brought within three years. It is, quite frankly, absurd that most contractual causes of action attract a limitation period of six years, but the limitation period is doubled if the instrument containing the parties' contract is in the form of a deed.

[2.03] There is, of course, a powerful interest group in the insurance industry, which would strenuously resist any suggestion that the limitation period for personal injuries actions should be extended beyond three years. That is not something which I would urge. Nonetheless, it must be recognised that the three-year limitation for personal injuries actions is something of an anomaly. Taking the example, mentioned earlier, of a motor vehicle collision, evidence of "liability issues" is likely to be the same - or substantially the same - whether the claim is one relating to property damage, or one relating to personal injuries. If a vehicle is damaged in a collision, the damage should be immediately apparent; by contrast, personal injuries (particularly where they involve "whiplash" and other spinal complications) often take quite some time to become apparent. Moreover, a person who has suffered no personal injuries and is merely left with a damaged vehicle is subject to much less stress and trauma, and should therefore be in a better position to institute proceedings promptly, as compared with a person who has suffered serious personal injuries. In a rational legal system, if one were to apply a different limitation period in respect of claims for property damage as compared with

claims for personal injuries, it would seem more logical to allow a longer (rather than shorter) period for personal injuries claims.

[2.04] In my view, an appropriate reform of the law in this State would reduce the limitation periods in respect of most causes of action, but (at the same time) liberalise the rules which govern the time from which a limitation period is taken to accrue, and the circumstances in which a party may institute proceedings outside a limitation period. For example, where a person claims to have been defamed, it seems absurd that the person may wait for up to six years before instituting proceedings to redress the alleged injury to his or her reputation, and I am of the view that a three year limitation period (or possibly an even shorter limitation period) would be appropriate, provided that time commences to run only once the potential plaintiff is aware of the defamation.

[2.05] Similarly, the six year limitation period for contractual causes of action (and the twelve year limitation period, where the contract takes the form of a "specialty") is quite inconsistent with the need of modern commercial entities to be able to undertake appropriate planning and budgeting: most business-people find it quite untenable that a action for contractual damages can be brought up to six years after the alleged breach of contract occurred, often at a time when relevant employees have departed and relevant documentary records are no longer in existence. To my mind, there is not reason why contractual causes of action should not also be subject to a three year limitation period, subject again to the proviso that the limitation period does not commence to run until some loss or damage flowing from the breach of contract has "crystallised".

[2.06] I acknowledge that land falls within a special category, since the limitation period also operates as a protection against claims by way of "adverse possession". Even so, it seems strange that the law allows a person who has been crippled in an accident only three years in which to commence proceedings, whilst a landlord can wait for twelve years (without collecting rent) before seeking to evict a tenant. Once again, I would regard a period of three years as perfectly adequate, so long as the limitation period does not commence to run until the plaintiff is aware of the circumstances giving rise to the plaintiff's claim.

[2.07] I recognise that there will always be special categories. No doubt there are particular policy reasons for the adoption of a one year limitation period in respect of "an action to recover an amount paid as tax that is recoverable because of the invalidity of an Act or a provision of an Act", and there may even be some justification for the adoption of a two year limitation period in respect of actions to recover a penalty or forfeiture. However, I am of the view that a degree of rational unity could be achieved, by adopting a three year period as the "standard" period for all causes of action, so long as the law is otherwise modified to provide that the limitation period does not commence to run until the plaintiff has knowledge (or ought reasonably to have knowledge) of the material facts, and so long as the law is otherwise amended to provide appropriate safeguards for those who find themselves statute-barred through no fault of their own.

3. ACCRUAL OF CAUSE OF ACTION

[3.01] One of the most difficult issues which has arisen concerning the application of limitation periods in recent years is that which arises where a cause of action is taken to accrue at a time when loss or damage has been sustained, but has not yet crystallised. Take the simple case of an individual to whom negligent advice is given by a financial consultant, with the result that the individual makes an imprudent investment. The current trend of authority would seem to suggest (although it is not perfectly clear) that the cause of action arises when the imprudent investment is made, since the plaintiff has suffered loss or damage in the sense that what he or she has received in return for his or her money is an investment less valuable than he or she was given to expect; but in a real sense, loss or damage may only be sustained many years later, when it is found that the investment is irrecoverable.

[3.02] In my respectful opinion, the most urgent reform required in respect of the law relating to limitations of actions is a reform providing that the limitation period in respect of <u>any</u> cause of action does not commence to run until loss or damage is manifested in some tangible way, which is either observable by the potential plaintiff, or would have become observable by the plaintiff had the plaintiff acted with reasonable care. For example:

> **[3.02.01]** Where the loss or damage consists of personal injuries, the limitation period should not commence to run until the relevant condition is either diagnosed, or becomes symptomatic.

[3.02.02] Where the loss or damage relates to defects in a building or other structure, or a chattel (such as a horse or motor vehicle), the limitation period should not commence to run until some physical manifestation of the defect becomes apparent (unless it is shown, and the onus of proof should be on the defendant to show, that the plaintiff has failed to take reasonable care in ascertaining whether there are any relevant defects); and

[3.02.03] Where the loss or damage is purely of a financial nature, such as an improvident investment, the limitation period should not commence to run until the loss has crystallised - either in the sense of the plaintiff's having to make a monetary payment (or becoming aware of a liability to make such a payment); or in the sense of the plaintiff's suffering a loss upon the realization of the investment (or becoming aware that such as loss is likely to be suffered) - subject again to a proviso that the defendant may prove that the plaintiff failed to take reasonable care to ascertain that such a loss would be (or would be likely to be) sustained.

[3.03] The requirement for some tangible manifestation of loss or damage should not, in my view, be satisfied merely because <u>some</u> form of loss or damage - however slight or superficial - has become evident. If a person involved in a road accident suffers slight headaches, that could theoretically constitute "loss and damage" sufficient to ground a cause of action in negligence; but very few people would sue. A person in that situation should not be precluded from commencing proceedings if, several years later, it is discovered that the headaches are symptomatic of a life-threatening brain tumour.

A negligence action against a builder, engineer or architect should not be precluded because the plaintiff observed minor cracking at an early point in time, but did not then realise (and could not reasonably been expected to realise) that the minor cracking was evidence of major structural faults. I would propose that the limitation period in respect of all causes of action commences to run only when substantial loss or damage is manifested in some tangible way, which is either observable by the potential plaintiff, or would have become observable by the plaintiff had the plaintiff acted with reasonable care - the word "substantial" being defined as loss or damage of such a nature that a reasonable person in the plaintiff's circumstances, acting reasonably in that person's own interests, would regard the extent of loss or damage observed or observable as sufficient to justify the institution of proceedings.

[3.04] At the present time, this aspect of limitations law suffers from the additional complication that a distinction is made between those causes of action which are actionable *per se*, and those causes of action which are not actionable unless some loss or damage is suffered. Whether a particular cause of action is or is not actionable *per se* seldom has anything to do with the merits of the case, but is based upon the historical development of the law over several centuries, and involves distinctions which are utterly archaic, if not arcane. For example, a negligence claim is not actionable *per se* - some actual loss or damage must be suffered before the cause of action arises - apparently because negligence was originally a form of "action on the case" based on the *Statute of Westminster II* of 1285, which provided (in Latin) that:

> "... whensoever from henceforth it shall happen in the Chancery that in one case a Writ is found and in a similar case falling under the same law

> and needing a similar remedy there is no writ found, the clerks of the Chancery shall agree in making a writ, or they shall adjourn the complaints to the next Parliament and they shall write down the cases in which they cannot agree and refer them to the next Parliament, and a writ shall be made by the consent of those learned in the law; so that henceforth it shall not befall that the Court shall fail those who seek justice."

Because the action for negligence ultimately derives from that statute of 1285, it has consistently been held over the centuries that actual loss or damage constitutes the "gist" of the cause of action: see, for example, Fifoot*, History and Sources of the Common Law - Tort and Contract.* One is reminded of Sir Frederick Maitland's well-known aphorism that "The forms of action we have buried but they rule us from their graves": *The Forms of Action at Common Law (1909).*

[3.05] The largely irrelevant question as to whether a particular cause of action is actionable *per se* can have very significant consequences as regards statues of limitations. Take the case where a person is the recipient of negligent advice. If the adviser breached a contractual duty to exercise due care in giving advice (such as a solicitor, accountant, financial consultant, or other professional adviser retained by the plaintiff), the limitation period commences at the time when the negligent advice is given, since that constitutes a breach of contract and breaches of contract are actionable *per se* - theoretically, the plaintiff may recover nominal damages, without suffering any actual loss. On the other hand, if the negligent advice involves the breach of a tortious duty of care, the cause of action only accrues when loss or damage is sustained, since an action for negligent mis-statement is not actionable *per se*. In many cases, this is not a problem, since a person who owes a contractual duty of care may also concurrently owe a tortious duty of care. But it is at least possible to imagine

circumstances in which a plaintiff has an action for the breach of a contractual duty of care, without at the same time having the action for the breach of a tortious duty of care; and in such cases, one is left with the absurd result that the plaintiff who has the apparent benefit of being owed a contractual duty of care is actually worse off than a plaintiff who is only owed a tortious duty of care, since the cause of action based on the tortious duty of care will only accrue once loss or damage is suffered. A similar absurdity may be noticed in respect of action for trespass to the person, as compared with actions for negligence causing personal injuries or property damage: if a person deliberately runs me down with his car, the cause of action accrues immediately, since assault and battery is actionable *per se*; but if the defendant negligently runs me down, the cause of action only accrues once I have suffered loss and damage. If, for example, the loss and damage consists solely of “nervous shock” resulting from the collision, which may only become manifested some considerable time after the collision, I am theoretically better off if I am the victim of negligent driving rather than a deliberate attempt to harm me.

[3.06] Once again, it seems to me that rational unity can be achieved by providing that, in respect of all causes of action, the limitation period only commences to run once loss or damage has been suffered. It is not necessary to change the substantive law, so as to provide that causes of action which are presently actionable *per se* shall no longer be actionable *per se*: although this may be a very useful reform, it could conceivably have undesirable ramifications. If a particular cause of action is actionable *per se*, such as an action for breach of contract or an action for trespass, there is no reason why a plaintiff should not be able to institute proceedings before the

plaintiff has suffered any loss or damage; but there is no obvious reason why time should commence to run against such a plaintiff because he or she has a theoretical right to institute proceedings to recover nominal damages before any actual loss or damage has been suffered.

[3.07] There is, however, one cause of action which may require special consideration - an action for damages for defamation. When a natural person is defamed, loss or damage is ordinarily presumed from the injury to the person's reputation. A corporation has no personal reputation, and therefore must prove actual loss or damage, in the form of some pecuniary harm. At the present time, there is a theoretical anomaly in the law (although one which seldom, if ever, arises in practice) that, whereas an individual must institute proceedings for defamation within six years after the publication of the defamation, a corporation has six years from the date on which it first suffers pecuniary loss or damage as a result of the defamation. Although for all other causes of action I am of the view that the limitation period should commence to run from the date on which actual loss or damage is sustained, I am inclined to the view that defamation actions should be commenced within the prescribed period - I would suggest three years - after the plaintiff first becomes aware of the publication of the defamatory matter. It may be that a similar expedient would be desirable in respect of more obscure tortious causes of action, such as "passing off", "slander of title to goods" and "malicious falsehood".

4. CONTINUING DUTIES OF DISCLOSURE

[4.01] The High Court's decision in *Hawkins v. Clayton* (supra) has created a major "loophole" in the law relating to limitations of actions, where it can be shown that the defendant owed a continuing duty of disclosure to the plaintiff. The proposition, in a nutshell, is that in certain circumstances a defendant who has acted negligently has a duty to inform the plaintiff that he or she has acted negligently, and that the limitation period does not commence to run whilst the defendant's breach of the continuing duty of disclosure effectively prevents the plaintiff from becoming aware that the plaintiff has a cause of action against the defendant. In *Hawkins v. Clayton*, the party who was said to have a continuing duty of disclosure was a solicitor, who had provided negligent advice to a client, and who had failed to disclose to the client that the solicitor's advice was negligent. However, the *Hawkins v. Clayton* principle is not confined to solicitors: it has been applied to public authorities (see, for example, *Gorton v. The Commonwealth,* [1992] 2 Qd.R. 603), and in a recent (as yet unreported) case I succeeded in persuading Demack J. of the Queensland Supreme Court that the same principle may be applied where a medical practitioner failed to discharge her continuing duty to disclose to a patient the fact that the medical practitioner had wrongly diagnosed the plaintiff's condition.

[4.02] Whilst the *Hawkins v. Clayton* principle undoubtedly produces a fair result in some cases, its ramifications are huge, and are yet to be fully recognised. If the principle applies to lawyers, doctors and public authorities, there is no reason to doubt that it may also be applied to other professional advisers (accountants, engineers, architects and so on), or even trades-people (for example, a motor mechanic who, it may be said, has a continuing duty to disclose to a customer the fact that the mechanic

has defectively repaired the customer's vehicle). Perhaps the day will come when an injured employee will succeed in arguing that the statutory limitation period does not apply to a worker's compensation claim, until the employer has discharged a continuing duty to inform the employee that the employer's system of work is unsafe.

[4.03] Whilst these developments are undoubtedly beneficial for plaintiffs, they have the propensity to cause great hardship to defendants. Take the case of a professional person - a lawyer, a doctor, an architect, or what have you - who has retired from practice. It is usual for such people to maintain professional indemnity insurance for several years after their retirement, to cover claims which may arise from allegedly negligent acts committed prior to their retirement. But most such people allow their professional indemnity insurance to lapse after a few years, confident that the statutory limitation period will protect them in respect of any time-barred claims. Based on the *Hawkins v. Clayton* principle, it is quite conceivable that such a person - or even the deceased estate of such a person - may be sued many years later, on the ground that he or she failed to discharge a continuing duty of disclosure. Apart from the fact that the defendant may have allowed his or her professional indemnity insurance to lapse (and it is notable that most professional indemnity insurance policies are granted on a "claims made" basis, so that the insured must hold cover at the time when the claim is brought), there are other very relevant considerations: the defendant may have died, leaving the defendant's widow or widower to defend the claim; other material witnesses may have died or disappeared; relevant documents may have been destroyed; and, even if the defendant and relevant witnesses are still available, their memory of relevant events will be greatly diminished. When this range of potential consequences is taken

into account, one may be forgiven for regarding *Hawkins v. Clayton* as an illustration of the principle that “hard cases make bad law”.

[4.04] What is the solution ? On the one hand, there are very sound reasons for arguing that the claim of a person who has received negligent advice (whether from a lawyer, a doctor, or other professional adviser) should not be barred whilst the potential defendant continues to “cover up” his or her own wrong-doing. On the other hand, the *Hawkins v. Clayton* principle is capable of applying in the case of a defendant who is guilty of no moral turpitude - a person who had no idea that his or her conduct was negligent, and who may have believed (and may continue to believe) that his or her conduct was not negligent - who is exposed to a liability which is virtually open-ended, merely for failing to communicate to the plaintiff a fact of which the defendant was also unaware. It is one thing to say that a lawyer, doctor, architect, or other professional person, should be answerable in damages for their negligence, and there is considerable merit in the view that the liability should endure for so long as the defendant conceals his or her negligence from the plaintiff; but it is another thing to say that one act of negligence, which the defendant did not then or subsequently realise was negligent, should result in the defendant’s being subjected to what is virtually a perpetual liability to be sued.

[4.05] In my view, it is reasonable that a continuing duty of disclosure should have the effect of preventing a limitation period from commencing to run, whilst there are on-going dealings between the potential plaintiff and defendant. For example, if a solicitor has provided negligent advice to a client, and the solicitor is still being consulted

by the same client (whether in relation to the same or different matters), it is fair that the solicitor should not be permitted to rely upon a limitation period if the solicitor has failed to inform the client that the solicitor's previous advice was wrong. Similarly, if a patient whose condition has been negligently mis-diagnosed by a doctor continues to consult the doctor, it is fair that the doctor should not be permitted to rely upon a limitation period whilst the doctor fails to discharge the continuing duty to rectify the original mis-diagnosis. At a practical level, many of the problems associated with an "open-ended" liability will not arise whilst the potential plaintiff is continuing to have regular dealings with the potential defendant: if the potential defendant is continuing to provide professional or other services to the potential plaintiff, it is likely that the potential defendant will continue to maintain appropriate insurance; it is likely that the potential defendant will continue to maintain documentary records concerning the affairs of the potential plaintiff; and the risk of material witnesses dying or becoming unavailable is reduced.

[4.06] However, it is in my opinion artificial that the commencement of a limitation period should be protracted - perhaps indefinitely - because of a continuing duty of disclosure, if the potential plaintiff has ceased to have any dealings with the potential defendant. It is unrealistic to expect a solicitor who has, at one stage, provided negligent advice to a client, to make disclosure of the fact that the advice was negligent after that person has ceased to be a client, or for a doctor who has at one stage given a negligent mis-diagnosis to notify the patient of that mis-diagnosis after he or she has ceased to be a patient of that doctor. Once the potential plaintiff has ceased to have regular dealings with the potential defendant, I am of the view that a continuing duty of

disclosure should only prevent the running of a limitation period if it is shown that the failure to discharge the duty of disclosure occurred knowingly. Thus, a solicitor who is (or becomes) aware that his or her advice to a client was negligent should be expected to disclose that fact to the client, even if the client has ceased to be a client of the solicitor; and a doctor who has given a negligent mis-diagnosis, and who is (or becomes) aware of that fact, should be expected to inform the patient, whether or not the patient continues to be a patient.

[4.07] At the same time, I am of the view that the *Hawkins v. Clayton* principle should be clarified, so as to ensure its application to all circumstances where there is or should be a continuing duty of disclosure. At the present time, it is less than clear in what circumstances such a duty may be found to exist. As I have mentioned, it has been found to exist in the case of some professional relationships (such as those of solicitor and client, and doctor and patient), and it has also been found to exist in respect of dealings by a member of the public with some public authorities. Whether it will be extended to include all professional advisers (such as accountants, engineers, architects, and financial consultants), or even trades-people (such as motor mechanics) is yet to be seen. I have some difficulty in understanding why the principle which requires a solicitor or doctor to disclose his or her negligence to a client or patient should not extend to any situation where a person relies upon the skill, competence and honesty of a person who is held out as having expertise, whether that person would ordinarily be regarded as a “professional” adviser or as a trades-person.

[4.08] Accordingly, it is my view that the *Hawkins v. Clayton* principle should be

replaced and codified by a principle of general application, along the following lines:

[4.08.01] The principle should apply in any situation involving reliance by a person (the plaintiff) on the skill, competence, or integrity of another person (the defendant).

[4.08.02] In such a situation, if the defendant commits a legal wrong (regardless of the nature of the cause of action, whether it be a breach of contract, negligence, negligent mis-statement, an intentional tort, or an equitable wrong such as a breach of trust or breach of fiduciary duty), the commencement of the applicable limitation period shall be postponed until a date fixed in accordance with the following provisions.

[4.08.03] Whilst the plaintiff continues to have regular dealings with the defendant in the same capacity as the dealings between the plaintiff and the defendant which gave rise to the plaintiff's reliance on the defendant's skill, competence or integrity (i.e., whilst the relationship of solicitor and client, doctor and patient, tradesman and customer, etc., continues) the commencement of the applicable limitation period is postponed until the patient becomes aware (whether as a result of disclosure by the defendant, or otherwise) of the material facts constituting the actionable wrong.

[4.08.04] Once the plaintiff has ceased to have regular dealings with the defendant, the commencement of the limitation period is postponed to a date six months after the last dealing between the plaintiff and the defendant, unless it is proved (the onus of proof being on the plaintiff) that the defendant, being or

becoming aware of the circumstances constituting the defendant's actionable wrong, has refrained from disclosing those circumstances to the plaintiff, in which event the commencement of the applicable limitation period continues to be postponed until the plaintiff becomes aware of those circumstances (whether or not as a result of disclosure by the defendant).

[4.08.05] Where the defendant is a legal practitioner, the plaintiff is not taken to be aware of the circumstances constituting the actionable wrong until the plaintiff becomes aware (whether as a result of disclosure by the defendant, or otherwise) that the plaintiff has the right to sue the defendant in respect of that actionable wrong.

[4.09] These provisions are to intended supersede the *Hawkins v. Clayton* principle, so that the commencement of a limitation period shall not be further postponed in accordance with the *Hawkins v. Clayton* principle beyond the date to which the applicable limitation period is postponed in accordance with these provisions.

5. EQUITABLE CAUSES OF ACTION

[5.01] One of the anomalies of limitations law, in Queensland and elsewhere, is that (generally speaking) statutes of limitations do not apply to equitable causes of action, although courts exercising equitable jurisdiction have a discretion to apply the same principles by analogy. This concept is enshrined in s.10(6)(b) of the 1974 Queensland *Limitations of Actions Act*.

[5.02] In a State where law and equity have been administered concurrently for more than 100 years, it is difficult to understand why different principles are applied to equitable as contrasted with common law or statutory causes of action, particularly where the same wrongful conduct may give rise to a cause of action either at law or in equity. Thus, for example, it is difficult to see why a six year limitation period should apply to an action for conversion of money by a person in a fiduciary position, but the same limitation period does not apply (except by analogy, in the court's discretion) if the claim is framed as a claim for breach of trust or breach of fiduciary duty. Conduct which constitutes fraud or duress at common law may also constitute undue influence or unconscionable conduct in equity, and it is not immediately apparent why different limitation periods should apply. An action for damages for breach of contract is normally subject to a six year limitation period (unless the contract is a "specialty"); and there is no logical reason why the same limitation period should not apply in a case where the plaintiff is able to commence proceedings in the form of a claim for specific performance of the contract, with an alternative claim for equitable compensation in lieu of specific performance.

[5.03] In my view, the same limitation periods should apply in respect of all causes of action, whether based on the common law, statute or equity. At the same time, the limitation periods in respect of all causes of action should attract the same qualifications, by way of postponement or extension of the limitation period.

6. FRAUD AND MISTAKE

[6.01] Section 38 of the 1974 Act contains a useful and beneficial provision, which enshrines the so-called “doctrine of fraudulent concealment”. However, its utility is limited in two significant respects.

[6.02] The first problem is that, insofar as s.38(1)(b) deals with a case where “the right of action is concealed by the fraud of [the defendant or the defendant’s agent]”, a plaintiff faces a very high onus in proving actual fraud of the kind discussed in *Derry v. Peek*, (1889) 14 App.Cas. 337. The need to prove such actual fraud has to some extend been ameliorated by the *Hawkins v. Clayton* principle, at least in the case of professional advisers; and if my recommendations in that regard are adopted, the amelioration will become more general.

[6.03] Even so, there are circumstances where it cannot be proved that a defendant has committed actual fraud in concealing the existence of a cause of action, although the defendant has acted in a way which is plainly dishonest and lacking in commercial morality.

[6.04] The extension available in the case of a "mistake" is very limited, since s.38(1)(c.) applies only where "the action is for relief from the consequences of the mistake". It may apply, for example, where the plaintiff's claim is in quasi-contract to recover moneys paid under a mistake of fact; but it does not apply in every instance where a plaintiff has made a mistake, even if the defendant has done nothing to disabuse the plaintiff of that mistake.

[6.05] Take, for example, the simple case of a plaintiff who commences proceedings against the wrong defendant - possibly, for example, a related company of the correct defendant. Although that is plainly a "mistake", s.38(1)(c) does not apply, as the action is not one "for relief from the consequences of the mistake". It may be completely dishonest, and utterly lacking in commercial morality, for the correct defendant to stand by and see the plaintiff proceed against the wrong party; but it is not "fraud" unless the correct defendant says or does something to encourage the plaintiff's error, whilst the limitation period against the correct defendant expires. This is not a hypothetical example: I have seen this happen in practice, where proceedings have been instituted against the wrong entity within a group of related companies.

[6.06] In my view, a postponement of the limitation period should be available in any case where:

> **[6.06.01]** The action is based on a mis-statement or misrepresentation by the defendant (whether fraudulent, "misleading and deceptive" in contravention of *Fair Trading Act*, negligent or innocent),

until the plaintiff has become aware of (or could with reasonable diligence have discovered) the true facts;

[6.06.01] The action is for relief from the consequences of a mistake, until the plaintiff has discovered (or, with reasonable diligence, could have discovered) the mistake;

[6.06.03] The plaintiff has not instituted the proceedings by reason of a misrepresentation or mis-statement (whether fraudulent, “misleading and deceptive”, or negligent) on the part of the defendant or an agent of the defendant, until the plaintiff discovers (or, with reasonable diligence, could have discovered) the true facts, unless the defendant proves (the onus of proof being on the defendant) that the misrepresentation or mis-statement was made in good faith and without negligence; or

[6.06.04] The plaintiff has failed to institute proceedings by reason of some mistake on the part of the plaintiff, if the plaintiff proves (the onus of proof being on the plaintiff) that the defendant was aware of the mistake and knowingly stood by and failed to correct the mistake, until the plaintiff discovers (or, with reasonable diligence, could have discovered) the mistake.

7. EXTENSIONS IN CASE OF DISABILITY

[7.01] S.29 of the *Limitation of Actions Act 1974* contains very beneficial provisions for the protection of persons under a disability. However, some aspects of this section warrant reconsideration.

[7.02] S.5(2) defines a disability as including infancy, being of unsound mind, or being a convict "who, after conviction, is undergoing a sentence of imprisonment".

[7.03] The benefit which this provision confers on prisoners is difficult to justify. There is nothing to prevent a prisoner's instituting proceedings whilst he or she remains a prisoner. The prisons system allows ready access to legal representatives. A person serving a prison sentence may not have access to substantial funds to conduct a litigation; but the same applies to anyone who is impecunious. It is difficult to understand why the law should confer a particular benefit on prisoners, which is not available to other impecunious members of the community, let alone to a prisoner who is not impecunious. Nor is it immediately apparent why a potential defendant's exposure to the institution of proceedings should be prolonged almost indefinitely, merely because the potential plaintiff is serving a lengthy term of imprisonment.

[7.04] On the other hand, if there is some justification for granting extensions to prisoners, it is difficult to see why the benefit should be available only to a "convict who, after conviction, is undergoing a sentence of imprisonment". One might think that a person who has been refused bail, and is imprisoned pending trial, is in a position equally meritorious with that of a convicted prisoner, whether or not the trial ultimately results in acquittal or conviction, but especially if the trial results in acquittal.

[7.05] The benefit which s.29 confers on convicts serving sentences of imprisonment raises the question whether other forms of "disability" should be recognised. What of a person who is absent from Australia, such as a member of the armed forces serving overseas - surely such a person has as good a claim to the benefits conferred by s.29, as a person incarcerated for a criminal offence ? Should a person who is working on a remote outback property, or on an oil rig or prawn trawler, be regarded as having a less meritorious claim than a convicted criminal serving a sentence of imprisonment ?

[7.06] The fact that "disability" includes being "of unsound mind" also raises the question whether the benefit of s.29 should be extended to persons who are physically (rather than mentally) disabled. The extreme example would be a person who is in a coma, with a perfectly sound mind but suffering a total physical incapacity. And what of a person who is unable to communicate effectively, such as a person who is blind, or a person who is deaf and dumb, or a person who is suffering complete tetraplegia?

[7.07] S.29(2)(a) and s.29(3)(a) are also capable of operating very harshly. The effect of these provisions is that the benefit of s.29 can only enure to the first person to whom the right of action accrues. If that person is not under a disability, but subsequently dies so that the right of action devolves to a person who is under a disability, the second person cannot take the benefit of s.29; and if the first person to whom the right of action accrues is under a disability but dies before that disability has ceased, the benefit of s.29 is not available to the person on whom the right of action then devolves. It is not difficult to think of circumstances where these provisions may

cause particular hardship. Take the case where a husband and wife die as a result of injuries sustained in the same motor vehicle collision, but the husband is killed instantaneously and the wife survives for some time after the husband's death: if the wife is the sole beneficiary of the husband's estate, a right of action in respect of a life assurance policy would immediately enure to the wife, and then on her death to their infant children; but the children would not be entitled to the benefit of s.29, since the "right of action first accrued to a person (not under a disability)", namely the wife.

[7.08] In my view, it is desirable that s.29 be reviewed so as to develop a principle of general application along the following lines:

> **[7.08.01]** The period of limitation in respect of a right of action is to be postponed for the period that a person is subject to a substantial hindrance in pursuing that person's right of action.
>
> **[7.08.02]** A "substantial hindrance" is taken to include:
>
> (a) A situation where the person is incapable of dealing with the person's own affairs, whether by reason of infancy or mental disability, or otherwise;
>
> (b) A situation where the person is physically incapacitated to an extent which makes it impracticable for that person to institute proceedings;

(c.) A situation in which the person is incarcerated (whether in Australia or elsewhere, and whether as a result of conviction, or pending trial, or for any other reason), but only if that person proves that his or her incarceration makes it impracticable for him or her to institute proceedings;

(d.) A situation in which a person is, for a period of not less than six months, either absent from Australia or located in a remote part of Australia, or at sea, provided that the person shows (the onus of proof being on him or her to show) that:

(i.) He or she was unaware of (and could not, with reasonable diligence, have become aware of) the right of action before leaving Australia, or removing to remote parts of Australia, or going to sea; and

(ii.) Those circumstances either prevented the person from becoming aware of the right of action, or made it impracticable for the person to commence proceedings.

(d.) Any other circumstances where the plaintiff proves (the onus of proof being on the plaintiff) that circumstances beyond the plaintiff's control either prevented the plaintiff's becoming aware (or having a reasonable opportunity to become aware) of the plaintiff's right of action, or made it impracticable for the plaintiff to institute proceedings.

[7.08.03] In the absence of other circumstances of substantial hindrance, a plaintiff's lack of financial capacity shall not be taken as constituting a circumstance of substantial hindrance, or as having the effect that it is impracticable for the plaintiff to institute proceedings, unless the plaintiff's financial incapacity is a result of the defendant's conduct which is the subject of the plaintiff's right of action.

[7.08.04] Where the person who would otherwise be entitled to take the benefit of these provisions is not the first person to whom a right of action accrued, the benefit of these provisions is not available to that person unless that person shows (the onus of proof being on him or her) that it is not the case that, since the right of action first accrued, a period of time equivalent to the relevant limitation period has elapsed (whether continuously or with interruptions) during which a person to whom the right of action then enured was not entitled to the benefit of these provisions.

8. EXTENSIONS OF TIME IN PERSONAL INJURIES ACTIONS

[8.01] In my professional experience ss.30, 31 and 32 of the *Limitation of Actions Act* - whilst serving a useful and beneficial purpose - have proved to be much too complex, and too arbitrary in their operation.

[8.02] The case of *Dwan v. Farquhar*, [1988] 1 Qd.R. 234, is a good example. Mr. Dwan contracted AIDS, allegedly as a result of a blood transfusion. He sought to recover damages from the hospital, medical practitioners, and Blood Bank. He applied for an extension of time, and failed because he was unable to prove (on the interlocutory application for an extension of time) the defendants' negligence. Of course, this was not the trial, and Mr. Dwan did not have the benefit of discovery or answers to interrogatories in order to prove his case. However, the Full Court held that, to obtain leave to proceed under s.31, he had to prove that there was evidence supporting his cause of action. I appeared in the matter in the High Court, to resist (on behalf of the Blood Bank) Mr. Dwan's application for special leave to appeal: he failed.

[8.03] In my view, the need for provisions such as ss.30, 31 and 32 will largely disappear if the other recommendations which I have made are adopted. It might be thought beneficial, however, to retain something along the lines of the present ss.30 to 32, as a "safety net" to cover cases of particular hardship.

[8.04] If that is to happen, I would urge that these sections should be revised to make them more simple, both in their language and in their operation.

[8.05] In the first place, I find it difficult to see why a plaintiff should be expected to prove that he or she has a right of action on the hearing of an interlocutory application for leave to proceed. If the plaintiff does not have a right of action, he or she will lose at trial. It is unreasonable to expect the plaintiff to prove his or her case twice - once on the interlocutory application, and a second time at trial. It is particularly unreasonable to expect the plaintiff to prove his or her case on an interlocutory application, without the benefit of other interlocutory steps (such as discovery or disclosure of documents and interrogation).

[8.06] Secondly, the language of the provisions is unnecessarily convoluted. For example, it is not immediately apparent why s.31(1) refers to "actions for damages for negligence, trespass, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of a contract or such provision) where the damages claimed by the plaintiff for the negligence, trespass, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person or damages in respect of injury resulting from the death of any person". Why could it not read, simply, "actions for damages consisting of or including damages in respect of personal injuries to or the debt of any person" ?

[8.07] Thirdly, but most fundamentally, it seems to me that the principles to which ss.30 to 32 are intended to give effect can be stated much more simply, without complex definitions of what is a "material fact", when a material fact is "of a decisive character", what constitutes "appropriate advice", and so on.

9. MISCELLANEOUS ISSUES

[9.01] One situation which occasionally arises is where there is a claim for a debt or a pecuniary liability, and the plaintiff can postpone the commencement of the limitation period indefinitely (or almost indefinitely) by deliberately failing to take some step which is a contractual pre-condition to the plaintiff's right of action. The most common example is a claim on a guarantee, where notice to the guarantor of the principal obligee's default, or demand upon the guarantor, is a pre-condition to the creditor's right of action against the guarantor. The creditor can refrain from giving notice to the guarantor of the principal obligee's default (even if the guarantor is, for example, a director of the principal obligee), with the result that the right of action against the guarantor is effectively postponed. In my view, it should be provided that, subject to the other provisions of the Act, a right of action is taken to accrue at the time when a plaintiff is entitled to institute proceedings against a defendant, whether or nor that entitlement is subject to some step on the part of the plaintiff which is in the discretion of the plaintiff.

[9.02] Apart from the mechanisms to circumvent the operation of the *Limitation of Actions Act* which I have already canvassed, there are some recognised exceptions which have largely been developed through case-law. It is, in my view, desirable that these should be codified and expressed in the Act. One example which comes to mind is the principle that a limitation period may be "waived" by the defendant, or that the defendant may be "estopped" from relying upon a limitation period. One particular form of "waiver" or "estoppel" is where the defendant elects not to plead a defence based on

a statute of limitations.

[9.03] As part of the process of codification, it would also be desirable, in my view, to incorporate in a single enactment limitation periods which are presently prescribed in a variety of enactments, regarding particular statutory causes of action, or regarding action against particular defendants or classes of defendants (such as public authorities). In this category, I would include statutory provisions which, whilst not strictly constituting statutory limitations of actions, operate in a similar way by requiring that notice of a claim or possible claim be provided to the proposed defendant (or to some other authority) within a limited period of time. It would be desirable if all legislative provisions which govern the time within which proceedings may be instituted, or which contain time limits relative to the institution of proceedings, were accessible in a single item of legislation.

[9.04] Finally, although I do not know whether this falls within the scope of the Law Reform Commission's current reference, it seems to me that it would be desirable to give some consideration to procedural problems in respect of limitation issues. The major problem is that, save where the plaintiff applies for an extension of time under ss.30 to 32 of the present legislation, limitation points usually fall to be determined at trial, along with all other issues in the action. Very occasionally, it is possible for a defendant to succeed on an application to have the plaintiff's claim struck-out because it is clearly statute-barred: see, for example, *Gillespie v. Elliott,* [1987] 2 Qd.R. 509. However, in *Wardley Australia Ltd. v. Western Australia,* (1992) 175 C.L.R. 514, the High Court indicated that proceedings should be summarily terminated only in the very

clearest of cases. What this means is that the intended object of limitations statues - which is to prevent the litigation of stale claims - is not achieved: the parties go to trial on all of the issues which have been raised (including issues of fact and law relevant to the substantive merits of the plaintiff's case), so that the defendant is compelled to exchange pleadings, make discovery, answer interrogatories, prepare for trial, and call evidence on the real merits of the case, even though it is statute-barred. Obviously, this can cause great expense and inconvenience to defendants; but nor does it serve any useful purpose for a plaintiff who conducts a case to trial, only to have the trial judge determine that the claim is statute-barred. In my view, consideration should be given to procedural mechanisms which allow limitation points to be determined promptly and inexpensively, without the parties being put to the cost and inconvenience of a "full blown" trial on all of the issues in the action.