By James Plunkett

When does the LIMITATION PERIOD COMMENCE in PERSONAL INJURY ACTIONS?

Every Australian jurisdiction has strict statutory limitation periods governing the time in which an action for damages arising out of personal injury must be commenced.

The time-limits that apply to personal injury claims vary from jurisdiction to jurisdiction, and depend on the type of personal injury claim (different time-limits may apply for motor vehicle accidents, workplace injuries, dust diseases, etc).[1] Rather than seek to catalogue the limitation period for every possible type of personal injury claim, this article discusses the most common tests governing the point at which a limitation period *commences*. These are when the action 'accrues', when the action becomes 'discoverable' and the point at which the 'act or omission that caused the injury' occurred.

WHEN DOES A CAUSE OF ACTION ACCRUE?

The limitation period for the majority of personal injury actions in Australia will commence when the action 'accrues'. In the absence of a statutory definition,[2] the general rule is that a cause of action accrues at 'the earliest point at which an action could be brought.'[3] In a personal injury action this will, by definition, be the point at which the plaintiff suffers damage. This proposition raises two separate problems:

1. *What* is 'damage', in particular, what is the minimum actionable damage; and
2. *When* is the damage suffered?

Minimum actionable damage

For many years there has been 'uncertainty surround[ing] what is the minimum damage that the law will recognise for the purpose of a claim. For example, will a person who is exposed to radiation and thereby has an increased chance of developing cancer in the future be treated as having suffered damage?'[4] In the *British Coal and Respiratory Litigation*,[5] for example, 'actionable personal injury' was defined as 'a condition of the body that represented more than a passing and minimal discomfort'. The damage must also be real rather than nominal;[6] that is, something 'beyond what can be regarded as negligible'.[7]

For example, in *Battaglia v James Hardy* [sic] *and Co Pty Ltd*,[8] the plaintiff developed pleural plaques as a result of exposure to asbestos. The pleural plaques were symptomless and did no more than signal the presence of asbestos fibres in the lungs, which may cause life-threatening or fatal diseases in the future, such as asbestosis or mesothelioma. The court held that no compensable damage had been suffered.

Importantly, *Battaglia* applied only to the *physical* damage (or lack thereof) as a result of exposure to asbestos. In *Maddalena v CSR*,[9] the plaintiff developed pleural plaques as a result of past asbestos exposure. He subsequently developed a fear of developing mesothelioma that amounted to a recognised psychiatric illness. The court held that, in circumstances whereby a plaintiff develops a recognised psychiatric injury, such as depression, as a result of developing pleural plaques, compensable damage may be established.

In relation to actionable psychiatric damage in general, Gleeson CJ commented in *Tame v NSW*[10] that 'save in exceptional circumstances, a person is not liable, in negligence, for being a cause of distress, alarm fear, anxiety, annoyance, or despondency, without any resulting recognised psychiatric injury'.[11]

When is damage suffered?

When damage is suffered is a question of fact, and will generally occur at the same time as the act or omission that is said to have caused it. However, in the case of latent diseases, where the act or omission that causes the damage and the plaintiff suffering the damage are not concurrent, the plaintiff's cause of action cannot be said to accrue until the *actionable* damage has been suffered, even if there is a substantial time gap between the negligent act or omission and when the damage is suffered. (For example, asbestos-related diseases such as asbestosis, mesothelioma or lung cancer may be unsypmtomatic for 40 or more years following exposure.)

It must also be noted that once actionable damage has been suffered, the limitation period extends for as long as the damage continues. Further, any additional damage or an aggravation of the initial damage, provided it arises out of the same breach of the defendant, constitutes part of the same cause of action.[12]

Problems with the accrual rule

Although the accrual rule is largely unproblematic for the majority of personal injury actions, it is subject to one major criticism: the plaintiff does not have to be aware, either subjectively or objectively, of the damage that they have suffered and therefore of the existence of a cause of action. This was affirmed in *Cartledge v E Jopling & Sons Ltd*,[13]

where the court held, albeit reluctantly,[14] that the plaintiffs' reasonable unawareness that they had suffered any damage did not prevent the limitation period from commencing: 'it is impossible to hold that a man who has no knowledge of the secret onset of pneumoconiosis ... cannot have suffered any actionable harm'.[15]

The perceived unfairness of a cause of action potentially expiring before the potential plaintiff could reasonably know of its existence led to the Ipp Committee recommending that the accrual rule be replaced with a 'discoverability' rule, whereby the limitation period did not commence until the cause of action was 'discoverable' by the plaintiff.[16]

WHEN IS A CAUSE OF ACTION DISCOVERABLE?

To some extent, the discoverability rule has been adopted by Victoria,[17] NSW,[18] Tasmania,[19] ACT[20] and, indirectly, Western Australia.[21] In these jurisdictions, the point at which a cause of action becomes discoverable is defined in the relevant legislation. Depending on the jurisdiction, a cause of action will arise when the plaintiff knows, or ought to know, some or all of the following:

(a) the death or personal injury concerned has occurred;
(b) the death or personal injury was caused by the defendant;
(c) the defendant was at fault in causing the death or personal injury; and
(d) the personal injury was sufficiently serious to justify the bringing of a cause of action.

The discoverability rule has been discussed in numerous cases since its introduction.[22] However, perhaps its most detailed consideration was in the recent Victorian Supreme Court case, *Spandideas v Vellar*,[23] which required the court to address the following issues:

1. What is meant by the word 'fault';
2. What is the plaintiff deemed to know or ought to know; and
3. At what point ought the plaintiff be aware of the defendant's 'fault'.

The meaning of 'fault'

In *Spandideas*, the court determined that 'the meaning of the word "fault" is plain and unambiguous ... in its context of ... the [relevant sections of the *Limitation of Actions Act*]. Its usual everyday meaning connotes culpability or blameworthiness.'[24] The court further commented:

> 'I do not consider that ... the plaintiff form a legal judgment as to the "fault" of a defendant in the tortious sense of the word. Rather, I consider that Parliament intended that the period of limitation is to commence when the plaintiff knew (or ought to have known), inter alia, of the fact that the death or personal injury, the subject of the claim, was caused by an act of a person, which should not have been carried out, or which should have been done differently, or by an omission by another person to carry out an act, which should have been done. In such a case, should a plaintiff have formed such a view, it may not be necessary for the plaintiff to have expressly entertained any notion of "fault".'[25]

The requirement of a plaintiff's reasonable knowledge of fault on the part of the defendant is present only in the Victorian and NSW legislation.

The meaning of knowledge

A strict reading of the legislation would suggest that a cause of action does not become discoverable until the plaintiff *knew* the injury was caused by the defendant (and, in Victoria and NSW, that the defendant was at fault). However, such a literal translation must be a misnomer when considering that a court may find for the plaintiff where it is satisfied merely of the necessary elements of the cause of action *on the balance of probabilities*.

Accordingly, in *Spandideas* the court commented that it is sufficient if the plaintiff has 'knowledge that would, objectively, justify a conclusion that the defendant *may* have been culpably responsible for that injury' [emphasis added].[26]

What the plaintiff 'ought' to know

There is presently some judicial disagreement as to the extent of the subjective attributes of the plaintiff that may be considered when determining what the particular plaintiff ought to have known.

In NSW and Victoria, the preferred approach appears to be to take into account the particular circumstances of the plaintiff when determining what the reasonable plaintiff ought to know.[27] It was commented in *Spandideas*:[28]

> 'It would be entirely artificial, and indeed well nigh intellectually impossible, to assess what a person "ought to know", without taking into account such subjective factors as the age, characteristics, the education, and physical and psychological state of the plaintiff.'

Tasmania, however, being the only other state to require an examination of what the plaintiff ought to have known, would appear to have adopted a more restrictive approach. In particular, it was commented, in the recent decision of *Kay v Hoffman*,[29] (among other things) that 'characteristics of a plaintiff which only go to his or her inclination to acquire relevant knowledge, will not be taken into account'.

WHEN DOES AN ACT OR OMISSION OCCUR?

Generally, when an act or omission occurs will be obvious and will refer to the conduct of which the plaintiff complains. However, difficulties may arise in cases involving omissions or continuing acts of negligence.[30] For example, *when*, exactly, does an omission occur? Although many will object to such a question which, *prima facie*, seems illogical, for the purposes of the inquiry, an omission is generally deemed to have occurred at the point when some action should have been taken.[31] In the case of injuries occurring as a result of a series of acts (for example, where the plaintiff's condition gradually deteriorates over time as a result of the activities they perform each day[32]) the series of acts will generally be severable and a separate limitation period will apply to each.[33]

Unfortunately, aside from the abovementioned, there is relatively little other guidance in relation to when an act or omission occurs. However, as a general guide, the plaintiff will usually be bound by the particulars of negligence pleaded in the statement of claim, and when they can be said to have occurred.

CONCLUSION

Limitation periods generally begin at one of three points: when the action accrues, when the action becomes discoverable, or when the act or omission alleged to have caused the damage occurs. However, because the limitation statutes vary significantly from jurisdiction to jurisdiction and often depend on the type of personal injury claim, particular attention should be paid to the jurisdiction's legislation, as identifying the point at which a limitation period commences is often critical to the bringing of a claim. ■

Notes: **1** For those who are interested, a comprehensive table can be found in Hanford, *Limitation of Actions: The Laws of Australia* (2nd ed, 2006). **2** See, for example, *Limitation of Actions Act 1958* (Vic) s5(1A), or s55(1) of the *Limitation Act* 2005 (WA). **3** *Reeves v Butcher* [1891] 2 QB 509, 511, Lindley J. **4** Luntz & Hambly, *Torts* (5th ed, 2006), 342 citing J Stapleton, *The Gist of Negligence: Parts I & II* (1988) 104 LQR 143. **5** (Unreported, Queens Bench Division, Turner J, 23 January 1998) [136]. **6** Hanford, *Limitation of Actions: The Laws of Australia* (2nd ed, 2006), [810]. **7** *Backhouse v Banomi* (1861) 9 HCL 503. **8** (Unreported, Vincent J, Supreme Court of Victoria, 12 March 1987). **9** [2006] HCA 1. **10** (2002) 211 CLR 317. **11** *Tame v NSW*, [7]. **12** *Re Donald Edgerton Jobbins v Capel Court Corporation Ltd* [1989] 25 FCR 226; *Hawkins v Clayton* (1986) 5 NSWLR 109, 124 (Glass JA). **13** [1963] AC 758, (*Cartledge*). **14** Colbran, Reinhardt, Spender, Jackson & Douglas, *Civil Procedure Commentary and Materials* (3rd ed, 2005), 302. **15** *Cartledge*, 778 (Lord Pearce). **16** *Review of the Law of Negligence Final Report*, Commonwealth of Australia, Rec 24. **17** *Limitation of Actions Act 1958* (Vic) s27F. **18** *Limitation Act 1969* (NSW) s50D. **19** *Limitation Act 1974* (Tas) s5A. **20** *Limitation Act 1985* (ACT) s16B. **21** *Limitation Act 2005* (WA) s55(1): which defines 'accrue' similarly to other jurisdictions' definition of 'discoverable'. **22** For example, *Delai v Western District Health* [2009] VSC 151; *Kaye v Hoffman* [2008] TASSC 2; *Casey v Alcock* [2009] ACTCA 1. **23** [2008] VSC 198 ('*Spandideas*'). **24** *Spandideas*, [32]. **25** *Spandideas*, [35]. **26** *Spandideas*, [27]. **27** *Telstra Corporation v Rea* [2002] NSWCA 49, *Commonwealth of Australia v Smith* [2005] NSWCA 478. **28** *Spandideas*, [65] **29** [2007] TASSC 31, [35] (Master Holt). **30** New Zealand Law Commission, *Limitation Defences in Civil Proceedings* (Report No. 6 1988) ('New Zealand Report'), [169]-[170]. **31** *Midland Bank Trust Co Ltd v Heft, Stubbs & Kemp* [1979] Ch 384. **32** *Turner v Roche Mining (MT)* [2006] QDC 094. **33** New Zealand Report, [170].

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WINDMILLS OF MY MIND

Rogue economist and plain-speaking judges

By Andrew Stone

One of my favourite books of recent times has been *Freakonomics: A Rogue Economist Explores the Hidden Side of Everything (2005)* by Steven Levitt and Stephen Dubner. Levitt, a well-regarded but self-described rogue economist, applies economic theories to analyse social phenomenon: why real estate agents sell their own homes for more; the economic hierarchies of gangs and why parents from lower socio-economic groups give their children wacky names. The book has topped the *New York Times* bestseller list.

One of Levitt's most controversial theories is his attribution of a drop in the crime rate in major US cities in the 1990s to the legalisation of abortion following *Roe v Wade* in 1973. Levitt hypothesises that the greater availability of abortion means fewer children being born to poor single mothers. Over time, this leads to fewer juvenile delinquents, fewer adult criminals and thus less crime.

In propounding this theory, Levitt was critical of John Lott, an academic who contends that the carrying of concealed weapons leads to a drop in crime rates. Lott has published his own research to support his argument. Levitt was critical of Lott's research, observing that other scholars had been unable to replicate Lott's results.

In passing, I disclose that while I am a fan of having a bill of rights, I am no fan of including a right to keep and bear arms. Far too many Americans have found that the second amendment impinges upon their right not to get shot.

Lott sued Levitt for defamation in the District Court in Illinois. An Illinois judge dismissed the case, finding no defamatory imputation.

Lott subsequently sought to revive his claim, arguing that Virginia law should have been applied, despite his prior acceptance and reliance on the Illinois jurisdiction. The District Court refused to revive the case, finding that Lott had waived his choice of law argument. Lott appealed. The Seventh Circuit of United States Court of Appeals dismissed Lott's appeal. Writing for the court, Judge Evans concluded:

> 'Lott is not entitled to get a free peek at how his dispute will shake out under Illinois law and, when things don't go his way, ask for a mulligan under the laws of a differing jurisdiction. In law (actually in love and most everything else in life), timing is often everything. The time for Lott to ask for the application of Virginia law has passed – the train has left the station.'

A quick search on Austlii shows that the mulligan (for the non-golfers it means to take a shot over again without penalty) has yet to enter the Australian legal lexicon. The readership for judgments from Australian courts might expand if Judge Evans' plainspoken style was more widely adopted. ■

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