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A plaintiff lawyer's guide to gambling on the future:

the looming debacle of reduced time bars for injured babies and children

In the annals of educational law, the decision in *Bubner v Stokes*[1] was a standout. In *Bubner v Stokes*, an eleven-year-old received a serious eye injury in a school classroom, during lessons, that was inflicted upon him by a nine-year-old fellow pupil wielding one of those old, steel-nibbed, dip-in-the-inkwell pens, which have long since disappeared into the realms of educational mythology.

What could the de-eyed boy do, in order to gain compensation? Was it any good calling the police? No. The perpetrator was only nine years old. He was therefore out of the reach of the South Australian cut-off age for ascribing criminal responsibility.

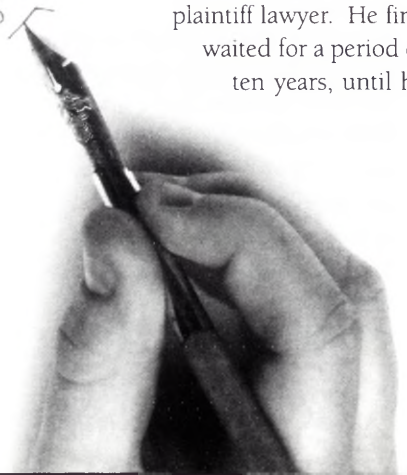
Could the educational authority, the South Australian Department of Education, be sued in vicarious liability for the negligence of its servant teacher who was on the spot in the classroom at the time of the eye impalement? No. The teacher had not been negligent. This was one of those 'out-of-the-blue' incidents, later characterised by the High Court in *Geyer v Downs*[2], as happening 'in the wink of an eye' (no pun intended) and where there was no observable lead up, no obvious foreseeability, and no reasonable preventability. Any additional supervision was not likely to have made much difference at all, given the suddenness of the attack.

What about the assailant's parents? Could they be sued in negligence? Obviously not, as they had not encouraged or incited their child to perform the assault. Moreover, they had completely relinquished their own authority, handing him over to the responsibility of the school during the school day. This is what they were required to do, under the statutory prescriptions of compulsory education legislation.

This leaves only one target for possible litigation, the nine-year-old perpetrator himself, as potential defendant. Would such an action have been worth the powder and shot? If the plaintiff had won the claim, who would have paid the damages and costs? At this age, the assailant was a 'man of straw' (or, more correctly, a 'boy of straw'). He had no status as a rich heir, and had no accessible trust fund of his own. Any victory would have been a Pyrrhic one.

However, the *Bubner v Stokes* decision confirmed there was one remaining very powerful plaintiff lawyer strategy still capable of being a weapon employed against child tortfeasors. It was possible and strategically advantageous to wait until the child perpetrator had acquired adult status, and some attachable assets, and was then worth suing.

That scenario has been legally available under 'Limitation of Actions' legislation in all states. Injured infant plaintiffs were given the option of waiting until the other child had reached adulthood before the time limitation clock of three or six years (depending on the jurisdiction) had begun ticking. In Bubner's case, that is what the eleven-year-old assault victim did, on advice from his plaintiff lawyer. He first waited for a period of ten years, until he



himself had acquired adult status (the keys of the door used to be at 21, rather than the present age of maturity set at 18). He further held his fire for almost another three years, within the allowable South Australian time limit of three years after adulthood. He then dramatically filed and served pleadings on the defendant, almost 13 years after the event. Presumably this was much to the shock and dismay of the now 22-year-old former assailant, who had since acquired considerable assets and by now constituted a worthy litigation target.

Importantly, the statutory option of strategically delaying the commencement of actions on behalf of persons with a 'disability' (such as age) ensured reasonable confidence that injuries had fully stabilised and all their sequelae had manifested themselves. Filing pleadings could be postponed until it had become tolerably clear what levels of permanent physical and emotional damage had eventuated, what potential achievement had been lost, what opportunities had now been jeopardised, what level of disability could be confidently expected to be permanent and ongoing, and what future medical, pharmaceutical, hospital, travel to treatment, equipment, and other recurring expenditures had to be budgeted for.

A reduction in the time-bar limitations for babies' and childrens' injuries is now looming large on the political horizon. It has been suggested in some jurisdictions, and implemented in others, that people under a legal disability will lose their right to have their limitation period suspended in certain circumstances. The Queensland Government is proposing to require the parents or legal guardians of injured children to notify the defendant within six years of when they knew or ought to have known that their child's injury occurred and that it was caused by the defendant's negligence.[3]

The panel which was appointed last year to review the law of negligence recommended that minors who are in the custody of parents or guardians should not have the benefit of having their limitation period suspended until they are 18 years of age.[4] The New South Wales Government has since amended their limitation legislation in line with the panel's recommendation.[5] All of these changes have been made with the confident assertion that surely parents ought to know after six years whether they want to sue on behalf of their child or not.

And what if a six-year-old child's parents neglect to sue and the time bar clicks into place? Will that six-year-old child then later be able, at the age of nine or perhaps twelve, to sue his or her own parents for the loss of a chance, assuming that at these later ages he or she is now mature enough to recognise negligence, and provided that he or she can find a substitute litigation guardian to do the deed against mum or dad?

Politicians, with their short-range perspectives, usually eying only the next round of voting, and with their penchant for the quick fix, have not thought through the hugely unfair disadvantages they would be inflicting upon injured babies and children, giving the pressure groups in the medical occupation the sop of a shortened limitation period.

It seems fair to say that many politicians appear to have largely capitulated under the pressures directed at them (and indirectly at their prospects of future re-election and consequent opulent superannuation) by the well-oiled publicity machines of the insurance companies, and by some of the self-centred, complaining, mercenary-minded medicos. Various plans for tort law reform are being bandied about at various government levels. Changes have already been implemented in some states, often with little debate, and accompanied by great urgency, inadequate consultation, and unjustifiable motivation.

In the background, the constant bleating of numerous medical practitioners assails politicians' ears, lamenting the high professional indemnity insurance premiums which they have to pay in order to obtain litigation assistance, possibly 21 years after any incompetent and negligent acts and omissions by them had damaged babies under their paid care. If any medico tries telling you how badly off the so-called medical 'profession' has now become, with the high cost of indemnity insurance cover, ask him or her if any improvement can confidently be expected in the year 2003 based on the previous official annual statistics of over 14,000 known instances of deaths and serious misadventures in Australia, all involving medical mistakes of one kind or another.

Anyone else who negligently injured or maimed a child has had to wait for years until the child's injuries have ▶

stabilised some of the wailing medicos have actually conceded. However, they do not see reason for them to wait that long to see the whirlwind of possible negligence towards babies and children. The provisions in the Queensland Bill which provide that children must give notice of a claim within six years only apply to cases of medical treatment. The negligence of the medical profession will be treated differently to the negligence of any other group in this regard.

In the present environment of legislative reform, when constructing a statement of loss and damage for an injured or maimed baby or child and suing through its litigation guardian, the plaintiff lawyer must now become a crystal ball gazer, employing masses of speculation in a by-guess or by-God pretence at rational decision-making.

Assessing general damages for pain and suffering has never been an exact science, even after an extended period of years with well established injuries that appear to have plateaued. To fix on a reasonably reliable and valid assessment of permanent disability, in the case of an immature human body which is still developing and growing and continually changing, becomes farcical non-scientific mumbo-jumbo if the process is to be rushed by politically expedient reduced limitation periods.

And what of assessments for future economic loss and the consideration of foregone opportunities, in the case of young children for whom the shortened limitation period door is closing? Evaluations of intelligence in all its various forms, together with assessments of affective qualities and a whole range of other psycho-social personality variables have never been regarded as highly valid in the case of young children. The data is responsibly accepted as merely indicative, in a very broad sense. Yet plaintiff lawyers are now likely to be asked to assess, once and for all, the damages payable to an injured child who may still be little more than a tabula rasa, with the cumulative developmental interplay of genotype, phenotype, culture and environment not having yet seriously begun to point the signs of future competencies, skills, needs, interests, likely successes, ambitions and opportunities.

In the case of a catastrophically injured baby or child (the stuff of nightmares to obstetricians and medical insurers) it is possible to make some intelligent calculation of major 24-hour needs over a destroyed lifetime. But how can realistic figures possibly be computed for future economic losses and for the loss of amenities of life if there is a rush to placate the obstetricians and other members of the medical occupation by a rush to close the time-bar gates before all the data are reliably in?

The proposed reduction in the time limitation period for babies and young children is not only both inefficient and ineffective, but also grossly unjust and ill-considered. The statement of loss and damage which previously sought to provide the basis of reasonable compensatory justice for injured children, by giving adequate time for the gathering and considering of pre-trial evidence, may now just as logically be replaced by a roulette wheel. (But the whining obstetricians would probably then complain that the odds were still unfairly stacked against them.)

Who can possibly foretell, for the purposes of a statement of loss and damage, what an injured baby, whose future economic loss might have to be assessed at the age of six years, could otherwise have earned? Would the child have aspired to be a beachcomber, an astronaut, an obstetrician perhaps, or even (dare I suggest it), an insurance assessor?

If babies and children are to be given only six years before a time bar slams down, I confidently predict the forthcoming development of a new kind of consultant expert witness to prepare medico-legal reports. The new experts will need to be clairvoyants, with qualifications in tarot card reading.

ENDNOTES:

1 [1952] SASR 1.

2 [1977] 138 CLR 142.

3 Schedule 2, Consultation Draft of the Civil Liability Bill 2002, accessed at http://www.justice.qld.gov.au/ourlaws/bills/CivilLiability.pdf pn 100/03/03.

4 Commonwealth of Australia, 'Review of the Law of Negligence: Final Report', September 2002, Recommendation 25).

5 Schedule 4.6 of the *Civil Liability Amendment (Personal Responsibility) Act* 2002.