DAMAGES AND LIMITATION ISSUES IN ASBESTOS CASES

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Obtaining compensation for asbestos-related diseases has been a long and complex process. But in recent cases, important obstacles to establishing the liability of mine operators have been surmounted There are, however, two important issues which remain. First, how does the death of the plaintiff during the litigation process affect the amount of damages recoverable? Secondly, what is the limitation period for plaintiffs suffering latent injuries? The author concludes that recent legislative attempts to address these issues in Western Australia have proved only partly successful.

> [I]n a year or two [Midalco Pty Ltd] will produce the richest and most lethal crop of cases of asbestosis in the world's literature.[1]

Three important cases decided in 1988 marked a turning point in the long struggle by workers who have been afflicted by asbestos-related diseases to recover compensation for the grievous harm they have suffered. In *Simpson v Midalco Pty Ltd*[2] ("*Simpson*"), the first of the three cases to be heard, the

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1. Letter from Dr Eric Saint to Dr Cook of the Public Health Department of Western Australia (6 June 1948), following a visit to the Wittenoom mine. Extracted from *Barrow v CSR Ltd and Midalco Pty Ltd; Heys v Same* infra n 7, 33.
2. (Unreported) Supreme Court of Western Australia 20 November 1987 no 1814 of 1985 (Brinsden J).

trial judge denied liability,[3] but the Full Court of Western Australia was prepared to grant a retrial.[4] Then in *Watson v State of Western Australia*[5] ("*Watson*") a Western Australian court awarded damages for an asbestos-related disease for the first time, and an appeal to the Full Court was dismissed.[6] Finally, in *Barrow v CSR Ltd and Midalco Pty Ltd; Heys v Same*[7] ("*Barrow and Heys*") Justice Rowland, in an exhaustive review of all the issues, confirmed the liability of the operators of the Wittenoom mine for causing asbestos-related diseases to their workers.[8]

Any obstacles that might be presented by the need to establish a duty of care, or a causal relationship, or the foreseeability of harm have now been surmounted.[9] It is significant that in a subsequent action against the defendants in the latter case,[10] liability was admitted. This article, therefore, concentrates on the issues that are now likely to be most important in cases involving asbestos-related diseases and other latent personal injury cases - the effect of death on damages, and limitation of actions.

I. DAMAGES

The problem which arises all too frequently in cases involving terminal diseases such as asbestosis or mesothelioma is that the plaintiffs may not survive long enough to sue in person, or if they do, they may not survive until the conclusion of the proceedings.[11]

3. The liability of the same defendants had earlier been denied in *Joosten v Midalco Pty Ltd* (unreported) Supreme Court of Western Australia 9 October 1979 no 1052 of 1979 (Wallace J).
4. (Unreported) Supreme Court of Western Australia 7 December 1988, Appeal no 110 of 1987 (Wallace, Franklyn and Walsh JJ).
5. (Unreported) Supreme Court of Western Australia 27 May 1988, no 2697 of 1987 (Pidgeon J).
6. *Western Australia v Watson* [1990] WAR 248 (Malcolm CJ, Brinsden and Seaman JJ).
7. (Unreported) Supreme Court of Western Australia 4 August 1988 nos 1148 and 1161 of 1987.
8. Damages were awarded to Barrow and to the estate and dependants of Heys, who died during the trial.
9. On these issues, see D R Williams "Latent Injuries: Foreseeability and Causation" Law Society of Western Australia Summer School, Paper No 15A, Perth (WA) February 1989.
10. *Neal v CSR Ltd and Midalco Pty Ltd* (unreported) Supreme Court of Western Australia 31 May 1990 no 3192 of 1989 (Ipp J); on appeal, Full Court 3 October 1990, Appeal no 79 of 1990 (Malcolm CJ, Wallace and Walsh JJ).
11. For a recent discussion, see L Formato "The Dying Plaintiff in an Action for Personal Injuries" Law Society of Western Australia Summer School, Paper No 7, Perth (WA) February 1991.

A. The Measure of Damages for a Living Plaintiff

1. Compensatory Damages

Where the plaintiff has survived until judgment, damages are assessed according to the normal principles governing damages for personal injury. In cases involving asbestos-related diseases, *Watson*, *Barrow and Heys* and *Neal v CSR Ltd and Midalco Pty Ltd* ("*Neal*") now provide examples of the assessment process at work.[12]

2. Exemplary Damages

In Australia exemplary damages are awarded on a much broader basis than in England.[13] Though they have been traditionally associated with wilful wrongdoing,[14] recent cases suggest that they are also available in negligence actions, at least in certain special circumstances.[15] The first negligence case in which such an award was made was an asbestos case, *Midalco Pty Ltd v Rabenalt*[16] ("*Rabenalt*"). A jury award of $250 000 exemplary damages (on top of $426 000 compensatory damages) was confirmed by the Victorian Full Court.

12. For examples of the assessment of damages in asbestos cases from other jurisdictions, see *Andrews v S C Lohse & Co* (1986) Aust Torts Reports ¶ 80-043 (Qld); *Kelly v Dowell Australia Ltd* (1988) Aust Torts Reports ¶ 80-184 (Vic); *Simon Engineering (Australia) Pty Ltd v Brieger* (unreported) New South Wales Court of Appeal 6 September 1990 no 40 378 of 1990; *Smith v Central Asbestos Co Ltd* [1972] 1 QB 244. For a recent Western Australian example of assessment in a case involving another kind of dust-related disease, see *Clarke v Chandler Clay Pty Ltd* (1984) Aust Torts Reports ¶ 80-631.
13. This has been so ever since the High Court in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 refused to adopt the limitations on the scope of exemplary damages outlined by Lord Devlin in the House of Lords in *Rookes v Barnard* [1964] AC 1129. The subsequent Privy Council decision in *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221 confirmed that English and Australian law would henceforth follow different paths.
14. In 1961, such damages could apply "only where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights": H McGregor *Mayne and McGregor on Damages* 12th edn (London: Sweet & Maxwell, 1961) 196. This statement was quoted with approval by McTiernan J in *Uren v John Fairfax & Sons Pty Ltd* supra n 13, 122.
15. See generally P R Handford "Aggravated and Exemplary Damages for Personal Injuries" Law Society of Western Australia Summer School, Paper No 6, Perth (WA) February 1991.
16. [1989] VR 461.

In this case the trial judge directed the jury that reckless conduct on the part of the defendant would justify an award of exemplary damages. This followed a concession by counsel for the defendant that exemplary damages could be awarded in an action for personal injury caused by negligence where the defendant was found to be reckless. This concession was based, it would seem, on the decision in *Lamb v Cotogno*,[17] in which the High Court held that exemplary damages were not only punitive but also acted as a deterrent to revenge or self-help, and that the absence of actual malice did not rule out exemplary damages. The intent or recklessness necessary to justify an award of exemplary damages might be found in contumelious behaviour which fell short of being malicious or was not aptly described as malicious. *Lamb v Cotogno* was a case of trespass, but in a case of recklessly caused personal injury it is difficult to make the justifiability of awarding exemplary damages dependent upon the form of the action.

In *Rabenalt*, on appeal to the Full Court, the defendant's new counsel accepted that, due to the concession made by his predecessor, it was not open to him to question the correctness of the judge's direction that exemplary damages could be awarded in such circumstances. This issue was therefore not argued, and the exemplary damages award was not disturbed. The Full Court, however, declined to endorse the trial judge's recklessness test. Justice Fullagar went further, stating that the use of the term "reckless" in a case involving personal injury caused by negligence was out of place. In his view, the recklessness of which the High Court was speaking in *Lamb v Cotogno* was a carelessness of consequences which had the additional characteristic of behaviour in a humiliating manner and a wanton disregard of the plaintiff's welfare.[18] If exemplary damages were available in a negligence action for personal injuries (which the court was not deciding), this would seem to be a suitable case for such an award.[19]

In *Barrow and Heys* the plaintiffs founded a claim for exemplary damages on *Lamb v Cotogno*, but Justice Rowland found it unnecessary to rule on the circumstances in which such damages could be awarded, since the defendant's conduct did not fall within any of the limits suggested by counsel.[20] He said that in the circumstances of the case an award of exemplary

17. (1987) 164 CLR 1.
18. Supra n 16, 477.
19. Ibid, 478.
20. Supra n 7, 221.

damages could not now fulfil its intended function of punishing the defendants or deterring others.[21] It seems that, despite the *Rabenalt* decision, awards of exemplary damages will not become common form in asbestos cases.[22]

B. Where the Plaintiff has Died Before Issue of the Writ

The death of the plaintiff once meant that his action also died, and even where the plaintiff's death was caused by a tort this gave no right of action to other persons, such as the plaintiff's dependants.[23] However, the rise in fatal accidents consequent on the growth of railways compelled the enactment of legislation giving a right of action to the dependants,[24] and the coming of the motor car made it necessary to provide that a plaintiff's cause of action survived the death of the defendant.[25] This latter enactment also provided that the plaintiff's death did not extinguish the action. Consequently, when a person dies as the result of a tort there are two separate actions which may be brought, one on behalf of the estate and one on behalf of the dependants.

1. The Estate's Claim: Law Reform (Miscellaneous Provisions) Act 1941 (WA) section 4

Section 4(1) of the Western Australian Law Reform (Miscellaneous Provisions) Act 1941 ("Law Reform (Miscellaneous Provisions) Act") provides that all causes of action (except defamation) subsisting against or vested in a person at the time of his death survive against or, as the case may be, for the benefit of that person's estate. Where it is the plaintiff who dies, section 4(2) places limitations on the damages that may be awarded, as follows:

(a) The damages are not to include exemplary damages.[26] (If the object of exemplary damages is to punish the defendant, it seems strange that they are allowed where the defendant dies but not on the death

21. Ibid, 222.
22. It may be noted that in *Neal* (supra n 10) no claim was made for exemplary damages.
23. *Baker v Bolton* (1808) 1 Camp 493; 170 ER 1033.
24. Fatal Accidents Act 1846 (UK), usually called Lord Campbell's Act after its sponsor. In Western Australia, it was adopted by 12 Victoria No 21 (1849), and re-enacted in the Fatal Accidents Act 1959 (WA).
25. Law Reform (Miscellaneous Provisions) Act 1934 (UK); Law Reform (Miscellaneous Provisions) Act 1941 (WA).
26. Law Reform (Miscellaneous Provisions) Act 1941 (WA) s 4(2)(a).

of the plaintiff.[27] Nonetheless, all the Australian statutes follow the English model in this respect.)

(b) Where the death of the deceased has been caused by the act or omission giving rise to the cause of action, the damages are to be calculated without reference to any loss or gain to the deceased's estate consequent on death, except that a sum in respect of funeral expenses may be awarded.[28]

(c) The damages are not to include any damages for pain and suffering, bodily or mental harm or the curtailment of the deceased's expectation of life.[29]

(d) The damages are not to include any damages for the loss of the capacity of the deceased to earn, or for the loss of the deceased's future probable earnings, during the time the deceased would have survived but for the act or omission which gives rise to the cause of action.[30] (This limitation was not added to the Act until 1982, when the High Court first allowed such damages in *Fitch v Hyde-Cates*.[31])

The result of section 4(2) is that apart from special damages and funeral expenses the damages which the estate may recover are confined to economic losses (lost earning capacity, medical expenses and so forth) up to the date of death. This includes gratuitous nursing and other services rendered by third parties.[32]

In *Barrow and Heys*, the plaintiff Heys died during the trial and the Law Reform (Miscellaneous Provisions) Act therefore governed the scope of the damages awarded to his estate.[33] Apart from funeral expenses and special damages, the damages were limited to loss of earning capacity up to the date of death.[34] Counsel for the estate attempted to argue that damages for loss of

27. J G Fleming *Law of Torts* 7th edn (Sydney: Law Book Co, 1987) 639-640.
28. Supra n 26, s 4(2)(c).
29. Ibid, s 4(2)(d). The English statute does not contain an equivalent limitation, though since 1982 loss of expectation of life has been excluded as a separate head of damages in all personal injury actions: Administration of Justice Act 1982 (UK) s 1.
30. Ibid, s 4(2)(e).
31. (1982) 150 CLR 482. A similar limitation was not added to the English Act until the same year: Administration of Justice Act 1982 (UK) s 4(2), replacing Law Reform (Miscellaneous Provisions) Act 1934 (UK) s 1(2)(a).
32. *Harper v Phillips* [1985] WAR 100.
33. Infra Part I.C.
34. The effect of this on the plaintiffs' claims in this case is discussed in detail in Formato supra n 11, 5-7.

amenities could be awarded, since they were not in terms excluded by section 4, supporting this argument by reference to a leading English authority, *H West & Son Ltd v Shephard*,[35] which distinguished between pain and suffering and loss of amenities for the purpose of assessing the damages to be awarded to an unconscious plaintiff.[36] Justice Rowland thought that this decision did not affect the issue before him, and held that loss of amenities was encapsulated within the heads of damage excluded by this paragraph of section 4(2).[37] This decision confirms the accepted understanding of this provision.

2. The Dependant's Claim: Fatal Accidents Act 1959 (WA)

Where a person's death is caused by a wrongful act, neglect or default, and the conduct in question would have entitled the deceased to sue had he or she survived, the Western Australian Fatal Accidents Act 1959 ("Fatal Accidents Act") provides that the defendant is liable to be sued notwithstanding the death of the deceased.[38] The action lies for the benefit of the deceased's dependants. The circle of dependants is defined by the Act,[39] and has been gradually widened since the original legislation was enacted. All claims must be made in the one action,[40] which is normally brought by the deceased's personal representative.[41]

Though the action is independent of any action brought by the estate, it is limited by the requirement that the deceased must have been able to sue had he or she survived. If, therefore, some defence would have been available against the deceased, such as voluntary assumption of risk or the running of a limitation period, the dependants have no right of action.[42] Dependants must

35. [1964] AC 326.
36. There is English authority for the more specific proposition that damages for loss of amenities can be awarded to an estate: *Andrews v Freeborough* [1967] 1 QB 1, although the Court of Appeal in this case indicated that they felt compelled to reach this decision because *H West & Son Ltd v Shephard* was binding on them, and but for that authority would have held that damages for lost amenities did not survive. As noted above, the English statute contains no provision excluding damages for pain and suffering and the like: n 29 supra.
37. Supra n 7, 174.
38. Fatal Accidents Act 1959 (WA) s 4.
39. Ibid, s 6(1) and Sch 2; see also the definitions in s 3.
40. Ibid, s 7(1).
41. Ibid, s 6(1)(b), but see also s 9.
42. Eg, *Burns v Edman* [1970] 2 QB 541 where the deceased, whose profession was burglary, would not have been able to claim damages for lost earning capacity because of the maxim "ex turpi causa non oritur actio".

also be able to show a reasonable expectation of pecuniary benefit.[43] Reflecting on these rules, it is interesting to note that the dependant's action is an exception to the general rule in negligence that plaintiffs have to establish that harm to them was foreseeable. It is enough to establish foreseeability of harm to the deceased.[44]

The Fatal Accidents Act contains little by way of guidance as to the damages recoverable, but soon after the passing of the original Act the courts decided that damages should be restricted to pecuniary losses.[45] This means that the damages which the dependants may recover are restricted to expenses reasonably incurred as a result of the deceased's death, such as medical and funeral expenses incurred by the dependants,[46] and the loss of support through income or otherwise that would have been forthcoming had the deceased survived.

In *Barrow and Heys*, in addition to the claim on behalf of Mr Heys' estate, a Fatal Accidents Act claim was made for the benefit of his dependants. The assessment of damages was governed by the principles set out above. Mr Heys' widow and his three children all had a reasonable expectation of pecuniary benefit. Proceeding in much the same way as when calculating the lost future earning capacity of a living plaintiff,[47] Justice Rowland arrived at a total figure which he apportioned appropriately between the four dependants.[48]

43. A requirement first stated by Pollock CB in *Franklin v South Eastern Railway Company* (1858) 3 H & N 211; 157 ER 448.
44. See P R Handford "Relatives' Rights and Best v Samuel Fox" (1979-1982) 14 UWAL Rev 79, 98-106.
45. *Blake v Midland Railway Company* (1852) 18 QB 93; 118 ER 35. In some jurisdictions, the statute has been amended to permit the recovery of certain non-pecuniary losses: Survival of Causes of Action Act 1940 (SA) s 3; Compensation (Fatal Injuries) Ordinance 1974 (NT) s 10; Administration of Justice Act 1982 (UK) s 1. In Western Australia, however, the Law Reform Commission's recommendation for a similar extension of the scope of damages, contained in its *Report on Fatal Accidents* (Project No 66 1978), was not accepted when the other recommendations in the report were implemented in 1984.
46. Recovery for which is specifically permitted by s 5(1) of the Fatal Accidents Act 1959 (WA).
47. But using 3% rather than 6% tables, following *Gwydir v Peck* [1983] 1 Qd R 351.
48. Supra n 7, 177.

In the usual case, the dependants who benefit under the Fatal Accidents Act will be the same persons who benefit under the deceased's estate.[49] However it will be evident that because of the limitations placed on the scope of recovery for non-pecuniary loss and the other limitations on damages set out in the Law Reform (Miscellaneous Provisions) Act, the total amount received by the dependants is likely to be rather lower than the amount which would have been awarded had the deceased not died. This was certainly true of Mr Heys' claim.[50]

C. Where the Plaintiff Dies Between Issue of the Writ and the Date of Judgment[51]

Asbestosis and mesothelioma are terminal illnesses, and obtaining damages in respect of them has been a long and complex process. In a number of cases, actions that had been instituted were aborted because of the death of the plaintiff before the trial commenced. *Watson* and *Barrow and Heys* were the first cases in which the plaintiffs survived long enough for judgment to be given in their favour,[52] though in the case of Mr Heys he died during the trial. It is therefore most important to see how the death of the plaintiff between the institution of proceedings and the date of judgment affects the action and the measure of damages.

The Supreme Court Rules of Western Australia specifically provide that where a party to an action already in existence dies, the action does not abate by reason of the death.[53] Where at any stage of the proceedings the interest

49. The rights granted by the Law Reform (Miscellaneous Provisions) Act 1941 (WA) are in addition to and not in derogation of the rights conferred by the Fatal Accidents Act 1959 (WA): Law Reform (Miscellaneous Provisions) Act 1941 (WA) s 4(5). However, any benefits received under the 1941 Act which duplicate benefits received under the Fatal Accidents Act must be deducted from the Fatal Accidents Act award: *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601. In Australia, the limitations on the damages awarded under the 1941 Act take care of most of the problems. In England, where these limitations have not been imposed, considerable overlap problems have been experienced, and it has even been suggested that the Fatal Accidents Act should be repealed: see S M Waddams "Damages for Wrongful Death: Has Lord Campbell's Act Outlived its Usefulness?" (1984) 47 MLR 437.

50. See Formato supra n 11, 6.

51. In writing Parts I. C. and D. I have been much assisted by memoranda prepared by Mr Roger Macknay during the course of *Barrow and Heys* supra n 7.

52. In *Simpson* supra n 2 and *Joosten v Midalco Pty Ltd* supra n 3, the plaintiffs also survived until the date of judgment but were not awarded damages. In *Simpson* the case was settled before the appeal was heard.

53. Rules of the Supreme Court 1971 (WA) O 18 r 7(1).

of a party is transmitted to or devolves upon some other person, the court may, if it thinks it necessary in order to ensure that all matters in dispute may be effectually and completely determined, order that some other person be made a party to the cause and the proceedings be carried on as if that person had been substituted for the first-mentioned party.[54] Before seeking such an order a personal representative would have to obtain a grant of probate or administration.

Even though the action has already been commenced at the time of death, the Law Reform (Miscellaneous Provisions) Act applies and so the action, if it is to be continued, has to be continued by the deceased's personal representative on behalf of the estate. Because of the limitations on the damages that may be awarded under this Act, it may also be necessary to bring proceedings under the Fatal Accidents Act on behalf of the dependants. This means the issue of a fresh writ. If evidence already heard is to be used in the Fatal Accidents Act action, the defendant's consent will be required. Even when these obstacles have been overcome, the death will have the effect of limiting appreciably the size of the damages awarded.

This is what in fact occurred in *Barrow and Heys*.[55] It is apparent that on the death of Mr Heys his legal advisers considered whether the action should be abandoned. The argument for abandonment was that the damages available to the estate were greatly limited in comparison with what a living plaintiff could obtain, and that if the action was unsuccessful the costs were likely to exhaust the estate - though bringing a Fatal Accidents Act action would give the dependants some benefits. On the other hand, Mr Heys had stated his wish that the action be continued. The claim was being brought as a test case, and it would not be possible to succeed in a Fatal Accidents Act action until the question of liability to the deceased had been resolved. In the end, the action was continued and joined with a Fatal Accidents Act action, but the damages eventually received by Mr Heys' family were much less than they would have been had he survived.[56] If the deceased has survived until a late stage in the proceedings, and has given evidence, it seems unfair that his death should have such a drastic effect.

54. Ibid, O 18 r 7(2).
55. For another case where the plaintiff (who was suffering from pneumoconiosis) died during the trial and the estate continued the action, see *Buck v English Electric Co* [1977] 1 WLR 806.
56. Note also that in further proceedings relating to the estate's claim, it was held that workers' compensation payments awarded to the deceased could be deducted from the sum awarded to the estate for loss of earnings (thus extinguishing the liability to pay damages under that head): *CSR Ltd v Heys* (1989) 1 WAR 294 (Pidgeon J).

D. Where the Plaintiff Survives Until the Date of Judgment but Dies During the Appeal Process

Joosten v Midalco Pty Ltd[57] ("*Joosten*") was the first action for damages arising out of the operations at Wittenoom to be heard by the Supreme Court of Western Australia. Mrs Joosten, who had survived long enough to hear judgment pronounced against her, died shortly before her appeal was due to be heard and the case was abandoned. Mr Barrow also died soon after judgment was pronounced in his favour. How is the situation affected by the plaintiff's death subsequent to judgment?

Where judgment has been pronounced, it is unnecessary to invoke the provisions of the Law Reform (Miscellaneous Provisions) Act and the Fatal Accidents Act. The cause of action merges in the judgment, and the estate can take further proceedings without the support of the Law Reform (Miscellaneous Provisions) Act. This was the situation in *Pickett v British Rail Engineering Ltd*[58] ("*Pickett*"), in which the plaintiff, a victim of mesothelioma, whose life expectancy had been considerably shortened as a result, died before his appeal on damages was due to be heard by the Court of Appeal. His widow was substituted as plaintiff, and persuaded the House of Lords to award damages for lost earnings in the "lost years", as is the Australian practice.[59]

The fact that the Law Reform (Miscellaneous Provisions) Act has no application to this situation does not necessarily mean that the plaintiff's death will have no effect on the size of the damages. An appeal to the Full Court is by way of rehearing,[60] and the court has a discretionary power to receive further evidence on questions of fact.[61] Such evidence may reduce the size of the damages. In *McCann v Sheppard*,[62] the plaintiff had been awarded a large sum for loss of future earnings, assessed over a 20 year period. Unfortunately, he had become dependent on pain-killing drugs, and died from an overdose two days after being convicted of forging prescriptions to obtain further drugs. The defendant appealed to the Court of Appeal and obtained permission to introduce evidence of happenings subsequent to

57. Supra n 3.
58. [1980] AC 136.
59. See *Skelton v Collins* (1966) 115 CLR 94.
60. Supra n 53, O 63 r 1.
61. Ibid, O 63 r 10(1).
62. [1973] 1 WLR 540.

judgment. The Court of Appeal reduced the damages for loss of future earnings from £15 000 to £400 for the twenty weeks between the date of the judgment and the date of his death.

This would not necessarily have been catastrophic had it been possible for the deceased's widow to obtain damages under the Fatal Accidents Act. But Lord Denning and Lord Justice James said obiter that they doubted whether it would be possible for such proceedings to be instituted. The Fatal Accidents Act requires that the deceased should have been able to sue and recover damages had he or she survived, and the deceased would not have been able to satisfy this requirement because he had already sued and obtained judgment in his favour. In *Pickett*, Lord Wilberforce made the same assumption, and said that it was supported by authority. Since no Fatal Accidents Act claim had been made in that case, this statement was also obiter.[63]

There could conceivably be cases in which substantial damages for future lost earning capacity are awarded to a plaintiff but taken away after the Full Court has heard evidence of the plaintiff's subsequent death.[64] If it is held that a Fatal Accidents Act action is unavailable in these circumstances, injustice will have been done.

So far, we have been considering cases in which the judgment was in the plaintiff's favour. Where the plaintiff dies following a judgment pronounced in favour of the defendant, as Mrs Joosten did, the position is not dissimilar. Though the estate does not have a judgment in its favour, it will have a right to appeal (if the deceased would have had such a right) until the time limit for exercising that right expires.[65]

63. In *Murray v Shuter and N & S Coaches Ltd* [1972] 1 Lloyd's Rep 6, the court ordered the postponement of the trial in a case where the plaintiff had only a few months to live, so that his dependants would be able to bring proceedings under the Fatal Accidents Act (which they subsequently did: see *Murray v Shuter* [1976] 1 QB 972). The major reason for taking this step, namely the courts' refusal before *Pickett* (supra n 58) to award damages for lost earnings in the "lost years", is of course not applicable in Australia.

64. In *Barrow and Heys* itself, the damages for future lost earning capacity awarded to Mr Barrow were quite small ($5000): supra n 7, 170.

65. Supra n 53, O 63 r 4.

II. LIMITATION OF ACTIONS

A. Introduction

Section 38(1)(c) of the Western Australian Limitation Act 1935 ("Limitation Act") provides that the limitation period for actions in negligence is six years. This period runs from the date that damage is suffered as a result of the breach of duty. *Cartledge v Jopling & Sons*[66] showed that this rule would cause considerable problems for those suffering from diseases such as asbestosis which have a long latency period. The plaintiff contracted pneumoconiosis as a result of inhaling silica dust while working in a steel factory. The House of Lords held that his action was barred by the United Kingdom Limitation Act 1939 because the cause of action had arisen more than six years before the issue of the writ. They affirmed the general principle that the cause of action arises at the time that damage is suffered, and that it made no difference that the damage was not discoverable at that time. In the words of Lord Pearce: "[I]t is impossible to hold that a man who has no knowledge of the secret onset of pneumoconiosis and suffers no present inconvenience from it cannot have suffered any actionable harm."[67] This approach has been confirmed in later cases involving asbestosis,[68] and was obviously destined to cause considerable problems for Wittenoom workers suffering from this disease.

Later cases showed that mesothelioma sufferers might be a little better off. Because of the different causal pattern of the disease, it appears that the courts are prepared to accept that until the malignant mesothelioma tumour develops any damage that the plaintiff suffers through exposure to asbestos fibres is so infinitesimal as to be negligible in the eyes of the law. Justice Jacobs so held in the South Australian case of *Footner v Broken Hill Associated Smelters Pty Ltd*,[69] and this approach enabled him to distinguish *Cartledge v Jopling* and hold that the plaintiff's claim was not statute-barred.

66. [1963] AC 758.
67. Ibid, 778. J Stapleton "The Gist of Negligence" (1988) 104 LQR 213, 218 points out that Lord Pearce may be making a distinction between the first exposure to the disease hazard and the later "secret onset" of the disease.
68. Eg, *Church v Ministry of Defence* The Times 7 March 1984; *Gordon v James Hardie & Co Pty Ltd (No 1)* (1987) Aust Torts Reports ¶ 80-132.
69. (1983) 33 SASR 58.

He referred to the earlier decision of Justice Wallace in *Joosten* and said that the judge must have made a similar distinction, although Justice Wallace gave no reasons for so holding.[70]

The problems exposed by the decision in *Cartledge v Jopling* caused the United Kingdom Parliament to enact the Limitation Act 1963, which allowed the plaintiff in a personal injury claim, if unaware of material facts of a decisive character, to bring an action within one year of the earliest date on which he or she could reasonably have been expected to discover the existence and cause of the injury.[71] This legislation had some deficiencies and it was eventually replaced by the United Kingdom Limitation Act 1975, the provisions of which have now been incorporated in the consolidating United Kingdom Limitation Act 1980.[72] This Act provides that in personal injury cases the limitation period begins to run from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured.[73] In addition, the courts have a discretion to override the normal limitation periods.[74]

Similar provisions were adopted in all Australian jurisdictions except the Australian Capital Territory and Western Australia between 1969 and 1981. New South Wales, Queensland and Victoria adopted provisions based on the United Kingdom Limitation Act 1963.[75] Tasmania, South Australia and the Northern Territory all enacted legislation giving a court the discretion to disregard the normal limitation periods.[76]

In Western Australia there was no move by the legislature to pass equivalent legislation - indeed, Western Australia, unlike the other Australian jurisdictions,[77] has never adopted the general limitation reforms of the

70. Ibid, 74.
71. Limitation Act 1963 (UK) s 1.
72. The provisions of the 1980 Act are still thought to be unsatisfactory in a number of respects: see Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions: Latent Disease and Injury* (Project No 36 Part I 1982) paras 3.2-3.25, 4.4-4.6; P J Davies "Limitations of the Law of Limitation" (1982) 98 LQR 249; D Morgan "Limitation and Discretion: Procedural Reform and Substantive Effect" (1983) 1 CJQ 109.
73. Limitation Act 1980 (UK) s 11. "Date of knowledge" is defined in detail in s 14.
74. Ibid, s 33.
75. Limitation Act 1969 (NSW) ss 57-58; Limitation of Actions Act 1974 (Qld) ss 30-31; Limitation of Actions Act 1958 (Vic) s 23A.
76. Limitation Act 1974 (Tas) s 5; Limitation of Actions Act 1936 (SA) s 48; Limitation Act 1981 (NT) s 44.
77. With the partial exception of South Australia.

United Kingdom Limitation Act 1939. The Western Australian Limitation Act merely brings together in one Act various English enactments passed between 1623 and 1837. Thus when the problems of asbestos mining at Wittenoom began to become apparent in the late 1970s the law was extremely ill-equipped to deal with them.

The problems of Wittenoom caused the Western Australian Liberal Government then in power to ask the Law Reform Commission of Western Australia to make proposals for the reform of the Western Australian Limitation Act in relation to latent disease and injury. The Commission reported in October 1982[78] and recommended that in personal injury actions the limitation period should not apply where a court determined that it was just that it should not apply.[79] The Commission did not confine its recommendations to latent disease and injury, although it is clear that it would be in such cases that the suggested provisions would have their main application.

The Commission's recommendations did not commend themselves to the Liberal Government. It appears that the Government wanted something confined to asbestos-related diseases, and there was a suggestion that an ex-gratia compensation scheme should be set up. In February 1983 the Labor Government came to power in Western Australia. It abandoned the idea of an ex-gratia compensation scheme but was not willing to adopt the reform recommended by the Commission without further study. Eventually it was decided to amend the Western Australian Limitation Act, but only in relation to asbestos-related diseases. The Western Australian Acts Amendment (Asbestos Related Diseases) Act 1983 came into operation on 19 January 1984.[80]

This may have been a convenient short-term solution, but its illogicality is inescapable. Those who suffer from asbestos-related diseases are provided for, but those who suffer from other latent diseases or injuries are left out in the cold. Those who suffer from silicosis, for example, are not covered. It has been pointed out that silicosis is a hazard of the other main form of mining in Western Australia, gold mining, and that it is illogical to make provision for one hazard but not the other.[81] Apart from silicosis, there are a number of

78. Supra n 72.
79. Ibid, paras 4.22-4.35.
80. Acts Amendment (Asbestos Related Diseases) Act 1983 (WA) s 2.
81. J Gordon "Latent Disease and the Limitation Act (WA) 1935-1978" (1987) 1 Kalgoorlie Juridical Quarterly 10.

other diseases caused by the inhalation of dust,[82] and other latent diseases such as AIDS, for which the Western Australian Limitation Act provides no special exception to the ordinary rule.

It seems a pity that Western Australia was not prepared to introduce reforms of a kind that were already on the statute book in most other Australian jurisdictions. It is perhaps worth noting that legislative developments since 1983 seem to confirm the correctness of the Commission's recommendation. In Victoria the Limitation of Actions (Personal Injury Claims) Act 1983 replaced the earlier Victorian law with a provision that in any personal injury action, a court may, on application by a plaintiff, if it decides that it is just and reasonable to do so, order that the limitation period shall be extended for such period as it determines.[83] In the Australian Capital Territory, section 36 of the Limitation Act 1985 gives a court, in relation to claims for personal injury, a general discretion to extend the limitation period where it is just and reasonable to do so, and provides for the court a set of guidelines very similar to those which appear in the Law Reform Commission of Western Australia's report.[84] In New South Wales, the Limitation Amendment Act 1990 has recently introduced a similar reform.[85]

B. The Acts Amendment (Asbestos Related Diseases) Act 1983 (WA): General

The Western Australian Acts Amendment (Asbestos Related Diseases) Act 1983 ("ARDA") amends limitation provisions in a number of different Acts, but in essence there are three different schemes, dealing respectively with:

(a) Actions against private defendants by living plaintiffs.
(b) Actions under the Law Reform (Miscellaneous Provisions) Act and the Fatal Accidents Act.
(c) Actions against the Crown, public authorities and local government authorities.

82. Eg, alveolitis, caused by inhaling alunite while making "kitty litter": *Clarke v Chandler Clay Pty Ltd* supra n 12.
83. These recommendations were based on the Victorian Chief Justice's Law Reform Committee *Report on Limitation of Actions in Personal Injury Claims* (1981).
84. Supra n 72, paras 4.25-4.32.
85. Limitation Act 1969 (NSW) ss 60C, 60E, adopting the recommendations of the New South Wales Law Reform Commission Report on *Limitation of Actions for Personal Injury Claims* (LRC 50 1986).

The ARDA is limited throughout to persons who suffer a latent injury that is attributable to the inhalation of asbestos. This presumably includes asbestosis itself, pleural plaques, diffuse pleural thickening, lung cancer and pleural mesothelioma.[86]

C. Actions Against Private Defendants by Living Plaintiffs

These are the most important provisions of the Act. The limitation period under the previous law was the six-year period provided by section 38(1)(c) of the Western Australian Limitation Act 1935. The ARDA[87] amends the Limitation Act by inserting a new section 38A. In most cases, this replaced the old limitation period with a new limitation period of three years.

Section 38A distinguishes between cases where a person had knowledge of the relevant facts before 1 January 1984 and cases where that person had no such knowledge. In the first category it then distinguishes between cases where the old limitation period would have expired before 1 January 1984 and cases in which the action would still have been in time on that date. It then makes a further distinction, in each of the two situations just mentioned, between cases where the old limitation period had expired before the action was commenced and cases where it had not.

The ARDA therefore provides for five possible situations. The first four deal with cases where the plaintiff had knowledge of the relevant facts before 1 January 1984. These are designed to deal with persons suffering asbestos-related diseases at the time the Act was passed. The fifth situation, which deals with cases where the plaintiff did not have the relevant knowledge before 1 January 1984, covers not only persons suffering asbestos-related diseases at the time the Act was passed, but also persons who contract such a disease at some time in the future.

(i) *The plaintiff had knowledge of the relevant facts before 1 January 1984, and the old limitation period expired before that date and before the action was commenced.*

The limitation period was three years, running from the date on which the ARDA came into operation (19 January 1984). Damages were not to be awarded except in respect of pecuniary loss, and were not to exceed $120 000.[88]

86. See the summary by Rowland J in *Barrow and Heys* supra n 7, 106-110.
87. Supra n 80, s 4.
88. Limitation Act 1983 (WA) ss 38A(2), (3).

Asbestos-related diseases are unlikely to be diagnosed within six years. Therefore, in 1984 this was potentially a common situation.

(ii) *The plaintiff had knowledge of the relevant facts before 1 January 1984, and the old limitation period had not expired before that date but expired before the action was commenced.*

The limitation period was three years from the time the ARDA came into operation if the old limitation period expired less than three years before that time. Damages were limited to pecuniary loss and were not to exceed $120 000.[89]

This was probably an unlikely situation, and might perhaps be considered comparatively undeserving. The plaintiff had the relevant knowledge before 1 January 1984 and the limitation period had not expired before that date. He could therefore presumably have issued a writ before 1 January 1984, or at any time before the limitation period expired, and yet he did not do so. The Act nevertheless extended the limitation period.

(iii) *The plaintiff had knowledge of the relevant facts before 1 January 1984, and the old limitation period expired before that date but had not expired before the action was commenced.*

The limitation period was three years from the time the ARDA came into operation, and there were no limits on damages.[90]

This may be a situation that was not really contemplated by the draftsman, but emerges from the way in which the ARDA was drafted. It could only happen if the limitation period expired before 1 January 1984 but not before the action was brought, that is, the writ had to be issued within the limitation period and before 1 January 1984. In such a case the old law did not bar the action, and yet the ARDA extended the limitation period.

(iv) *The plaintiff had knowledge of the relevant facts before 1 January 1984, and the old limitation period had not expired before this date and had not expired before the action was commenced.*

The limitation period was that given by the previous law or, if that period expired less than three years after the ARDA came into operation, three years from the time the ARDA came into operation. There were no limits on damages.[91]

89. Ibid, ss 38A(4), (5).
90. Ibid, s 38A(2).
91. Ibid, s 38A(4).

Here the plaintiff could presumably have issued a writ within the time limit provided by the old law. The ARDA gave him a further alternative.

(v) *The plaintiff did not have knowledge of the relevant facts before 1 January 1984.*

Here, the ARDA provides that the limitation period is the period granted by the law before amendment (that is, six years) but runs from the time when the plaintiff acquires knowledge of the relevant facts.[92]

This is probably the most important provision since it deals with cases where the plaintiff does not have the relevant knowledge before 1 January 1984. It therefore covers cases of asbestos-related diseases contracted either before or after 1 January 1984. The ARDA adopts the English solution of allowing the period to run from the time when the plaintiff has knowledge of the relevant facts.

What section 38A means by having "knowledge of the relevant facts" is explained in sub-sections (7) to (9), which are drawn from the United Kingdom Limitation Act 1980.[93] Sub-section (7) provides that:

> [A] person has knowledge of the relevant facts in relation to a cause of action when he has knowledge:
>
> (a) that the injury in question was significant;
>
> (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute the cause of action;
>
> (c) of the identity of the defendant; and
>
> (d) if it is alleged that the act or omission was that of a person other than the defendant, of the identity of that person and the additional facts supporting the bringing of an action against the defendant,
>
> and knowledge that any acts or omissions did or did not, as a matter of law, give rise to a cause of action is irrelevant.

Sub-section (8) says that an injury is significant if the person whose knowledge is in question could reasonably have considered it sufficiently serious to justify instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment. Sub-section (9) provides that a person's knowledge includes knowledge which that person might reasonably have been expected to acquire from facts observable

92. Ibid, s 38A(6).

93. Limitation Act 1980 (UK) s 14. For criticism of this provision, see Law Reform Commission of Western Australia supra n 72, para 3.13.

or ascertainable by him, or from facts ascertainable by him with the help of expert advice which it was reasonable for him to seek.

In the context of the asbestos cases, once a plaintiff has knowledge that he or she was suffering from a latent injury attributable to the inhalation of asbestos, this would constitute knowledge that the injury was significant. It seems that knowledge that the injury was attributable to the act or omission which is alleged to constitute the cause of action would be interpreted to mean actual knowledge, and not merely a reasonable belief,[94] but the knowledge required is of the acts or omissions alleged to constitute negligence generally, and not of each of the particular acts or omissions complained of.[95] Likewise, knowledge that the injury was caused by the defendant's act or omission is not required, but only knowledge that the injury was capable of being attributed to that act or omission.[96] In relation to the third requirement, it would be a matter of some doubt, at least before *Barrow and Heys*, whether workers at Wittenoom would have the necessary knowledge of CSR (the effective controllers of the mine) as opposed to Midalco (a subsidiary company which operated it) as a potential defendant, even with the additional knowledge gained as a result of seeking legal advice.

The provisions of section 38A(7) were referred to by Justice Pidgeon in his judgment in *Watson*. The defendant originally pleaded that the action was barred by the six-year period set out in section 38(1)(c) of the Limitation Act. In his closing address, counsel for the plaintiff suggested that this provision had no application in an action against the State, and that the question of limitation was governed by section 6 of the Western Australian Crown Suits Act 1947.[97] His Honour was of the view that the plaintiff's contention was correct,[98] but in case he was wrong he made certain findings of fact as to whether, for the purposes of section 38A, the plaintiff had knowledge of the relevant facts before 1 January 1984. The plaintiff had been exposed to asbestos while working for the Harbour and Light Department at Port Samson. The trial judge found that he had knowledge that he was suffering a latent injury and that the injury was significant, and that it was attributable in whole or in part to the act or omission which it was alleged constituted the cause of action. The question was whether he had knowledge of the identity

94. *Wilkinson v Ancliff (BLT) Ltd* [1986] 1 WLR 1352 Slade LJ, 1366.
95. Ibid, 1364-1365.
96. Ibid, 1364.
97. Infra, Part II. E.
98. Supra n 5, 51-54.

of the defendant. The complication here was that it was only shortly before the trial that the plaintiff and his lawyers found out, as a result of revised pleadings filed by the defence, that the appropriate defendant was not the Minister for Transport but the State of Western Australia. Justice Pidgeon found on the facts,[99] but because of his view that the Western Australian Limitation Act had no application refrained from making a decision.

Apart from this case, the provisions of section 38A have not really been tested in Western Australian courts.[100] No limitation issues were raised in the first instance hearing in *Simpson*. Before the Full Court, the defendants cross-appealed on the limitation issue, but the case was eventually settled. In *Barrow and Heys*, Midalco abandoned their plea of limitation at the opening of the defence and CSR in closing - in each case, presumably because the plaintiffs were suffering from mesothelioma rather than asbestosis.

D. Actions under the Law Reform (Miscellaneous Provisions) Act 1941 and the Fatal Accidents Act 1959

1. Law Reform (Miscellaneous Provisions) Act 1941

The provisions of section 38A apply not only in actions by living plaintiffs but also in actions brought by the estate of a deceased person under the Law Reform (Miscellaneous Provisions) Act.[101] The ARDA[102] amends this Act to make it clear that where under the ARDA damages are restricted to pecuniary loss and to a limit of $120 000, the same limitation applies in an action brought under the Law Reform (Miscellaneous Provisions) Act.

2. Fatal Accidents Act 1959

The ARDA[103] amends the Fatal Accidents Act so as to provide that where a person dies as a result of an asbestos-related disease and relatives bring an action under the Fatal Accidents Act, the position is to be assimilated to the

99. Ibid, 56.
100. But for a recent discussion of the essentially similar New South Wales provision in an asbestos-related disease case, see *Ditchburn v Seltsam Ltd* (1989) 17 NSWLR 697.
101. This is because there is no special limitation period applying to such actions. Contrast actions *against* a deceased estate, for which s 4(3) of the Act provides a special limitation period. C Hare *Tragedy at Law* (London: Faber, 1942) is a novel in which the plot revolves around the equivalent special limitation period which was formerly found in the Law Reform (Miscellaneous Provisions) Act 1934 (UK).
102. Supra n 80, s 11.
103. Ibid, s 9.

position the deceased would have been in under the ARDA had he or she survived to sue in person.

Under the law prior to the ARDA, there were two different limitation rules which could affect a Fatal Accidents Act action. The Fatal Accidents Act provided that actions under the Act must be brought within one year of the death[104] unless within six years of the death the defendant consented or a court gave leave.[105] In addition, because of the rule that in order for a Fatal Accidents Act action to lie the deceased must have been able to sue had he or she survived,[106] if the ordinary limitation period[107] had run against the deceased before death, the deceased would have been unable to sue and so a Fatal Accidents Act action would not lie.[108] It is the latter period which is affected by the ARDA.[109]

The ARDA provides for three situations:

(a) where the death occurred before 1 January 1984;
(b) where the death occurred between 1 January 1984 and the date on which the ARDA came into operation (19 January 1984);
(c) where the death occurred on or after the date on which the ARDA came into operation.

The first two situations are of course designed to cover cases of asbestos-related diseases already contracted at the time the Act was passed. The third situation covers cases of asbestos-related diseases contracted subsequently.

In each case the ARDA then makes a distinction between cases where the old limitation period would have expired against the deceased at the time of death and cases where it would not.

If the old limitation period would have expired against the deceased at the time of death, then:

(i) if the death occurred before 1 January 1984, the limitation period was three years from the date the ARDA came into operation;[110]
(ii) if the death occurred between 1 January 1984 and the date on which the ARDA came into operation, the action could be commenced in

104. Supra n 38, s 7(1).
105. Ibid, ss 7(2)(b), 7(2)(c).
106. Supra n 38 and accompanying text.
107. Ie, the six-year period under s 38(1)(c) of the Limitation Act 1935 (WA).
108. Eg, *Williams v Mersey Docks and Harbour Board* [1905] 1 KB 804.
109. The Fatal Accidents Act limitation period is not to be read as subject to the "date of knowledge" provisions in s 38A(6) of the ARDA: *Sinclair v Minister for Works* (1990) 2 WAR 371.
110. Supra n 38, s 7(1a).

accordance with sections 7(1) or 7(2), that is, within one year of the death, or within six years, if the defendant consents or the court gives leave;[111]

(iii) if the death occurred on or after the date on which the ARDA came into operation, the action may only proceed if the other provisions of the Act would have allowed it to proceed against the deceased had he or she survived.[112]

In the first two situations, damages were not to be awarded except in respect of pecuniary loss and were not to exceed $120 000.[113] In the third situation, if the deceased had survived, he or she could only have recovered these limited damages and the same limitation accordingly applies to the relatives.[114]

If the old limitation period would not have expired against the deceased at the time of his death, then:

(i) if the death occurred before 1 January 1984, the limitation period was three years from the date the ARDA came into operation;[115]

(ii) if the death occurred between 1 January 1984 and the date the ARDA came into operation, the action could be commenced in accordance with sections 7(1) or 7(2);[116]

(iii) if the death occurred on or after the date on which the ARDA came into operation, no provision of the ARDA applies, but the existing provisions of the Fatal Accidents Act allow the relatives to sue providing they comply with the normal Fatal Accidents Act time limit.

In the first of these situations damages were not to be awarded except in respect of pecuniary loss and were not to exceed $120 000 if a court had granted leave for the action to be brought within six years and that period has expired.[117] Otherwise, there is no limitation on damages in any of these cases.

111. Ibid, s 7(3).
112. Ibid, s 7(5).
113. Ibid, s 7(4).
114. Ibid, s 7(5).
115. Ibid, s 7(1a).
116. Ibid, s 7(3).
117. Ibid, s 7(4)(b).

E. Actions Against the Crown, Public Authorities and Local Government Authorities

In Western Australia, there are special limitation rules applicable to actions against the Crown, public authorities and local government authorities:[118]

(a) Actions against the Crown: Crown Suits Act 1947 section 6

The plaintiff must notify the Crown Solicitor within three months and the action must be brought within one year; but with the Attorney General's consent, or in certain circumstances, with the leave of the court, the action may be brought within six years.[119]

(b) Actions against public authorities: Limitation Act 1935 section 47A

The plaintiff must notify the prospective defendant as soon as practicable, and the action must be brought within one year; but with the defendant's consent, or in certain circumstances, with the leave of the court, the action may be brought within six years.

(c) Local government authorities: Local Government Act 1960 section 660

The plaintiff must notify the council 35 days before the action is commenced and give further particulars as soon as practicable after the cause of action arises, and the action must be brought within one year; but in certain circumstances, with the leave of the court, the action may be brought within six years.

The ARDA amends each of these Acts[120] but the three sets of provisions are in essence the same. These provisions contain fewer complications than

118. For a detailed study of these provisions, see J F Young "An Examination of Legislation Requiring Notice Before Commencing Action" in Law Society of Western Australia *Causes of Action and Time Limitations* (1985). In England and most other Australian jurisdictions, these special limitation provisions have been abolished.

119. In *Watson* (supra n 6) the Full Court followed *R v McNeil* (1922) 31 CLR 76 in holding that the Crown Suits Act 1947 (WA) did not function like an ordinary limitation provision in barring the right of action (with the consequence that a party could waive it if he chose to do so) but provided a special statutory procedure and prevented him resorting to it unless he complied with its requirements. In the particular circumstances of the case, however, it held that it was wrong for the Crown to rely on this point.

120. Supra n 80, ss 7, 5, 13 respectively.

the other provisions of the ARDA. In each case the ARDA makes no change in the length of the limitation period, but provides that it shall run from a date different from that specified.

The ARDA distinguishes between a case where a person had knowledge of the relevant facts[121] before 1 January 1984 and a case where a person did not have such knowledge before that date.

In the case where a person had knowledge of the relevant facts before 1 January 1984, the Act then makes a further distinction between a case where the six-year limitation period has expired before the action was commenced and a case where it has not expired before that time.

There are thus three separate instances for which the ARDA provides, as follows:

(i) *The plaintiff had knowledge of the relevant facts before 1 January 1984 and the six-year limitation period expired before the action was commenced.*

The limitation period was to run from the date the ARDA came into operation. However, damages were not to be awarded except in respect of pecuniary loss, and were not to exceed $120 000.[122]

In 1984 this seemed likely to be a common situation. The new limitation period which the Act gave was plainly needed in such cases.

(ii) *The plaintiff had knowledge of the relevant facts before 1 January 1984 and the six-year limitation period had not expired before the action was commenced.*

The limitation period was to run from the time the ARDA came into operation and there were no limits on damages.[123]

In this situation an action could be brought without the assistance provided by the Act, at least in some cases, but the ARDA gave an additional limitation period running from the date it came into operation.

121. The provisions expressly refer to the knowledge referred to in s 38A of the Limitation Act 1935 (WA).
122. Crown Suits Act 1947 (WA) ss 6(4)-(5); Limitation Act 1935 (WA) ss 47A(5)-(6); Local Government Act 1960 (WA) ss 660(3)-(4).
123. Crown Suits Act 1947 (WA) s 6(4); Limitation Act 1947 (WA) s 47A(5); Local Government Act 1960 (WA) s 660(3).

(iii) *The plaintiff did not have knowledge of the relevant facts before 1 January 1984.*

The limitation period runs from the time the plaintiff has that knowledge.[124]

This would apply both to cases in which the disease was contracted before 1 January 1984 and to cases in which it was contracted at any time after that date.

III. CONCLUSIONS

One major shortcoming of these provisions has already been mentioned: they single out those with asbestos-related diseases for special treatment, and leave other plaintiffs without remedy. This apart, the ARDA can be criticised on the ground that it is so complicated. This is partly due to the fact that there are so many special limitation periods in the existing law, but complications also arise in the details of the provisions. It is hard to see why the amendments to the Western Australian Limitation Act 1935 and the Western Australian Fatal Accidents Act 1959 had to be so complex, in contrast to the amendments to the legislation dealt with immediately above[125] which are rather simpler.

To take the amendments to the Limitation Act as an example, surely all that was necessary was to distinguish between those who had knowledge of the relevant facts before 1 January 1984 and those who did not; and, as respects those who had knowledge before 1 January 1984, between persons who acquired that knowledge before the limitation period expired and the probably much larger group who did not.

Where plaintiffs had knowledge of the relevant facts before the limitation period expired but did not commence an action, it may be that they should nevertheless be given a fresh limitation period - and where plaintiffs did not acquire the relevant knowledge before the limitation period expired, there is good reason to give them a fresh limitation period. In each case, a new cause of action would be created retrospectively. That being so, if it is thought desirable to limit damages to pecuniary loss with a maximum of $120 000, it is hard to see why those limitations should not apply to both sorts of case, whereas the ARDA in its present form applies them to some of these cases but not to others.

124. Crown Suits Act 1947 (WA) s 6(6); Limitation Act 1935 (WA) s 47A(7); Local Government Act 1960 (WA) s 660(5). Knowledge of the relevant facts means the same as in s 38A of the Limitation Act 1935: Limitation Act 1935 (WA) ss 38A(7)-(9).

125. Supra Part II. E.