



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Preliminary Paper 39

LIMITATION OF
CIVIL ACTIONS

A discussion paper

*The Law Commission welcomes your comments on this paper
and seeks your response to the questions raised.*

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1

Introduction

- 1 | IN OCTOBER 1988 the Law Commission produced its sixth report *Limitation Defences in Civil Proceedings: NZLC R6* ("the 1988 Report"). The 1988 Report contained a wide-ranging review of the then law and recommended that the Limitation Act 1950 be repealed and replaced by a new Limitation Defences Act, a draft of which was contained in the report. The 1988 Report was not received with enthusiasm. There was criticism of its jettisoning of the existing statutory language, of its proposal to abridge limitation periods, and of its proposal that time would not cease to run until actual service of court documents. However, since that time, there have been a number of significant developments warranting a revisiting of the topic, including:
- the enactment of the Building Act 1991, section 91, providing a long-stop period of 10 years for civil proceedings arising from building work;
 - the endorsement by the Privy Council of a "reasonable discoverability" test of the date from which time runs in building cases;¹
 - the extension by the Court of Appeal of this test to personal injury cases,² and its more recent acknowledgement that in sexual abuse cases the test is inevitably a subjective one;³
 - the extension by the Accident Insurance Act 1998, section 396, of the right to claim exemplary damages to claims against defendants who have been charged with, convicted, or acquitted of, a criminal offence involving the conduct in respect of which such damages are claimed. The purpose of this provision is to overturn the Court of Appeal decision of *Daniels v Thompson*.⁴ It is expected to result in an increase in the number of such claims, including claims based on sexual interference at a much earlier date. A number of recent decisions (to be discussed later in this report) have emphasised the special limitations difficulties that can arise in such cases;
 - the enactment in Alberta in 1996 of a new Limitations Act, which constitutes an interesting and significant departure from the traditional approach to this area of law; and
 - the decision of the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council & Ors*⁵ (which, together with the continued development of the law of restitution generally, necessitates consideration of limitation in relation to restitutionary actions).

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

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

³ *W v Attorney-General* [1999] 2 NZLR 709.

⁴ [1998] 3 NZLR 22.

⁵ [1999] 2 AC 349.

- 2 The Commission was initially prompted to revisit this area by the decision of the Court of Appeal in *Gilbert v Shanahan*.⁶ Mr Gilbert was a director and shareholder of a company that entered into an agreement to lease commercial premises. The agreement did not contain any requirement for personal guarantees. When the draft lease was sent to the company's solicitors (the defendants) it contained a personal guarantee by Mr Gilbert. The defendants negligently failed to advise him that he was not obliged to sign the guarantee. In October 1985 he signed the guarantee. The company defaulted, and in 1993 the lessor sued Mr Gilbert for arrears. Mr Gilbert issued proceedings against the defendants in December 1993. He was held to be time barred. The Court said:

This might be thought a hard case for Mr Gilbert. The result derives from the way the Limitation Act 1950 applies to the present circumstances. In its report no 6 entitled "Limitation Defences in Civil Proceedings" presented to the Minister of Justice in October 1988 (NZLC R6), the Law Commission recommended substantial changes to this area of the law. One of its central recommendations was that, subject to an ultimate longstop period of 15 years, time should not run against a plaintiff in the absence of knowledge of essential facts relevant to the claim. From Mr Gilbert's point of view, it is unfortunate that the reform recommended by the Law Commission has not yet been implemented. From a wider perspective, this subject deserves early legislative attention.⁷

- 3 It does not appear to us entirely clear that the change to a "reasonable discovery" test proposed in our 1988 Report would have assisted Mr Gilbert, because from the outset the preliminary agreement was accessible to him and he knew both that he had provided the guarantee and the extent of any advice received by him relating to his obligation to do so.⁸
- 4 Following *Gilbert v Shanahan*, the Commission published a letter in *LawTalk*⁹ advising the profession that it intended to revisit the question of limitations, and seeking any views as to areas needing reform. The only response received (from the New Zealand Law Society) was that the issue of the date of commencement of the limitation period, particularly when relevant facts are not discovered promptly, needed consideration. We were also aware of a recent article by Christine French,¹⁰ counsel for Hamlin in both the Court of Appeal and Privy Council, in which she had argued strongly for legislative intervention in this area.

THE SCOPE OF THIS PAPER

- 5 This paper will address the questions of whether and how the Limitation Act 1950 should be amended to make special provision for situations where the intending plaintiff is unaware of the damage or of the intended defendant's responsibility therefor. Consideration of such questions will involve examination of whether if the existing law is to be changed there should be a long-stop provision. It will be necessary to consider the position where the lack of awareness is attributable to

⁶ [1998] 3 NZLR 528.

⁷ *Gilbert v Shanahan*, above n 6, 544–545.

⁸ *Gilbert v Shanahan*, above n 6, 538.

⁹ Issue 504, 17 August 1998, 2.

¹⁰ French "Time and the Blamelessly Ignorant Plaintiff: A Review of the Reasonable Discoverability Doctrine and Section 4 of the Limitation Act 1950" (1998) 9 Otago LR 255.

the very nature of the harm done (as in cases of infant sexual abuse). In addition, and as a separate topic, it will be necessary to consider the need to provide some relief to defendants in respect of claims to which a limitation does not apply by reason of the provisions of section 28.

2 The present law

- 6 **T**HE LIMITATION ACT 1950 is a descendant of an English statute of 1623. The law of limitation in England was comprehensively reviewed in 1939, and as a result of that review, a new Limitations Act 1939 (UK) was passed. Our Act substantially follows the 1939 UK Act. We set out below a brief description of the Limitation Act 1950, which is based on the discussion in our 1988 Report.¹¹

ACCRUAL OF CAUSE OF ACTION

- 7 The Limitation Act 1950 applies to “actions”, defined as non-criminal proceedings in a court of law (section 2), and to arbitrations (section 29). Most actions, including those based on contract or tort, which are by far the most common civil actions, have a 6 year time limit. Other actions have time limits of 2, 12 or 60 years.
- 8 These time limits are generally measured from “the date of the accrual of a right of action”. The Act does not attempt to define this expression. *Halsbury* defines it as follows:
- Apart from any special provision, a cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when there are present all the facts which are material to be proved to entitle the plaintiff to succeed.¹²
- 9 The facts which are material to be proved will differ according to the nature of the legal claim made. A claim for breach of contract accrues on the date of breach, irrespective of whether the breach has caused actual loss. A claim in negligence does not accrue until there is damage resulting from a breach of duty. Where there is a continuing series of events that infringes the rights of a claimant, there is a separate accrual for each event and a separate limitation period applies to each event. In such cases (copyright infringement is an example), the limitation period acts as a limit on recovery, as damages (and interest) will normally only be available back to the 6 years preceding the commencement of the litigation.

¹¹ A more detailed consideration can be found in *The Laws of New Zealand* (Butterworths, Wellington, 1992–) vol 17, Limitation of Civil Proceedings, and *Halsbury's Laws of England* (4 ed reissue, Butterworths, London, 1997) vol 28.

¹² *Halsbury's Laws of England* (4 ed reissue, Butterworths, London, 1997) vol 28, Limitation of Actions, para 820.

EXTENSIONS OF LIMITATION PERIODS

- 10 Part II of the Limitation Act 1950 modifies the operation of the various limitation periods in limited circumstances. In broad terms, the commencement of the period is postponed until the claimant reaches 20 years of age, or while the claimant is mentally impaired or unable to discover the existence of a cause of action by reason of fraud or mistake; the cause of action is revived and the limitation period starts again if the person subject to the claim (the intended defendant) has acknowledged liability in some way or made a part payment.

MATTERS OUTSIDE THE ACT

- 11 The Limitation Act 1950 expressly excludes from its scope the following matters:
- any cause of action within the Admiralty jurisdiction of the High Court that is enforceable *in rem* (section 4(8));
 - any claim for specific performance of a contract, for an injunction, or for other equitable relief (except where applied by the court by way of analogy) (section 4(9));
 - customary land within the meaning of the Māori Affairs Act 1953 (section 6(1));
 - the right of the Crown to minerals (including uranium, petroleum and coal) (section 6(3));
 - actions relating to mortgages and charges on ships (section 20(5));
 - actions against trustees in respect of fraudulent breaches of trust or for recovery of converted trust property (section 21(1));
 - recovery of any tax or duty or interest thereon, or to forfeiture proceedings (under the Customs Acts or in respect of a ship) (section 32, proviso); and
 - where a period of limitation is prescribed by any other enactment (section 33(1)).
- 12 The Act does not prevent a claimant from bringing an action outside the prescribed period, it simply allows a defendant to raise the time limit as a defence. The Act does not extinguish a right to claim, it prevents the court from enforcing the claim. It is still possible to rely on the right in some circumstances. For example, if a debtor pays a "statute-barred" debt (one in respect of which a limitation defence could have been pleaded successfully), it cannot be later recovered on the ground that it was not due; and the creditor may also be able to obtain satisfaction of a statute-barred debt by (among other things) retaining possession of a thing until a claim is satisfied, or making a deduction from a legacy payable to the debtor.

EQUITABLE RULES

- 13 Under section 4(9) of the Limitation Act 1950, claims for equitable relief (such as specific performance or an injunction) in relation to matters subject to a six year limitation period – such as, tort and contract – are expressly excluded from that period "except insofar as [it] may be applied by the court by analogy". This reflects the historical development of English law through two different court systems – the courts of equity and of common law – and the rule that courts exercising the equitable jurisdiction will apply limitation rules by analogy in certain cases.

14 An example of the application of a limitation period against an equitable claim by way of analogy is *Matai Industries Ltd v Jensen & Others*,¹³ where a claim alleging breach of fiduciary duty against the receiver of a company was held to be barred on that basis.

15 A body of equitable rules that may bar claimants from obtaining a remedy (even where the Act does not) survives under section 31:

Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.

The application of equitable principles under this section is limited to refusals of relief. The main thrust of those principles is that a claimant is bound to pursue his or her claim without undue delay. Equity does not specify a fixed time after which claims are barred. The doctrine of laches looks at the circumstances of the case – in particular, acquiescence on the claimant's part and any change of position on the defendant's part. The doctrine applies when an action is subject to the Act and the court refuses to grant relief to a claim not already barred by the Act – effectively shortening the period. That is most likely to happen where there has been a short delay but serious prejudice to the defendant.

16 An equitable defence is generally only available where the claimant knew or reasonably should have known of the existence of a cause of action *and* where that delay was actually prejudicial to the defendant. Prejudice is the key notion: in the absence of prejudice, even a long delay will not bar an action; but a short delay with serious prejudice will certainly do so. In practice, the courts are reluctant to countenance excessive delay. The maxim *lex vigilantibus, non dormientibus, subvenit* (the law assists those who are watchful, not those who are sleeping) applies.

PARTICULAR STATUTES

17 There is a large number of statutes which provide for statutory time limits for specific types of action. Examples include the Fair Trading Act 1986 (section 43(5)) and the Matrimonial Property Act 1976 (section 24). The provisions of the Limitation Act 1950 do not apply to exceptions created in other statutes.

18 We note that the Business Law Reform Bill 1999 proposes to revoke section 43(5) of the Fair Trading Act and replace it with a reasonable discovery test. This would be undesirable because the proposed amendment contains no long-stop provision. In the 1988 Report,¹⁴ in the context of a proposal to reduce the general period from six to three years, we recommended that the separate provision in the Fair Trading Act, under which there is already a three-year period, be repealed so that the new general provisions would apply equally to Fair Trading Act claims. The present paper does not advance any proposal to reduce the general limitation period.

¹³ [1989] 1 NZLR 525.

¹⁴ New Zealand Law Commission *Limitation Defences in Civil Proceedings: NZLC R6* (Wellington, 1988) para 388.

3

Limitations and latent defects – developments since the 1988 report

- 19 **A**S WAS NOTED IN THE 1988 REPORT (paragraphs 60 onwards), in most cases limitation issues do not arise because the “wrong” (be it a breach of contract or negligent breach of a duty of care), the damage or injury, and a knowledge of both by the potential claimant, are more or less simultaneous. However, difficulties arise in the area of latent damage, where the plaintiff may not be aware of having suffered damage or having a cause of action until many years after the wrongful act or omission. The three areas in which latent damage issues typically occur, and which were discussed in detail in the 1988 Report, are latent defects in buildings, negligent professional advice, and personal injuries claims. There have been significant developments since the 1988 Report, and we shall review each of the three areas below.

BUILDING CASES

- 20 The only legislative reform to limitation periods that has been enacted since the 1988 Report is the Building Act 1991, section 91. It relates to building cases only, and provides that the provisions of the Limitation Act shall apply to building cases, except that such proceedings may not be brought 10 years or more after the date of the act or omission on which the proceedings are based. Thus the Building Act introduces a long-stop of 10 years, but does not address the question of when the cause of action accrues in the first place. That remains governed by the Limitation Act 1950 and the common law to which it alludes.
- 21 At the time of the 1988 Report, the New Zealand law was that the cause of action accrues when the defect becomes apparent or manifest.¹⁵ The English position (as settled in the 1983 House of Lords decision of *Pirelli General Cable Works Ltd v Oscar Faber & Partners*)¹⁶ had until recently been that the cause of action accrues when the damage comes into existence and not when it was, or could with reasonable diligence be, discovered. However, *Pirelli* had been seen as unfair, and had recently been reversed by the UK Parliament by the enactment of the Latent Damage Act 1986. No equivalent statute was enacted in New Zealand. In *Askin v Knox*,¹⁷ the Court of Appeal had noted the “unsatisfactory disharmony” between the New Zealand and English positions, but had not been required to determine

¹⁵ *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234.

¹⁶ [1983] 2 AC 1.

¹⁷ [1989] 1 NZLR 248.

whether or not *Pirelli* should be followed. That disharmony has now been removed by the decision of the Court of Appeal in *Invercargill City Council v Hamlin*,¹⁸ which was affirmed by the Privy Council.¹⁹

- 22 Mr Hamlin's house was built in 1972. The Council's building inspector negligently approved the foundations on 1 June 1972. The first cracks appeared in the masonry veneer and in the kitchen wall in 1974. By 1979 a crack in the eastern wall had developed to such an extent that a brick was loose. In the early 1980s the plaintiff noticed some cracks in the foundation wall. But it was not until 1989, when the back door stuck badly, that Mr Hamlin obtained an engineer's report which concluded that the foundations should be replaced as they had not been built to an acceptable standard. In 1990 Mr Hamlin issued proceedings. The trial judge found that a reasonably prudent homeowner would not have discovered the cause of the cracks any earlier. The case therefore raised squarely the question of when the cause of action accrued. If the *Pirelli* test were applied, the cause of action arose at the time of the negligent act or omission or when the first cracks appeared, and the claim was time barred. But if the *Mount Albert Borough Council* approach were applied, the cause of action did not accrue until Mr Hamlin was advised in 1989 that the foundations were defective, and he was in time.
- 23 In the Court of Appeal, the majority²⁰ held that the cause of action arose when the material facts on which it was based were discovered or could have been discovered by reasonable diligence. They considered that claims for building defects are for economic loss, and thus distinguishable from claims for physical injury. Gault J put it thus:

Damage or loss is a necessary element in the tort of negligence. The cause of action accrues when all the elements of the cause of action are in existence. On the categorisation of the loss in the case of a building defect as economic loss, it necessarily follows that it comes into existence when it is suffered – that is when the defect becomes known or with reasonable diligence is discoverable. Only then is the value of the building affected. Before that the building could be sold for its full value with no loss.²¹

- 24 McKay J gave a dissenting judgment. He noted the House of Lords decisions of *Cartledge v E Jopling & Sons Ltd*²² and of *Pirelli*. In both those cases, damage had occurred, and therefore the cause of action had accrued, more than six years before the claimants knew about it, and therefore in both cases the claimants were time barred through no fault of their own. In both cases, the House of Lords saw their conclusions as harsh but necessary as a matter of statutory interpretation, and urged legislative amendment. In both cases, the UK Parliament did provide the amendments: in response to *Cartledge* they passed what is now section 11(4) of the Limitation Act 1980 (UK), which provides that claims for damages for personal injury shall be brought within three years from the date the cause of action accrued or from the date of knowledge (if later) of the person injured; and in

¹⁸ [1994] 3 NZLR 513.

¹⁹ *Invercargill City Council v Hamlin*, above n 1.

²⁰ *Invercargill City Council v Hamlin*, above n 18, Cooke P, Richardson, Casey and Gault JJ, McKay J dissenting.

²¹ *Invercargill City Council v Hamlin*, above n 18, 534.

²² [1963] AC 758; [1963] 1 All ER 801.

response to *Pirelli* they passed section 14A into the Limitation Act 1980 (UK), which provides that in any action for damages for negligence, other than personal injury claims, the time limit is six years from the time the cause of action accrued or three years from the earliest date on which the plaintiff, or anyone in whom the cause of action was vested before him, first had both the knowledge required to bring the action and the right to bring it.

- 25 McKay J found the reasoning in *Cartledge* and *Pirelli* compelling, and concluded that the proper test is when did the damage occur, and if that test is seen to be unfair, amendment must be by way of legislative amendment:

The different view decided in *Pirelli* was considered and discussed, again obiter, by Cooke P in giving the judgment of five Judges of this Court in *Askin v Knox*. Reference was made to the unfairness to a plaintiff if his claim were to be held to be statute-barred before he either knew or ought reasonably to have known that damage had occurred. This is a view which had been expressed by Lord Reid in *Cartledge v E Jopling & Sons Ltd* and by Lord Fraser of Tullybelton in *Pirelli*, but they regarded it as a matter for legislation. Statutes of limitation may in such circumstances appear unfair to plaintiffs, but the question is when did the cause of action arise, not whether the period for bringing proceedings should be calculated from some different date. The statute is clear that time runs from the accrual of the cause of action. Whether the present law is fair or reasonable is clearly relevant to any proposed statutory amendment, but the consideration of that question cannot be limited to the position of the plaintiff ... The statute provides that time runs from the accrual of the cause of action. That has always meant the time when all the facts necessary to establish the claim are in existence, whether or not they are known or ought to have been discovered. No authority to the contrary has been found in either country since the Limitation Act 1623 (UK) until its repeal in New Zealand in 1950, nor thereafter until *Sparham-Souter* in 1976. No logical reason has been suggested why the cause of action should be held not to arise until the necessary facts have been discovered or ought to be discovered. Lord Denning MR in *Sparham-Souter* at p 868 offers no reason other than it would be "unfair". He refers to Lord Reid's comments in *Cartledge v E Jopling & Sons Ltd*, but omits to mention that Lord Reid was there giving reasons for legislative amendment, not suggesting a new interpretation of the existing statute.²³

- 26 The case was appealed to the Privy Council²⁴ which unanimously upheld the majority in the Court of Appeal and for the same reasons. Their Lordships concluded that the cause of action accrues when the defects become apparent:

Once it is appreciated that the loss in respect of which the plaintiff in the present case is suing is loss to his pocket, and not for physical damage to the house or foundations, then most, if not all the difficulties surrounding the limitation question fall away. The plaintiff's loss occurs when the market value of the house is depreciated by reason of the defective foundations, and not before. If he resells the house at full value before the defect is discovered, he has suffered no loss. Thus in the common case the occurrence of the loss and the discovery of the loss will coincide.

But the plaintiff cannot postpone the start of the limitation period by shutting his eyes to the obvious ...

In other words, the cause of action accrues when the cracks become so bad, or the defects so obvious, that any reasonable homeowner would call in an expert. Since the defects would then be obvious to a potential buyer, or his expert, that marks the moment when the market value of the building is depreciated, and therefore the

²³ *Invercargill City Council v Hamlin*, above n 18, 543–544.

²⁴ *Invercargill City Council v Hamlin*, above n 1.

moment when the economic loss occurs. Their Lordships do not think it is possible to define the moment more accurately. The measure of the loss will then be the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if it is not: see *Ruxley Electronics and Constructions Ltd v Forsyth* [1995] 3 WLR 118.²⁵

27 While *Hamlin* effectively settled New Zealand law, some members of the Commission consider that the decision was wrong, and that as a matter of statutory interpretation the dissenting judgment of McKay J is to be preferred. They consider that the majority view ignores the clear wording of the Act. They say that it is a settled principle of construction that where a statute uses a common law term of defined meaning, that term must be given the meaning it had when the statute was enacted. In their opinion, the difficulties with the majority's approach include:

- While the argument that economic damage is not suffered until it is known of is appealing, it does not take account of the fact that damages in negligence may be measured not only by diminution of value but also by the cost of reasonable repair:²⁶

With respect to claims in negligence, the basic measure of damages for injury to real property is either diminution in value or the cost of reasonable repair and reinstatement. The cost of repair or replacement may provide a prima facie measure of the diminution in value and the two approaches may lead to the same result. Where, after all practical repair and restoration work has been carried out, there is still a diminution in the market value of the property, the plaintiff can recover the residual diminution. The primary measure of damages in such cases is the cost of remedial work or reinstatement. Reinstatement will be awarded provided the plaintiff is intending to reinstate and it is reasonable to do so, otherwise the appropriate measure of damage is diminution in value. Where a designer of a building is sued in respect of damage caused by faulty design work, and it is shown that the cost of a properly designed building would have been greater and that the plaintiff would have proceeded with the project in any event, the proper starting point for calculation of the plaintiff's loss is the cost of erecting a properly designed building. The plaintiff will also be entitled to compensation for other pecuniary losses incidental to the repair and reinstatement, and damages for loss of use. Loss of profits from a business venture may also be awarded.

- If damages are calculated on a remedial basis, all the elements of the cause of action exist once there is damage which can be compensated by remedial damages, and there is no need for the plaintiff to be aware of the existence of the damage. Mr Hamlin could have sued the Council in 1972 for the cost of remedying the defective structure; all the elements of the cause of action had accrued, he just was not aware of them.
- It ignores section 28 of the Act, which provides that in cases of fraud or mistake the limitation period shall not start to run until the plaintiff could by reasonable diligence have discovered its cause of action. The fact that the Act contains such an exception suggests that Parliament did not intend that lack of knowledge would always postpone the starting date.

28 Other Commissioners consider that the dilemma of choice between the majority view and that of McKay J is better resolved by the solution offered by the former. All Commissioners, however, that agree the concept of reasonable discovery raises

²⁵ *Invercargill City Council v Hamlin*, above n 1, 526.

²⁶ *The Laws of New Zealand*, above n 11, vol 19, Negligence, para 100.

practical difficulties when it is applied outside the area of building negligence. It has already been extended by the courts to personal injury cases,²⁷ and there has been an academic suggestion²⁸ that there is no good reason why the principle of reasonable discovery could not be extended to all contractual claims. As the only long-stop provision is section 91 of the Building Act, any other case to which the principle is applied is potentially open-ended. We suggest that if there is to be a reasonable discovery test, it must be contained in legislation and balanced by a long-stop provision.

PERSONAL INJURIES CLAIMS

- 29 The *Hamlin* reasonable discovery test was extended to personal injury cases in *S v G*,²⁹ which was decided after the Court of Appeal judgment in *Hamlin* but before the Privy Council decision. It was alleged that S medically neglected G and committed sexual, physical, and emotional abuse upon her. The alleged offending occurred from 1978, when G was 14, until she was 16. In 1992, S was convicted of indecent assault against G. It was claimed that in October 1990, in the course of therapy, G came to recognise that the emotional and psychological damage from which she was suffering was causally linked to S's conduct. It was not until early 1992 that she was advised that she could bring legal proceedings, and proceedings seeking exemplary damages were filed in October 1993. The causes of action pleaded were negligence, trespass to the person, and breach of fiduciary duty, but all relied on the same set of facts.
- 30 Under section 4(7) of the Limitation Act 1950, G applied to bring the proceedings out of time, on the grounds that the bodily injury alleged had been sustained more than two years but less than six years after the date at which the causes of action accrued. Although leave to continue was declined for reasons which are not relevant here, it was held that time began to run from when she discovered, or reasonably ought to have discovered, all the facts making up the cause of action, that is, October 1990 when she realised the causal link in counselling. The Court of Appeal held:³⁰

Of course the Limitation Act itself does not define when a cause of action accrues. It is not a matter of statutory construction. It is a question of when as a matter of law the cause of action accrues for the purpose of the Limitation Act. In the *Hamlin* case the majority view was that the cause of action in negligence in causing defective foundations accrued when the house owner discovered the defect or acting reasonably would have done so. That he had earlier seen cracks around the house was not sufficient since those observations did not lead to discovery of the defective foundations nor would they have led a reasonable house owner to that discovery. By analogy it can be said that the sexual abuse victim who reasonably has not linked serious psychological and emotional damage to the abuse does not have the limitation period run merely because of awareness of the symptoms of that damage. It is only when the psychological damage is or reasonably should have been identified and linked to the abuse that it can be said that the elements of the negligence cause of action are known and thus the cause of action has accrued ...

²⁷ *S v G*, above n 2, and *GD Searle & Co v Gunn*, above n 2.

²⁸ *The Laws of New Zealand*, above n 11, vol 8, Contract, para 448.

²⁹ *S v G*, above n 2.

³⁰ *S v G*, above n 2, 687.

In the judgement under appeal, Blanchard J appears to have gone somewhat further in adopting what seems to be a wholly subjective test when at p 29 of his judgment he expressed the view that the intended plaintiff's cause of action in negligence did not accrue until she herself appreciated the causal connection between the injury and the intended defendant's alleged conduct. We would not go that far. It would be to render the Limitation Act quite ineffective to hold that a cause of action accrues only when the plaintiff realises that it exists.

- 31 While the Court was at pains to point out the test is objective, with respect, that is simply not so. As Christine French points out:

... inevitably a more subjective element must be involved in cases of this sort. How in practice can a court really assess whether the reasonable victim of abuse would have come to an earlier realisation than the plaintiff did? Does it take 10, 20 or 30 counselling sessions?³¹

- 32 The position in relation to sexual abuse cases has now been clarified by the Court of Appeal in *W v Attorney-General*.³² In June 1970, at the age of 11, W was placed in the care of the Superintendent of Child Welfare. She was put in a foster home, where she was sexually abused. The abuse ended in mid 1971, when she was removed from the foster home. She turned 20 on 16 December 1978. It was not until April 1996, when she read about another woman who was suing the Department of Social Welfare in respect of sexual abuse suffered as a child in foster care, that she started to make the connection between her abuse and her subsequent mental and behavioural problems. An application for leave by an intending plaintiff to bring an action under section 4(7) of the Limitation Act was filed on 25 March 1997.³³ In granting W's appeal, thereby granting W leave to bring her proceeding but without prejudice to the right of the Attorney-General to raise limitation as an affirmative defence at trial, the Court acknowledged that the exercise of determining when a sexually abused woman makes the causal link between abuse and later psychological and emotional injuries necessitates an essentially subjective approach with little or no scope for the concept of reasonableness and the objectification of the characteristics of the abused woman. Thomas J for the Court said:

The problem which confronted the courts is readily apparent. If a limitation period applies, the cause of action does not accrue until it is reasonably discoverable. As a general rule that proposition is entirely acceptable. It is also acceptable that the answer to the question whether the cause of action was reasonably discoverable should be determined on an objective basis. For the most part, as in *Hamlin*, the rule will serve the objectives of the Limitation Act and the interests of justice well. But the courts have clearly struggled to adapt this rule to the human situation of a woman who has been sexually abused as a child. In *G v S* (High Court, Auckland, CP 576/93, 22 June 1994) Blanchard J, favouring the approach adopted by the Supreme Court of Canada in *M(K) v M(H)* (1992) 96 DLR (4th) 289, adopted a subjective test. On appeal, this Court balked at the notion of a "wholly subjective" test in the context of limitation legislation and insisted that the statutory bar will apply where the woman reasonably should have discovered the link between her childhood abuse and her later psychological and emotional damage. But it was, of course, practically impossible to

³¹ French, above n 10, 265.

³² *W v Attorney-General*, above n 3.

³³ The procedure adopted was criticised: the plaintiff should have issued substantive proceedings based on a cause of action accruing, or time expiring, within the previous two years and an application for leave to file. However, nothing turned on the procedural deficiency.

treat this situation, even by way of analogy, as equivalent to the discovery of defects in a building foundation. So the test has been applied objectively, but the intended plaintiff's position has been assessed, not against the perceived behaviour of a reasonable person, but against the perceived "reasonable" behaviour of someone in the intended plaintiff's position, that is, a sexually-abused victim. Alternatively, the intending plaintiff herself has been taken, but taken subject to the capacity of acting reasonably. The reasonableness of the intending plaintiff is measured against herself, with or without all her characteristics.

But the question must be asked: how sensible is the notion of a reasonable sexually-abused person?

It seems to me that the notion is incongruous. To postulate a woman who has been sexually-abused as a child and then suppose her to be reasonable in respect of matters relating to that abuse is almost a contradiction in terms. The contradiction would be plain if one were to speak of a "reasonable abnormal person" or an "abnormal person acting reasonably". Yet, the sexually-abused woman will not behave "normally". The vice in the construction of a hypothetical reasonable sexually-abused person lies in the tension between the way in which the courts assume such a person will behave and the way in which a real victim, psychologically damaged and disadvantaged, will actually behave. I suspect that in the fullness of time the notion of the reasonable sexually-abused person will be perceived as a grotesque invention of the law.

The question as to when a woman who has been sexually-abused in childhood will draw the connection between her abuse and her later behaviour is essentially subjective. The need to introduce a hypothetical sexually-abused victim sharing the circumstances of the intended plaintiff is itself an indication of the fact that the question cannot be approached objectively. While psychiatrists have discovered a definite pattern in the post-abuse behaviour of sexually-abused victims, the impact on each individual victim, and the reaction of each individual victim, will necessarily vary. There is, in other words, no such person as the reasonable sexually-abused person or sexually-abused person acting "reasonably" to whom reference can be made. What the courts necessarily do is to assume that a reasonable sexually-abused person will behave in a certain way. It is in implementing that assumption that the courts face difficulties and both confront and exhibit their limitations in this particular field.³⁴

- 33 Thomas J also raised (obiter) the issue of disability; in his opinion, a plaintiff is under a disability, in terms of section 2 and section 24 of the Act, if by reason of the plaintiff's psychological condition he or she is incapable of undertaking legal proceedings. In his opinion, there is no requirement that a person who is so disabled need be "of unsound mind", and that disability may continue even after the plaintiff has realised the causal link and the cause of action has thereby accrued:

... the test for "disability" requires no more than that the woman must have made the connection between her childhood abuse and her later behaviour and yet by reason of her psychological condition be incapable of undertaking legal proceedings.³⁵

- 34 This raises the interesting possibility that a plaintiff could discover her cause of action, delay more than six years because of such a disability, and yet not be out of time. Tipping J, on the other hand, considered the possibility that such a disability

³⁴ *W v Attorney-General*, above n 3, 724–725.

³⁵ *W v Attorney-General*, above n 3, 732.

could extend beyond the date of discovery of the cause of action “an inherently unlikely proposition”.³⁶

- 35 It is likely that claims for exemplary damages for personal injury will increase because of the recent confirmation of the right of claimants to sue for exemplary damages.³⁷

NEGLIGENT PROFESSIONAL ADVICE

- 36 Although there has been some indication, both at District Court level³⁸ and High Court level,³⁹ that the reasonable discovery rule may be imported into professional negligence claims, there has also been resistance. In *Utting v BNZ*⁴⁰ the plaintiffs claimed inter alia for negligence for losses which occurred when a fund was converted into New Zealand dollars in 1987 but which were not discovered until 1993. Proceedings were issued in 1996. Master Thomson considered *Hamlin, S v G*, and *Searle v Gunn*, and concluded that although reasonable discovery is now part of our law as a result of those cases, there is no indication in those cases that the Court of Appeal would be willing to import the doctrine into commercial cases, and if it were to be so applied then the protection of section 4 of the Act would be “completely illusory”.⁴¹
- 37 The Court of Appeal has indeed maintained a more traditional approach in this area, although it had an opportunity to extend the reasonable discovery test into professional negligence in the case of *Gilbert v Shanahan*,⁴² the facts of which are set out in paragraph 2 above. The Court of Appeal held that the cause of action arose when G signed the lease, because the wording of the relevant clause was such that he was not a guarantor simpliciter but a principal debtor/covenantor, and therefore he incurred a liability at that time. So his claim was time barred. In this conclusion the Court followed the House of Lords case of *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (no 2)*,⁴³ which followed the traditional line of cases which includes *DW Moore & Co Ltd and Ors v Ferrier and Ors*.⁴⁴ The reasoning in this line of cases is that, in the absence of fraud, concealment or mistake, time runs from the date of damage whether the claimant knows of the damage or not. In extreme cases, this can result in a claimant becoming time barred before even knowing that there is reason to sue anyone. That is harsh, but can only be remedied by statutory amendment.⁴⁵ The Court also discussed obiter the question of what would happen if the liability incurred were contingent (such as an indemnity), and indicated that in such a case it would be inclined to follow

³⁶ *W v Attorney-General*, above n 3, 734.

³⁷ See the fourth bullet of para 1 of this discussion paper.

³⁸ See *Te Kanawa v Low Chapman Hollinger & Forgeson* (18 May 1998) unreported, District Court, Auckland, NP 2560/96, Judge Cadenhead.

³⁹ See *Rabadan v Gale* [1996] 3 NZLR 220, per Salmon J.

⁴⁰ (1997) 11 PRNZ 57.

⁴¹ *Utting v BNZ*, above n 40, 64.

⁴² *Gilbert v Shanahan*, above n 6.

⁴³ [1997] 1 WLR 1627; [1998] 1 All ER 305.

⁴⁴ [1988] 1 All ER 400.

⁴⁵ *Nykredit Mortgage Bank plc v Edward Erdman Group (Ltd) (no 2)*, [1997] 1 WLR 1627, 1630; [1998] 1 All ER 305, 308.

the High Court of Australia in *Wardley Australia Ltd v State of Western Australia*.⁴⁶ In that case, the High Court held that in the case of a contingent liability no damage is suffered and therefore no cause of action accrues until the contingency is actually fulfilled and damage occurs.

- 38 It is interesting to note that in *Gilbert v Shanahan* the Court of Appeal did not mention *Hamlin* at all, and while they made a call for a reasonable discovery test to be instituted by statute, did not consider importing such a test judicially, although this was a clear opportunity to do so if they wished. In the Canadian Supreme Court case of *Central Trust Co v Rafuse*,⁴⁷ that Court applied the discovery rule to a professional negligence case, holding that it was a general rule and there was no principled reason for distinguishing between an action for injury to property and one for the recovery of pure financial loss caused by professional negligence.

⁴⁶ (1992) 175 CLR 514; (1992) 109 ALR 247.

⁴⁷ (1986) 31 DLR (4th) 481; [1986] 2 SCR 147.

4 Possible reform

A REASONABLE DISCOVERABILITY TEST?

Policy factors to be considered

- 39 **T**HERE ARE A NUMBER OF ISSUES TO BE CONSIDERED in relation to:
- whether a reasonable discovery test should be enacted;
 - whether there should be a long-stop, and if so, whether it should apply to all actions, or whether some actions (such as those relating to sexual abuse) should be exempted; and
 - the point at which a long-stop should apply.
- 40 In summary, the issues are:
- It is desirable that there be an end to litigation and that defendants not be exposed to stale claims. Individuals should have the reassurance that after a set period, an incident that could have led to a claim against them is in fact closed and no longer hangs over them. It is also in the community interest that disputes and conflict do not drag on interminably.
 - Claimants should have a reasonable opportunity to investigate what appears to be wrongful conduct, obtain expert advice, gather evidence, consult counsel, and prepare and file their claims. There should also be ample time allowed for discussion and negotiation which may lead to settlement without the need for a claim to be filed in court.
 - In time, witnesses die, memories fade, and records are lost. Litigation should be commenced while the evidence is available and fresh. Defendants may be at a particular disadvantage because a person who feels aggrieved is more likely to recall clearly and gather evidence at an early stage. Minimising evidential difficulties makes courts function more effectively. Also, standards of reasonable behaviour or ability change over time, and where this is an issue, it is better that it be decided promptly rather than a judge being obliged to decide what the reasonable standard was some years ago.
 - A minority of claims are brought at the very end of the limitation period. Having a set limit focuses the mind and forces claimants to make their move if they are going to.
 - Many professionals and businesses have insurance against legal claims. Extended limitation periods increase the cost of that insurance, a cost which is inevitably passed to consumers. If limitation periods are too long, it may not be possible to get insurance at all for all the time of exposure. Also, when insured persons retire from their professional practice, they should be able to know when they can safely discontinue their insurance. There are other economic reasons too – persons who fear a claim may be brought against them

and do not know how much that may eventually cost may be reluctant to commit themselves to other investments or business ventures.

- The Māori perspective should also be considered. The 1988 Report pointed out that seeking an early and irrevocable solution to disputes is not necessarily the Māori way. But the absence of Māori from the civil courts is largely for other cultural and socio-economic reasons, and not as a result of time limits.

The equitable/common law division

- 41 In the 1988 Report (at paragraphs 335–337) we recommended that one general limitations regime should apply to equitable claims as well as to others. The exclusion of equitable claims from the Limitation Act 1950 is clearly a result of the historical separate development of equity and common law, and is arguably no longer appropriate. We note that the Law Commission for England and Wales has recently come to the same conclusion,⁴⁸ as has the Queensland Law Reform Commission.⁴⁹ The Alberta report⁵⁰ contains an interesting analysis of the differing strategies which have been used in limitation law. They differentiate between the two strategies adopted by the English-derived legal systems: the strategy at law and the strategy in equity. The strategy at law is that embodied in the Act. It involves three main elements:
- the assignment of claims to various categories (tort, contract, trust etc);
 - the use of fixed limitation periods for each category of claim; and
 - the commencement of the limitation period at the time of accrual, which is a technical legal issue that depends on which category the claim has been assigned to.
- 42 While the strategy at law should be simple and efficient, and it often is, it clearly has given rise to problems and relies too much on the categorisation of claims into their causes of action. Causes of action can overlap.⁵¹ This strategy does not match up with the common-sense notion that claims should be brought as soon as reasonably possible. It acts against claimants by sometimes denying them the right to bring an action because they do not discover the cause of action in time, and it acts against defendants because in many cases a claimant is promptly aware that a claim should be brought but can keep the matter hanging for up to six years.
- 43 The strategy in equity is the doctrine of laches as developed by the equity judges. It is judge-made, not statutory, and its two main features are:
- the duration of the limitation period is measured by judicial discretion in respect of each particular case as it falls for consideration; and
 - time commences at the time of discovery. The degree of knowledge required to activate the limitation period is also governed by judicial discretion.
- 44 While this is in accordance with common sense, its disadvantage is that the exact length of the period is uncertain.

⁴⁸ Law Commission (England and Wales) *Limitation of Actions: A Consultation Paper* (Consultation Paper 151, Her Majesty's Stationery Office, London, 1998) para 13.165.

⁴⁹ Queensland Law Reform Commission *Review of the Limitation of Actions Act 1974 (Old)* (QLRC R53, Brisbane, 1998) 108.

⁵⁰ Alberta Law Reform Institute *Limitations* (Report No 55, Edmonton, 1989).

⁵¹ For example *S v G*, above n 2, where the facts gave rise to causes of action in negligence, trespass to the person and breach of fiduciary duty.

- 45 The reasonable discovery rule seems to be an extension of the strategy in equity into the strategy at law, and it has caused considerable confusion and unfairness because there is no clear cut-off point. Several judges have indicated that legislatures are better equipped to develop new limitations rules. The Alberta statute was drafted in a conscious effort to follow the principles of the strategy in equity rather than the strategy at law; by adopting an equitable approach to all claims, it eliminates reliance on the form of the cause of action.
- 46 The Limitation Act 1950 also does not specifically provide for restitutionary claims. We note with concern the recent United Kingdom Court of Appeal case of *Portman Building Society v Hamlyn Taylor Neck (a firm)*,⁵² in which the claimant attempted (unsuccessfully) to reframe a professional negligence claim as a restitutionary claim simply in an effort to take itself outside the statutory limitation period. The treatment of restitutionary claims will depend upon the historical antecedents of the particular restitutionary claim:

The state of the law of limitation compels us to provide a catalogue of heads of restitution claims and their appropriate limitation periods. It must be borne in mind that a given set of facts may give rise to alternative causes of action, for example, in contract, tort or breach of fiduciary duty. [The plaintiff] may then take advantage of the different limitation periods applicable to each cause of action.⁵³

Is a reasonable discoverability test the appropriate solution?

- 47 It is a criticism of the reasonable discoverability test that although it is fairer, in that it avoids the situation where plaintiffs are time barred before they even know that they have a cause of action, it introduces an avoidable element of uncertainty. For this reason, consideration was given to confining the test to classes of claim where the damage is latent; in particular, personal injury claims (which in this jurisdiction are effectively limited to exemplary damages claims) and claims arising out of building and engineering works. However, such an approach would add a second factual enquiry, in that it would be necessary to ascertain not only when the claim was reasonably discoverable but also whether the claim fell within the particular class however defined. In practice, the issue of whether the cause of action is reasonably discoverable or not is likely to arise only where there existed circumstances hindering discovery. If this is correct, there seems no point in confining the discoverability test to such circumstances. It might just as well be available in every case.

Should some cases, such as sexual abuse, be treated differently?

- 48 It is sometimes argued that civil claims for sexual abuse should be treated differently to other civil claims for limitation purposes. Certainly it is only recently that claims for historical sexual abuse have been brought at all;⁵⁴ they were not envis-

⁵² [1998] 4 All ER 202.

⁵³ Goff and Jones *The Law of Restitution* (5 ed, Sweet & Maxwell, London, 1998) 848–849. See also generally McLean “Limitation of Actions in Restitution” [1989] Cambridge LJ 472.

⁵⁴ The first New Zealand case to confront the issue of limitation in the case of historical sexual abuse appears to be *G v S* (22 June 1994) unreported, High Court, Auckland, CP 576/93, Blanchard J, on appeal *S v G*, above n 2; in Australia it was *Tiernan v Tiernan* (13 April 1993) unreported, Queensland Supreme Court, 39/1992; in the United Kingdom *Stubbings v Webb* [1993] AC 498; in Canada *Gray v Reeves* (1992) 89 DLR (4th) 315, closely followed by the leading case of *M(K) v M(H)* (1992) 96 DLR (4th) 289.

aged at the time that the Act was passed. It is therefore appropriate that we consider whether the policy considerations that apply to other civil claims apply equally to historical sexual abuse claims.

Policy factors to be considered in sexual abuse claims

- 49 The policy considerations that may be different for sexual abuse claims are:
- There is no public benefit in allowing repose to perpetrators of sexual abuse:
The patent inequity of allowing these individuals to go on with their life without liability, while the victim continues to suffer the consequences, clearly militates against any guarantee of repose.⁵⁵
 - Indeed, such a policy could actively encourage perpetrators to threaten and terrify their victims into silence. But this assumes, as does the discussion of issues by Thomas J in *W v Attorney-General*, that the intended defendant is a perpetrator, which may or may not be the case.
 - While the deterioration of evidence must be of some concern, and particularly the difficulty of establishing alibi after an extended period of time, it must be remembered that disability on the grounds of infancy will often delay these cases for many years in any event. In cases of sexual abuse there is frequently no corroborative evidence, just one person's word against another. It is arguable that a further lapse of time does not cause further problems in such evidence. There is unlikely to be an issue of preserving documents or records. Moreover, time works against plaintiffs, too, as they will also have difficulties in obtaining any corroborative evidence.
 - Encouraging victims not to "sleep on their rights" is inapplicable:
How can it be said that a victim of sexual abuse is sleeping on her rights when she is unaware of the link between the sexual abuse and the damage which she has suffered? Limitation legislation provides no incentive for her to prosecute her claim when she is psychologically incapable of recognising that a cause of action exists.⁵⁶
- 50 Even if there is a limit to civil claims for sexual abuse, there is no limitation for corresponding criminal charges; although the Court has an inherent jurisdiction to stay criminal proceedings if they represent an abuse of process.⁵⁷ If civil claims for sexual abuse are subject to time limitation, cases in which an extended period of time had elapsed would have to be dealt with in the criminal courts and would be subject to the higher, criminal, standard of proof, which may alleviate the concerns of those who fear deterioration of evidence. Aside from the varying standards of proof, each choice has advantages and disadvantages:⁵⁸
- Civil litigation gives the plaintiff a lot of control over the proceedings, and given that feelings of powerlessness are often suffered by sexual abuse victims, that may well be seen as therapeutic. The plaintiff may also obtain substantial damages, although it seems that is seldom the primary motive for such actions. On the other hand, in civil litigation the plaintiff must establish the quantum

⁵⁵ *M(K) v M(H)* (1992) 96 DLR (4th) 289, 302.

⁵⁶ *W v Attorney-General*, above n 3, 730.

⁵⁷ An order for permanent stay on the grounds of delay should be made only in exceptional cases: see *R v The Queen* [1996] 2 NZLR 111.

⁵⁸ See further Clute "Adult Survivor Litigation as an Integral Part of the Therapeutic Process" (1993) 2(1) *Journal of Child Sexual Abuse* 121; Walker "When An Incest Survivor Sues Her Father: A Commentary" (1992) 1(2) *Journal of Child Sexual Abuse* 127; Mallia "Adult Survivor Litigation as an Integral Part of the Therapeutic Process: A Reply" (1993) 2(1) *Journal of Child Sexual Abuse* 129.

of damages and is therefore open to attack on a range of issues that could not be traversed in criminal proceedings. Counselling records will be at issue, and that may affect how those records are made and what information the plaintiff chooses to divulge to their counsellor. Moreover, a loss may be highly counter-therapeutic.

- Criminal proceedings have the advantage that the victim incurs no legal costs, is not required to have any input other than as a witness, and is less likely to be seen as simply seeking revenge. However, the victim has no control over the proceedings and again may suffer badly if the case is lost.

It may be seen as appropriate that a plaintiff have the right to choose whether to sue, invoke the criminal law, or both.

- 51 The issue of choice of remedy arose in *G v G*.⁵⁹ The plaintiff sued her ex-husband for exemplary damages for assault and battery in the course of a violent domestic relationship. Some criticism was raised of the fact that the plaintiff had chosen to issue civil proceedings rather than pursue criminal charges, use the Domestic Protection Act, or initiate disciplinary proceedings under the Medical Practitioners Act (the defendant was a doctor). The Court did not accept this criticism:⁶⁰

It is consistent with the move towards restorative justice in this country that the victim have a direct part in the process of reparation for wrong done, rather than allow the State to take full responsibility and, in isolation from her, exact punishment ... In the plaintiff's submission it is for her to control the course of any proceedings brought against the defendant. If she chooses to bring an action for exemplary damages based on the torts committed by the defendant then it is not for him to suggest that she had other avenues open to her and must therefore fail or that the outcome of these proceedings be modified as a consequence. It is also appropriate that she should be permitted that degree of control over the actions that she takes. Domestic violence is founded upon the desire on the part of the assailant to exercise power and control in a domestic relationship. It is only fitting that a plaintiff who claims that such violence has been perpetrated on her should have the right to choose her remedy, provided of course it is within the parameters of the law.

- 52 It has been suggested⁶¹ that there are three broad justifications for delay in commencing a sexual abuse action, all of which require an understanding of the psychological effects of child sexual abuse. They are:
- a psychological inability to bring the action. This usually arises because:
 - although the victim has attained legal majority, she continues to blame herself, not the abuser, for the abuse;
 - complaining of abuse, especially incestuous abuse, requires considerable courage and emotional strength, which abuse victims often lack, that lack being caused by the abuse they have suffered; and
 - even though the abuse has ended, the relationship has not. The victim may still be emotionally and/or financially dependent on the abuser.

⁵⁹ (1996) 15 FRNZ 22.

⁶⁰ *G v G*, above n 59, 33–34.

⁶¹ Mullis "Compounding the Abuse? The House of Lords, Childhood Sexual Abuse and Limitation Periods" [1997] *Med L Rev* 22.

There is also evidence that some victims suffer post-traumatic stress disorder (PTSD):

PTSD is characterised by emotionally painful re-experiencing of the event. When recalling the event the victim may feel in a very real sense that the event has just occurred or is actually occurring. Individuals with PTSD will, unsurprisingly, go to considerable efforts to avoid any of the stimuli associated with the trauma. Thus, they “may make efforts to avoid thoughts, feelings or conversations associated with the trauma” and also to “avoid activities, places, or people that arouse recollections of the trauma”. For a victim to commence a legal action she must inevitably confront what has happened to her. Where an individual has PTSD it would be unsurprising if she did not find it exceedingly difficult to commence an action particularly when the reality of child sexual abuse is taken into account.⁶²

- an inability to recognise the link between cause and effect; this is the discoverability point. In New Zealand, the cause of action does not arise until discovery (see *W v Attorney-General*, paragraph 32 above); and
- repression – this is where the victim has no conscious memory of the abuse but later regains the memory, usually in therapy. There is disagreement in scientific circles as to the existence of the phenomenon of repressed memory and whether, if it does exist, regained memories are reliable. In the Law Commission’s recent paper *Total Recall? The Reliability of Witness Testimony*⁶³ we concluded that there is some support for the existence of such memories, but its reliability is controversial:

Evidence based on recovered memories of sexual abuse has been a controversial issue in recent years. The research surveyed suggests that sexual abuse and other traumatic events may be forgotten and then remembered again. The research also shows that false memories may be created by suggestion. Unfortunately, it is not possible to clearly distinguish between false and true memories on the basis of such characteristics as vividness of recall or confidence in the memory.

There is no evidence that recovered memories are any more or any less reliable than apparently continuous memories, other things being equal. However, the issue has only been examined in two studies to date. The draft Evidence Code does not specifically address the issue of evidence based on recovered memories. The Law Commission considers that such evidence is best dealt with on a case by case basis, with the assistance of expert evidence where such evidence is likely to substantially assist the fact finder.

It appears that, assuming a plaintiff could establish that she had recovered repressed memories and her recovered memories are accurate, she could argue that she did not discover her cause of action until that recovery.

Other ways around time limitations

- 53 Quite apart from the issue of when the cause of action accrues, cases have indicated a number of other ways to avoid the time restriction. They are: reliance on disability, fraudulent concealment, and equitable claims or other causes of action.

⁶² Mullis, above n 61, 27.

⁶³ New Zealand Law Commission *Total Recall? The Reliability of Witness Testimony: MP 13* (Wellington, 1999) paras 197–198.

Disability

- 54 As discussed in paragraphs 33–34 above, in *W v Attorney-General*, Thomas J suggested that a victim may make the causal connection necessary for the cause of action to accrue, and yet be disabled from instructing a solicitor. This issue was also discussed, again obiter, in *T v H*.⁶⁴ In that case, T was abused by M when she was a child between 1959 and 1970. She was so terrified of him that she was unable to tell anyone about the abuse until 21 May 1992, when she heard that M had recently died. She then told her husband and soon consulted a solicitor. An application under section 24 of the Act was filed, claiming that she had been under a disability due to fear of harm from M if she revealed the abuse, and that fear only disappeared with his death. Her intended cause of action was in tort, there being no suggestion of a fiduciary relationship. Her appeal was declined because she did not come under the Act at all; section 33 of the Act provides that the Act does not apply where a period of limitation is prescribed by another Act, and in this case section 3 of the Law Reform Act 1936 (effect of death on certain causes of action) applied. The Law Reform Act 1936 contains no disability provision, so her argument failed. However, acknowledging that the point may be of importance to future cases, the majority judgment discussed the meaning of “under a disability”, and concluded that “unsoundness of mind” may cover a person who is capable of managing their affairs in some respects but who, for a recognised psychiatric or psychological cause, is incapable of managing them in other respects:

Whether or not a person is of unsound mind must depend on the purpose of the inquiry, and must in all cases be a matter of fact and degree. In the present context, the question must be determined in the light of the purpose of s 24 of the Limitation Act. Read against the definition in s 2, that purpose is plainly to ensure that a person who is incapable of, or disabled in the more general sense from instituting proceedings does not lose the right to do so while the incapacity or disablement continues. In the light of that purpose, I have no doubt that one who from established psychiatric or psychological causes is unable to bring him or herself to initiate proceedings is to that extent of unsound mind and so under a disability while that condition lasts.⁶⁵

- 55 In the more recent case of *M v H*, Gault J indicated (obiter) that he would have considered favourably an argument that the appellant was under a disability within section 24 of the Act, in that:

... through lack of recognition of the true nature of the alleged abuse and its consequences or because of psychological repression [she had been] reasonably unable adequately to disclose the facts and secure proper advice.⁶⁶

However, that argument had not been advanced on appeal by counsel for the appellant and therefore did not fall to be decided in that case.

- 56 In the Commission's view, the appropriate solution to the problems in the area of sexual abuse is to extend the definition of disability so that it is clear that cases of this sort fall within it (see paragraph 82 below).

⁶⁴ [1995] 3 NZLR 37.

⁶⁵ *T v H*, above n 64, 49.

⁶⁶ (9 September 1999) Court of Appeal, CA188/98, para 41.

Fraudulent concealment

- 57 It has been suggested (obiter) that fraudulent concealment under section 28 of the Act may be applicable in cases of sexual abuse of children:

As is well documented, sexual abuse of children frequently is accompanied by deceit as to the nature of the acts and leads to victims constructing psychological blocks or denials and underlying psychological and emotional damage may be neither recognised nor linked to the abuse. Where it is established that the very conduct of the defendant and accompanying deceit had the effect of preventing the victim from recognising the true nature of the abuse and the damage caused by it, it does not strain interpretation to hold that there has been fraudulent concealment of the right of action.⁶⁷

- 58 If fraudulent concealment were found in fact, the effect would be that the period of limitation would not begin to run until the plaintiff had discovered the fraud or could with reasonable diligence have discovered it. However, given the more subjective test now provided in *W v Attorney-General*, it seems most unlikely that the cause of action could accrue and yet in fact remain fraudulently concealed.

Equitable claims

- 59 Many sexual abuse claims are pleaded with multiple causes of action (typically negligence, assault and battery, and breach of fiduciary duty),⁶⁸ all of which arise out of the same set of facts. The Act does not apply to fiduciary claims, but the Court of Appeal has indicated (obiter) that in such cases the equitable doctrine of laches will apply:

... where the pleaded claims are really alternatives in respect of essentially the same conduct there is much to be said for the long-established analogy whereby equity follows the law which was preserved in s 4(9).⁶⁹

The application of the Limitation Act by analogy has recently been re-affirmed by the Court of Appeal in *M v H*.⁷⁰

- 60 On the other hand, in *M(K) v M(H)*, the Supreme Court of Canada, noting that the relevant statute (Ontario) was one of the few remaining limitation statutes in Canada that is not applicable to all civil actions, both common law and equitable, held that a limitation period should not be imposed by analogy nor was the action barred by laches: the respondent did not alter his position because of the delay and the appellant did not acquiesce (see pages 321 ff of the judgment). This view has been supported by the Court of Appeal of New South Wales in *Williams v Minister, Aboriginal Land Rights Act 1983 & Anor* (discussed below, paragraphs 62–65). Like Ontario's, our statute does not cover equitable claims.
- 61 However, if the point arises for direct consideration, we would expect the New Zealand Court to adopt the cogent reasoning of the unanimous verdict of the

⁶⁷ *S v G*, above n 2, 688.

⁶⁸ It has also been suggested (Mullis, above n 61) that in principle it would be possible to sue for intentional causing of physical harm, under the principle in *Wilkinson v Downton* [1897] 2 QB 57, or negligent infliction of emotional distress in both of which the cause of action accrues upon damage.

⁶⁹ *S v G*, above n 2, 689.

⁷⁰ *M v H*, above n 66, Gault J.

Federal Court of Australia in *Paramasivaim v Flynn*.⁷¹ In that case, it was held that sexual abuse is properly in the purview of the law of torts, and a fiduciary claim is unlikely to be upheld. Certainly, it seems wrong in principle to allow the use of a cause of action, into which the alleged behaviour does not naturally fit, simply in an effort to elude limitation provisions. The better path would be to change the limitation provisions, if it is agreed that is appropriate.

Are there further special cases?

- 62 There is also the question of whether, if an exception is to be made for sexual abuse cases, there are not other cases which, perhaps by analogy, also should receive special treatment. An interesting example is *Williams v Minister, Aboriginal Land Rights Act 1983 & Anor*.⁷² The New South Wales statute contains personal injury claims with a limitation period of 3 years from the date the cause of action accrues, plus a long-stop provision of 30 years "running from the date from which the limitation period for that cause of action fixed by or under Part 2 runs". However, that long-stop is not an absolute bar, because there is a discretionary extension for latent injury which provides (section 60G(2)):

If an application for an order under this section is made to a court by a person claiming to have a cause of action to which this section applies, the court, after hearing such of the persons likely to be affected by the application as it sees fit, may, if it decides that it is just and reasonable to do so, order that the limitation period for the cause of action be extended for such period as it determines.

- 63 Ms Williams was a woman of aboriginal descent. Born in 1942, she was removed from her mother almost immediately and placed in a home for aboriginal children. She was fair-skinned, and when she was four the Aborigines' Welfare Board removed her to a home for white children, where she remained until she was 18. She attained legal majority in September 1963. She suffered considerably at the home and her adult life was very disturbed. She was hospitalised for various mental disorders, including acute anxiety and reactive depression. She claimed it was not until 1991 that she came to realise that her borderline personality disorder was the result of her childhood experiences. She sought legal help in 1991, but because of problems getting legal aid, proceedings were not issued until January 1993. The proceedings sought damages in tort (negligent breach of duty and wrongful imprisonment) and also equitable compensation for breach of fiduciary duty.
- 64 The leading judgment was given by Kirby P. He held that the Aborigines' Welfare Board was in the nature of a statutory guardian, and therefore it was at least arguable that it had a fiduciary duty to Ms Williams. The New South Wales Act does not apply to causes of action for equitable relief except by analogy, and he held that the limitation period should not be applied by analogy nor was it barred by laches.
- 65 He also ordered that time be extended under section 60G(2) for the tortious claims. The respondents argued that they could not fairly defend themselves because of the loss of evidence over time, but it was held that crucial facts had been

⁷¹ (1998) 160 ALR 203, per Miles, Lehane, and Weinberg JJ.

⁷² (1994) 35 NSWLR 497.

objectively established and sufficient records and witnesses were available. It was noted that the limitation period did not commence until 1963, so there would have been a long lapse anyway. There was also the question of justice to Ms Williams:

I do not for a moment say that the long delay would not occasion considerable disadvantage to the respondents in mounting their defence to Ms Williams' case. But it is in the nature of any application to lift the time bar, that there will be some prejudice. The fading of memories and the removal of witnesses are inherent in the passage of time. This consideration cannot therefore be determinative, of itself. It is necessary, in each case, to judge the prejudice and to weigh it against the prejudice to the plaintiff of refusing the extension sought. In this case, as in *KM v HM*, it is important to keep in mind that Ms Williams was an infant at the time the alleged wrongs occurred. The time bar did not descend against her in 1953, six years after her placement in [the home]. It was postponed until she reached her majority ... There is an element of justice which requires, in my respectful view, the agitation and determination of her claim in an open trial, with her entitlement (or lack thereof) decided on the merits. If she can make good her contentions, she has suffered a grievous wrong at the hands of the agencies of this State. The passage of time, and changing perceptions of right and wrong conduct present as great a problem for Ms Williams as they do for the respondents. But so far, the Court has been concerned over three days with the preliminary issue of whether it is just and reasonable that she should be entitled to have her day in court. With hindsight, it might have been preferable that this time had been devoted to the substantive trial of her claim. I acknowledge the disadvantages, and even the prejudice, which the respondents suffer as a result of such a long delay since the events occurred which are now complained of. But if "justice and reasonableness" are the criteria, such prejudice must be weighed in scales that also take account of justice to the appellant, an Australian Aboriginal, who invokes the courts of her country.⁷³

THE POSITION IN OTHER JURISDICTIONS

United Kingdom

- 66 The United Kingdom statute does contain a separate time limit for actions in respect of personal injuries (three years from the date of accrual or the date of knowledge of the person (if later)), plus a discretionary exclusion of time limit,⁷⁴ but the House of Lords has held⁷⁵ that these provisions do not apply to intentional assaults such as sexual abuse.⁷⁶ The United Kingdom is also considering reform: in 1998 the Law Commission for England and Wales⁷⁷ tentatively proposed a "core regime", which would allow an initial limitation period of 3 years from when the plaintiff knows, or reasonably ought to know, that she has a cause of action. There would be a long-stop limitation of 10 years, or 30 years in the case of personal

⁷³ *Williams v Minister*, above n 72, 514.

⁷⁴ See Limitations Act 1980 (UK), ss 11 and 33.

⁷⁵ *Stubbings v Webb* [1993] AC 498.

⁷⁶ But note that the Court of Appeal of Victoria refused to follow *Stubbings* and held that their provision, which is virtually identical, did include intentional torts: *Mason v Mason* [1997] 1 VLR 325.

⁷⁷ Law Commission (England and Wales), above n 48, contains a lengthy and comprehensive review of all aspects of the law of limitations.

injury claims, which would run from the date of the act or omission giving rise to the claim. The core regime would apply to most torts (including sexual abuse) but not to purely equitable claims.

- 67 The Law Commission for England and Wales considered whether sexual abuse claims should be subject to any limitation period, and if so, whether they should be subject to the core regime or to special provisions. It concluded that they should be subject to a limitation period and to the core regime for the following reasons:
- At some point, regardless of the merits of the case, litigation should be stifled because the quality of the evidence is such that a fair trial cannot be given. It is particularly relevant that in sexual cases there is usually no corroborative evidence. One must rely on the memories of the parties.
 - The issue is complicated by “repressed” memory. The reliability of such evidence is controversial. Although it is up to the court to decide what weight to give such evidence, a defendant may have substantial difficulty in producing evidence to counter it years, or decades, after the alleged events.
 - In *Stubbings v Webb*, the European Court of Human Rights⁷⁸ held that the limitation period of six years from the age of majority is not unduly short.
- 68 The Law Commission for England and Wales also concluded that there should be no special regime for sexual abuse claims, but given the proposed 30 years long-stop, it seems unlikely that further extension would be needed.

Alberta

- 69 In 1996, Alberta enacted a new Limitations Act which constitutes a significant departure from the traditional approach to this area of the law. Its basic structure is that all claims must be brought within 2 years of reasonable discovery, with a long-stop of 10 years from when the claim arose. The law came into force on 1 March 1999 and is based on recommendations in a 1989 report by the Alberta Law Reform Institute.⁷⁹ That report contains no specific discussion of sexual abuse, probably because the issue had simply not come before the courts yet.⁸⁰ However, between the report and the enactment of the new statute, an amendment was made so that the statute now provides:

Section 1(i) “person under disability” means

- (i) a minor who is not under the actual custody of a parent or guardian,
- (ii) a dependent adult pursuant to the Dependent Adults Act, or
- (iii) an adult who is unable to make reasonable judgments in respect of matters relating to the claim . . .

Section 5(1) The operation of the limitation periods provided by this Act is suspended during any period of time that the claimant is a person under disability.

⁷⁸ The European Court of Human Rights heard an appeal from the House of Lords decision reported at (1996) 23 EHRR 213.

⁷⁹ Alberta Law Reform Institute, above n 50.

⁸⁰ See n 54 above.

- Section 5(2) Where a claimant brings an action against
- (a) a parent or guardian of the claimant, or
 - (b) any other person for a cause of action based on conduct of a sexual nature, including, without limitation, sexual assault,
- and the cause of action arose when the claimant was a minor, the operation of the limitation periods provided by this Act is suspended during the period of time that the claimant is a minor.
- Section 5(3) Under this section, the claimant has the burden of proving that the operation of the limitation periods provided by this Act was suspended.

- 70 It seems likely that someone who for established psychiatric or psychological causes arising out of sexual abuse had been unable to bring themselves to initiate proceedings (see the first bullet of paragraph 52 above) would be able to establish that they had been disabled within the terms of section 1(i)(iii).

Other Canadian provinces

- 71 In British Columbia, Newfoundland and Saskatchewan, there is no limitation period at all for a cause of action based on misconduct of a sexual nature.⁸¹ In Nova Scotia, the cause of action is deemed not to arise until the plaintiff becomes aware of the injury or harm and discovers the causal relationship with the abuse, and time will not begin to run while the plaintiff is not reasonably capable of commencing proceedings because of physical, mental, or psychological conditions resulting from the abuse.⁸² In Prince Edward Island, the Statute of Limitations provides that in any action for injury to the person based on an allegation of sexual abuse, the usual limitation period (two years from when the cause of action arose) begins to run when the plaintiff understands the nature of the injuries and recognises the effects of the abuse.⁸³ There is no long-stop. In Ontario, the Limitations Act Consultation Group recommended⁸⁴ that limitation periods should be abolished in sexual abuse cases, but no legislation has yet been enacted as a result of their recommendations.

Western Australia

- 72 In 1997, the Law Reform Commission of Western Australia published a comprehensive review of their limitation law. Their proposals are heavily influenced by the Alberta model. Like Alberta, they recommend having discoverability as the basic rule, rather than having accrual as the basic rule and discoverability as the exception. They propose:
- (a) all claims (with exceptions in relation to recovery of land, mortgages and tax) shall be subject to a discovery limitation period which would expire if the claimant does not issue proceedings within three years after the date that he first knew, or in the circumstances ought to have known, that:

⁸¹ Limitations Act (British Columbia), s 3(3)(k) (amended 23 June 1992); Limitations Act (Newfoundland) 1995, s 8(2); Limitation of Actions Act (Saskatchewan), s 3(3.1) (amended 4 May 1993).

⁸² Limitation of Actions Act (Nova Scotia), s 2(5).

⁸³ Statute of Limitations (PEI), s 2(3), amended 6 May 1992.

⁸⁴ "Recommendations for a Limitations Act: Report of the Limitations Act Consultation Group" (unpublished, 1991).

- (i) the injury in respect of which he brings the proceedings had occurred;
 - (ii) the injury was attributable to conduct of the defendant; and
 - (iii) the injury, assuming liability on the part of the defendant, warrants bringing proceedings.
- (b) an ultimate limitation period (again with exceptions for land and tax) of fifteen years from the date the cause of action arose.
- (c) ... a very narrow discretionary power which enables a court to disregard either the discovery period or the ultimate period in appropriate cases. The court should be able to order that either period may be extended in the interests of justice, but should only be able to make such an order in exceptional circumstances, where the prejudice to the defendant in having to defend an action after the normal limitation period has expired, and the general public interest in finality of litigation, are outweighed by other factors. The plaintiff would have the burden of proving that the conditions for the exercise of discretion in his favour had been met. It should be noted that the recommended discretion provision is phrased in narrow terms. In addition, the Commission would expect the courts to maintain a strict approach to the exercise of this discretion, in view of the focus on the discovery period and the length of the ultimate period.⁸⁵

73 This discretion is not contained in the Alberta model.

74 The Western Australia Law Reform Commission carefully considered the need for special provisions for sexual abuse cases,⁸⁶ but concluded that such cases should be subject to the general scheme they have proposed. The general discretion to disregard the long-stop period is sufficient for the very small number of cases which will fall outside the 15 year period. The Court will be able to take into account such factors as whether the plaintiff has delayed unreasonably or the defendant has been significantly prejudiced by loss of evidence.

75 No legislation has yet been enacted as a result of this report.

Other Australian jurisdictions

76 In New South Wales, the limitation period for a personal injury action is three years, but there is a discretionary extension for latent injury where the plaintiff did not know the injury had been suffered, was unaware of the nature or extent of the injury, or was unaware of the connection between the injury and the defendant's act or omission. There is no long-stop, but an application must be made within three years after the plaintiff became aware, or ought to have become aware, of these facts.⁸⁷ It was under this legislation that the case of *Williams v Minister* (discussed in paragraphs 62–65 above) was decided.

77 In Victoria, there is discretionary provision to extend the limitation period in the case of personal injury.⁸⁸ There is no long-stop and the provision is not limited to sexual abuse. In exercising the discretion, the court shall have regard to:

⁸⁵ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project 36 Part II, Perth, 1997) para 7.40.

⁸⁶ Law Reform Commission of Western Australia, above n 85, paras 9.45–9.47.

⁸⁷ Limitation Act (NSW) 1969, s 60F–I.

⁸⁸ Limitation of Actions Act (Vic) 1958, s 23A.

- the length of and reasons for the delay on the part of the plaintiff;
- the extent to which, having regard to the delay, there is or is likely to be prejudice to the defendant;
- the extent, if any, to which the defendant had taken steps to make available to the plaintiff means of ascertaining facts which were or might be relevant to the cause of action of the plaintiff against the defendant;
- the duration of any disability of the plaintiff arising on or after the date of the accrual of the cause of action;
- the extent to which the plaintiff acted promptly and reasonably once he knew that the act or omission of the defendant, to which the injury of the plaintiff was attributable, might be capable at that time of giving rise to an action for damages; and
- the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

The Australian Capital Territory has a very similar provision.⁸⁹

- 78 In Tasmania, there is also a discretion⁹⁰ to extend the limitation period in a personal injury case if the court thinks that in all the circumstances of the case it is just and reasonable to do so, but the period (ordinarily three years) cannot be extended for more than a further three years. A 1992 report of the Law Reform Commission of Tasmania⁹¹ recommended that the court should have a discretion to permit the extension of the limitation period without any time limits, and that there should be a statutory list of factors to be taken into account, similar to those in Victoria and the Australian Capital Territory. The report also recommended that the limitation period for personal injury actions be increased from three years to six.
- 79 In the Northern Territory, there is also a discretion for the court to extend time. This is not restricted to sexual abuse or personal injury claims, and there is no long-stop.⁹² South Australia's provisions are essentially identical.⁹³ In Queensland, there is a discretion to extend the limitation period in personal injury cases, but only for one year.⁹⁴

EXTENSION OF DISABILITY PROVISIONS

- 80 In our view, the appropriate solution to the problem of sexual abuse claims is to extend the definition of disability, the term employed in section 24. An appropriate provision would be along the following lines:

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

⁸⁹ Limitation Act (ACT) 1985, s 36.

⁹⁰ Limitation Act (Tasmania) 1974, s 5.

⁹¹ Law Reform Commission of Tasmania *Limitation of Actions for Latent Personal Injuries: R 69* (Hobart, 1992).

⁹² Limitation Act (NT), s 44.

⁹³ Limitation of Actions Act (SA) 1936, s 48.

⁹⁴ Limitation of Actions Act (Qld) 1974, s 31.

This proposal is influenced by the Albertan solution discussed in paragraph 69, but differs from it by requiring some or all of the matters on which the action is founded to be causative of the plaintiff's inability to make reasonable judgments. It is along the lines proposed by Gault J in his judgment in *M v H* (see paragraph 55 above), but is not confined as was that proposal to sexual abuse. Although in practice such a provision is likely to be used mostly in sexual abuse claims, it could extend to situations such as those in the *Williams* case (see paragraphs 62–65 above) or cases of non-sexual torture of children.

- 81 The solution we propose deals with the first and sixth of the first six points raised by Thomas J in his dissenting judgment in *M v H*.⁹⁵ It should remove any temptation to the courts to fiddle with the question of when the cause of action arises in sexual abuse cases (Thomas J's second and third points). It should similarly remove any need for the invention of fiduciary duties to get round limitation problems (Thomas J's fourth point). The matter of fraudulent concealment (the fifth point) we have already discussed in paragraphs 57–58.

⁹⁵ *M v H*, above n 66, 20–21.

5

Actions for relief from consequences of a mistake

- 82 **I**N THE RECENT CASE of *Kleinwort Benson Ltd v Lincoln City Council and Ors*,⁹⁶ the House of Lords overturned the longstanding rule against recovery of money paid under a mistake of law. This rule had already been abrogated in New Zealand in 1958 by the enactment of sections 94A and 94B of the Judicature Act 1908.
- 83 The House of Lords recognised that the effect of their decision, under section 32(1)(c) of the Limitation Act 1980 (UK),⁹⁷ was that a cause of action for money paid under a mistake of law might be postponed indefinitely, and this may not have been appreciated at the time when section 32(1) was enacted. They considered that this could be remedied only by legislation to provide for a time limit in such cases.⁹⁸
- 84 When sections 94A and 94B of the Judicature Act were drafted, passing mention was made of the fact that under the Limitation Act 1950, time would not begin to run until the mistake was discovered,⁹⁹ but the matter was not taken further. Although it does not appear to have caused problems in practice, probably because of the enactment of section 94A(2), it is a lacuna in the law which has now been highlighted by the House of Lords and should be remedied.
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⁹⁶ *Kleinwort Benson*, above n 5.

⁹⁷ This is the equivalent of the Limitation Act 1950, s 28(c).

⁹⁸ *Kleinwort Benson*, above n 5, 389.

⁹⁹ Letter from Mr JF Hogg (senior lecturer in torts and contract law, Victoria University) to Department of Justice, 14 November 1956, National Archives File J.1: 18/1/198.

6 Recommendations

- 85 **W** E RECOMMEND THAT THE LIMITATION ACT 1950 be amended to:
- make it clear that the cause of action accrues when all the elements of the cause of action are in existence, whether or not the claimant knows that they have a cause of action;
 - introduce a “reasonable discovery” test, which allows the limitation period to be extended beyond the normal six year period if the claimant can show that he or she (or his or her predecessor in title) could not reasonably have known within the six year period that they had a cause of action. This makes it clear that the reasonable discovery test is an exception to the usual rule and the onus is on the claimant to prove its entitlement;
 - introduce a “long-stop” of 10 years from time a cause of action accrues, beyond which a claim may not be brought (except in the case of fraudulent concealment under section 28(a) or (b) of the Limitation Act 1950);
 - extend the disability definition in section 24 as described in paragraph 80 above; and
 - provide that actions for relief from the consequences of a mistake be subject to the same limitation provisions, including a long-stop, as other causes of action.
- 86 The Commission welcomes submissions on these recommendations and on any other points raised in this paper.
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