



The Law Reform Commission
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

REPORT

ON

**THE STATUTES OF LIMITATIONS:
CLAIMS IN CONTRACT AND TORT IN RESPECT OF LATENT DAMAGE
(OTHER THAN PERSONAL INJURY)**

(LRC 64 - 2001)

**IRELAND
The Law Reform Commission**

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THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20th October, 1975, pursuant to section 3 of the *Law Reform Commission Act, 1975*.

The Commission's Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government in Autumn 2000. The Commission also works on matters which are referred to it on occasion by the Office of the Attorney General under the terms of the Act.

To date the Commission has published sixty three Reports containing proposals for reform of the law; eleven Working Papers; sixteen Consultation Papers; a number of specialised Papers for limited circulation; and twenty one Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in an Annex to this Report.

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The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners. The Commissioners at present are:

<i>President</i>	The Hon. Mr Justice Declan Budd High Court
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<i>Part-time Commissioners</i>	Dr Hilary A Delany Barrister -at- Law Lecturer in Law, Trinity College, Dublin; Ms Patricia T Rickard-Clarke Solicitor, Partner - McCann FitzGerald Solicitors; Professor Finbarr McAuley Jean Monnet Professor of European Criminal Justice, University College Dublin.

The Secretary to the Commission is John Quirke.

Research Staff

Director of Research: (Professor) David Gwynn Morgan LLM (Lond), PhD (NUI)

Legal Researchers: Ms Bairbre O'Neill BCL, LLM
Ms Dara Dowling BCL, LLM (University of Paris II)
Ms Olwyn Burke BA, LLB, LLM (Edin)
Ms Jane McCullough BCL, EMA (Padua)
Ms Niamh O'Brien LLB, LLM(Cantab)
Ms Mairead O'Dwyer MB, BCh, BAO, BCL
Ms Bronagh Maher BCL

Legal Information Manager: Ms Marina Greer BA, H Dip LIS

Cataloguer: Ms Eithne Boland BA (Hons), H Dip Ed, H Dip LIS

Project Manager: Mr Pearse Rayel

Clerical Staff

Mr Liam Dargan	Private Secretary to the President
Mr Denis McKenna	Higher Clerical Officer
Ms Teresa Hickey	Clerical Officer

Legal Researchers on this Project

Dara Dowling
Leesha O' Driscoll

Contact Details

Further information can be obtained from:

***The Secretary
The Law Reform Commission
IPC House
35-39 Shelbourne Road
Ballsbridge
Dublin 4***

Telephone: (01) 637 7600
Fax No: (01) 637 7601
Email: info@lawreform.ie
Website: www.lawreform.ie

NOTE

This Report was submitted on 14 February 2001 to the Attorney General, Mr. Michael McDowell, S.C., under Section 4 (2)(c) of the *Law Reform Commission Act 1975*. It embodies the results of an examination of and research in relation to the law relating to the *Statutes of Limitation 1957 and 1991* concerning contract and tort (excluding claims in respect of personal injuries) where the loss was latent i.e. in circumstances where a person was not or could not have been aware of the accrual of a right of action until after the expiration of the relevant limitation period. The Report was requested by the former Attorney General, Mr. David Byrne S.C., and includes proposals for reform which the Commission were requested to formulate.

While these proposals are being considered in the relevant Government Departments the Attorney General has requested the Commission to make them available to the public, in the form of this Report, so as to enable informed comments or suggestions to be made by persons or bodies with special knowledge of the subject.

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INTRODUCTION

1. On 11 November 1997 the Attorney General requested the Law Reform Commission

“to review the *Statutes of Limitation, 1957 and 1991* in relation to claims in contract and tort (other than claims in respect of personal injuries) in circumstances where the loss is latent i.e. in circumstances where the person was not aware, or could not have been aware of, the accrual of the right of action until after the expiration of the relevant limitation period.”

The Commission considers that ‘quasi-contractual’ claims are also within the terms of the Attorney General’s Reference.

2. A Consultation Paper on foot of this Reference was published in November 1998. A colloquium was held on 23 March 1999. This Report now sets out the final recommendations of the Law Reform Commission in response to the Reference from the Attorney General.

Statutes of Limitations

3. The law of limitations in Ireland is governed by the *Statute of Limitations, 1957*, as amended by the *Statute of Limitations (Amendment) Act, 1991* and the *Statute of Limitations (Amendment) Act, 2000*. In summary, it provides that if proceedings are commenced after the expiration of the specified statutory limitation period for the claim in question, the defendant may raise the defence that the proceedings are ‘statute-barred’ thereby precluding any discussion of the merits of the claim.

Purpose of Limitation Periods

4. The purpose of limitation periods is twofold: to discourage plaintiffs from unduly delaying the institution of proceedings; and to protect defendants from stale claims.

5. The existence of a stringent procedural rule, which bars discussion of substantive issues, is justified by reference to the increasing risk of injustice with the passing of time. Firstly, there is some truth in the statement that long dormant claims have “more of cruelty than justice in them”,¹ since the later the claim, less reliable the memories of witnesses and the more likely that there will be difficulties in locating witnesses and evidence.

6. Secondly, factors add to the length of time which is required to resolve the dispute and thereby prevent the use of the public resources of the courts system for

¹ Per Best CJ in *A'Court v. Cross* (1825) 3 Bing 329, 332-333.

current disputes. Thirdly, the expense of extended insurance coverage and storage of records necessary to defend a claim, further adds to the defendant's burden and, where the defendant is a business, these costs may be passed on to its customers.

7. On the other hand, to bar all plaintiffs without exception with claims above a certain age, from bringing their case to court to secure justice is a strong sanction to apply. Apart from the possibility of injustice to the individual plaintiff, society in general has an interest in claims which challenge anti-social behaviour as this contributes to the maintenance of proper standards and bolsters the public regulatory regime.²

Consolidation of the Statutes of Limitations

8. The Statutes of Limitations to date consists of:

- (i) the Principal Act being the *Statute of Limitations, 1957*;
- (ii) the *Statute of Limitations (Amendment) Act, 1991* which deals with personal injury cases;
- (iii) the *Statute of Limitations (Amendment) Act, 2000* which deals with sexual abuse cases.

In the near future, two more pieces of legislation are to be added to this list.³ Thus there will be a total of five Acts, dealing with the law of limitations in this jurisdiction, not to mention the other pieces of legislation, like the *Liability for Defective Products Act, 1991*, which also deal with limitation periods.

9. Our limitations legislation is becoming very untidy. Both for the ordinary person on the street and practitioners alike; the amendments and the cross referencing are cumbersome and confusing.

10. The Commission believes that there is an urgent need for the consolidation of the limitations legislation.

Commission Recommendations

11. Under the existing law, claims for damage in contract and tort (other than personal injury), will be statute-barred after a period of six years from the date the cause of action accrues. It is irrelevant whether the claimant was aware or could have been

² Law Reform Commission *Consultation Paper on the Statutes of Limitation: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)* (November, 1998) at 7.

³ Legislation dealing with non-sexual physical abuse cases, and legislation dealing with latent damage (other than personal injury).

aware of the right of action until after that period. The central question which the reference asks by implication is whether this law sets the correct balance.

12. The Commission is of the opinion that the current law does not adequately protect the plaintiff in cases where the damage is so latent as not to be discoverable until after (or perhaps shortly before) the expiration of the current limitation period. This conclusion leads the Commission to propose the introduction of a special provision to extend the limitation period in such cases.

13. However, the Commission is also mindful of the valuable functions served by limitation periods and would not wish to introduce undue uncertainty into the law. It is for this reason that, along with its main recommendation of the introduction of a discoverability test in cases of latent loss in contract and tort, excluding personal injury, the Commission recommends in Chapter Four the enactment of a long-stop limitation period after which all claims would be statute-barred.

14. In short, the Commission's main recommendations are that a discoverability test be introduced, balanced by the enactment of a long-stop limitation period. The Commission believes that its final recommendations would reduce the potential for injustice to the plaintiff who suffers latent loss under the present law, while still retaining the appropriate limitation period.

Layout of this Report

15. Words which import the masculine gender, should be construed throughout this Report as also importing the feminine gender, and vice versa, unless the contrary intention appears. See s.11 of the *Interpretation Act, 1937* and s.33 of the *Interpretation (Amendment) Act, 1993*.

16. This report takes the following format:

Chapter One deals with the current law in respect of discoverability and accrual. It looks at the *Statute of Limitations (Amendment) Act, 1991*, the *Liability for Defective Products Act, 1991* and the *English Latent Damage Act, 1980*.

Chapter Two discusses the discoverability test as it already exists for personal injury claims. It then goes on to consider non-personal injury claims and to propose a discoverability test that would be more suitable to latent defects. The Commission then explains the proposed test of discoverability and defines the parameters of the test by reference to practical examples from the current regime.

Chapter Three deals with the question of whether the limitation period based on accrual should be retained and combined with the discoverability test or whether the discoverability test should be the sole limitation period.

Chapter Four details the Commission's proposals for a 'long-stop' that is an ultimate limitation period beyond which all claims would be statute-barred. Considering that

long-stop limitation periods are still relatively new in this jurisdiction, the Commission weighs the arguments in favour and against the proposal, and also the various considerations pertinent to the length of the period chosen. It also looks at the options of accrual or the date of the act/omission and opts for the date of accrual as the starting point of the long-stop.

Chapter Five looks at the implications and consequences of the proposed discoverability test for:

- A. Separate incidents of damage arising from the same cause of action;
- B. Subsequent purchasers;
- C. The burden of proof;
- D. Transitional provisions.

Chapter Six considers the situations where the ascertainment of the date of accrual is not crystal clear. Since it is recommended that the long-stop run from the date of accrual, it is important to consider these situations.

Chapter Seven addresses a number of miscellaneous issues, some of which arise from the Commission's main recommendations. The issue of postponement of the limitation periods in cases of legal incapacity, fraud or mistake is discussed. The survival of actions both for the benefit of and against the estate of the deceased are also examined in the context of the proposed discoverability provision.

Chapter Eight contains a summary of the Commission's recommendations.

CHAPTER ONE: PRESENT LAW

I: Current Law

1.01 The *Statute of Limitations, 1957*, s.11, provides that (save in personal injury actions) no action, in tort or contract, is to be brought after the expiration of six years from the date on which the cause of action accrued.⁴ A cause of action is defined as every fact which it is necessary for the plaintiff to prove to support his right to judgment.⁵ A cause of action accrues at the earliest time at which an action can be brought i.e. “when a complete and available cause of action first comes into existence.”⁶ Thus traditionally Irish law has rejected the concept that a cause of action does not accrue until the damage is discovered, or is at least discoverable, in tort and contract cases not involving personal injuries. In England, the case of *Pirelli General Cable Works Ltd. v. Oscar Faber and Partners*⁷ dealt with a claim for physical damage to property caused by negligence in the design or workmanship of a building.⁸ It was held that the cause of action in tort accrued at the date when physical damage occurred to the building. In this case cracks due to the negligent design of the chimney first occurred in April 1970. The plaintiffs had contended that the faults could not have been discovered until 1972 and therefore the cause of action did not accrue until that date. Had they been successful in their claim, the proceedings instituted in 1978, shortly after the cracks had both become discoverable and been discovered, would have been in time. The House of Lords, however, rejected the date of discoverability as the date when the cause of action accrued. Accordingly, the limitation period began to run prior to 1970, and the action was statute-barred.

⁴ In cases involving personal injuries, the limitation period is three years from the accrual of the cause of action, or the date of knowledge, as defined in s.2 of the *Statute of Limitations (Amendment) Act, 1991*, if it is later.

⁵ *Read v. Brown* (1888) 22 QBD 128, 131 *per* Lord Esher MR, tacitly accepted by Finlay CJ in *Hegarty v. O'Loughran* [1990] 1 IR 148.

⁶ *Per* Griffin J in *Hegarty ibid* at 178.

⁷ [1983] 2 AC 1.

⁸ While subsequent English cases have limited *Pirelli* to the factual scenario with which it was concerned, that is where there is an *inter partes* professional relationship or a special relationship amounting to reliance, the decision on the limitation point still stands. See *Nitrigin Eireann Teoranta v. Inco Alloys Ltd* [1992] 1 All ER 854; 28 *Halsbury's Laws of England* (4th ed. Reissue) para.821. More importantly the *Latent Damage Act, 1986* in the UK has altered the picture considerably. This is discussed *below*, at paras.1.09-1.10. In terms of Irish law however, *Pirelli* found favour with the Supreme Court in *Hegarty v. O'Loughran* and is therefore still relevant. See para. 1.03.

1.02 In so holding, the House of Lords overruled the case of *Sparham-Souter v. Town and County Developments*⁹ which had adopted a discoverability starting date.¹⁰ This latter case had been substantially relied upon in *Morgan v. Park Developments*.¹¹ In *Morgan* the plaintiffs purchased a house in September 1962. The defendants were notified of some defects at the end of 1963 and these were repaired in 1964 and again in 1965. In 1965 the plaintiffs were informed that the defect in question was just a settlement crack. However the crack re-emerged in 1979, whereupon consultation with an architect revealed that it was the result of major structural weaknesses and so proceedings were instituted in 1980. Carroll J held that the cause of action in tort accrued on the date of discoverability, “meaning the date the defect either was discovered or should reasonably have been discovered.”¹² This effectively postponed the date of accrual of the cause of action beyond the point in time when the damage actually occurred to the time -1979- at which the plaintiff became aware of the structural defect.

1.03 However, *Morgan* was in effect overruled in the Supreme Court case of *Hegarty v. O’Loughran*.¹³ In both cases, the relevant law was the *Statute of Limitations, 1957* (not at the time amended by the *Statute of Limitations (Amendment) Act, 1991*) which was at that time identical for both personal injury and non-personal injury claims. Although it concerned personal injuries, *Hegarty* is important because of the consideration given by the Supreme Court to Carroll J’s interpretation of the 1957 Statute in *Morgan*. In interpreting the statute, the Supreme Court felt bound to reject the discoverability test and held that the cause of action accrued when the defect first occurred thus overruling Carroll J’s decision in *Morgan* as to when accrual of the cause of action in tort occurred. In so doing, McCarthy J commented:

“I recognise the unfairness, the harshness, the obscurantism that underlies this rule, but it is there and will remain there unless qualified by the Legislature or invalidated root and branch by this Court.”¹⁴

The facts of *Hegarty v. O’Loughran* illustrated the injustice to which McCarthy referred. The plaintiff underwent surgery to her nose in 1973. This surgery subsequently began to deteriorate in 1976 and she suffered great pain and injury as a result. The plaintiff was not aware of the existence of the cause of action against the defendant until 1980, and she instituted proceedings two years later in 1982 against the defendant. The Supreme Court held however that the cause of action accrued when provable personal injury capable of attracting compensation occurred to the plaintiff which was the completion of the tort alleged to have been committed against her. On this basis, the

⁹ [1976] QB 858.

¹⁰ The *Latent Damage Act, 1986* was enacted to address the potential for injustice that the *Pirelli* decision revealed.

¹¹ [1983] ILRM 156.

¹² *Ibid.* at 160.

¹³ [1990] 1 IR 148.

¹⁴ *Ibid.* at 164.

three year limitation under s.11.(2)(b) of the *Statute of Limitations, 1957* began to run from 1976, not 1980, against the defendant, resulting in the action against him being barred.

II: Discoverability in the Present Law

1.04 Before going on to consider reform in the present area, we must consider three analogous fields in which the discoverability concept has been adopted.

A. *Limitation in Personal Injury Actions*

1.05 The Law Reform Commission in a Report of 1987 recommended the introduction of a 'discoverability' test in relation to the limitation of actions in cases of personal injury.¹⁵ The Commission's central line of reasoning in favour of such a reform was that: "whatever hardship there may be to a defendant in dealing with a claim years afterwards, it must be less than the hardship to a plaintiff whose action is barred before he knows he has one."¹⁶ This recommended test was enacted by the *Statute of Limitations (Amendment) Act, 1991*,¹⁷ s.3(1) of which provides for a limitation period of three years from the date "on which the cause of action accrued or the date of knowledge (if later) of the injured person."

1.06 Under the *Statute of Limitations (Amendment) Act 1991*, the limitation period commences with the date when the cause of action accrued or (if later) "the date of knowledge" of the plaintiff. S.2 defines the date of knowledge as the date on which the person first had knowledge of certain facts, namely:

"that the person alleged to have been injured had been injured;
that the injury in question was significant;
that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;
the identity of the defendant; and
if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of the action against the defendant."¹⁸

¹⁵ Law Reform Commission, *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* (No. 21, 1987).

¹⁶ *Ibid.* at 42, quoting from *Morgan v. Park Developments* [1983] ILRM 156, 160 (per Carroll J).

¹⁷ Attempts to have the Bill amended at Committee Stage to include "non-personal injuries" were ruled out of order: see 409 Dáil Debates cols.2333-2350. See paras. 2.01-2.19 for an analysis of the 1991 Act.

¹⁸ These constituent parts of "knowledge" are almost identical to those found in s.14(1) of the English *Limitation Act, 1980*. See also *Whitely v. Minister for Defence, Ireland and the Attorney General*, [1997] 2 ILRM 416, where Quirke J. deals with some of the principles concerning the application of s.2 of the *Statute of Limitations (Amendment) Act, 1991*.

B. *Liability for Defective Products Act, 1991*

1.07 This Act, which was introduced pursuant to the *Liability for Defective Products Directive* No. 85/374EEC provides a limitation period of:

“three years from the date on which the cause of action accrued or the date (if later) on which the plaintiff became aware, or should reasonably have become aware of the damage, the defect and the identity of the producer.”¹⁹

The reference to the date of ‘reasonable awareness’ is to be construed in accordance with s.2 of the 1991 Act so long as this does not entail a construction which would impinge upon the effectiveness of the Directive.²⁰

1.08 However, the focus of this legislation is the relatively narrow field of the consumer who suffers by virtue of a defective product. While it does include damage to property, (other than the defective product itself) the property must have been ordinarily intended for private use or consumption, and have been used by the ‘injured person’ mainly for his own private use or consumption. The key concept in the 1991 Act is “product”, which the Act defined to mean “all moveables” (with certain exceptions not relevant for our purposes). Under this definition, it would be possible to claim for latent damage caused by a moveable product which caused latent defects in a building for example tiles on a roof. However, it seems that construction cases involving latent loss are more likely to be caused by a number of factors, often including the design of the building so that in practice a claim confined within the limits of the 1991 Act - “defective products” - would only apply in rather narrow circumstances.

C. *(English) Latent Damage Act, 1986*

1.09 The notion of discoverability is also now part of limitations law in many other jurisdictions.²¹ In England the Law Committee was asked to examine the law in relation to limitation of actions in negligence cases involving latent defects (other than personal injury). Their Report in 1984 made the plaintiff’s knowledge of significant damage the cornerstone of their recommendations for an extended period of limitation.²² The advantage in using the word ‘significant’ in the test, according to the Committee is that latent damages can be particularly difficult to ascertain, often beginning with trivial

¹⁹ S.7 of the Act implementing Article 10 of the Directive 85/374/EEC.

²⁰ S.7(5) (c) of the Liability for Defective Products Act, 1991.

²¹ In Canada and the United States, discoverability provisions are widespread. Latent defects are also catered for in the laws of New Zealand, Scotland, England and Wales, Austria, Norway, Italy and France. See chap. 3 of our *Consultation Paper on The Statutes of Limitation: Claims in Contract and Tort in respect of Latent Damage (other than Personal Injury)* (Nov.1998).

²² *Report on Latent Damage* (No.24, 1984) at 19. It was only concerned with actions for negligence not involving personal injury.

minor defects. It is also noteworthy that the English test makes specific reference to the 'reasonable person'.

1.10 The *English Latent Damage Act, 1986*, s.1, which inserts s.14A (5) into the *Limitation Act, 1980* defines the starting date of the limitation period as:

"the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required and a right to bring an action."

"Knowledge" is defined in 14A(6) as "knowledge both -

- (a) of the material facts about the damage in respect of which damages are claimed; and
- (b) of the other facts relevant to the current action "

Both (a) and (b) are further expanded. First, "the material facts" in (a) are defined as:

"Such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment."²³

Secondly, these "other facts" referred to in (b) are:

- "(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and
- (b) the identity of the defendant; and
- (c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant."²⁴

²³ S.14A(7) This is essentially the same formula used to define 'significant' in s.14(2) of the *Limitation Act, 1980* in respect of personal injury. Although the word 'significant' is not employed in s.14A(7).

²⁴ These are the same as under s.2 (1) (c)-(e) of the *Irish Statute of Limitations (Amendment) Act, 1991*.

CHAPTER TWO: THE DISCOVERABILITY TEST

I. Discoverability Test for Personal Injuries

2.01 In this Part, in order to give us certain reference points for our detailed discussion of discoverability in the context of non-personal injury litigation, we consider the case-law on the new discoverability test in the field of personal injuries which was established by the *Statute of Limitations (Amendment) Act, 1991*.²⁵

A. *The Judicial Interpretation*

2.02 The fundamental change to the limitation of actions in respect of personal injuries brought about by the 1991 Act was the introduction of the “date of knowledge of the person injured” as the date from which the limitation period shall run. Under s.2(1) knowledge means knowledge of the following facts:

- “(a) that the person alleged to have been injured had been injured,
- (b) that the injury in question was significant,
- (c) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty,
- (d) the identity of the defendant,
- (e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.”²⁶

Constructive knowledge will also trigger the limitation period under s.2(2) which states that :

- “a person’s knowledge includes knowledge which he might reasonably have been expected to acquire-
- (a) from facts observable or ascertainable by him, or
 - (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek.”²⁷

²⁵ The purpose of the 1991 Act was to provide for a discoverability test in relation to latent personal injury cases.

²⁶ S.2(1).

²⁷ S.2(2).

2.03 It is further provided by s.2(3) that a person will not be fixed with knowledge of a fact which could only be ascertained with the help of expert advice, so long as he has taken all reasonable steps to obtain that advice. Nor, it is provided, shall a person be fixed with knowledge of a fact relevant to the injury which he has failed to acquire by virtue of that injury.

Actual Knowledge

2.04 Interpretation of the actual knowledge requirement by the courts reveals that 'knowledge' is taken to mean "know with sufficient evidence to justify embarking on a claim."²⁸ Accordingly, it can be inferred that while vague and unsupported suspicion would not be sufficient; absolute certainty is not required.

2.05 The discoverability limitation period is triggered only when the claimant has knowledge of the facts in s.2(1) listed (a) to (e). Difficulties have arisen in relation to (b); "that the injury in question was significant". The primary purpose of this requirement is to prevent a trivial injury, or a significant injury which would appear trivial to the reasonable person, from triggering the limitation period.²⁹

2.06 The 1991 Act, unlike the English *Limitations Act, 1980*, does not define what is meant by "significant". Under the English *Limitations Act, 1980*, s.14(2), an injury is defined as significant:

"[i]f the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy judgment."³⁰

This test, according to Geoffrey Lane LJ in *McCafferty v. Metropolitan Police Receiver*,³¹ is partly objective and partly subjective. He explains the definition in the following terms:

"Taking that plaintiff, with that plaintiff's intelligence, would he have been reasonable in considering the injury not sufficiently serious to justify instituting proceedings for damages?"

2.07 The Commission in its Report on *Personal Injuries*³² alludes to the various criticisms of the English definition. One of these is that it may be difficult to decide

²⁸ *Per O' Higgins J in Gallagher v. Minister for Defence* High Court, [1998] 4 IR 457, citing Lord Donaldson in *Halford v. Brookes* [1991] 1 WLR 428, 433. See also *Nash v. Eli Lilly & Co* [1993] 1 WLR 782, 792.

²⁹ *Dobbie v. Medway Health Authority* [1994] 1 WLR 1234.

³⁰ S. 14(2) *Limitations Act, 1980*.

³¹ [1977] 1 WLR 1073, 1081.

³² LRC No.21, 1987 at 17.

"whether the test to be applied in determining whether it was reasonable to regard the injury as not 'sufficiently serious' is an objective or a subjective test."³³

2.08 On one view the absence of any definition of the term "significant" in the 1991 Act, suggests that the requirement is to be directed to the quantum and not to the claimant's evaluation. Accordingly, it is implicit that the test of "significance" is objective.

2.09 However, Quirke J in *Whitely v. Minister for Defence*³⁴ took a different view. He was of the opinion that the absence of a definition of the term "significant" in s.2 of the 1991 Act signalled that the test of significance ought to be even more subjective than the English test.

2.10 Quirke J, refers to the Law Reform Commission Report, which led to the Irish 1991 Act:

"The Law Reform Commission Report entitled *The Statute of Limitations: Claims in Respect of Latent Personal Injuries* published in 1987 expressly considered the definition contained in s.14 of the English Act and pointed out that the provision had been criticised on various grounds (see p 17 thereof). The Commission expressed the view that 'the best approach would be for the legislation to require that, for time to begin to run, the plaintiff ought to have been aware that the injury is significant'(see p. 44). Furthermore the Report provided a 'General Scheme of a Bill' which made no provision for a definition of the kind contained in s. 14(2) of the English Act and indeed this 'General Scheme' appears to have been enacted into legislation more or less without amendment by the Legislature."³⁵

Having made these observations, the judge concludes:

"Accordingly Section 2 of the 1991 Act expressly avoids any attempt to define what is meant by a 'significant' injury within the meaning of sub-section 2(1)(b) of the Act and I take the view that by excluding any definition it was the intention of the Legislature to avoid confining the sense in which the word "significant" ought to be understood to the terms of the definition contained in Section 14(2) of the English Act or to any particular terms. If I am correct and if it was intended that a broader test should be applied than was contemplated by the definition contained within Section 14(2) of the English Act, then it would seem to follow that the test to be applied should be primarily subjective and that the Court should take into account the state of mind of the particular Plaintiff at the particular time having regard to his particular circumstances."³⁶

³³ *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* (No. 21, 1987) at 45.

³⁴ [1998] 4 IR 442. *Whitely* was recently confirmed by the Supreme Court in *Bolger v. O'Brien* [1999] 2 ILRM 372.

³⁵ [1998] 4 IR 442, 452-453.

³⁶ *Ibid.* at 453.

2.11 Quirke J described the requirement that the injury be significant as “*primarily subjective*” [his emphasis] as it is qualified to a certain extent by the provisions in subs.2.³⁷ It appears that Quirke J envisaged that the limitation period would commence when the claimant knew or could reasonably be expected to know, taking into account the state of mind of the particular plaintiff, in his particular circumstances that the injury was significant.

2.12 The practical implication of the difference between the English and the Irish test as to whether “the injury in question was significant” is that Quirke J entertained several extraneous factors arising from the plaintiff’s individual circumstances. For example, he took into account not only the plaintiff’s heart condition and by-pass surgery which would have distracted his attention from the symptoms of hearing loss and tinnitus; but also that his personality was such that he was the sort of person who would dismiss the injury and decide he was getting better.

2.13 In the later case of *Bolger v. O’Brien*,³⁸ in following and applying this “primarily subjective” test of significance, in the High Court, McGuinness J considered that the plaintiff was “the sort of man who perhaps puts to one side the injuries that he is suffering and has made up his mind that he is getting better”³⁹ and furthermore, that “subjectively” the plaintiff was not aware of the full significance of his injuries until he was re-examined two years after the accident.⁴⁰

2.14 The Supreme Court⁴¹ in *Bolger*, while accepting the interpretation of “significant” offered in *Whitely*, overturned the decision of McGuinness J in the High Court, holding that the test had not been correctly applied to the facts.

“The test is when he knew or ought reasonably to have known ‘from facts observable or ascertainable by him’ that he had suffered a significant injury... The fact that the respondent did not realise the full significance of the effect of such injury is not of relevance once it is established that he knew that the injury was significant.”⁴² Nevertheless the issue remains unclear.

In doing so it seems that the Court sought to place more emphasis on the objective element of the provision and the actual facts as disclosed by the evidence, as opposed to the plaintiff’s impression of those facts.

³⁷ “Knowledge which he might reasonably have been expected to acquire from facts observable or ascertainable by him”.

³⁸ High Court, 24 April 1998.

³⁹ *Ibid.* at 12.

⁴⁰ *Ibid.* at 13.

⁴¹ [1999] 2 ILRM 372.

⁴² *Ibid.* at 380, *per* Hamilton CJ.

Constructive Knowledge

2.15 Under the 1991 Act, a person's constructive knowledge refers to knowledge, "which he might reasonably have been expected to acquire". This knowledge can be acquired either from "facts observable or ascertainable by him" or from facts "ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek".

2.16 The Law Reform Commission Report⁴³ suggested that the test should be that of the "reasonable person", taking account of those circumstances which cannot be divorced from the situation.

"The test of what a reasonable man should know is in one sense undoubtedly objective, but it also must take account of at least some aspects of the particular person's subjective experience. Thus, for example, if the plaintiff is a doctor this fact should not be ignored when assessing what he or she might reasonably have been expected to know about his or her condition. We consider that if the effect of the accident is to slow the injured person down so that he is less diligent in finding out about how it was caused than an ordinary healthy person would be, the question of the reasonableness of the discoverability of his injuries should embrace the fact of his debilitated condition. Beyond this we consider that no further deference to subjective considerations would be appropriate in determining whether the plaintiff has acted reasonably."

There does not appear to be anything in the case-law which would suggest that the test is otherwise. However, the interpretation of the "significant injury" requirement, in s.2(1) of the 1991 Act, by Quirke J in *Whitely*, has considerably diluted the test as it applies to this requirement.

2.17 Since the Irish case-law to date has not examined in any detail what is meant by the constructive knowledge provision, it may be useful to briefly examine the English case-law on the similarly worded English provision. These cases disclose an absence of any consistent direction. In *Nash v. Eli Lilly & Co*⁴⁴ Purchas LJ said:

"The standard of reasonableness in connection with the observations and/or the effort to ascertain are therefore finally objective, but must be qualified to take into consideration the position, circumstances and character of the plaintiff."

However, in *Forbes v. Wandsworth Health Authority*⁴⁵ all three members of the Court of Appeal expressed their reservations as to how an objective test, like the one in s.14 - and in s.2 of the Irish 1991 Act- could be combined with an approach that takes into account the personal characteristics of the plaintiff. Furthermore, Stuart-Smith LJ

⁴³ *Report on the Statute of Limitations Claims in Respect of Latent Personal Injuries* (No.21, 2000).

⁴⁴ [1993] 1 WLR 782 at 799.

⁴⁵ [1997] QB 402.

stated: "It does not seem to me that that the fact that the plaintiff is more trusting, incurious, indolent, resigned or uncomplaining by nature can be a relevant characteristic, since this too undermines any objective approach."⁴⁶ Not surprisingly the majority of the Court of Appeal found that *Nash* did not entail any such subjective qualification of the objective test.

2.18 In *O'Driscoll v. Dudley Health Authority*⁴⁷ Otton LJ, having examined both *Forbes* and *Nash* stated "It is not easy to reconcile these two approaches but in my view it is not necessary to do so for the purpose of deciding the case."

2.19 However, whatever about the particular circumstances of the claimant,⁴⁸ there at least seems to be a consensus that the test is an objective test, and therefore should not take into account the personal characteristics of the claimant.⁴⁹

II. The Discoverability Test for Non-Personal Injury Claims

A. Actual Knowledge & Constructive Knowledge

2.20 Inevitably, the non-personal injury discoverability test will include an actual knowledge and a constructive knowledge element. "Actual knowledge" as under the 1991 Act means "know with sufficient evidence to justify embarking on a claim."⁵⁰ In respect of the latter it is necessary to decide when a claimant should be imputed with constructive knowledge in non-personal injury claims.

2.21 The concern here is to devise a test which strikes a balance between a subjective test which would take into account the factors which have influenced the particular claimant and possibly led to the delay, and, on the other hand, an objective test which would focus on the actual circumstances, unaffected by how they might be perceived by someone in the plaintiff's circumstances.

2.22 There are three options. The first, a purely objective test which in determining the point when the damage was discoverable would involve the application of a straightforward list of criteria to the facts, without any consideration of the plaintiff's individual circumstances or characteristics. In other words, it would apply the "reasonable person" test to the average man. It would be irrelevant that the claimant was an engineer with specialist knowledge or indeed a blind person. While such a purely objective test would guarantee a degree of certainty for defendants and insurers, the Commission is of the opinion that it could operate to bar many of the claims which

⁴⁶ *Ibid.*

⁴⁷ Court of Appeal, 30 April 1998. See also *Fenech v. East London & City Health Authority* [2000] Lloyd's Rep Med 35.

⁴⁸ Poole J in *O'Driscoll v. Dudley Health Authority* [1996] 7 Med LR 408.

⁴⁹ *Parry v. Clwyd Health Authority* [1997] PIQR 1, 10.

⁵⁰ *Per O' Higgins J in Gallagher v. Minister for Defence* High Court, [1998] 4 IR 457, citing Lord Donaldson in *Halford v. Brookes* [1991] 1 WLR 428, 433.

under the current law are statute-barred, and so give rise to injustice. Indeed as stated by the New Zealand Law Commission an “objective hypothetical reasonable man” test may undermine the essential thrust of the discoverability extension.⁵¹ In order to avoid this outcome some element of subjectivity is considered essential.

2.23 The second option is a subjective standard of reasonableness, along the lines of the suggestion in the English Law Commission's Consultation Paper.⁵²

"Constructive knowledge should include a large subjective element so that it should be defined as "what the plaintiff in his circumstances and with his abilities ought to have known had he acted reasonably."⁵³

2.24 The Commission wishes to avoid formulating a test which would open the doors to allow those with a claim for latent loss, to postpone the running of time against them until they choose to take cognisance of certain facts, which would have been obvious to them had they exerted normal powers of observation. It is, therefore, appropriate to require prospective plaintiffs to measure up to a certain objective standard.

2.25 Under the English Law Commission's test, the circumstances and abilities of the plaintiff are taken into account when assessing the objective reasonableness of the delay. We feel that the phrase "in his circumstances and with his abilities" is too wide. It could be interpreted as embracing some inappropriate personal characteristics of the claimant, like for example the fact that the claimant is naïve or unobservant. The objective requirement of reasonableness would be considerably undermined if such factors could be taken into account.

2.26 The third option is an objective test of reasonableness tempered only by certain subjective elements along the lines of the Alberta *Limitations Act, 1996*. S. 3(1) of the Alberta *Limitations Act, 1996* provides for a limitation period⁵⁴ starting at:

“[T]he date on which the claimant first knew, or in the circumstances ought to have known....”

The Alberta Law Reform Institute explains the criterion as follows: "The discovery rule incorporates a constructive knowledge test which charges the claimant with knowledge of facts which, in his circumstances he ought to have known. This is the reasonable man standard"⁵⁵ Effectively this is the same "reasonable person test" which has been developed in the law of torts.⁵⁶ The test pertains to a standard: the judge should ask, not

⁵¹ *Limitation Defences in Civil Proceedings* (No. 6, 1988) at 72.

⁵² *Consultation Paper on Limitation of Actions* (No.51, 1998).

⁵³ *Ibid.* at 271.

⁵⁴ S.3 provides for a limitation period of 2 years. However, in this Report we propose that the discoverability limitation period be 3 years.

⁵⁵ Alberta Law Reform Institute *Report on Limitations* (No. 55, 1989) Chap. 4 at 33.

⁵⁶ McMahon & Binchy, *Irish Law of Torts* (3rd ed., Butterworths, 1990) at paras.7.05-7.06.

“when would I have known?” or “when would the average man have known?” but rather “when should the plaintiff, as a reasonable person, have known?”⁵⁷ The way people normally behave is an essential element in the determination of the answer: there is a close correlation between the second and third questions.

2.27 The Commission believes that the third option, strikes the desired balance between a purely objective and a subjective standard of reasonableness.

2.28 The Commission is of the view that adding the word, “reasonably” to the just quoted Alberta test will emphasise the intention to apply the test of “reasonable person” within the circumstances of the claimant’s situation. Thus the limitation period commences on “The date on which the claimant first knew, or in the circumstances ought *reasonably* to have to have known”.

2.29 *The Commission recommends that the discoverability limitation period commence when the claimant first knew or in the circumstances ought reasonably to have known of the elements listed in the discoverability formula.*⁵⁸

B. The Constructive Knowledge Test

2.30 The test recommended effectively incorporates the “reasonable person” standard used in the law of torts.⁵⁹ The reasonable person is possessed of a certain basic level of knowledge, experience, moral qualities and intelligence which make him act reasonably. Take a case where this approach was applied to the defendant. He had been advised of the probable consequences of allowing a stack of damp hay, which he had erected without proper ventilation, to remain in this condition. Subsequently the hay spontaneously ignited damaging the plaintiff’s house. The defence that he acted to the best of his judgment was rejected as he did not take the precautionary measures that common foresight and precaution would suggest.⁶⁰

2.31 However, while the standard is objective, it does not prohibit consideration of certain particular capacities of the plaintiff.⁶¹ The “reasonable person” test makes allowance for physical infirmities if they are substantial and capable of reasonably certain proof.

2.32 The phrase, “in the circumstances” in the proposed test⁶² is intended to take into account those factors which cannot be divorced from the facts of the case. The law

⁵⁷ McMahon & Binchy, *Irish Law of Torts* (3rd ed., Butterworths, 1990) at paras.7.05-7.06.

⁵⁸ See paras.2.39-2.54.

⁵⁹ In the law of negligence it is the defendant’s conduct which is being judged by reference to the standard of the “reasonable person”.

⁶⁰ *Vaughan v. Menlove* (1837) 3 Bing NC 468. See also Salmond and Heuston, *The Law of Torts* (20th ed.) at 226.

⁶¹ McMahon & Binchy, *Irish Law of Torts* (3rd ed., Butterworths, 1990) at paras.7.05-7.06.

⁶² See para. 2.29.

could not fail to do otherwise; the frequently quoted example is that a blind person will not be required to see.⁶³ We cannot therefore impute to the blind person knowledge of the cracks in his wall which were signs of serious structural defects. The plaintiff's blindness will be one of the "circumstances" in which the reasonable person finds himself. The standard to be applied here is that of the "reasonable person who is blind," and the question becomes whether the "reasonable person who is blind" would have got the house surveyed by a friend or an expert. Admittedly this phraseology is cumbersome. However it is employed so as to demonstrate that the circumstances which may be taken into account in applying the test are circumstances such that, if they were taken out of the factual basis, then the actual situation would take on a different dimension so that it would have to be differently assessed.

2.34 In *McComiskey v. McDermott*⁶⁴ Henchy J refers to the standard of care which is to be expected from a reasonably careful person "in *the* circumstances." Although this case involved the test of liability of the defendant and not the limitations regime applying to the plaintiff, it is still relevant as it is essentially the same test. What is meant by this phrase, according to *McComiskey*, is that the "particular circumstances dictate the degree of care required". The degree of care demanded is "particularised and personalised by the circumstance of the case".⁶⁵ In this case, the plaintiff and the defendant were in a motorcar rally, the defendant was driving, and the plaintiff was his navigator and passenger in the car. The car overturned and the plaintiff was injured when the defendant rounded a bend and, to avoid a collision with two parked cars, drove his car into the ditch. The plaintiff instituted proceedings for damages for negligence against the defendant. In applying the test in that particular case, Griffin J commented that the duty of care owed by the defendant was to drive the car as carefully as a reasonably prudent competitive rally driver could be expected to drive *in the circumstances*. The circumstances, as Griffin J elaborated, were factual ones, such as the competition they were in and the requirement to maintain a certain speed. As we can see, the crucial fact that the defendant was a rally driver was also one of the circumstances, in that the reasonable person in this application also is taken as a rally driver.

2.35 In the examples we have just seen, the reasonable person is alternatively a blind person or a rally driver and the law adjusts its standards to cater for the circumstances. However this subjectivity is permitted only to the extent that those circumstances or characteristics cannot be divorced from the situation at hand. The nature of the issue to be decided would be different if the appropriate circumstances and characteristics were not taken in to consideration.

2.36 However the standard is considered to be an objective one in that little peculiarities or foibles will not be tolerated: the reasonable person does not possess these. The reasonable person is not naïve or unobservant. He "is always up to

⁶³ See for a thorough discussion Warren Seavey, "Negligence - Subjective or Objective?" (1927) 41 Harv LR 1. See also James, "The Qualities of the Reasonable Man in Negligence Cases" (1951) 16 M LR.

⁶⁴ [1974] IR 75, 89 [his emphasis].

⁶⁵ *Ibid.*

standard, he is the careful man being careful...he is dehumanised.”⁶⁶ Thus even where the plaintiff is not an engineer, has no interest in DIY and the like, he would still not be excused for taking no action in response to the rapid spread of a large damp green mouldy patch on his wall. The reasonable person would have taken some action. He would have known something was wrong, because he would have used his standard intelligence to draw from his store of standard past experience.

2.37 As we have seen the test established by the English *Latent Damage Act, 1986* also uses the “reasonable person” measure.⁶⁷ In the English case of *Higgins v. Hatch & Fielding*,⁶⁸ the plaintiffs were suing the surveyors for a negligent valuation. They took the action several years after they received the engineer’s report which showed the valuer’s report to be wrong, as they did not realise until then that they had a remedy against the surveyors. It was held that the limitation period would run from the date when the plaintiffs received the report, as a reasonable person in the light of the content of the structural report would have taken advice as to from whom he could seek a remedy. The circumstances giving rise to the delay were not taken into account in the decision. In another English case with a similar outcome, the plaintiff was an illegal immigrant at the time when his cause of action in negligence arose. He commenced proceedings only later, when his status had changed and argued that because he was in fear of the law, it was reasonable to postpone seeking advice. It was held that, although his conduct was understandable, it was not reasonable.⁶⁹

2.38 The exact scope of this latitude has always been dealt with by the courts on an individual basis and it is considered that it would be neither helpful nor possible to enlarge further on this here. Suffice it to say for the moment that the standard of the “reasonable person” will accommodate the plaintiff’s superior knowledge, intelligence and experience, so that the engineer will be expected to infer the appropriate facts from the cracks on the walls of a house sooner than the ordinary householder lacking in such professional experience.

C. The Discoverability Formula

(i) Scope of the Discoverability Formula

2.39 It is envisaged that the discoverability formula would be applicable to all actions for breach of duty whether the breach occurs in tort, contract, statute or independent of any such provision.⁷⁰ However the Commission is of the view that the

⁶⁶ Warren Seavey, “Negligence - Subjective or Objective?” (1927) 41 Harv LR 1, 11.

⁶⁷ The 1980 Act, s. 14A(7), provides for an objective test based on the reasonable person.

⁶⁸ [1996] 1 EGLR 133.

⁶⁹ *Coban v. Allen* [1996] TLR 566.

⁷⁰ Once this provision applies to the right of action for breach of duty in tort, contract, statute or independent provision, “it equally applies to any co-extensive right in relation to the constitution”. See the judgement of Keane J in *McDonnell v. Minister for Communications and An Post* Supreme Court, 23 July 1997.

discoverability limitation period should not apply to actions for libel, slander, and injurious falsehood.

2.40 *The Commission recommends that the discoverability limitation period should be applicable to all actions for breach of duty whether the breach occurs in tort, contract, statute or independent of any such provision, except that this should not include actions for libel, slander, and injurious falsehood.*

(ii) *Elements that Trigger the Discoverability Limitation Period*

2.41 Having set out what is meant by actual and constructive knowledge, we now focus on two relevant facts of which there must be knowledge. In the next section, at para.2.51 we shall deal with the remaining factors after setting out the two alternative frameworks which will shape these factors.

Knowledge of Loss / Damage

2.42 First, what is loss or damage? The Commission is of the view that, save in the limited narrow sense indicated in paras.2.39-2.40, it would be too audacious to attempt to define damage. There are so many variations of damage, that to define it would only serve unnecessarily to restrict the scope of loss or damage.

2.43 Secondly, if knowledge of even minimal loss or damage on the part of the claimant was sufficient to trigger the discoverability limitation period, it would inevitably cause hardship to numerous plaintiffs. This would be so particularly in construction cases where the full significance of a minor hairline crack might not be evident for four or five years.

2.44 The Commission is thus of the view that the discoverability formula should be so drafted as to prevent trivial damage, or significant damage which would appear trivial to the reasonable person, from triggering the limitation period.⁷¹ The requirement is not directed at the claimant's evaluation, but is an objective requirement and therefore, does not need to be defined. In fact it would be impractical to try to define it as the circumstances will vary considerably depending on the situation.⁷²

2.45 The formula used in the *Statute of Limitations (Amendment) Act, 1991* in respect of personal injury incorporates this requirement. In s.2(b), knowledge "that the injury was significant" is necessary in order to trigger the discoverability limitation period. We do not recommend the use of the term "significant", the difficulties encountered in connection with this term in the 1991 Act have been discussed earlier.⁷³

2.46 In this regard we prefer the phrase used in the *Alberta Limitations Act, 1996*;

⁷¹ *Dobbie v. Medway Health Authority* [1994] 1 WLR 1234.

⁷² Alberta Law Reform Institute, *Report For Discussion on Limitations* (No.4, 1986) at para. 2.180. See also the section headed, "Separate Incidents of Damage" in Chap. 5 of this Report at paras. 5.01-5.10.

⁷³ See paras.2.05-2.14.

" that the loss, assuming liability on the part of the defendant, warrants bringing proceedings".

D. Drafting

(i) *The Two Options:*

2.47 We set out here the two alternative models for our recommended draft. The draft legislation is set out in Appendix 1.

Statute of Limitations Act (Amendment) 1991 Model

2.48 The first option is to follow the same scheme as the *Statute of Limitations (Amendment) Act, 1991*. There are however important differences in the wording. The key words "or in the circumstances ought reasonably to have known"⁷⁴ have been added to it; the form of words "the loss warrants bringing proceedings" has been substituted in place of "the injury was significant";⁷⁵ the wording has been adjusted to reflect the fact that the central concern of the provision is damage to property not injury to the person. With adjustments of this type, the model is as follows:

1. (1) For the purposes of any provision of Part II of this Act whereby the time within which an action in respect of loss or damage may be brought depends on a person's date of knowledge, references to the person's date of knowledge are references to the date on which he first knew, or in the circumstances ought reasonably to have known:
 - (a) that the damage for which the person seeks a remedy had occurred;
 - (b) that the damage, assuming liability on the part of the defendant, warrants bringing proceedings,
 - (c) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute the breach of duty in tort, contract, statute or independent of such provision,
 - (d) the identity of the defendant, and
 - (e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;and knowledge that any acts or omissions did or did not, as a matter of law, involve a breach of duty is irrelevant.

⁷⁴ See para. 2.29.

⁷⁵ See para. 2.46.

(2) For the purposes of this section, a person's knowledge includes knowledge which the person might reasonably have been expected to acquire:

- (a) from facts which are or in the circumstances ought reasonably to be observable or ascertainable by the person, or
- (b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for the person to seek.

(3) Notwithstanding subsection (2) of this section a person shall not be fixed under this section with knowledge of a fact ascertainable only with the help of expert advice so long as the person has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

2. (1) An action claiming damages in respect of loss or damage (other than personal injury) caused by a breach of duty whether the duty exists in tort, contract, statute, or independent of any such provision, shall not be brought after the later of either the expiration of:

- (a) six years from the date on which the cause of action accrued; or
- (b) three years from the date of knowledge of the person who has suffered the loss or damage.

2.49 The advantage of the 1991 model is that because the format is the same as the 1991 Act, it prevents further fragmentation of an already fragmented limitations legislation. There is a risk that, by changing the structure of the model, the different format of the two models may be used by lawyers to create loopholes that are not intended. It is however unnecessarily complex and its interpretation has caused difficulty. It is on this ground that it has been criticised, as has the *English Limitation Act, 1980* on which it is based.

Alberta Model

2.50 The second option is along the lines of the *Alberta Limitations Act, 1996* with the addition of "reasonably" in s.1(a) to spell out the blend of objectivity and subjectivity.

(1) An action claiming damage in respect of loss or damage (other than personal injury) caused by a breach of duty whether the duty exists in tort, contract, statute, or independent of any such provision, shall not be brought after the later of either the expiration of:

- (a) six years from the date on which the cause of action accrued; or
- (b) three years from the date on which the person first knew or in the circumstances ought reasonably to have known:
 - (i) that the loss for which the person seeks a remedy had

- occurred;
- (ii) that the damage was attributable to the conduct of the defendant; and
- (iii) that the loss, assuming liability on the part of the defendant, warrants bringing proceedings.

(ii) *Comparison of the Two Models*

2.51 The key phrase "first knew or in the circumstances ought to have known" is common to both models. However there are salient differences in presentation and drafting between the two models. These are examined below.

1. In line with the traditional common law approach, the 1991 Act uses a preliminary provision to provide a definition of the key term, "date of knowledge", which it then utilises in the subsequent operative section. By contrast, the Alberta model does not employ any such term or definition; but states the substance of the definition as part of the operative provision. The result is that the Alberta model gives in a single section, the material which the 1991 Act takes two sections to rehearse. Since our draft will use the concept represented by the term 'date of knowledge' only once, we do not see any advantage in employing a term of this or a similar type and taking a separate provision to define it.

2. The Alberta provision enumerates in (i)-(iii) the three factors about which the claimant ought to know. By contrast, the 1991 model lists five items at (a)-(e). The additional paragraphs are as follows:

- "(d) the identity of the defendant;
- (e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;"

In comparison the Alberta model uses the phrase "attributable to the conduct of the defendant". The Alberta Law Reform Institute interprets the "attributability" requirement as meaning: "The discovery period will not begin until the claimant first knew that his injury was to some degree attributable to the conduct of the defendant."⁷⁶ Accordingly the requirement embraces both attributability and the identity of the defendant.⁷⁷ In addition, the scope of the

⁷⁶ *Report on Limitations* (No.55, 1989) at 33.

⁷⁷ A situation can be easily envisaged in construction industry cases where the projects are of a technical nature so that it may take some time before it is clear to whom the act or omission is attributable. It would be unfair to a claimant in such instances to start the limitation period running before this date.

term "attributable" is sufficiently wide to encompass a situation where the defendant is vicariously liable.

3. The 1991 model specifies that "knowledge that any acts... did or did not as a matter of law, involve a breach of duty is irrelevant". There is no equivalent of this in the Alberta Act. We also take it that the fundamental legal axiom that a person can get no advantage from ignorance of the law goes without saying.

4. Under the 1991 model, knowledge which the person could reasonably be expected to acquire "from facts which are or in the circumstances ought reasonably to be observable or ascertainable by the person" is expressly imputed to that person. There is no such phrase in the Alberta model. The same idea is, however, implicit in the key phrase in the Alberta model: "ought reasonably to have known". Therefore, bearing in mind the need to keep the legislation as simple as possible and consonant with the meaning it is intended to convey, we believe that it is not necessary to spell it out again.

5. The 1991 model imputes knowledge to the person "from facts ascertainable by him with the help of appropriate expert advice, which it is reasonable for the person to seek". But it continues "a person shall not be fixed under this section with knowledge of a fact ascertainable only with the help of expert advice so long as the person has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice". It seems to us that these provisions are covered by the key phrase in the Alberta model: "in the circumstances ought reasonably to have known".⁷⁸ This phrase clearly indicates that if a claimant has a suspicion that (say) the building is unsafe, he should have it checked out with say a local engineer. However, if that engineer gives it a clean bill of health the claimant is not expected to consult the Professor of Building Materials at the Massachusetts Institute of Technology. It should be added that while expert advice is often sought in personal injury cases, this is less often the case in situations in which the damage is sustained in the non-personal injury field.

(iii) *Conclusion*

2.52 In view of the above considerations, the Alberta model is the model preferred by the Commission. Our preference can be explained on the following basis. In contrast to the 1991 model, the Alberta model is drafted in plain language in line with the standards recommended in our Statutory Drafting Report.⁷⁹ It is simple and easily comprehensible to the average litigant. Furthermore, having compared the 1991 model and the Alberta model, we believe that it is no less comprehensive than the 1991 model.

⁷⁸ See para. 2.29.

⁷⁹ LRC No. 61, 2000.

Also in respect of the future consolidation of limitations legislation, it represents a move away from the traditional to a simpler and better construction.⁸⁰

2.53 Until there is a redrawing of the entire limitations law⁸¹ the legislation we propose will be part of the same code as the 1991 Act. It might be argued, therefore that there is a danger that a judge interpreting legislation based on our draft might infer from the differences in drafting and format that a substantive change is intended even where this is not the case. This is unlikely to occur because the format breaks totally with that in the 1991 Act, and there is nothing to indicate that the 1991 Act ought to be used as a basis for comparison. Indeed there is a danger that if the 1991 model were used it would signal that the 1991 Act ought to be used as a basis for comparison; whereas, as we indicate at paras.2.45-2.46, we intend for substantive reasons, that there should be a marked difference. However, as a precautionary measure, we recommend as clause 2(5) of the draft legislation:

"The Law Reform Commission Report (LRC-64, 2001) may be considered by any court when interpreting any provision of this Act and shall be given such weight as the court considers appropriated in the circumstances."

2.54 *The Commission recommends that the Alberta Limitations Act, 1996 model be taken as the model for the drafting of the discoverability test, which is contained in Appendix 1. The Commission also recommends that the clause set out in the previous paragraph be included in the interpretations section of the draft.*

F. Application of the Discoverability Test in Practice

2.55 The main impact of the introduction of a discoverability test for latent damage in non-personal injury cases will be in the construction industry and in professional negligence claims. In order to illustrate how the test would work, we set out below some examples.

Example 1

2.56 A purchases a house from B, the builder, in 2000. In 2001, A notices some slight cracks in the living room walls and contacts the builder who informs A that they are just settlement cracks. Six years later, in 2007, one of the cracks becomes noticeably large after a small tremor, measuring 2 on the Richter scale. A mentions the matter to a friend who is an engineer and he is of the opinion that A should pursue the matter and have a proper survey. A however does nothing. In 2008, he wishes to sell the house and is informed by the surveyor for a prospective buyer that there are major structural defects in the foundations and the house is slowly subsiding. In 2008 A goes to his solicitor to see what recourse he has to recover for the loss in value of the property.

⁸⁰ See the Introduction to this Report at paras. 8-10 and LRC No.14, 1999.

⁸¹ *Ibid.*

Action in Tort

The cause of action at present in tort accrues in 2001 upon the some damage materialising. Therefore, under the current law, A has until 2007 to take action. However under the test we propose, A arguably did not know that the loss had occurred in 2001. It is likely that he could be deemed to have constructive notice only in 2007. Although it would be a matter for the judge to decide whether a reasonable person in the circumstances (therefore including the fact that he had spoken to a friend who was an engineer) should have known (i) that some damage attributable to the construction of the house had occurred and (ii) that it was sufficiently significant. Thus A would probably have three years from 2007, up to 2010, to institute proceedings.

Action in Contract

The cause of action in contract accrues in 2000 upon the purchase of the house (assuming there was no other term in the contract to the contrary). Under the current law, A has until 2006 to bring an action for breach of contract. However under the proposed test, the limitation period would not start running until 2007, giving him again until 2010.

Example 2

2.57 Z purchases a building in 1998. Having investigated the title, in 1998 Z's solicitor S advises Z to pay the balance of the purchase money. Z believes himself to have purchased a leasehold interest which carries a statutory right to acquire the freehold estate, while in fact the premises are held under a 99 year lease with 30 years left to run and no statutory entitlement concerning the freehold. It is not until 2005, when he decides to sell the premises and instructs another firm of solicitors to act for him, that this is brought to his attention. Z immediately institutes proceedings against S.

Action in Tort & Contract

Z's cause of action in tort accrues when the damage occurs; in 1998. Z's cause of action in contract accrues at the date of the breach; 1998. Therefore the proceedings instituted in 2007 are statute-barred. They ought to have been instituted before the relevant date in 2004.

Under the discoverability test Z cannot reasonably have been expected, in the circumstances, to become aware of the loss which occurs before 2005. The limitation period would start running in 2005 and Z would have until 2008 to bring proceedings in both tort and contract.

Example 3

2.58 M engages S, a firm of solicitors, to apply for planning permission for a site in 1993. In 1993, outline planning permission is granted and in October 1993 M purchases the site for £150,000. In 1997 M is notified that a certificate required had not been lodged with the application for planning permission and, accordingly, that the permission is void. M instituted proceedings in 2001 against S.

Action in Tort & Contract

1993 is the date the cause of action in negligence accrued (in economic loss cases the cause of action accrues when the plaintiff suffers a significant loss for which he can sue). Clearly at present the proceedings instituted by M in 2001 are statute-barred.

In regard to the claim for breach of contract, it also accrued in 1993: the cause of action at present would be statute-barred before 2001.

Under the proposed discoverability test, M only became aware of the loss he suffered in 1997 when he was notified of the failure to lodge the certificate causing the planning permission to be void. He could not reasonably have been expected to ascertain this at an earlier date. It is therefore at this date that time would start to run. M instituted proceedings in 2001 but under the discoverability test time would have been up in 2000, so his proceedings would have been statute-barred anyway even under the extended period given by the discoverability test.

CHAPTER THREE: DISCOVERABILITY & ACCRUAL

3.01 In this brief chapter, we consider two options: (a) whether the present accrual standard should be retained, with the discoverability test as an alternative to it; or (b) whether a discoverability test should be the sole test for the law of limitations.

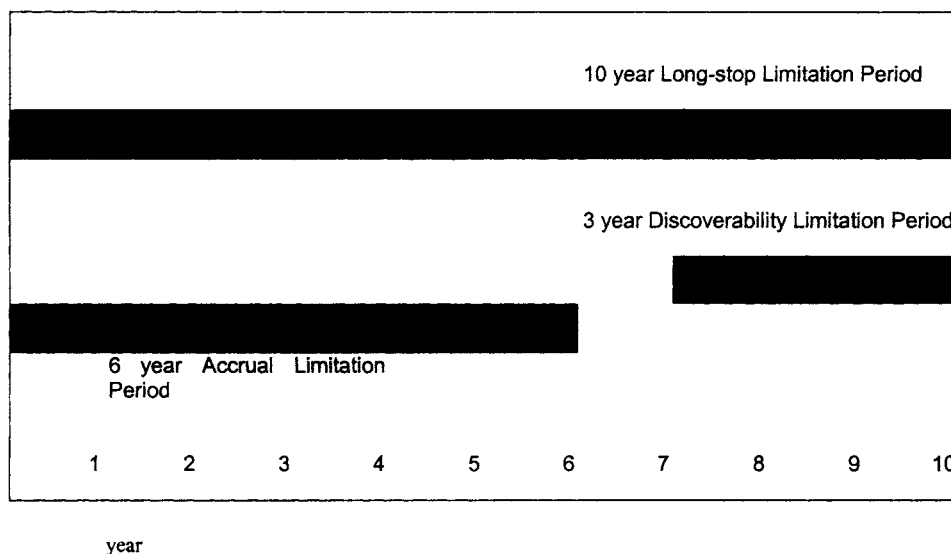
3.02 In the provisional recommendations in our *Consultation Paper* some Commissioners expressed a preference for (b)discoverability as the sole test, since it would obviate the complexity involved in the initial ascertainment of accrual, followed by the application of a discoverability test, with a calculation as to which event is later. Option (b) has much to recommend it in terms of simplicity and certainty in the law. However, in the final analysis, and taking into account the terms of the Reference from the Attorney General which refers to the limitation period “in circumstances where the loss is latent”, the Commission is of the opinion that the discoverability test should be introduced to deal only with latent loss. Thereby retaining for the plaintiff any advantage stemming from the accrual limitation period in cases of obvious or patent loss and indeed in certain latent damage cases. While it can sometimes be difficult to ascertain the date of accrual, it happens that this difficulty particularly arises where the loss is latent. The date of accrual of the cause of action, as the trigger by which the limitation period is begun, generally works well in cases of patent or obvious loss, since this date does not usually differ from the time of the discovery of the damage. We do not see any justification for recommending the abolition of the date of accrual as the start of the limitation period for cases of patent loss.

3.03 This conclusion is also influenced by the desirability of consistency in the law and cohesiveness between the different limitation periods which exist for different types of action. As the date of accrual still governs the general law of limitations outside the scope of the present Report, the Commission believes it would be inappropriate to advocate an entirely separate regime for patent loss in tort and contract (excluding personal injury). This is without prejudice to the general opinion within the Commission that the entire law of limitations is in need of examination with a view to reform.

3.04 Finally, it may appear to be necessary to justify a test, like (a) above, which appears to give a plaintiff the best of both worlds. The response to such a perceived difficulty is that, even if the cause of action were discoverable and yet, for some reason, the plaintiff failed to take action within three years from the date of discoverability, the defendant would still be no worse than under the present law.

3.05 *The Commission recommends the following test: the plaintiff may take action within six years from the accrual of the cause of action (present position); or three years from the date the cause of action is or ought to be discoverable by the plaintiff, whichever expires later.*

3.06 The practical effect of this dual test may be illustrated by the following examples: if the criteria for the discoverability test is fulfilled two years after accrual, then the four remaining years of the normal six-year limitation period would nevertheless continue to run. If discoverability occurs only four years after accrual then the two remaining years of the normal six year period would run with one year added to make up the three year period provided under the new alternative. If, as in our illustration below, the discoverability does not occur until after the six year period commencing at accrual has expired, the three year period would begin at the time of discoverability, subject to an overall long-stop limitation period.⁸²



⁸² See Chap. 4 below.

CHAPTER FOUR: THE LONG-STOP

4.01 The second main recommendation of the Commission stipulates an ultimate limitation period, commonly referred to as a 'long-stop' period, beyond which no claim can lie. In the *Consultation Paper* the Commission provisionally recommended the introduction of a long-stop limitation period of fifteen years from the date on which the cause of action accrued. Essentially, this would mean that upon the expiration of fifteen years from the accrual of the cause of action, any claim would be statute-barred and for most purposes effectively dead. The central point is that this rule would apply even if the damage was not discoverable and the extra three years under the discoverability test had not elapsed.

4.02 The purpose of a long-stop is to achieve certainty in the legal system. This function takes on particular importance where the existence of a discoverability test permits more latitude as to when the proceedings may be instituted. The introduction of a long-stop in this jurisdiction is not without precedent. The *Liability for Defective Products Act, 1991* provides for an ultimate limitation period of ten years from the date on which the product was first put into circulation.⁸³

4.03 In two previous Law Reform Commission Reports on various limitation issues, the concept of a long-stop was rejected.⁸⁴ Both of these Reports however dealt with personal injuries and, as the Commission noted in the *Consultation Paper*, "in cases of personal injury, the right of the plaintiff should be ascribed a greater weight than that of a defendant - at least as an initial point of departure."⁸⁵

4.04 The recommendation in favour of a long-stop limitation period in the present context therefore represents a new departure. The issue generated considerable interest and comment during the consultation process both in respect of whether there should be a long-stop at all and, if there should, as to the appropriate length of time. The

⁸³ A proposed amendment which would have introduced a long-stop of 20 years for latent defects was postponed until the review of the entire Directive on which the Act is based.

⁸⁴ *Report on The Statute of Limitations: Claims in respect of Latent Personal Injury (No. 21, 1987); Report on Defective Premises (No. 3, 1982).*

⁸⁵ *Consultation Paper on The Statutes of Limitation: Claims in Contract and Tort in respect of Latent Damage (other than Personal Injury) (Nov. 1999)* at para. 4.41. See also the earlier discussion in this Report in respect of the inherent differences between personal injury and non-personal injury actions at paras. 2.11-2.14.

arguments for each side will now be discussed, dealing, first with whether to have a long-stop; and then, with its length.

I. Whether to have a Long-Stop

4.05 Arguments in favour of a long-stop essentially stem from concerns regarding the best framework within which justice can be achieved and economic concerns arising from the costs of defending an action for latent damage, or even taking precautions against the possibility of such a claim.

4.06 They are not, basically, dissimilar from the general arguments in favour of limitation periods, canvassed in the Introduction. Difficulties in regard to collecting evidence, locating witnesses and retrieving documentation will all increase as time goes by. Justice requires that each side be afforded the opportunity to adequately present its case. Plaintiffs must only prove their case on the balance of probabilities in civil law. The more time which is allowed to pass before proceedings are instituted, the more difficult it may be for the defendant to gather witnesses and evidence. While the law should seek to accommodate the plaintiff's claim, this ought not to be at the expense of the defendant's rights and it is important that a balance be preserved between the two parties.

4.07 With regard to the difficulty in locating records and evidence, the current practice in the construction industry is to retain records for a minimum of six years after the Final Certificate of completion in the case of a simple contract, and twelve years for a contract under seal. For condition-reports, and other like purposes, documents are usually kept for six years. The introduction of a discoverability test without a long-stop period would make it necessary to keep these documents indefinitely. Each potential case involves many documents involving the storage of voluminous amounts of files with associated costs. A further consequence of discoverability without the limit of a long-stop would be the necessity to extend personal indemnity insurance coverage. Currently, upon ceasing practice, independent professionals usually maintain such insurance for a run off period of six years.

4.08 These factors point to a considerable increase in the overheads of the defendant, which, it is argued, would be passed on to the consumers who purchase goods or services from that defendant. To justify the increased expenses and risk of injustice to the defendant, there would have to be a compelling justification. This was found to exist in the case of personal injuries. However the same justification does not arise here, given the inherent differences pointed out earlier,⁸⁶ between claims for personal injuries and claims for material loss.

4.09 The utilitarian approach suggests that the defendant should be protected, and the costs avoided, at the point of balance where the gain to potential plaintiffs becomes less in comparison with the cost to the potential defendants and, through insurance, to

⁸⁶ See paras. 2.11-2.14.

the community. It is at that time that justice would be best served by the introduction of a long-stop.

4.10 On the other hand, against the introduction of the long-stop it could be argued that in some cases the nature of the defects which may arise are such that a long-stop would undo the good of introducing a discoverability test because the loss resulting from the latent damage to the plaintiff would exceed any costs incurred by commercial enterprises in bearing the responsibility of providing for these eventualities.

4.11 Another counter argument might be to the effect that a long-stop is not necessary because equitable use of judicial discretion is sufficiently developed in this country to deal adequately with those cases where there is an extreme lapse of time.⁸⁷ The courts have an inherent "jurisdiction to dismiss a claim in the interests of justice where the length of time which has elapsed between the events from which it arises and the time when it comes for hearing is in all the circumstances so great that it would be unjust to call upon a particular defendant to defend himself".⁸⁸ In the few cases, where the court has dismissed such a claim in the interests of justice, the period of limitation which elapsed since the cause of action arose was 24 years; the limitation period is extended under s.72 of the *Statute of Limitations, 1957* where the plaintiff is a minor. In cases where the normal limitation periods apply, there is less of a risk of injustice. Thus the fact that the delay is inordinate and inexcusable alone may not be sufficient to strike out the proceedings. However, if the plaintiff is also guilty of such delay in prosecuting the proceedings, the courts are willing to exercise their discretion to dismiss a claim for want of prosecution.⁸⁹ The principles applied by the courts when considering an application to dismiss a claim for want of prosecution are set out in *Primor plc v. Stokes Kennedy Crowley*.⁹⁰ The length of time elapsing prior to the delay is an important factor to be taken into account.⁹¹ We are of the opinion that a long-stop is preferable to relying

⁸⁷ This factor could be offered as justification for the fact that the Liability for Defective Products legislation which came from the European Community, there are no ultimate limitation periods on the Irish statute books. Those countries which favour the use of long-stops do not necessarily have such a well-developed tradition in regard to such an equitable jurisdiction.

⁸⁸ See *O' Domhnaill v. Merrick* [1984] IR 151, *Toal v. Duignan* 1991 ILRM 140. See also *Glynn v. The Coombe* High Court, 6 April 2000, where O' Sullivan J reluctantly accepted that the court has jurisdiction to dismiss an action brought within the limitation period in the interests of justice.

⁸⁹ See *Rules of the Superior Courts*, Order 27 rule 1, Order 36 rules 12-13 and Order 122 rule 11.

⁹⁰ [1996] 2 IR 459.

⁹¹ O' Hanlon J in *Celtic Ceramics Ltd v. IDA* [1993] ILRM 248 said "it should not be forgotten that long delay before issue of the writ will have the effect of any post-writ delay being looked at critically by the court and more readily being regarded as inordinate and inexcusable than would be the case if the action had been commenced soon after the accrual of the cause of action. And that if the defendant has suffered prejudice as a result of such delay before issue of the writ he will only have to show something more than minimal additional prejudice as a result of the post-writ delay to justify striking out the action." This was also the approach taken by the Supreme Court in *Kelly v. Cullen* Supreme Court, 27 July 1998. Here, Barron J giving the judgment for the court, stated "Delay cannot really be inordinate if the proceedings are commenced within the limitation period. Nevertheless, delay thereafter is more likely to be found to be inordinate the less excuse there is for delay in commencing the proceedings. Again, the longer it is since the cause of action arose, the less likely it is that circumstances giving rise to delay will be regarded as excusable".

on judicial discretion as over-reliance on judicial discretion would result in endemic uncertainty.

Conclusion

4.12 We are of the opinion that, in non-personal injury cases, the need for certainty in the law and also the economic considerations, which affect not only the defendant but society in general, are of greater weight when pitched against the purely economic claims with which we are dealing. In such cases, we are essentially weighing up two economic interests: that of the plaintiff in being able to bring a potential action; and that of the defendant in having to maintain insurance cover indefinitely (which can be significant, especially in construction cases) or bear the risk if he does not, as well as the costs inherent in storing the relevant documents. In addition, underlying the consideration of these opposing interests is the overriding concern of ensuring certainty and confidence in the law.

II. Length of The Long-Stop

4.13 Many of the reasons advanced in the preceding section also apply in respect of length. Strong representations were made at our seminar to the effect that the long-stop period should not be 15 years based on the evidentiary difficulties already referred to and the increased insurance costs.⁹² Both a 10 and a 12 year long-stop were suggested.

4.14 The question is how long after the event do the number of plaintiffs wishing to take claims become fewer. In Ireland the Law Reform Commission carried out a survey among medium sized solicitors' firms located outside Dublin. Most solicitors who completed the survey said that they had never come across non-personal injury claims involving latent damage which had only become known after the limitation period had expired. German and French studies on latent defects in the construction industry indicate that only 20-25% of defects appear longer than 5-6 years after accrual. The Aachener Institute⁹³ study revealed that 80% of defects, especially serious ones, appear during the first five years and the Agence Qualitel⁹⁴ study concluded that 75% of defects appear before 6 years have elapsed. The National House-Building Council, which is essentially the UK equivalent of the Irish HomeBond Scheme, reports that defects tend to become manifest in years 6 and 7. HomeBond⁹⁵ gives cover for 10 years

⁹² A 15 year long-stop was recommended by the New Zealand Law Reform Commission in their *Discussion Paper on the Limitations Act, 1950* at 48, and also by the Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions* (Project No. 36 Part II 1997) paras. 7.30 and 7.54.

⁹³ Aachener Institut für Bauschadensforschung und angewandte Bauphysik.

⁹⁴ *Moniteur des Travaux Publics* 19.06.87 at 60.

⁹⁵ HomeBond is a scheme set up to provide home owners with a warranty against major structural defects. HomeBond members consist of builders and developers. Dwellings constructed by its members come within the HomeBond scheme.

which could be seen as a further indication that after this period new problems are unlikely to arise.⁹⁶

4.15 It appears from the above analysis that a 10 or a 12 year long-stop period would offer adequate protection to a plaintiff in the majority of cases. Some Commissioners were in favour of the 12 year period as it is more generous towards the claimant. Also it is consistent with the limitation period for contracts under seal. On the other hand the advantage of 10 years⁹⁷ is that it is consistent with: the growing trend in the construction sector to take out ten year insurance cover;⁹⁸ the legislation on Product Liability;⁹⁹ and the HomeBond¹⁰⁰ guarantee scheme. On balance most Commissioners decided in favour of a 10 year long-stop period.

4.16 *The Commission recommends that the length of the long-stop should be 10 years.*

4.17 Thus while the maximum period in which an action in contract can normally be brought would be 10 years from the date of breach, if the contract is under seal¹⁰¹ the limitation period would be 12 years. Law Reform Commissions in other jurisdictions have suggested that there should not be a longer period for instruments under seal on the basis that: "Most acts which may be done by deed may also be done by simple contract. The one exception is a promise to pay money which is not supported by consideration. There seems to be little justification for a longer litigation period with respect to gifts of money made under seal than with respect to ordinary debts."¹⁰² The Law Reform Commission of Western Australia¹⁰³ expressed the view that, if the only function of the special rule in relation to contracts under seal is to provide a means of fixing a longer limitation period, the distinction between contracts under seal and simple contracts is not justifiable, as there is no obstacle to prevent parties from contracting for

⁹⁶ HomeBond 1997 rule 50(n) defines the liability period as "a period of 10 years from the date of issue of the Final Notice".

⁹⁷ The English Law Commission in their *Consultation Paper on Limitation of Actions* (No. 151,1998), recommend a long stop of 10 years. This is also the position in Alberta, see the *Limitations Act, 1996* cL-15.1, s3(1)(b), although the Alberta Law Reform Institute recommended a 15 year long-stop in their *Limitations Report* (No.55 1989).

⁹⁸ The Forum for the Construction Industry has been given the task of implementing a recommendation from the Report, "Strategic Review of the Construction Industry" (Pn.3839, Government Publications) 1997 concerning the introduction of a national latent defects insurance scheme.

⁹⁹ *Liability for Defective Products Act, 1991* s. 7(2)(a).

¹⁰⁰ See fn. 95.

¹⁰¹ Deeds conveying an interest in land must be sealed (see Wylie, *Irish Conveyancing Law* (2nd ed., Butterworths, 1996) at para. 18.122) and sealing is also still necessary in the case of some company transactions. See *Aiken v. Stewart Wrightson Members Agency Ltd* [1995] 1 WLR 1281, affirmed in [1996] 2 Lloyd's Rep 117, for further discussion.

¹⁰² British Columbia Law Reform Commission, *Report on Limitations* (No. 15, 1974) at 27-28.

¹⁰³ *Report on Limitation and Notice of Actions* (Project No 36 Part II),1997 at para. 12.12.

a longer limitation period in a simple contract. This reasoning was also supported by the English Law Commission in their recent *Consultation Paper*.¹⁰⁴

4.18 However it is reasonable to assume that where a contract is under seal, the parties understand and desire that the well established 12 year period should apply. For this reason the Commission is reluctant to recommend change in an area where there is already certainty and a long tradition of commercial practice.

III. Starting point of Long-Stop

4.19 The choice is between: the date of accrual of the cause of action; or the date when the harmful act or omission took place. It is argued in respect of the latter, that it makes the starting point much clearer as the problems associated with the determination of the date of accrual are avoided.¹⁰⁵ Consequently there would be an increased level of certainty for parties to a transaction. The other advantage, is that it would provide a common starting point for the long-stop for claims in both tort and contract.¹⁰⁶ As against these advantages, however, there exists the possibility that the long-stop limitation period will have commenced before the cause of action has accrued and the plaintiff has a right to bring proceedings.

4.20 On the other hand the date of accrual is the logical starting point as it is only at this point that a plaintiff will have a complete cause of action. The date of accrual is an established concept, on which there has been much discussion and case-law. Moreover, as the Commission has recommended the retention of the current six year limitation period commencing at the date of accrual, it would be convenient to have the date of accrual as the starting point of the long-stop. The introduction of a third commencement date for the long-stop would only further complicate the calculation of limitation periods.

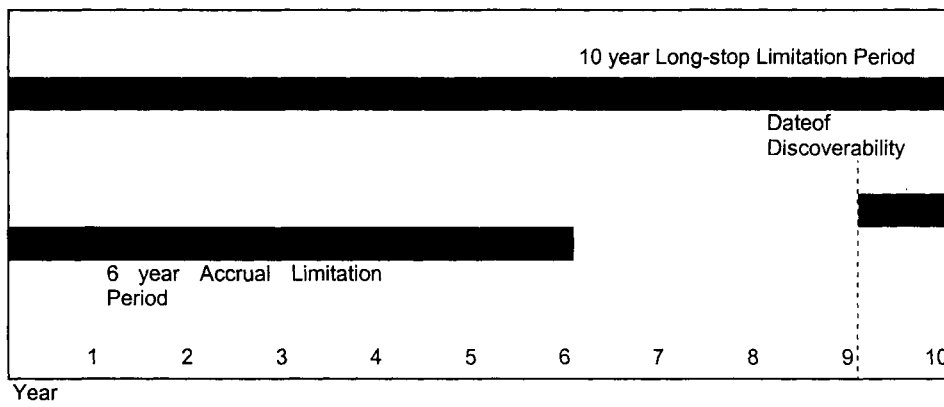
4.21 *The Commission recommends that the long-stop start at the date of accrual of the cause of action.*

¹⁰⁴ English Law Commission, *Consultation Paper on Limitation of Actions* (No. 151, 1998) at para. 13.36.

¹⁰⁵ See New Zealand Law Reform Commission *Report on Limitation Defences in Civil Proceedings* (No. 6, 1988) at para. 169. See also chap. 6 where the problems associated with determining the date of accrual are examined.

¹⁰⁶ The Ontario Limitations Act Consultation Group, *Group Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (1991) at 22.

IV. Illustration



If there was no long-stop the discoverability limitation period would run to the end of year 12. However, in the above example the long-stop prevents the discoverability limitation period extending beyond year 10.

CHAPTER FIVE: CONSEQUENCES OF DISCOVERABILITY

This chapter considers the consequences, in particular situations, of the introduction of a discoverability test.

I. Separate Incidents of Damage

A. *The Present System*

5.01 The problem under discussion here is the situation where there has been a tort resulting in separate heads of damage, A and B. When does the limitation period commence in respect of the later damage B: at the time of A; or at the time of B?

5.02 The concept of a cause of action¹⁰⁷ is the key element that in most cases triggers the limitation period. "A cause of action is every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the court."¹⁰⁸ In torts actionable *per se* the 'gist of the action'¹⁰⁹ is the commission of the wrong¹¹⁰ and not the damage. Consequently the limitation period starts to run from the date of the wrong.

5.03 Thus the problem only arises in connection with torts actionable on proof of damage, such as negligence and nuisance where damage is the essential element of the cause of action. We will examine the problem first of all on the basis of the existing law – the limitation period starting to run from the date of accrual.

(i) *General Rule*

5.04 The following is an illustration of where this problem might arise: P bought a house from a builder B in 1980. Cracks began to emerge in a side wall, which P noticed. In 1987 a major crack appeared in the foundations. P issued proceedings in 1990. The limitations period in respect of the cracks occurring in 1980, has expired by the time the

¹⁰⁷ The definition of a cause of action for the purposes of the *res judicata* doctrine and statutes of limitation does not differ.

¹⁰⁸ *Read v. Brown* (1888) 22 QBD 128, 131.

¹⁰⁹ See Stapleton, "Gist of Negligence" (1988) 104 LQR 213.

¹¹⁰ The limitation period will run from the commission of the wrong. Examples are trespass and assault.

plaintiff takes the action. The question arising is whether P can nevertheless sue in relation to the damage occurring in 1987.

5.05 The general rule here seems to be that the cause of action¹¹¹ accrues and time starts to run as from the date of the earliest item of damage.¹¹² Any damage occurring after the date of accrual is regarded as part of that cause of action. As Lord Halsbury put it in *Darley Main Colliery Co v. Mitchell*:¹¹³ "A house that has received a shock may not at once shew all the damage done to it, but it is damaged none the less then to the extent that it is damaged, and the fact that the damage only manifests itself later on by stages does not alter the fact that the damage is there."

5.06 Therefore according to the general rule, the limitation period for both sets of damage in the above example would start to run in 1980. Hence the action in relation to the later damage would be statute-barred.

(ii) *Possible Exceptions to General Rule*

5.07 It is possible that there are two limitations to this proposition. The first is where there is more than one cause of action because a single act which is not actionable *per se* causes distinct damage on two separate occasions.¹¹⁴ The second is where there is more than one cause of action because there is a continuing tort.

5.08 The first exception - where a single act causes distinct items of damage on two separate occasions - has been interpreted as the 'proper explanation'¹¹⁵ of *Darley Main Colliery Co v. Mitchell*.¹¹⁶ Here the excavation of the plaintiff's land caused subsidence and a number of years later it caused further subsidence. The new damage combined with the original wrongful act gave a new cause of action with a fresh limitation period starting from the date of the second subsidence. There has been limited support for this qualification to the general rule in some Commonwealth jurisdictions. In *Jobbins v. Capel Court Corporation*¹¹⁷ the Federal Court of Australia, while applying the general rule to the facts of the case, cited the following hypothetical situation as an example of where the general rule might not apply:

¹¹¹ The elements of a cause of action in negligence are: the negligent act, the breach of duty and reasonably foreseeable damage.

¹¹² *Higgins v. Arfon Borough Council* [1975] 2 All ER 589 illustrates this point. The Irish courts in *Morgan v. Park Developments* [1983] ILRM 156 and *Hegarty v. O'Loughran* [1990] 1 IR 148 implicitly acknowledge this rule.

¹¹³ (1886) 11 App Cas 127.

¹¹⁴ Although this is not by any means universally accepted. An example of this first exception is where there is economic loss and loss due to physical damage both arising from the same negligent act.

¹¹⁵ *McGregor on Damages*, The Common Law Library Series No. 9, (15th ed., Sweet & Maxwell, 1988) at para. 378.

¹¹⁶ (1886) 11 App Cas 127.

¹¹⁷ (1989) 91 ALR 314, 318-319.

“A simple example would be a false statement about the merits of a subdivision leading, first, to the purchase of a particular block of land in the subdivision, and, subsequently, to a separate purchase of another block of land in the same subdivision. If the first purchase occurred more than three years before the institution of proceedings, but the second purchase occurred within that period, there is no reason a claim in respect of damage suffered by the second purchase should be held to be barred.”

5.09 At the other extreme, the New Zealand Court of Appeal in *Mount Albert Borough Council v Johnson*¹¹⁸ treated subsequent damage flowing from the original damage as giving rise to a new cause of action. In this case, cracks appeared in 1967 and remedial work was done. Further cracking, occurring a number of years later, was held to create a new cause of action. It was held to be distinct from the earlier cracking, even though it was caused by the same acts of negligence. However it is unlikely that this approach will be followed in Australia¹¹⁹ and it has been rejected outright in England.¹²⁰

5.10 The second exception to the general rule, which is a continuing tort (actionable only on proof of damage), has been illustrated most frequently by nuisance cases. For example where there is constant loud noise caused by the defendant which gradually renders the plaintiff deaf.¹²¹ A continuing tort consists of a course of conduct or a series of actions or omissions so closely related as to amount to a course of conduct. Where the tort is one actionable on proof of damage so long as the damage is also continual, a cause of action continually accrues to the plaintiff, or, if the damage is severable, each separate incident of damage amounts to a separate cause of action. The practical consequence is that given the possibility of a further action being brought, the court will not give prospective damages. Damages will only be awarded for the loss suffered up to the time that proceedings are instituted and a further action will be necessary to recover the loss which occurs after this date.

B. Separate Incidents of Damage under a Discoverability Regime

5.11 Now let us consider the question of separate incidents of damage from the perspective of the proposed discoverability test. While it might be questioned whether this issue arises from the terms of reference, it is correct to regard it as at least incidental to them. One practical reason for saying this, is that in the English case-law, as can be seen below, the treatment of successive damage turned on the interpretation given to the *Limitations Act, 1980*.¹²² This would presumably be the case here too and so there is a need to give some guidance on this small, but real point.

¹¹⁸ [1979] 2 NZLR 234, see also *per Cooke J Bowen v. Paramount Builders Ltd* [1977] 1 NZLR 394, 424.

¹¹⁹ See *Sutherland SC v. Heyman* (1984-5) 157 CLR 424, 490-2 *per Brennan J*.

¹²⁰ *Horbury v. Craig Hall & Rulley* (1991) 7 PN 206, *Hamlin v Edwin Evans* (1997) 29 HLR 414.

¹²¹ *Berry v. Stone Manganese Marine Ltd* [1972] 1 Lloyd's Rep 182.

¹²² Which implemented one of the Law Reform Committee's recommendations in the limitations fields. See the Law Reform Committee, *Final Report on Limitation of Actions* (Cmnd 6923, 1977).

5.12 In designing a law to regulate this situation, it is necessary to decide whether the discoverability rule should be modelled on the existing law relating to accrual, so that the limitation period in respect of each incident of damage would run from the date of the first item of damage, or alternatively, should a new rule be introduced on this point so that each separate incident of damage would trigger a fresh limitation period. The following considerations appear to be relevant:

(i) From the perspective of policy, this is a matter of trying to strike a fair balance between the interests of defendants and those of plaintiffs. The change to discoverability, in any case, moves the balance somewhat in the plaintiff's favour. This is so because, under a discoverability regime, time starts to run against him only when the earlier item of damage becomes discoverable (when the plaintiff knows the damage is significant), rather than as at present when it accrues. The implication of this difference is that the plaintiff is on notice of the first item of damage, or, ought to know that there has been damage, which is at least more than trivial. Thus, at least in some circumstances, the position of the plaintiff has been improved in that he has some chance to seek out the other head of damage which only becomes fully discoverable at the later point.

(ii) Other jurisdictions,¹²³ for example England and Australia have applied the same rule to the discoverability test as to accrual, with the effect that the cause of action is complete when the initial damage becomes discoverable. Damage flowing from the same wrongful act, which subsequently becomes apparent will form part of the original cause of action. This is illustrated by *Horbury v. Craig Hall & Rutley*.¹²⁴ In this case, the defendant, a firm of chartered surveyors, provided the plaintiffs with a report on a Victorian house in 1986, on which they relied to purchase the house. The report failed to point out two defects which became apparent at different times. First, in 1984 it was discovered that when the chimney was removed, the upper portion was left unsupported in the loft. Second, in 1985 dampness caused the plaintiffs to consult experts who reported that the property was infested with dry rot. Applying the *Limitation Act* 1980, s.14A, it was held there was only a single cause of action arising out of the negligent making of the report. Therefore both the claim in relation to the structural damage and in relation to the dry rot formed part of the same cause of action. It was further held that the plaintiff had "the knowledge required for bringing an action for damages in respect of the relevant damage" in 1984 when she learned of the defendants' negligence in failing to advise her about the matter of unsupported remains of the partially demolished chimney stacks. Thus the cause of action encompassing both claims was statute-barred since discoverability limitation period commenced in 1984 and expired before the proceedings were commenced.

¹²³ *Hamlin v Edwin Evans* (1997) 29 HLR 414 (affirmed *Horbury v. Craig Hall & Rutley* (1991) 7 PN 206, QBD and overruled *Felton v. Gaskill Osborne & Co.* [1993] 2 ELGR 176 where it was held that "knowledge" in s. 14 A of the *Limitation Act*, 1980 related to the particular head of damage and not to damage in the general sense), per Brennan J in *Sutherland SC v. Heyman* (1984-5) 157 CLR 424, 490-2.

¹²⁴ *Horbury v. Craig Hall & Rutley* (1991) 7 PN 206.

(iii) From the perspective of legal concepts, in the case of torts actionable on proof of damage, the cause of action arises when the damage materialises. Furthermore the limitation period applying to this cause of action shall apply to all damage which either subsequently occurs or becomes apparent. Likewise if a discoverability principle were to be adopted, the cause of action would arise when the damage and the other elements of the cause of action become discoverable. This is really a rule of public policy, although cast as a legal dogma, aimed at preventing a defendant from being liable for a long and indefinite period of time. However it appears, given the general assumptions of the law on limitations, to be a reasonable policy, which there is no reason to disturb, especially in the context of this Report, whose main thrust is in a related field.

5.13 The Commission is of the opinion that the general rule to be applied should be that the limitation period will start to run from the time the first item of loss resulting from the wrongful act becomes discoverable, even in respect of any other damage which becomes discoverable after that date. The exceptions to the general rule¹²⁵ which apply in the context of accrual should also apply here to the extent that they are accepted by the Irish courts.

5.14 Thus having considered the rule from the three perspectives set out above and concluded that it should also apply to the proposed discoverability provision, we can apply it to the example at para.5.06, on the assumption that the law has been changed so that it is possible for P to invoke the discoverability test. The facts were that P bought a house from a builder B in 1980. Small cracks begin to appear in a side wall in 2000. In 2007, a major crack in the foundations becomes discoverable. P issues proceedings in 2010. If the small cracks became discoverable to P in 2003 should the discoverability time period for the cracks in the foundations also start to run at this time. Based on the fact there is only one cause of action arising from the negligent act and the general rule that the discoverability limitation period will start to run from when the first item of damage becomes discoverable, the limitation period would probably start to run when the small crack became discoverable by P in 2003.

II. Subsequent Purchasers

A. Subsequent Purchasers under the Present Regime

5.15 Before addressing the main question here, a brief digression is made in order to explain a rule which has caused much difficulty in England and to establish whether it exists in Irish law or not.

The rule that a person who is not the owner of the property when the cause of action accrues, cannot sue.

5.16 It is well established that everyone concerned with the design and construction of a building owes a duty in tort to a class of persons, not just to the person with whom

¹²⁵ See paras. 5.07-5.10.

they contract; the class being the original owner and his successors.¹²⁶ However, at common law in England there is a rule which is relevant to a claim by a subsequent purchaser, namely that a person who is not the owner of the property when the cause of action accrues cannot sue.¹²⁷ The rule was set out in the context of builders and subsequent purchasers by Lord Denning in *Sparham-Souter*.¹²⁸ Newey J in *Perry v. Tendring*,¹²⁹ relied heavily on this decision when applying the rule:

“I think that it follows from the words of Lord Denning and Roskill LJ in *Sparham-Souter*, which I have quoted, and which were not disapproved in *Pirelli* and from Lord Fraser’s words in *Pirelli* that when damage to a building occurs its owner acquires a cause of action immediately, even though he is not aware of it, and that unless he assigns that right of action, when agreeing to convey or conveying the building to a successor, or possibly transferring occupation of it to him, the successor has no right to sue.”¹³⁰

Thus, as the cause of action has already accrued when the subsequent purchaser took possession, he has no right of action against the builder. There had not been a contractual assignment of the cause of action and Newey J ruled out the possibility of a cause of action in tort passing with the legal or equitable title to the property. As a consequence of this decision the position of subsequent purchasers against the builder was greatly weakened.¹³¹

5.17 This rule had to be uprooted in England, by s.3 of the *Latent Damage Act, 1986*, which states: "a fresh cause of action shall accrue to the ...[subsequent owner] on the date on which he acquires his interest in the property". The question relevant here is whether this English common law rule exists here, in its unreformed vigour, and, if so, whether it ought to be removed or altered.

¹²⁶ *Dutton v. Bognor Regis UDC* [1972] 1 QB 373; *Anns v. Merton London Borough Council* [1978] AC 728; *Colgan v. Connolly Construction Co (Ireland) Ltd* [1980] ILRM 33; *Ward v. McMaster* [1985] IR 29.

¹²⁷ This exclusionary rule was enunciated in *Cattle v. Stockton Waterworks Co* (1875) 10 QB 453, 457- 458, and followed in *Simpson v. Thomson* (1877) 3 App Cas 279, 290, and *Leigh & Sullivan Ltd. v. Aliakmon Shipping Co Ltd* [1986] AC 785. It was applied more particularly to cases of builders’ negligence in *Sparham-Souter v. Town and Country Developments (Essex) Ltd.* [1976] 1 QB 858, 868 and *Perry v. Tendring District Council* [1983] 1 EGLR 260.

¹²⁸ [1976] 1 QB 858, 868. The rule was confirmed by Lord Wilberforce in *Anns v. Merton London Borough Council* [1978] AC 728, 758, who was of the view that it would reduce the possibility of an endless and indeterminate class of potential plaintiffs.

¹²⁹ [1983] 1 EGLR 260.

¹³⁰ *Ibid.*

¹³¹ In a subsequent case, *Polk & Co v. Edwin Hill* [1988] 1 EGLR 142 Judge Lewis examined the arguments in *Perry v. Tendring*[1983] 1 EGLR 260 and also the decision in *Donoghoe v. Stevenson* [1932] AC 562 and *Anns v. Merton London Borough Council* [1978] AC 728, before applying the rule in that case.

5.18 It bears noting, in the first place, that “this rule has not been accepted outside England.”¹³² From an Irish perspective, this rule does not appear to have been expressly considered by the Irish Courts. In *Colgan v Connolly Construction Co (Ireland) Ltd*¹³³ where McMahon J states that “the principle of *Donoghue v. Stevenson* applies to the relationship between builder and subsequent occupier” he did not distinguish between defects which manifested themselves during the ownership of the subsequent purchaser and the first purchaser. Also indicative that this rule does not exist in Irish law is its non-appearance in the seminal case of *Ward v. McMaster*,¹³⁴ where although the plaintiff was the first purchaser, the builder had lived in the house for 6 years before selling it and it was during this time that the damage occurred. When finding that a duty of care was owed by the builder Costello J stated:

“There are no facts here arising under contract or otherwise that require that that duty should be restricted or limited in any way: in particular, I do not consider that the duty is in any way affected by the fact that instead of selling it immediately after its completion, the defendant resided in it himself for a number of years.”¹³⁵

This conclusion was not criticised by the Supreme Court.

5.19 The absence of such a rule in Irish law would be in line with the modern trend in Irish law by which the Irish courts, as McMahon & Binchy¹³⁶ remark, are “more willing than the House of Lords¹³⁷ to embrace the ‘neighbour’ and ‘proximity’ principles espoused in *Donoghue v. Stevenson* and *Anns v. Merton*.”

5.20 *It appears that there is no substantive rule in Irish law which prevents a claim in tort for damage to property, where the plaintiff had no interest in the property at the time of the damage being inflicted. Nonetheless we recommend legislation to this effect.*

Subsequent Purchasers and the Accrual Limitation Period

5.21 Accordingly, it is necessary to consider, from the perspective of the present limitations regime, the situation where the original purchaser transfers property to the subsequent purchaser. Two situations are distinguishable. First, if when the subsequent

¹³² Fleming, *The Law of Torts*, (9th ed., LBC Information Services, 1998) at 199-200. Fleming points out that the Australian High Court distanced itself from any broad exclusionary rule in *Caltex Oil v. The Willemstad* [1976] CLR 529 and the Supreme Court of Canada also disclaimed the exclusionary rule in *Canadian National Rly v. Norsk Pacific Steamship Co* [1992] 1 SCR 1021.

¹³³ [1980] ILRM 33.

¹³⁴ [1985] IR 29. In this case the builder lived in the house himself from 1974 to 1980 before selling it to the plaintiff.

¹³⁵ *Ibid.*

¹³⁶ McMahon & Binchy, *Irish Law of Torts* (2nd ed., Butterworths, 1990) at 253.

¹³⁷ *D&F Estates v. Church Commissioners for England* [1989] 1 AC 177; *Murphy v. Brentwood* [1991] 1 AC 398.

purchaser comes into possession the cause of action has not yet accrued, then the 6 year limitation period will not start to run against him, until the cause of action accrues. The second situation, where the limitation period has already begun to run against the predecessor purchaser, is the one which concerns us. The question which arises here, whether the limitation period commences afresh for a subsequent purchaser, or whether he simply acquires the property with the limitation period running against him.

5.22 If the limitation period were to commence afresh against a subsequent purchaser it would mean that:

“[i]f the property happened to be owned by several owners in quick succession, each owning it for less than six years, the date when action would be time-barred might be postponed indefinitely... I think the true view is that the duty of the builder and of the local authority is owed to owners of the property as a class, and that if time runs against one owner, it also runs against all his successors in title . No owner in the chain can have a better claim than his predecessor in title.”¹³⁸

Therefore the present law seems to be that where a cause of action accrues under the predecessor owner it does not and should not commence afresh but does and should continue to run against any subsequent owner.

B. Claim by a Subsequent Purchaser, under a Discoverability Regime.

5.23 An analysis is now made of the situation of a claim by a subsequent purchaser in the context of the discoverability limitation period proposed in this Report. Again, two situations are plainly distinguishable. The first arises if the damage becomes discoverable only when the house is owned by the subsequent purchaser. There is no difficulty here as the limitation period would begin to run from the point of discoverability. The second and more difficult situation arises, when the damage was discoverable by the predecessor owner. This is illustrated by the following example. P purchases a house from V and there are latent defects in the house caused by the builder: assume that these defects are discoverable by V but he has done nothing about them when he sells the house to P. Should the limitation period begin to run against P only when he could have discovered the defects; or from the time at which V could have discovered them?

5.24 A precise analogy cannot be made with the corresponding situation under the accrual limitation period because the knowledge of the actual plaintiff is fundamental to the application of the proposed discoverability regime. This difficult situation has to be looked at from two perspectives. First from the perspective of the defendant: if the limitation were to begin only when P, the subsequent purchaser, could have discovered the defects, then this would amount to a fresh limitation period. On this approach, if the period of limitation were to commence afresh every time there was a change in

¹³⁸ *Pirelli General Cable Works Ltd v. Oscar Faber and Partners* [1983] 2 AC 1,18 per Lord Fraser of Tullybelton.

ownership, theoretically the builder would be liable just because of the accident of the house being transferred, for a longer period of time, though not in perpetuity. This is a significant fact. In contrast to the present regime, the builder is not open to liability in perpetuity because the long-stop would limit the period for which the builder could be held liable. He is effectively only liable for an extra four years.¹³⁹ Secondly, from the perspective of P, the plaintiff, if no concession is made by the law to the fact there has been a change of ownership, it is P who would be placed at a disadvantage. He would have a shorter period in which to take action than would be the case if he were in the position of the normal plaintiff, such as V.¹⁴⁰

C. *Can P not Sue his Surveyor?*

5.25 It might be thought that the subsequent purchaser can avoid this situation (in the same way as a subsequent purchaser would at present where time starts to run from the date of accrual) by employing a surveyor to discover any damage which has already become apparent. If the surveyor discovered the damage, then P could negotiate either a reduction in the purchase price to take account of the defects or for the cause of action to be assigned to him by the predecessor owner.¹⁴¹ Alternatively, if the surveyor fails to discover the damage, the fact that it ought to have been discovered (otherwise a cause of action would not have accrued to the original owner) suggests that he would have a remedy against the surveyor.

5.26 This solution was the one put forward in our Consultation Paper¹⁴² as sufficient to obviate the need to make any special provision for the predicament of the subsequent purchasers. However in submissions received during the consultation process the Commission was urged, particularly by members of the relevant professions within the construction industry, to reconsider the practical effectiveness of this solution. A number of difficulties were brought to mind:

1. What if, as is often the case with houses below a certain price threshold, there is no survey? Alternatively, properties may be surveyed by the purchaser who may be reluctant to have a thorough investigation undertaken due to the expense. It is said with some authority that clients are quite capable of buying a building on a preliminary report or a superficial report.
2. Again, what if consultants make a negative report and the client nevertheless continues with the purchase?

¹³⁹ See Chap.4.

¹⁴⁰ We return to deal with these conflicting interests at paras.535-5.36.

¹⁴¹ Assignment of claims for latent defects is not without problems either. See Robertson, "Defective Premises and Subsequent Purchasers" (1983) 99 LQR at 562-563.

¹⁴² *Consultation Paper on The Statutes of Limitation: Claims In Contract and Tort In Respect of Latent Damage (Other Than Personal Injury)* (1999) at para. 4.97.

3. Limitation and exclusion clauses will often be set out in the surveyor's report. Qualifications on liability are often included in survey reports not least because they are required by insurance companies providing professional indemnity. In many cases a purchaser will rely on the survey commissioned by the building society. The building society surveyor is under a duty to exercise reasonable skill and care in carrying out the survey. This duty of care is owed, not only to the building society, but also, as long as certain conditions are satisfied, to the mortgagor.¹⁴³ However, any duty of care to the mortgagor is usually excluded by a disclaimer in the mortgage application form.¹⁴⁴

There are numerous problems in relying on professional indemnity insurance policies,¹⁴⁵ both in relation to the extent of the cover and the risk that there might not be insurance cover the year the plaintiff makes the claim.

5.27 In short, there may be many reasons why an action against the surveyor is not always a viable option.

D. Solutions adopted in other Jurisdictions

5.28 In England the *Latent Damage Act, 1986*, s.3 provides that where the defect becomes discoverable only when the building is owned by the subsequent purchaser, he acquires a cause of action with a fresh limitation period which commences at the date of 'discoverability'. However, where the defect was discoverable by the predecessor owner, even if the limitation period had not run out by the time of the transfer of property, the subsequent purchaser has no cause of action.

5.29 From a policy point of view, this provision sets the balance unduly in favour of the builder. Why should a builder be in a more defensible position if the predecessor owner sells the property rather than if he retains it? It seems likely that this rule is the outcome not so much of limitations policy as of the substantive approach that a person

¹⁴³ See *Hedley Byrne* [1964] AC 465 and a case in point *Smith v. Bush* [1990] 1 AC 831. The House of Lords decision *Smith v. Bush* [1990] 1 AC 831, has been interpreted by the courts as setting out three conditions which must be met before a duty of care can be established between a surveyor engaged by the building society and the mortgagor. There must be (i) sufficient proximity between the task of the surveyor and the affairs of the mortgagor, (ii) it must be foreseeable that the mortgagor is likely to suffer damage if the surveyor is negligent, and (iii) possibly it must be just and reasonable to impose liability (see *Beaumont v. Humberts* [1990] 49 EG 46). Costello J in *Ward v. McMaster* [1985] IR 29, 54, Part III of his judgment, 'assumed' that the auctioneers, instructed by the County Council to value the house, owed a duty of care to the purchaser. This assumption was not criticised by the subsequent Supreme Court decision.

¹⁴⁴ According to the House of Lords in *Smith v. Bush* [1990] 1 AC 831, the disclaimer is ineffective, unless it satisfies the reasonableness requirement in the *Unfair Contract Terms Act, 1977*. There is, however, no such Act or requirement in Irish law. The *Sale of Goods and Supply of Services Act, 1893*, s. 55(4), which prevents a party relying on an exclusion clause, applies to contractual liability not tortious liability. See *Kennedy v. AIB plc and AIB Finance Ltd* Supreme Court, 29 October 1996 and paras. 6.49-6.51.

¹⁴⁵ Ann Minogue and Siobhan McCloskey "Latent defects insurance: a viable alternative?" *Solicitors Journal* 19 June 1992.

cannot sue if he is not the owner of the property at the time the damage occurred.¹⁴⁶ In any case, this rule seems unfair.

5.30 In contrast to English law, the law in Alberta¹⁴⁷ adopts a compromise position: Alberta *Limitations Act, 1996*, s.3(2), provides that the limitation period begins: “against a successor owner of a claim when either a predecessor owner or the successor owner of the claim first acquired or ought to have acquired the knowledge”. Thus, where the discoverability test is fulfilled under the ownership of the original owner, the subsequent purchaser will acquire the claim with the limitation period already running against him. It is implicit in this provision that the knowledge of the predecessor owner is imputed to the successor owner. In effect it makes the commencement of the limitation period solely referable to the fulfilment of the discoverability test, regardless of the person who owns the action at that time. But the crucial feature here is that no new limitation periods are triggered by the change in ownership. This was also the solution recommended by the Ontario Limitations Act Consultations Group.¹⁴⁸

5.31 At the other extreme from the English *Limitation Act, 1980* (as amended), the New Zealand Law Commission¹⁴⁹ recommends that time should only run against a subsequent owner of the property when he discovered or ought to have discovered the cause of action. The New Zealand Law Commission emphasises, the fact that the ultimate protection for the defendant is the 15 year ‘long-stop’. It is interesting to note that the English Law Commission in its recent *Consultation Paper on Limitation of Actions*¹⁵⁰ also recommends that a fresh cause of action should accrue to a subsequent owner of damaged property, when he has or ought to have knowledge of the facts, even where the previous owner had this knowledge (save in the unlikely case that the subsequent owner had the necessary knowledge before that date, in which case the limitation period would start to run when he acquired an interest in the property).

5.32 It will usually though not inevitably happen that if the defect was discoverable by V, then it will also be discoverable by P when he or she acquires an interest in the property. Presumably it was on this ground that the Law Reform Commission of Western Australia¹⁵¹ recommended that, where the defect was discoverable by the predecessor owner, the initial period should begin against a subsequent owner when he or she acquires an interest in the property (unless the subsequent owner had the necessary knowledge before that date).

¹⁴⁶ See para. 5.16.

¹⁴⁷ Alberta Law Reform Institute, *Report on Limitations* (No 55, 1989) at 67.

¹⁴⁸ *Report on Recommendations for a New Limitations Act, (1991)* Recommendation 7, at 26; Ontario (General) Bill 1992 cl 11 (1).

¹⁴⁹ New Zealand Law Commission *Report on Limitation Defences in Civil Proceedings*, (NZLCR6 1988) paras. 216-225. The New Zealand Law Commission do not recommend include a separate provision for subsequent purchasers in their Report.

¹⁵⁰ English Law Commission, *Consultation Paper on Limitation of Actions* (No 151, 1998).

¹⁵¹ *Report on Limitation and Notice Of Actions* (Project No. 36- Part II 1997) paras. 8.30- 8.31.

E. Recommendation

5.33 After examining this comparative material, it seems that there are two real options as regards the time at which the limitation period begins to run against the successor owner P.

These are either:

- (a) When the defect is discoverable by V which is the approach taken by the Alberta Law Reform Institute, and the Ontario Law Commission;
- (b) When the defect is discovered/discoverable by P which is the approach taken by the New Zealand Law Commission and the English Law Commission.

In this area we encounter the all too common problem of a dispute between two relatively innocent third parties. As indicated earlier when we considered the issue from the perspectives of the builder and of the plaintiff, it is hard on the defendant if his liability is to be extended simply because the building happened to be sold by the party for whom the house was built. Conversely, it is also hard on P, if his limitation period is to be reduced.

5.34 In this evenly balanced situation the Commission preferred solution (a), in other words the limitation period should start to run against a successor owner of a claim when it is or ought to be discoverable by either a predecessor or the successor owner of the claim.

III. Discoverability and Equitable Remedies

5.35 The position at present is that s.11, the central provision in the *Statute of Limitations, 1957* does not apply to equitable remedies except to the extent that it can be applied by analogy.¹⁵² It is excluded by subs.9:

- “(a): This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief.
- (b) Paragraph (a) of this subsection shall not be construed as preventing a Court from applying by analogy any provision of this section in like manner as the corresponding enactment repealed by this Act has heretofore been applied.”

5.36 Instead, the equitable remedies have developed what may be regarded as their own limitation period: laches, by which it is a defence to an action that the plaintiff has unreasonably delayed before taking action and the circumstances are such as to make it inequitable to enforce the claim.¹⁵³ While there are many factors which may be relevant

¹⁵² See Spry, *Equitable Remedies* (4th ed., Sweet & Maxwell, 1990) at 407.

¹⁵³ Snell's *Principles of Equity* (27th ed.) at 35.

to the question of what is equitable, one of these factors is when the plaintiff knew or should have known, that he had a cause of action. In short, discoverability has always been built into the equitable test for limitations. We see no need therefore to make any change to the subsection which has just been quoted.

5.37 We recommend no change to the existing statutory provision which excludes specific performance, injunctions and other equitable reliefs from the purview of the Statute of Limitations, 1957.¹⁵⁴

IV. Burden of Proof

Allocation of the Burden of Proof

Present Position

5.38 The general rule is that the burden of proof is on the party who affirmatively asserts the fact in issue - "he who asserts must prove". Lord Maugham in *Constantine Line v. Imperial Smelting Corporation* said:

"The burden of proof in any particular case depends on the circumstances in which the claim arises. In general the rule which applies is *Ei qui affirmat non ei qui negat incumgit probatio*. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons."¹⁵⁵

This rule requires the party who would fail if no evidence were called to prove that the issue should be decided in his favour.¹⁵⁶ It is not relevant that that party in the pleadings is stating a negative and the other party is stating an affirmative.

5.39 There are two burdens of proof: the legal burden; and the evidential burden.¹⁵⁷ The legal burden can be defined as "the burden of persuading the tribunal of fact, to the required standard of proof, and on the whole of the evidence, of the truth or probability of every essential fact in issue"¹⁵⁸ The evidential burden is the burden of adducing evidence to prove the facts in issue. It is implicit that the party who has the legal burden also has an evidential burden. Once this burden is discharged the evidential burden passes to the other party, who must adduce evidence in opposition. In this brief section we are mainly concerned with the incidence of the legal burden of proof.

5.40 Particular rules can apply for specific classes of cases so that it is necessary to resort to precedents in order to ascertain the true allocation of the burden of proof.

¹⁵⁴ Except to the extent that the statute can be applied by analogy. Spry, *Equitable Remedies* (4th ed.) at 409.

¹⁵⁵ [1942] AC 154,174.

¹⁵⁶ See Taylor, *A Treatise on the Law of Evidence* (12th ed.) at para. 365.

¹⁵⁷ See *Phibson on Evidence* (15th ed., Sweet & Maxwell, 2000).

¹⁵⁸ Peter Murphy, *A Practical Approach to Evidence* (3rd ed., Blackstone Press Ltd., 1980) at 78.

5.41 The specific question of the burden of proof in relation to the Statute of Limitations is dealt with in the case of *Cartledge v. Jopling & Sons Ltd.*¹⁵⁹ In this case, claims were made by the plaintiffs for damages for injuries caused by the contracting of pneumoconiosis in the course of work as steel dressers in the defendant's factories. It was held by Glyn Jones J that the cause of action accrued more than six years before the issue of the writ on the 1st of October 1956. On appeal the defendants argued that the burden of proving that the injury occurred within the limitation period was on the plaintiff. The Court of Appeal found for the defendants on this issue. Pearson LJ stated:

“Where there is a *joinder of issue*¹⁶⁰ on a defendant's plea of the Statute of Limitations.... the burden of proof is on the plaintiff to show that his cause of action accrued within six years of whatever is the relevant period for the purposes of the statute: *Hurst v. Parker* (1817) 1 B&Ald 92; *Beale v. Nind* (1821) B&Ald 568, 571; *Wilby v. Henman* (1834) 2 Cr & M 658; *Darley Main Colliery Co v. Mitchell* 11 App Cas 127, 135... *O'Connor v. Issacs* [1956] 2 QB 288.”¹⁶¹

The same view was taken by Harmon LJ.¹⁶²

5.42 On appeal, to the House of Lords, Lord Pearce agreed with these judgments. In his speech with which the other Law Lords agreed he stated:

“I agree with the judgments of the Court of Appeal ... I would only wish to add a gloss to what was said on the onus of proof in the case of the plaintiff South. I agree that when a defendant raises the Statute of Limitations the initial onus is on the plaintiff to prove that his cause of action accrued within the statutory period. When, however, a plaintiff has proved an accrual of damages within the six years (for instance, the diagnosis by X-ray in 1953 of hitherto unsuspected pneumoconiosis), the burden passes to the defendants to show that the apparent accrual of a cause of action is misleading and that in reality the causes of action accrued at an earlier date. As, however, the judge found that South was in fact suffering from pneumoconiosis in 1950, the question of onus was not a deciding factor.”¹⁶³

¹⁵⁹ [1962] 1 QB 189.

¹⁶⁰ Our emphasis. In cases where the defendant pleads the Statute of Limitations in his defence, the plaintiff can put this defence in issue by delivering a reply. However, should the plaintiff not deliver a reply within the requisite period, the defence is deemed to be denied by the plaintiff and put in issue. There is an implied joinder of issue. See: Rules of the Superior Courts: Order 19 rule 18; Order 23 rule 1; Order 27 rule 14 (Ireland); The Supreme Court Practice Order 18 rule 14 (England).

¹⁶¹ At 208.

¹⁶² *Ibid.* at 202.

¹⁶³ [1963] AC 758,784. For a different approach to the burden of proof question see the Australian case, *Pullen v. Gutteridge Hoskins & Davy* [1993] 1 VR 27. Here it was held that the burden of proof is on the defendant, on the basis that, it is not part of the cause of action for negligence that the claim is not statute-barred.

The “gloss” added by the House of Lords here limits the extent of the burden of proof on the plaintiff to an “initial” onus to show that the cause action accrued within the limitation period. This leaves the defendant the burden of proving that proceedings were not commenced within the limitation period.¹⁶⁴

5.43 A further gloss was added by the Court of Appeal in *London Congregational Union Incorporated v. Harriss & Harriss*¹⁶⁵ where Lord Justice Ralph Gibson stated:

“In my judgment the burden on a plaintiff is to show that, on the balance of probabilities, his cause of action accrued, ie came into existence, on a day within the period of limitation. If he shows that, then the evidential burden would, as stated by Lord Pearce, pass to the defendants to show, if they can, that the apparent accrual of the plaintiffs’ cause of action was misleading etc.”

Ralph Gibson LJ appears to be saying that the legal burden lies upon the plaintiff, and once the plaintiff has discharged this burden and established a *prima facie* case, the defendant who bears no legal burden of proof, acquires an evidential burden of proof.¹⁶⁶ At this point the defendant must adduce some evidence against the plaintiff’s case or else the plaintiff will succeed.

5.44 There does not appear to be any Irish cases dealing specifically with the burden of proof in relation to the Statute of Limitations. However having examined: the Irish case-law dealing with the Statute of Limitations; the rules of evidence; and the rules of practice and procedure, there does not appear to be any reason why the incidence of the burden of proof should differ from that set out above in the English case-law. Thus the burden of proving that the cause of action took place within the limitation period is on the plaintiff, while it is up to the defendant to show that the cause of action in fact accrued outside the limitation period.

5.45 *In summary, it is established at common law that when there is joinder of issue,¹⁶⁷ the burden of proving, that proceedings in respect of a cause of action were brought within the limitation period, is on the plaintiff. The Commission is of the view that this is and should remain the position in this jurisdiction. However because the incidence of the burden of proof is an area of law better left to development by the courts and one where a degree of flexibility in the law is necessary, we do not recommend legislation.*

¹⁶⁴ See also *Perry v. Tendring* (1985) 3 ConLR 74; *Congregational Union v. Harriss & Harriss* (1985) ConLR 96.

¹⁶⁵ [1988] 1 All ER 15.

¹⁶⁶ See para. 5.39.

¹⁶⁷ In limitation cases even where the plaintiff does not deliver a reply to a limitations defence, there is an implied joinder of issue. See the Rules of the Superior Courts: Order 19 rule 18; Order 23 rule 1; Order 27 rule 14

5.46 In respect of the provisions relating to postponement of the limitation period due to legal incapacity, fraud or mistake,¹⁶⁸ the onus is on the plaintiff in each case to prove that the limitation period has been postponed because of the existence of one of these factors.

5.47 *The Commission is of the view that this is the correct approach and does not recommend any change in the law.*

Impact of Discoverability Test on the Burden of Proof

5.48 The present allocation of the burden of proof, where a limitations defence is pleaded, will work especially well under the proposed discoverability test. Since the limitation period commences from when the plaintiff knows or ought to know of the damage, there will be facts in certain cases of which only the plaintiff is aware, and therefore, which the plaintiff is in the best position to prove. Thus, it is appropriate that the burden of proof lies with the plaintiff. Indeed, in personal injury cases coming within the 1991 (amendment) Act s.2, where the date of discoverability is the date the limitation period commences, it has been accepted that the onus of proof is on the plaintiff.¹⁶⁹

5.49 *The Commission recommends that the burden of proving that proceedings in respect of a cause of action were brought within the discoverability limitation period should be on the plaintiff. The Commission is of the view that legislation to this effect is not required.*

V. Transitional Provisions

5.50 Should the legislation which we propose apply only to actions which accrue after the date it comes into force, or should it apply to certain actions where the limitation period is already running at the date the act comes into force?

5.51 Before dealing with this question, it is important to note that either the act itself indicates the scope of its application, or in the absence of such a provision, the presumption in law against giving retrospective effect to a statute applies. O'Higgins CJ in *Hamilton v. Hamilton*¹⁷⁰ explained the policy behind this presumption as follows: "[r]etrospective legislation, since it necessarily affects vested rights, has always been regarded as being prima facie unjust".¹⁷¹ This policy does not extend to procedural changes as they do not affect vested rights.¹⁷² Thus even if the proposed act did not

¹⁶⁸ See chap.7.

¹⁶⁹ *Everitt v. Thorsman Ireland Ltd* High Court, 23 June 1999 Keams J at 12.

¹⁷⁰ [1982] IR 467, 474.

¹⁷¹ *Ibid.* at 474.

¹⁷² For a full discussion on this point see the *Consultation Paper on The Law of Limitation of Actions Arising From Non-Sexual Physical Abuse of Children* (No.16, 2000) at 49 and also fn.148.

contain an express provision regarding its scope, the rule would probably not apply on the grounds that vested rights are not affected by a change in the limitations legislation.

5.52 We now move on to the question, whether or not the proposed statute should expressly provide that it is to operate retrospectively. Two key issues arise here: one is the constitutionality of such a provision; the other is where the appropriate balance between the rights of the plaintiff and fairness to the defendant lies.

(i) *Constitutional Aspect*

5.53 First, we look at the constitutional aspect. There are two constitutional provisions which appear relevant in this regard: Article 15.5 and Article 40.3. It is provided in Article 15.5 of the Constitution that:

“The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission.”

In interpreting Article 15.5 in *Sloan v. Culligan*,¹⁷³ Finlay CJ stated that: “It does not contain any general prohibition on retrospection of legislation, nor can it be by any means interpreted as a general prohibition of that description.” Thus the retrospective effect of a statute, does not, *per se*, infringe Article 15.5 so long as no new infringement of law is created. Since the expiry of a limitation period merely prevents a plaintiff bringing a claim where the Statute of Limitations is pleaded by the defendant, and does not extinguish the claim or the liability of the defendant, the constitutional right protected by Article 15.5 is not infringed.

5.54 The other constitutional provision to be considered in this regard is Article 40.3 which protects “the personal rights of the citizen”. The Supreme Court in *The State (Nicolau) v. An Bord Uchtala*¹⁷⁴ stated that the personal rights referred to in Article 40.3 “are those which may be called the natural personal rights and the reference therein to ‘laws’ exclude such rights as are dependent only upon law”. Since the right of a defendant to plead the statute of limitations is a right defined by statute and not a “natural personal right”, any change in relation to the limitation law is not an infringement of Article 40.3.

5.55 It follows that a provision giving retrospective effect to the proposed limitation legislation would not be unconstitutional.

(ii) *Rights of Plaintiff and Fairness to Defendant*

5.56 Having established that there is no constitutional bar to limitations legislation having retrospective effect, we turn to examine where the appropriate balance lies

¹⁷³ [1992] 1 IR 223.

¹⁷⁴ [1966] IR 567.

between protecting the rights of the plaintiff and ensuring fairness to a defendant. The possibility that a cause of action could be statute-barred under the present legislation even before the plaintiff knew or ought reasonably to have known of its existence, is an injustice to the plaintiff, and it was this which provoked our core recommendation to introduce a discoverability limitation period. However, because the proposed recommendations extend the limitation period, the defendant is inevitably made worse off. The hardship to the defendant would be particularly acute, if the proposed recommendations were to apply retrospectively. This is because many professionals and other potential defendants will have made insurance provisions for actions against them involving latent damage based on the present limitations legislation.

5.57 There have been express provisions concerning retrospective application in the *Statute of Limitations, 1957* and the *Statute of Limitations (Amendment) Act, 1991*. The *Statute of Limitations, 1957*, s.8 provides that the Act applies to all causes of action, except those barred before the Act came into force and those for which proceedings were commenced before the Act came into force. The *Statute of Limitations (Amendment) Act, 1991*, s.7, provides that the Act applies to all causes of action in relation to personal injuries, which are not statute-barred at the date the Act comes into force. It even expressly includes those actions which were pending at the date at which the Act comes into force. The English *Latent Damage Act, 1986*, ss.1 and 2, provides that, while the act does not apply to actions which are already statute-barred under the Limitations Acts 1939 or 1980, it applies to all other actions accruing before and after it comes into force.

5.58 But is the present injustice to the plaintiff greater than the hardship that would be caused to the defendant by the retrospective introduction of the legislation? In our *Consultation Paper on The Law of Limitation of Actions arising from Non-Sexual Abuse of Children*,¹⁷⁵ the Commission was of the view that the injustice to the plaintiff was greater than the inconvenience caused to the defendant by an extended period of liability. Similarly in our *Report on the Statute of Limitations Claims in Respect of Latent Personal Injuries*¹⁷⁶ the Commission was of the view that if the new legislation did not apply retrospectively, it would in certain cases frustrate the proposed reform of the law. However, in this instance, the injustice to the plaintiff does not involve either physical injury to the person or sexual or physical abuse, but latent damage to his property. The Commission is of the view there is no need for the legislation to be applied retrospectively.

5.59 *The Commission recommends that the proposed law in relation to latent damage should only apply to actions which accrue after it comes into force.*

¹⁷⁵ (No. 16-2000) at 81-88.

¹⁷⁶ (No.21-1987) at 53.

CHAPTER SIX: ACCRUAL- STARTING POINT FOR LONG-STOP

6.01 Accrual remains a key and occasionally difficult concept. In the first place, it is the reference point for the present law and for reasons given in Chapter Three we recommend that it should be retained for patent loss. Secondly, it is ultimately the basis of the discoverability test, recommended in Chapter One, in that the underlying foundation of this test is the point at which the accrual of the cause of action becomes discoverable. Finally, it is the anchor-point for the long-stop recommended in Chapter Four.¹⁷⁷ Consequently for the long-stop to maintain certainty in the law, it is essential that the date of accrual can be easily ascertained.

6.02 “A cause of action does not accrue until every element of the cause of action is present.”¹⁷⁸ Therefore clearly different types of action accrue at different times. Due to the rapid change in the substantive law of tort, there can sometimes be a difficulty in applying those rules. These difficulties are the focus of this chapter.

6.03 In Part I of the chapter, we consider certain aspects of accrual in contract actions, in particular the difficulty of pin-pointing the date of breach, especially in the case of continuing breach and construction industry claims. Part II deals with claims in tort, focusing in particular on pure economic loss claims; continuing torts; and construction industry claims in cases involving a continuing tort; and finally pure economic loss cases involving physical defects in tort. The difficulty in the latter instance is most commonly encountered in construction cases.¹⁷⁹ Finally in Part III we examine the possibility of different dates of accrual applying to concurrent contract and tort actions. These are complicated areas and we have thought it right to put forward recommendations for reform only in respect of construction industry claims. However, as this entire area is likely to be of increasing importance in the future and, since there is a dearth of judicial and academic analysis, we include our tentative discussion in the hope that it may assist future developments.

¹⁷⁷ Below at para. 4.21.

¹⁷⁸ *Read v. Brown* (1888) 22 QBD 128, 131.

¹⁷⁹ This is because defective products are regulated by the *Liability for Defective Products Act, 1991*.

I. Contract

A. Accrual: Date of Breach

6.04 The general rule¹⁸⁰ that applies in contract law is that the cause of action accrues when the breach occurs, rather than when any damage is suffered. The point at which the breach actually occurs, will depend on the nature of the breach and on the terms of the contract.

6.05 In a situation where the nature of the breach consists of an act or omission which renders the contract impossible to perform, then the date of this act or omission is the date when the breach occurs and the action accrues.

6.06 However there are other more common situations, where it is not the nature of the breach but the terms of the contract which determine when the breach occurs. These situations arise where it is stated in the contract that the promise be carried out by or on a specific date¹⁸¹ or by or on the happening of a contingency,¹⁸² and the innocent party accepts the non-performance as discharging the contract.

6.07 In construction cases the breach usually occurs either at the date of the negligent act or on the completion of the work in question unless as is usual in construction contracts there is a repair clause in the contract. In *Morgan v. Park Developments*¹⁸³ a clause in the contract provided for the builders to carry out repairs if requested within 12 months of the date of completion. As a result of the repair clause, the breach was held not to have occurred until the failure of the second attempt to remedy the structural defect during the 12 month period after the completion date. The High Court held that it was only at this point that the limitation period began to run in respect of the original negligent act. However, in a contract in which there is no contractual provision obliging or giving the service-provider the right to rectify the work, then there is not, nor should there be, a suspension of the limitation period. A separate limitation period will apply in respect of the repairs carried out.

B. Difficulty Where there is no Specific Date by Which the Contract Must be Performed.

6.08 The real difficulty arises where there is no specific date or implied term indicating when the contract must be performed. Such were the circumstances in *Bell v. Peter Browne & Co.*¹⁸⁴ In this case the defendant solicitors were employed by the plaintiff to act on his behalf in divorce proceedings. They were to transfer the

¹⁸⁰ *Gibbs v. Guild* (1882) 9 QBD 59.

¹⁸¹ *Re Henry* [1894] 3 Ch 290.

¹⁸² *Waters v. Earl of Thanet* (1842) 2 QB 757.

¹⁸³ [1983] ILRM 156.

¹⁸⁴ [1990] 2 QB 495.

matrimonial home into the sole name of the wife but the plaintiff's interest, being one sixth of the proceeds of sale, was to be protected by trust. The property was duly transferred in 1978, but the defendants neglected to take the appropriate steps to protect the plaintiff's interest. This failure could have been remedied until 1986 when the house was sold to a third party. However, the Court of Appeal held that, while the contractual obligation continued until it could no longer be performed, the breach itself, nonetheless occurred when the obligation should have been performed, in 1978, the date of the transfer. Nicholls LJ giving judgment for the Court stated:

“A remediable breach is just as much a breach of contract when it occurs as an irremediable breach, although the practical consequences are likely to be less serious if the breach comes to light in time to take remedial action. Were the law otherwise, in any of these instances, the effect would be to frustrate the purpose of the statutes of limitation, for it would mean that breaches of contract would never become statute-barred unless the innocent party chose to accept the defaulting party's conduct as a repudiation or, perhaps performance ceased to be possible”.¹⁸⁵

6.09 What appears to be the general rule set out in this case is that the limitation period will start to run from when the obligation should have been performed. The advantage of this approach is that it eliminates the prospect that, other than in exceptional circumstances, a service provider is under a continuing contractual duty to remind himself everyday of the omission of which, often, he is unaware. It means that from a defendant's point of view it is reasonably possible to ascertain for how long a claim can be made against him. However, where the duty is not one to carry out a particular step at a particular time, “the date when the obligation should have been performed”, could prove to be quite elusive.

6.10 The earlier decision in *Midland Bank Trust Co Ltd v. Hett Stubbs & Kemp*¹⁸⁶ appears to provide an exception to this general rule (though in *Bell v. Browne*,¹⁸⁷ Nicholls LJ said that the *Midland Bank* case was confined to its own special facts). The *Midland Bank Trust* case involved a solicitor's failure to register an option to purchase land in 1961, which led to the option being defeated in 1967. The breach of contract was held to have occurred not in 1961, as would be the case if the rule in *Bell v. Browne* were applied; but in 1967, when the obligation became impossible to perform.

6.11 In *Midland Bank Trust Co Ltd* Oliver J distinguished *Bean v. Wade*,¹⁸⁸ a case decided along the lines of *Bell v. Browne*. In *Bean v. Wade* the cause of action was held to have accrued at the time notice of the assignment of trust funds should have been given, as opposed to seven years later, when notice of a mortgagee's interest was given, thereby gaining priority. Oliver J pointed to a number of distinguishing factors:

¹⁸⁵ *Ibid.* at 499.

¹⁸⁶ [1979] Ch 384.

¹⁸⁷ [1990] 2 QB 495.

¹⁸⁸ (1885) 2 TLR 157.

the terms of the retainer in the client /solicitor relationship; the fact that the payment was rendered in such a manner as to indicate the relationship had terminated; and that the contracting party at fault was treated as *functus officio*.¹⁸⁹ Furthermore, Oliver J noted that in *Bean* the claim was for losses incurred due to failure to give notice within a reasonable time. By contrast, in the *Midland Bank* case, the solicitors had never treated themselves as *functus officio*. Thus the cause of action was held not to have accrued until the option was defeated. An analogous situation in a construction project might be where an architect negligently designed a building. His duty to rectify this would continue right up until the completion of the building assuming the contractual relationship also continued until completion.

6.12 *Halsbury's Laws of England* contains the following statement:

"[W]here a party, in breach of his contractual undertaking, fails to perform a contractual obligation, the plaintiff's cause of action will accrue on the date when the obligation should have been performed, notwithstanding that that failure was capable of rectification at a later date, unless the parties remain in a contractual relationship, in which case time will not start to run until the date when the relevant obligation becomes impossible to perform".¹⁹⁰

This general statement seems to encapsulate both the *Bell* and the *Midland Bank* decisions. However, as already stated, where the duty does not entail the carrying out of particular steps at a particular time, "the date when the obligation should have been performed", could prove to be quite elusive. Inadvertently in such situations the decision in the *Midland Bank* case may be applied, since the date when the obligation becomes impossible to perform may be the only discernable date.

C. Continuing Breach of Contract

6.13 In cases where the breach of contract consists of a continuous course of conduct or a series of related acts or omissions so closely related as to amount to a continuous course of conduct, it is categorised as a continuing breach.¹⁹¹ Authority for this is the Court of Appeal decision of *National Coal Board v. Galley*¹⁹² which stated that whether a breach was a "continuing" one must depend on "the nature of the particular obligation broken."¹⁹³ An example given in this case was a contract of service

¹⁸⁹ McGee, *Limitation Periods* (2nd ed., 1994) at 80, states that '*functus officio*' is not a useful distinguishing factor, as the argument in *Bell v. Peter Browne & Co* is not that the plaintiff's solicitors had a general continuing duty to him, but that they had been under a duty to complete the task for which they had originally been engaged.

¹⁹⁰ 24 *Halsbury's Law of England*, (4th ed., Reissue) at para. 865. The following authorities are cited: *Bell v. Peter Browne & Co.* [1990] 2 QB 495; *Forster v. Outred & Co* [1982] 1 WLR 86; *Moore & Co Ltd v. Ferrier* [1988] 1 WLR 267, 400; *Midland Bank Trust Co Ltd v. Hett, Stubbs & Kemp* [1979] Ch 384.

¹⁹¹ It is distinguishable from a recurring obligation, for example, an obligation under a contract to make periodic payments, where each breach is a separate breach of the recurring obligation.

¹⁹² [1958] 1 WLR 16.

¹⁹³ *Ibid.* at 27.

for a specified time containing a clause that precluded an employee from carrying on, or being concerned in, any other business of the same kind as the employer's business. It was stated that should an employee work in such a business in breach of the stipulation in the contract "the breach would we think clearly be a continuing one"¹⁹⁴ and would continue until he ceased to work in such a business.

6.14 Where a breach amounts to a continuing breach, it gives rise to a continuous cause of action. The plaintiff can bring an action based on the continuing breach so long as the last moment of the course of conduct is within the limitation period; in other words the action may be taken up to six years after the last moment of the breach. However, only the loss which occurred within this limitation period can be recovered.¹⁹⁵ Take a situation, in which a plaintiff took an action in 1999 for a continuing breach of contract, which commenced in 1990 and ended in 1994. Because the action was commenced 5 years after the course of conduct ended, the plaintiff would only be able to recover for loss suffered as a result of the causes of action accruing between 1993-1994 and not during the three years prior to 1993.

D. Construction Liability Claims in Contract

6.15 The construction of a building can involve services provided by a number of different contractors, companies and professional people. Therefore the breach could occur at different times. Accordingly the limitation period for the individual participants in the construction process starts at different dates. Therefore it will also end at different dates. In circumstances where the limitation period is in issue, much time and money could be spent trying to pinpoint exactly when the breach committed by any particular participant took place. This is one of the difficulties associated with insuring against latent defects. Mullany listed examples of the different stages when a breach can occur:

- "1. When the building was incorrectly designed;
2. When the building, although correctly designed, was incorrectly drawn on the relevant plans;
3. When plans, either incorrectly designed or incorrectly drawn were submitted for the contractor's tender;
4. When the defective building was constructed;
5. When the building or that part of it containing the defect was improperly inspected; or
6. When the building while in a defective state, was handed over on completion."¹⁹⁶

¹⁹⁴ *Ibid.* at 26.

¹⁹⁵ See *Chitty on Contracts General Principles* (27th ed., 1994) at para. 28.002.

¹⁹⁶ Mullany, "Reform of the Law of Latent Damage" (1991) 54 MLR 349 at 354.

The situation could be improved, if the cause of action in contract for each of the participants accrued at a common point in the construction process such as the date of completion or purported completion of the building.

6.16 *Completion or purported completion* is the date of the issue of the certificate of practical completion. A certificate of practical completion is issued when works are substantially complete having passed any prescribed final test, and there has been an undertaking to finish any outstanding work in the maintenance period provided for in the contract. In the construction industry there is a distinction between the carrying out of works and the snag list dealing with minor defects in them. In the absence of a certificate, the date of practical completion can be ascertained from the date of the release of the retention of title; the possession or occupation of the building by the purchaser; or can be deduced from the circumstances. In large building projects taking a number of years to finish, a certificate of completion can be issued for a section of the project where the works in that section are substantially complete.

6.17 The claimant would also benefit from such a provision, as the date of practical completion would in most cases be later than the date of the actual act or omission which gave rise to the defect.

6.18 *The Commission recommends that in construction liability claims,¹⁹⁷ a cause of action in contract should accrue for all the participants in the construction process at the date of completion or purported completion.*

II. Actions in Tort (Non-Personal Injury actions)

A. Torts Actionable *Per Se* and Torts Actionable on Proof of Damage

6.19 S. 11(2) of the *Statute of Limitations, 1957*, states that an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.¹⁹⁸ For torts actionable on proof of damage, such as negligence, the cause of action will accrue when the defendant's wrongful act causes damage.¹⁹⁹ For torts actionable *per se* such as trespass, false imprisonment, and libel, the cause of action will accrue when the wrongful act is committed. The distinction between torts actionable *per se* and those actionable upon proof of damage is a relic of the historical development of the law of tort and can be explained by reference to the following underlying policy: torts actionable *per se* involve *prima facie* wrongful behaviour, the harm of which is usually immediately apparent, and as the act was considered to be such as to arouse violent resentment, it was in the interests of public security to provide an instant remedy. For example, in trespass, the cause of action accrues when there is a

¹⁹⁷ As defined at para. 6.44.

¹⁹⁸ Torts causing personal injuries are governed by the *Statute of Limitations (Amendment) Act, 1991* which is discussed at paras.2.01-2.10.

¹⁹⁹ "Negligence alone does not give a cause of action, damage alone does not give a cause of action: the two must co-exist." *Per Reading CJ in JR Mundy v. London County Council* [1916] 2 KB 331 at 334.

direct physical act which interferes with the plaintiff's possession. By contrast in the case of torts actionable only upon proof of damage, like negligence and nuisance, the fact of the damage was "the catalyst which induced the courts to furnish redress."²⁰⁰ For example, a situation where a builder negligently leaves a plank of wood so that it is about to fall from a scaffolding and seriously injure a passer-by, there is no action in negligence unless the plank falls and injures a passer-by. In contrast to torts actionable on proof of damage, of their nature, torts actionable *per se* are less likely to cause latent damage.²⁰¹ Thus injustice in the past due to the expiration of limitation periods prior to the discovery of latent damage has arisen mainly in the case of negligence. Accordingly, it is on torts, such as negligence, which are actionable only on proof of damage, that we focus our discussion.

B. Torts Actionable on Proof of Damage

6.20 In causes of action, like negligence, actionable only on proof of damage, damage is a prerequisite to the cause of action. In such cases, the point at which damage occurs will dictate when the cause of action accrues. Three types of damage can arise: physical loss; consequential economic loss; and pure economic loss. The date of accrual is reasonably straightforward for each type of loss. However certain anomalies exist concerning the accrual of a cause of action for pure economic loss. These are dealt with below but first it is helpful to examine each type of loss and its corresponding date of accrual.

(i) Physical loss or damage is the most straightforward. It occurs when there is actual physical damage. For example if a builder when putting the finishing touches to a house accidentally lets his tools fall on top of the conservatory smashing the glass roof, the damage to the conservatory is classed as physical damage. The cause of action accrues when the physical damage occurs.

(ii) In some cases the physical loss will cause a consequential economic loss. For instance, if due to the damage to the conservatory in the example in (i), the plaintiff had to stay in a hotel while the damage was being repaired, then this extra cost would be classed as consequential economic loss. The limitation period in respect of this runs from the date of the physical damage. This proposition follows from the principle, discussed in Chapter 5 at para. 5.02, that a cause of action accrues when a "complete and available cause of action *first* comes into existence".²⁰² The effect of this is that,

²⁰⁰ Fleming, *The Law of Torts*, (9th ed., LBC Information Services) at 22.

²⁰¹ However that is not to say that latent damage cannot occur in torts actionable *per se*. In *Larche v. Middleton* Supreme Court, 28 July 1989, there was leakage of defamatory material, of which the plaintiff was unaware until it affected him through the refusal of a job. Although defamation is a tort actionable *per se*, the Supreme Court of Ontario said they could see no principled reason to distinguish an action for defamation from a negligence action for the purposes of applying the discoverability test which subsists in that jurisdiction. Presumably toxic torts could be framed in an action for trespass or nuisance in this jurisdiction. See Christopher McAuliffe, "Ressurrecting an Old Cause of Action for a New Wrong: Battery as a Toxic Tort" (1993) 20 *Boston College Environmental Affairs L. Rev.* 265.

²⁰² *Read v. Brown* [1888] 22 QB 128, 131.

when the first damage occurs, any subsequent deterioration or loss does not alter the date of accrual of the cause of action.

(iii) Finally, pure economic loss is defined as ‘financial loss which is not causally consequent upon physical injury to the plaintiff’s own person or property’.²⁰³ For example, if the wrong type of glass had been used in constructing a conservatory, the cost of replacing the glass is classed as “pure economic loss”. It is only in the past twenty or so years that there has been recovery for this type of loss in tort at all. After *Donoghue v. Stevenson*²⁰⁴ allowed recovery for economic loss consequent on physical harm, it appeared unlikely that recovery for pure economic loss would be allowed in the future. However in *Hedley Byrne v. Heller & Partners*²⁰⁵ economic loss arising from negligent misstatement was held to be recoverable. Subsequently *Junior Books v. Veitchi Co*²⁰⁶ extended recovery to pure economic loss resulting from a defect where there was no physical damage. In this case the plaintiff recovered the cost of repairing a defective floor from the defendant subcontractor, who had negligently installed it. *Junior Books* has been approved and followed by the Irish courts in *Ward v. McMaster*.²⁰⁷ In this case pure economic loss resulting from non-dangerous defects in the quality of workmanship was held to be recoverable.

C. *Date of Accrual for Economic Loss Cases: Two Different Rules*

6.21 When determining the date of accrual in pure economic loss cases, it appears that two different rules apply, depending on whether or not the loss is caused by a physical defect. In law a physical defect such as exist in the foundations, is distinct from the physical damage which it later causes to the building.²⁰⁸

Pure Economic Loss Cases Where there is no Physical Defect

6.22 First, the case where there is no physical defect is examined. This is frequently the situation in professional negligence cases. A general rule of thumb here is that where the plaintiff suffers an immediate loss at the date he relies on negligent advice this is the date his cause of action accrues. Kelly LJ in *McInerney Properties Ltd v. Department of the Environment*²⁰⁹ stated: “In cases of economic loss in my view the cause of action accrues from the moment when the plaintiff suffers a significant loss for which he can sue.” However in situations where the loss suffered is not immediate or

²⁰³ B Feldthusen, *Economic Negligence, The Recovery of Pure Economic Loss* (2nd ed., Carswell Legal Publications 1989).

²⁰⁴ [1932] AC 562.

²⁰⁵ [1964] AC 465.

²⁰⁶ [1983] AC 520.

²⁰⁷ [1985] IR 29.

²⁰⁸ *London Congregational Union Incorporated v. Harriss & Harriss* [1988] 1 All ER 335.

²⁰⁹ [1984] NI 1.

inevitable, at the time when the plaintiff acts in reliance on the advice, then the cause of action does not accrue, until the actual loss is incurred.

6.23 The general rule is illustrated in *Forster v. Outred & Co*²¹⁰ where the plaintiff in February 1973, at the offices of her solicitor executed a mortgage, on her house for the security for her son's borrowings. She believed that the mortgage was in relation to a temporary bridging arrangement and it was not until 1975, when a demand was made upon her by the mortgagee, that she discovered the truth. In 1980 she issued a writ against the solicitor claiming they had been negligent in not making her aware of the true nature of the transaction. The Court of Appeal held that the loss was suffered in 1973 when she executed the mortgage, this being the act of reliance on the defendant's advice. It has been suggested that this case lays down a rule that the cause of action accrues from the date of reliance.²¹¹ However it was crucial to this decision that a financial loss had been incurred not in 1975, when the demand was made upon her, but at the earlier date when she obtained an interest which was of less value to her and demonstrably less than if the defendants had done their duty. In the words of Templeman LJ in *Baker v. Ollard & Bentley*²¹² actual damage was suffered "because [she] did not get what [she] should have got."

6.24 In later cases²¹³ similar to *Forster*, the cause of action was held to accrue on the date of reliance on the act, but significantly in all of them, the plaintiff had also suffered an actual loss at this date though it had not yet fully materialised. Consistent with this approach, the Court of Appeal in *UBAF Ltd v. European American Banking Corporation*²¹⁴ held that the cause of action did not accrue, when in reliance on the negligent advice, the plaintiffs lent money to two Panamanian shipping companies, because no loss had been suffered at this point. It was not until subsequently when the shipping market deteriorated and the two companies got into difficulty that the loss occurred and the cause of action accrued. Ackner LJ giving the judgment for the Court of Appeal said that the question as to when the cause of action accrued in professional negligence cases, depended on the facts: "This must depend on the evidence. The mere fact that the innocent but negligent misrepresentation caused the plaintiff to enter into a contract which it otherwise would not have entered into, does not inevitably mean that it had suffered damage by merely entering into the contract".²¹⁵ He distinguished the present case from *Forster v. Outred* "a case dealing with a different situation";²¹⁶ one where the reliance on the negligent advice resulted in immediate economic loss.

²¹⁰ [1982] 1 WLR 86.

²¹¹ S.W. Hewett, "Professional Negligence: Latent Economic Damage and Limitation" (1984) 81 *Law Society's Gazette* 3333.

²¹² (1982) 126 SJ 593.

²¹³ *Melton v. Walker & Stanger* (1981) 125 SJ 861 and *Costa v. Georghiou* [1985] 1 PN 201.

²¹⁴ (1984) QBD 713.

²¹⁵ *Ibid.* at 234.

²¹⁶ *Ibid.* at 235.

6.25 Although the above case-law concerns the approach adopted in England, it appears that the Irish courts have approved this case-law. In *Tuohy v. Courtney* (No.1)²¹⁷ the plaintiff purchased a house in 1978 in the belief that he was acquiring a leasehold interest which carried a statutory right to buy in the freehold estate. He subsequently discovered that the house was held under a ninety nine year lease, with less than 30 years to run. The defendant solicitor, who had acted for the purchaser, pleaded the Statute in defence to the negligence action. Blayney J held that the cause of action accrued in 1978 when the transaction was entered into and accordingly the claim was barred. Here it seems to have been held that the actual loss was suffered at the time of reliance although it had not yet manifested itself.

Pure Economic Loss Caused by a Physical Defect

6.26 The second situation is where the pure economic loss is due to a physical defect.²¹⁸ This was the situation in *Pirelli General Cable Works Ltd v. Oscar Faber & Partners*.²¹⁹ Here the House of Lords deviated from the approach taken in pure economic loss cases like *Forster v. Outred*.

6.27 In *Pirelli*, the defendants were consulting engineers employed to advise the plaintiffs on the design of a chimney at their factory. The chimney was completed in July 1969. However the design of the chimney was negligent and physical damage in the form of cracks occurred. These cracks were not discovered by the plaintiffs until 1977 though the court held that they could not have occurred later than 1970. The defendants submitted that there were three possible dates on which the cause of action could have accrued. Lord Fraser recorded their submissions thus:

“They suggest three possible dates as the date of accrual. The earliest suggested date is that on which the plaintiffs acted in reliance on the defendants’ advise to install the chimney, which was bound to be defective and eventually to fall down unless previously demolished. They did not fix this date precisely but it must have been between March and June 1969, well outside the limitation period. The second suggested date is that on which the building of the chimney was completed, namely, July 1969. The third is that on which cracks occurred, namely, April 1970. These three dates are all more than six years before the issue of the writ, which as already mentioned was October 17, 1978.”²²⁰

Lord Fraser adopting the third option stated: “The plaintiff’s cause of action will not accrue until damage occurs, which will commonly consist of cracks coming into

²¹⁷ High Court, 10 April 1991. A subsequent challenge to the constitutionality of the Act was unsuccessful in *Tuohy v Courtney* (No. 2) [1994] 2 ILRM 503.

²¹⁸ As already stated, in law a physical defect such as may exist in the foundations of a building is distinct from the actual physical damage which it later causes to the building.

²¹⁹ [1983] 2 AC 1.

²²⁰ *Ibid.*

existence as a result of the defect.” Applying this conclusion to the facts of this particular case the learned judge said “ I would hold that the cause of action accrued in spring 1970 when damage, in the form of cracks near the top of the chimney, must have come into existence.”²²¹

6.28 The defendants argued that the cause of action should accrue immediately when the economic loss occurred on the basis that their negligence as consulting engineers was analogous to that of the solicitor in *Forster*. Had *Forster v. Outred* been applied to the facts in *Pirelli*, the cause of action would probably have accrued when the building was completed in July 1969. At this point economic loss had already occurred as the chimney was less valuable and was in need of repair. Lord Fraser stated: “It is not necessary for the present purposes to decide whether that submission is well founded, but as at present advised, I do not think it is.”²²²

6.29 In the later case of *Dove v. Banhams Patent Locks*²²³ it was suggested that the reasoning in *Forster* had been undermined by the *Pirelli* decision. However, in the even later case of *Moore v. Ferrier*,²²⁴ a pure economic loss case where there was no physical defect, O’Neill LJ stated that *Forster* was consistent with the *Pirelli* decision. The learned judge advised that “care be exercised in using the building cases as though they were a precise analogy” with other professional negligence cases.

6.30 Ralph Gibson LJ giving judgment for the Court of Appeal in *London Congregational Union Incorporated v. Harriss & Harriss*²²⁵ incisively remarked that:

“There is an element of policy in the decision of the House of Lords in *Pirelli’s* case in choosing, as the date of accrual of the cause of action, the date when physical damage comes into existence. It was found to be impossible to escape from a result, which was “unreasonable and contrary to principle”, by postponing accrual of the cause of action until the date of discoverability. The solution lay in legislation. Meanwhile, as it seems to me their lordships fixed upon that event which at least afforded to the victim of the breach of duty a chance of discovering his right of action before it was lost: namely, the coming into existence of physical damage resulting from the negligent design.”

²²¹ *Ibid.* While subsequent English cases have limited *Pirelli* to the factual scenario with which it was concerned, that is where there is an *inter partes* professional relationship or a special relationship amounting to reliance, the decision on the limitation point still stands. See *Nitrigin Eireann Teoranta v. Inco Alloys Ltd* [1992] 1 All ER 854; 28 *Halbury’s Laws of England* (4th ed. Reissue) para 821. More importantly the *Latent Damage Act, 1986* has altered the picture considerably. This is discussed below, at para.1.09. In terms of Irish law however, *Pirelli* was applied by the Supreme Court in *Hegarty v. O’Loughran* [1990] 1 IR 148, when there was no distinction in the treatment of personal injuries and non-personal damage, and is therefore still relevant.

²²² *Ibid.* at 18.

²²³ [1983] 1 WLR 1436, 1445.

²²⁴ [1988] 1 WLR 267.

²²⁵ [1988] 1 All ER 15.

While there may be a legitimate policy reason behind the *Pirelli* decision, it does not sit well with the principle of recovery of pure economic loss. To say that a cause of action for economic loss does not accrue until there is some physical damage, is to ignore the decisions of *Junior Books* and *Ward v. McMaster* which permit a complete cause of action to exist as soon as the economic loss occurs. The case-law in England, prior to *Junior Books*²²⁶ being distinguished in *Murphy v. Brentwood*,²²⁷ generally avoided dealing with the conflict between the rule in *Pirelli* and the principle of recovery for economic loss, either by not recognising it and reiterating the rule in *Pirelli*,²²⁸ or by acknowledging the point but expressing no opinion one way or the other.²²⁹ This approach by the English courts shows support for the policy behind the rule in *Pirelli*, which though conflicting with the principle of recovery for economic loss, provides a plaintiff with a longer period of time in which to notice the damage and bring an action. A consequence of the rule in *Pirelli* is that there is less of a possibility that the limitation period will have run before the plaintiff even realises that the cause of action exists.

6.31 The hardship caused to a plaintiff by allowing the cause of action to accrue when the economic loss occurs is illustrated in *Irish Equine Foundation v. Robinson*.²³⁰ The plaintiffs brought an action for breach of contract and negligence due to the alleged faulty design of a roof. The architects had been retained in 1979 and prepared plans in 1982. A certificate of practical completion was issued in 1986 with a final certificate in 1987. There was an ingress of water through the ceiling in 1991 and a plenary summons was issued in 1996. The contract action was clearly statute-barred. The question here was whether an action founded on the tort of negligence was also statute-barred.

6.32 The plaintiff had a cause of action in tort arising in 1986 or 1987 for the economic loss suffered in making good the defects in the defectively designed roof. At this point, (or perhaps earlier at the date the negligent design plan was made) the cause of action was complete, and the subsequent physical damage was immaterial to the date of accrual of the cause of action. This was the outcome of Geoghegan J's analysis of the facts. However, it is unclear whether the learned judge mistakenly applied the rule in *Pirelli* to the defect itself, as opposed to the actual physical damage, or whether Geoghegan J was in fact applying the exception to the rule in *Pirelli*, known as the "doomed from the start"²³¹ exception, (explained below) to arrive at this result. Had the learned Judge correctly applied the rule in *Pirelli* the limitation period would not start to run until 1991 when physical damage occurred.

²²⁶ *Junior Books* allowed recovery for pure economic loss resulting from a non-dangerous defect; the cost of repairing a defective floor negligently installed by the defendant subcontractor.

²²⁷ *Murphy v. Brentwood District Council* [1991] 1 AC 398. In *Junior Books* every judge with one dissentient held that pure economic loss was recoverable, and quoted other House of Lords decisions to that effect. However despite this, in subsequent cases it has frequently been distinguished on its facts.

²²⁸ *Ketteman v. Hansel Properties Ltd* [1987] 2 WLR 312.

²²⁹ *Dove v. Banhams Patent Locks* [1983] 2 All ER 833.

²³⁰ [1999] 2 ILRM 289.

²³¹ See paras. 6.33-6.36.

“Doomed from the Start” Exception to the Rule in Pirelli

6.33 There is one English case, *Kaliszewska v. John Clague & Partners*,²³² which acknowledges and to some extent resolves the conflict between *Pirelli* and the principle of recovery for pure economic loss. It does so by finding that in *Pirelli* the defect fits into the exception to the general rule which is referred to by Lord Fraser in *Pirelli*, in the following terms:

“There may perhaps be cases where the defect is so gross that the building is doomed from the start, and where the owner’s cause of action will accrue as soon as it is built, but it seems unlikely that such a defect would not be discovered within the limitation period. Such cases, if they exist, would be exceptional.”²³³

6.34 This has become known as the “doomed from the start” principle, and there are reservations as to how seriously this exception should be taken. In the House of Lords decision, *Ketteman v. Hansel Properties*,²³⁴ Lord Keith stressed that these comments were not necessary to the decision in *Pirelli* and were inconsistent with it. Lord Brandon dismissed it as “no more than *obiter dicta*”. However the exception has been applied, though not with any degree of consistency, in a small number of cases. From this limited body of case-law it appears that the “doomed from the start” exception will apply where, on the acquisition of a building, although physical damage has not yet occurred, but it is inevitable that it will occur in the future either as a result of the passing of time²³⁵ or the use²³⁶ to which the building is put. The defect itself must be serious²³⁷ and exceptional.

6.35 This “doomed from the start exception” was used in the case of *Kaliszewska v. John Clague & Partners*²³⁸ as a means of allowing the limitation period run from the date the economic loss occurred, and not the date of the subsequent physical damage. In this case, Judge White recognised that at the date of the acquisition of the bungalow, recoverable economic loss resulting from the cost of the repairs or the diminution in value of the building had been suffered; but the physical damage had not yet taken place. He concluded that as the defects were serious it could be said they came within the ‘exceptional case’ contemplated by Lord Fraser in *Pirelli*.

²³² *Kaliszewska v. John Clague & Partners* [1984] “Construction Law Report” 62.

²³³ [1983] 2 AC 1.

²³⁴ *Ibid.*

²³⁵ *Kensington and Chelsea and Westminster Health Authority v. Wettern Composites* [1985] 1 All ER 346, concerned defective roofing which was liable to blow away at any time.

²³⁶ *Dove v. Banhams Patent Locks* [1983] 2 All ER 833, concerned negligent installation of a security gate by a security firm.

²³⁷ *Ketteman v. Hansel Properties Ltd* [1987] 2 WLR 312.

²³⁸ *Kaliszewska v. John Clague & Partners* [1984] Con LR 62.

6.36 This solution has been described as an “acceptable practical compromise” by Merkin²³⁹ even though “[i]t is scarcely consistent with *Junior Books* which does not rest upon proof of substantial or exceptional economic loss but merely upon the establishment of a duty of care.” It seems clear that from a substantive perspective, the “doomed from the start” exception enables recovery for the cause of action at the point when the economic loss occurs, while from a limitations perspective it could mean that the plaintiff’s cause of action arose at an earlier date and consequently, he might be prematurely out of time.

D. Continuing Torts

6.37 A continuing tort includes not only one continuous tortious act but also a series of wrongful acts which are so closely related that they effectively amount to a single course of conduct. The series of torts is treated as a single tort because each act contributes to a single harm. The most common instances arise out of the torts of trespass or nuisance. For example, a trespass which involves placing and leaving some object on another’s land is a trespass which continues for as long as that object remains on the land.

6.38 There appears to be two different approaches to the question of when a continuing cause of action accrues. On the one hand there is the view that it accrues continually so that with every passing day a new cause of action arises until the defendant discontinues the action. Consequently when the limitation period for the final cause of action expires, only damage occurring within six years from the date the final cause of action accrued, is recoverable. Pearson LJ (as he then was) in *Cartledge v. E Jopling & Sons Ltd*²⁴⁰ states:

“In a case where there is a continuing breach of duty by the defendant continually causing damage to the plaintiff there is a fresh cause of action arising every day, and if the breach and resulting damage have continued for more than the period of limitation, the Limitation Act, if relied upon by the defendant, will bar the plaintiff’s action for the damage occurring before the critical date but not for the damage occurring after it.”

6.39 The alternative approach which has found favour in many states in America requires that the limitation period for a continuing tort begins at the time the tortious conduct ceases.²⁴¹ Accordingly so long as any of the damage occurred within the limitation period the plaintiff will be able to recover for *all* the damage resulting from all the wrongs of the defendant. In cases where the damage is ongoing, the plaintiff effectively has the option of bringing an action immediately for the ascertainable damages or waiting until the damage has ceased to recover all damages. This

²³⁹ Merkin, *Richards Butler on Latent Damage* (1987) at 43.

²⁴⁰ [1962] 1 QB 189, 207.

²⁴¹ *Page v. United States of America* (1984) 729F.2d 818. The “continuing tort doctrine” was also applied in the English case of *Clarkson v. Modern Foundries Ltd* [1957] 1WLR 1210.

“continuing tort doctrine”, as it is known, provides an exception to the rule that a limitation period runs from the date of accrual of the cause of action. It is generally applied where “no single incident in a continuous chain of tortious activity can ‘fairly or realistically be identified as the cause of significant harm’[making it] proper to regard the cumulative effect of the conduct as actionable”.²⁴² The value of this approach is that it avoids the need to determine at what point during the continuous course of conduct the harm occurred, something which in practice may be impossible.

E. Construction Liability Claims

6.40 Both because of the frequency of the disputes arising in the construction industry and because of the difficulties in insuring against latent defects, a fixed and easily ascertainable period of liability is essential. The Commission proposes to make a special recommendation in respect of the long-stop in construction liability claims in tort. Special provisions in relation to construction liability claims can be found in the *Defective Premises Act, 1972* s.1(1) in the England and in our 1982 *Report on Defective Premises* whereby it was recommended that causes of action in respect of a duty to build premises properly should be deemed to accrue:

- “(a) on the date on which the premises were completed; or
- (b) on the date when any person entitled to occupy the premises, whether as first or subsequent owner or occupier, knew or ought reasonably to have known, of any defect in the building work attributable to a breach of the duty [to build premises properly]imposed by section 3.”²⁴³

The Commission is of the view that the long-stop in an action in tort should start at the date of practical or purported completion. Completion or purported completion is the date of the issue of the certificate of practical completion.²⁴⁴ This long-stop would apply to both the discoverability and the accrual limitation periods as an overall limitation period. As regards construction liability claims in contract, at para. 6.18, it has been recommended that in, the date of completion or purported completion should be the date of accrual. Accordingly, in contract, the long-stop would also run from the date of practical or purported completion.

6.41 *The Commission recommends a special provision for construction liability claims; the starting point of the long stop for construction liability claims in both tort and contract should be the date of completion or purported completion.*

²⁴² *Page v. United States of America* (1984) 729F.2d 818, 821-22. It has been applied in cases involving negligent treatment of a patient by a doctor, protracted sexual battery and intentional infliction of emotional distress, alienation of affection involving a series of wrongful acts over a period of time, continuous exposure to gradual injury-causing conditions during an employment relationship and in nuisance cases based on gradual contamination.

²⁴³ *Report on Defective Premises* (No. 3, 1982) at 17, s.5 of the draft bill.

²⁴⁴ See para 6.16.

6.42 Our recommendation means that there would be a fixed period of liability in construction industry claims in both tort and contract running for 10 years from the date of completion or purported completion. This would make it easier for insurers to predict future claims and maintain adequate reserves, thereby lessening the cost and improving the scope and availability of latent defect insurance in the construction industry. However, if the contract was a contract under seal,²⁴⁵ we believe that the limitation period should remain 12 years.

6.43 The Commission is conscious that recommending the completion date as the starting point of the long-stop could give rise to the theoretical problem that the limitation period provided by the long-stop could expire before the cause of action actually accrued. However the Commission is of the opinion that the advantage of, in construction liability claims, starting the long-stop at the date of completion or purported completion outweighs any anomalies resulting therefrom.

6.44 *The Commission also recommends that construction liability claims be defined as follows:*

Construction liability claims are claims arising from all construction operations. Construction operation²⁴⁶ means, an operation of any of the following descriptions-

- (a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form part of the land (whether permanent or not);
- (b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land including (without prejudice to the foregoing) walls, roadworks, tunnels, bridges, power-lines, telecommunications apparatus, aircraft runways, docks and harbours, railways, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;
- (c) installation in any building or structure of fittings or structures forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;
- (d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;

²⁴⁵ See paras. 4.16-4.17. Deeds conveying an interest in land must be sealed (see Wylie, *Irish Conveyancing Law* (2nd ed., Butterworths, 1996) at para. 18.122) and sealing is also still necessary in the case of some company transactions. See *Aiken v. Stewart Wrightson Members Agency Ltd* [1995] 1 WLR 1281 affirmed in [1996] 2 Lloyd's Rep 117, for further discussion.

²⁴⁶ This definition of construction operations is taken from the *Housing Grants, Construction and Regeneration Act, 1996*.

- (e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works.

III. Concurrent Contractual and Tortious Obligations

6.45 From a substantive law perspective, the question of whether concurrent obligations could exist in tort and contract actions was problematic for several years. The two obligations are different. Contractual obligations are voluntarily assumed by parties to the contract while tortious obligations are imposed by the general law. The method by which damages are assessed is also different. Contractual damages aim to put the plaintiff in the position he would have been in had the contract been performed; while tortious damages aim to put the claimant in the position he would have been in had the tort not taken place. A consequence of the continuing expansion of the law of torts is that the grounds of liability in tort and contract frequently overlap.

6.46 Originally it was thought that if there were concurrent obligations the existence of a contractual relationship was a bar to recovery in tort.²⁴⁷ This came from the belief that tort could not interfere in voluntarily assumed contractual relationships. It was also the consequence of a line of authority in cases like *Howell v. Young*²⁴⁸ which admitted the existence of concurrent liability but took the view that the plaintiff was bound by the least favourable period of limitation.

6.47 However, much has changed. Now, if there is negligence in the performance of a contract, alternative claims may exist both in tort and contract. This is partly due to the line of English cases starting with *Hedley Byrne v. Heller & Partners Ltd*²⁴⁹ and culminating in *Junior Books v. Veitchi Co. Ltd*.²⁵⁰ These cases allowed third parties to a contract to take a cause of action in tort²⁵¹ against the defendant. But if a third party has a cause of action in tort, it would seem logical that a party to the contract would also have a cause of action in tort. This final step was taken by Oliver J in *Midland Bank*

²⁴⁷ *Groom v. Cocker* [1939] 1 KB 194. In earlier authorities like *Turner v. Stallibrass* [1898] 1 QB 56 and *Jarvis v. Vandervell & Co* [1936] 1 KB 399, only if it was not necessary to rely on a contract could an action be brought in tort.

²⁴⁸ (1826) 5 B&C 259.

²⁴⁹ [1964] AC 465. *Hedley Byrne* was described by Oliver J in the *Midland Bank* case as establishing “a general duty arising by law from a relationship of the type therein described however that relationship is created. It is therefore inconsistent with *Groom v. Crocker*...”.

²⁵⁰ [1983] 1 AC 520.

²⁵¹ See also *Tulsk Co-Operative Livestock Market v. Ulster Bank Limited* High Court, 13 May 1983 and *Ward v. McMaster* [1985] IR 32.

Trust Co. v. Hett Stubbs and Kemp.²⁵² Here it was held that the existence of a contractual duty of care does not preclude a parallel claim in tort.²⁵³ The client's right to sue his solicitor for negligence in the discharge of his professional duties lay in both tort and contract. There was no need here to decide whether the plaintiff had the right to choose the action with the more favourable limitation period as the action accrued in tort and contract at the same point. Subsequently the case, *Tai Hing Cotton Mill Limited v. Liu Chong Hing Bank Limited*,²⁵⁴ caused some confusion. This case involved a commercial contract between a bank and a customer. All duties, both tortious and contractual stemmed from this contractual relationship. After some analysis, the Privy Council concluded that in the circumstances the mutual obligations arising in tort could not be more extensive than those found expressly or by necessary implication in the contract. In such cases "[T]heir lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship."²⁵⁵

6.48 The decision of the Privy Council in *Tai Hing* does not inhibit a duty of care in tort imposed by the general law which arises independently of the contract from being more extensive than the duty arising under the contract. This is explained succinctly by Hirst J in *Holt v. Payne*²⁵⁶ as follows:

"In our opinion, there is no reason in principle why a *Hedley Byrne* type of duty of care cannot arise in an overall set of circumstances where by reference to certain limited aspects of those circumstances, the same parties enter into a contractual relationship involving more limited obligations than those imposed by the duty of care in tort. In such circumstances, the duty of care in tort and the duties imposed by the contract will be concurrent but not co-extensive. The difference in scope between the two will reflect the more limited factual basis which gave rise to the contract and the absence of any term in the contract which precludes or restricts the wider duty of care in tort."

6.49 In cases where there is both a contractual duty, and a duty of care in tort which is independent of the contract, the plaintiff may pursue the action which is most advantageous. This is clear from the House of Lords decision in *Henderson v. Merrett Syndicates Ltd.*²⁵⁷ Concurring with Oliver J's judgment speech in *Midland Bank Trust Co*, Lord Goff stated that, "given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, I do not find it

²⁵² [1979] Ch 496. Oliver J affirmed Lord Denning's decision in *Esso Petroleum Co Ltd v. Mardon* [1976] QB 801 which cited *Boorman v. Brown* (1844) 11 CL Fin 1 as authority for allowing concurrent liability in tort and contract.

²⁵³ In situations where the contract excludes an action in tort, then there is no concurrent action in tort. It is possible to contract out of a tortious duty.

²⁵⁴ [1986] AC 80.

²⁵⁵ *Ibid.*

²⁵⁶ (1996) 77 BLR 51.

²⁵⁷ [1995] 2 AC 145.

objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle the parties must be taken to have agreed that the tortious remedy is to be limited or excluded."

6.50 It appears that the Irish courts are moving in a similar direction to the English courts. In the same year as the *Midland Bank Trust* case the Supreme Court in *Finlay v. Murtagh*²⁵⁸ held that there can be liability in tort even where there is a contractual relationship.²⁵⁹ This is a case where the plaintiff took an action against his solicitor for not instituting proceedings within the time imposed by the *Statute of Limitations, 1957*.

6.51 Subsequently in *Kennedy and Others v. Allied Irish Banks PLC and AIB Finance, Ltd.*,²⁶⁰ Hamilton CJ was of the view that, while it is established that where obligations in tort arise from a contractual relationship, they cannot by necessary implication be greater than those in the contract, this is not so where the obligation in tort arises independently of the contract. Having cited a passage from *Henderson v. Merrett Syndicates Ltd.*,²⁶¹ the learned judge stated:

"[w]here a duty of care exists, whether such duty is tortious or created by contract, the claimant is entitled to take advantage of the remedy which is most advantageous to him subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded."

6.52 In summary, while often a duty of care in tort arises from the terms of the contract, and thus cannot be wider than the latter, this is not automatically the case. A tortious duty can exist independently of the contract. Therefore it is necessary to examine the facts and circumstances particular to each case. Provided there is no express term in the contract restricting or excluding a tortious duty, it is possible for the scope of the tortious duty to be wider than the duty set out in the contract. In such cases it is open to the plaintiff to choose whichever remedy is most advantageous.

6.53 The implication of concurrent causes of action in tort and contract for the long-stop is that in certain circumstances there may be separate starting points for each. This possibility could be eliminated by harmonising the dates of accrual of a cause of action based upon a breach of a duty of care in contract and tort. There are two possible

²⁵⁸ [1970] IR 249.

²⁵⁹ Griffin J stated that: "In my opinion it is both reasonable and fair that, if the issues of fact are such that he would be entitled to succeed either in contract or in tort, the plaintiff should be entitled to pursue either or both remedies; there can be nothing wrong in permitting the plaintiff, who is the injured party, to elect or choose the remedy which to him appears to be that which will be most suitable and likely to attract the more favourable result."

²⁶⁰ Supreme Court, 29 October 1996.

²⁶¹ [1995] 2 AC 145.

solutions to this difficulty. One is to provide that the cause of action based on a breach of duty of care in contract or tort runs from the date of the breach.²⁶² While this solution would be popular among defendants, it would be unfair to a plaintiff, as the limitation period could start to run before the cause of action accrued and the plaintiff had the right to take proceedings. The alternative solution is to provide that the limitation period will run from the date of the damage regardless of whether the action is in tort or contract.²⁶³ But these solutions appear too drastic and clearly carry their own sets of difficulties. Accordingly we make no recommendation on this point.

²⁶² Law Commission of British Columbia, *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (No. 112, 1990) at 34-35.

²⁶³ N.H. Andrews, "Reform of Limitations of Actions : The Quest for Sound Policy" (1998) 57 CLJ 589 at 607.

CHAPTER SEVEN: SPECIAL CASES

7.01 If the plaintiff is not in a position to commence proceedings when time begins to run, then factors such as (i) disability, (ii) fraud, and (iii) mistake have traditionally prevented time from running, thereby extending the limitation period. This rule is based on the idea that it would be unfair to a plaintiff, who is subject to one of these factors, if no allowance were to be made for them. While this body of law is not one which calls for review in the present reference, we should like to state that in our view it is based on an essentially fair policy. In this chapter we examine the impact of discoverability, as a trigger for the commencement of the period of limitations, upon the operation of the three factors identified above, and also propose some consequential changes to the existing law as well as other limited changes which do not flow from discoverability. Finally, in this chapter, we examine the impact of the discoverability limitation period on the survival of actions both for the benefit of and against the estate of the deceased.

I. Legal Incapacity

A. *The present position*

7.02 The running of a limitation period, where a plaintiff is under a legal disability, is postponed by the *Statute of Limitations, 1957*, s.49. The policy behind this provision is that where a plaintiff is so disadvantaged by a particular circumstance that he can not manage his own affairs, then he should be entitled automatically to an extension of the limitation period until that disability ceases. This principle is well recognised and is present in, most if not all, jurisdictions. The *Statute of Limitations, 1957*, s. 49.(1)(a), provides:

“If, on the date when any right of action accrued for which a period of limitation is fixed by this Act, the person to whom it accrued was under a disability, the action may, subject to the subsequent provisions of this section, be brought at any time before the expiration of 6 years from the date when the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation has expired.”

7.03 A person is treated as being under a disability²⁶⁴ if he fits into one of the following three categories:“(a) he is an infant or (b) he is of unsound mind.”²⁶⁵ Formerly,

²⁶⁴ S. 48(1) 1957 Act.

²⁶⁵ See also *Consultation Paper on The Statutes of Limitation: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)* (1998) at para. 4.24. There is no statutory definition. In *Rohan v. Bord na Mona* [1990] 2 IR 425, Barron J applied the test of “ability to manage his own affairs”. Lord Denning in *Kirby v. Leather* [1965] QB 367 interpreted “unsoundness of mind” in the

there was a category (c) which consisted of “a convict subject to the operation of the *Forfeiture Act, 1870*²⁶⁶ for whom no administrator has been appointed”. Subs.(1)(c) is obsolete since the *Forfeiture Act, 1870* was repealed by the *Criminal Law Act, 1997*.²⁶⁷ Accordingly it should be removed.

7.04 *The Commission recommends that s.48(1)(c) should be removed from the Statute of Limitations, 1957.*

B. Preliminary Points

7.05 Two preliminary matters ought to be addressed at this point.

7.06 The first point is in relation to the term ‘disability’. For reasons referred to in the Consultation Paper²⁶⁸ we are of the opinion it is no longer an appropriate term, and therefore, favour the adoption of the term “legal incapacity” in its place, to encompass minority and unsoundness of mind.

7.07 *The Commission recommends that the term ‘disability’ in s.49 should be replaced with the term ‘legal incapacity’.*

7.08 Secondly, the categories (a)-(b) in s. 48 above, may not be a reliable indicator of the individual’s inability to manage his affairs. In particular, the Commission is of the view that “unsoundness of mind” may, as the New South Wales and the Western Australian Law Reform Commissions pointed out, be too narrow a concept.²⁶⁹ It excludes categories of people who, though not suffering the necessary mental illness, should come within s.48 as they are incapable of managing their own affairs. Examples include: those who are unconscious or in a coma; or those who suffer from a very severe physical incapacity. To take account of these situations, the Commission is of the opinion that incapacity needs to be defined in wider terms. Alternative definitions have

Limitation of Action Act, 1939 as when a person is “[b]y reason of mental illness, incapable of managing his affairs in relation to the accident as a reasonable man would do” Also along these lines the Alberta Institute in its *Report on Limitations* (No. 55, 1989) at 41 have defined disability specifically in terms of the claim- “unable to make reasonable judgments in terms of the claim”. By connecting the incapacity to the terms of the claim, there is a recognition that a person can be competent for one purpose, but not for another.

²⁶⁶ Before the *Forfeiture Act, 1870*, was repealed, s.8 prevented persons convicted of treason or felony and sentenced to death or penal servitude from bringing any action at law or suit in equity.

²⁶⁷ See the Third Schedule to the *Criminal Law Act, 1997*.

²⁶⁸ Law Reform Commission, *Consultation Paper on The Statutes of Limitation: Claims in Tort and Contract in respect of Latent Damage* (1998) at para. 4.75.

²⁶⁹ New South Wales Law Reform Commission, *Third Report on the Limitation of Actions- Special Protections* (No. 3, 1967) paras. 88-89, Western Australia Law Reform Commission, *Limitation and Notice of Actions* (Project No. 36 Part II, 1997). See also Ontario Law Reform Commission, *Report on Limitation of Actions* (1969) at 99; Law Reform Commission of British Columbia, *Report on Limitations: Part II* (LRC 15, 1974) at 66.

been recommended in other jurisdictions. These have been classified into the following three groups by the Western Australian Law Reform Commission.²⁷⁰

7.09 The first group consists of those who recommended a definition along the lines of the model in s.11(3) of the New South Wales *Limitation Act, 1961*.²⁷¹ It provides that a person is under a disability:

“[w]hile he is, for a continuous period of twenty eight days or upwards, incapable of, or substantially impeded in, the management of his affairs in relation to the cause of action in respect of the limitation period for which the question arises, by reason of:

- (i) any disease or impairment of his physical or mental condition;
- (ii) restraint of his person, lawful or unlawful, including detention or custody under the Mental Health Act, 1958;
- (iii) war or warlike operations; or
- (iv) circumstances arising out of war or warlike operations.”

7.10 The second group consists of those who have recommended a definition along the lines of the model in the *Canadian Uniform Limitation of Actions Act, 1931* whereby a person is “incapable of the management of his affairs because of disease or impairment of his physical or mental condition.”²⁷²

7.11 The third group consists of other definitions not following either of the above models. For instance in South Australia under the *Limitation of Actions Act, 1958*, s. 45(2), a person is under a disability “while he is subject to a mental deficiency, disease or disorder by reason of which he is incapable of reasoning or acting rationally in relation to the action or proceeding that he is entitled to bring”. In Alberta the *Limitations Act, 1996* provides that a person under a disability means “(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 a claim”.

7.12 Having examined the different models of incapacity in these three groups, the Commission favoured the Canadian definition. We are of the view that it achieves the objective without being either unnecessarily complicated or too broad.

7.13 Accordingly, the Commission is of the view that unsoundness of mind should be replaced with a definition of disability along the lines of the Canadian model. Thus s.48(1)b should be amended to read “where a person is incapable of the management of his affairs because of disease or impairment of physical or mental condition”.

²⁷⁰ *Limitation and Notice of Actions* (Project No. 36 Part II, 1997) at paras. 17.13-17.18.

²⁷¹ These include *Australian Capital Territory, Act 1985* s.8(3), *Ontario Limitations Bill 1992*, c. 9(2), New Zealand Law Commission, *Limitation on Defences in Civil Proceedings* (No.6,1988) at para. 258.

²⁷² See *British Columbia Limitation Act, 1979* s.7(5)(a)(ii); *Manitoba Limitation of Actions Act, 1987* s. 7(1)(b); *Northern Territory Limitation Act, 1981* s. 4(1); Ontario Law Reform Commission, *Report on Limitation of Actions* (1969) at 99; Newfoundland Law Reform Commission, *Report on Limitation of Actions* (R1,1986)

C. *The Impact of the Discoverability Test in the Context of Incapacity*

7.14 Under the present law the accrual limitation period is postponed if the legal incapacity occurs before the date of accrual. We see no reason not to apply an analogy with the existing law when dealing with the proposed discoverability test. Thus where the plaintiff is under a legal incapacity before the date of discoverability,²⁷³ the limitation period should be suspended until either the incapacity ceases or the plaintiff dies. For this result to be achieved, s.49 needs to be amended.

7.15 The Commission recommends that if on the date when any right of action became discoverable, the person to whom it became discoverable was under a legal incapacity, the action may be brought at any time before the expiration of three years after the legal incapacity has ceased.

D. *Changes Proposed to the Existing Law*

7.16 We turn next to consider two important modifications of the law, which flow only partly from the introduction of the discoverability test.

(i) Supervening Incapacity

7.17 It is significant, that at present under s.49, the limitation period will only be suspended if the legal incapacity occurs *before* the date of accrual. In other words the period of limitation will not be suspended by some supervening legal incapacity, which occurs after the cause of action has accrued. Of the two categories of legal incapacity, only unsoundness of mind is affected by this restriction, since in contrast to minority, it can arise after the commencement of the limitation period.²⁷⁴ This restriction derives from the rule that once time has started to run, it will continue to do so until proceedings are commenced or the claim is barred. This is said to be based on the premise that, by neglecting to take proceedings when time starts to run, a plaintiff implicitly accepts the risk that some unpredictable event may intervene and prevent him from doing so in the future.

7.18 The purpose of s.49 is to postpone the limitation period because a person suffering from a legal incapacity will be incapable of managing his affairs. However, a person suffering from an incapacity after the limitation period starts to run would be equally incapable of managing his affairs. Therefore, logically the limitation period

²⁷³ S. 49(1)(a) apart, there is a possibility that under the proposed discoverability test itself, time will not start to run until the disability ceases. This would occur where the reasonable man suffering from the same incapacity would not discover the damage until such a time. However as this may only rarely be the case, it will almost always be s.49(1)(a) which will be relied on by those under a legal incapacity. This difficulty is further compounded by the fact that the discoverability test assumes that the person to whom the latent damage becomes discoverable is capable of managing his own affairs.

²⁷⁴ *Statute of Limitations Act, 1957*, s.48(1)(b).

should also be suspended in this instance.²⁷⁵ Where an incapacity develops subsequent to the commencement of the primary limitation period, there is no justification for not postponing the limitation period.²⁷⁶ The force of this argument has been recognised in the following foreign jurisdictions²⁷⁷ which have changed the law so that a supervening incapacity may suspend the running of the limitation period: Alberta, Newfoundland, South Australia, Northern Territory and Australian Capital Territory, Manitoba and British Columbia. The English Law Commission²⁷⁸ has also recommended that a supervening disability suspend the running of time.

7.19 When the supervening incapacity ceases, if the limitation period were to start afresh, this would be overly favourable to the plaintiff and would go beyond merely taking his incapacity into account. For this reason we recommend that, when the incapacity ceases only the remainder of the limitation period should be available to the plaintiff. In cases where the disability occurs near the end of the limitation period, the Commission does not consider it necessary to provide for a minimum amount of time in which an action can be brought after the disability ceases.²⁷⁹ See the illustration below.

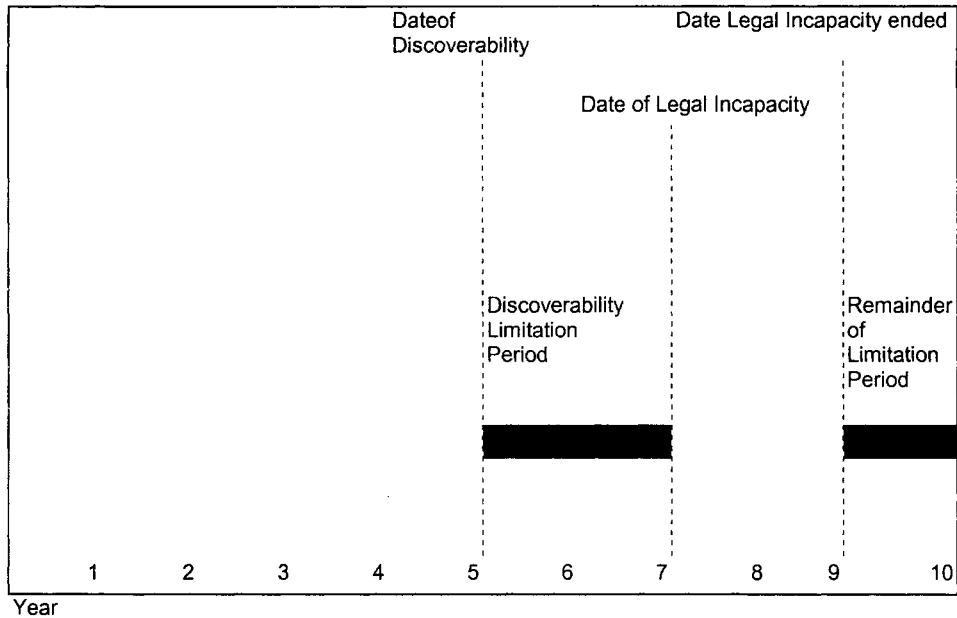
²⁷⁵ Barron J in *Rohan v. Bord na Mona* [1990] 1 IR 425, 430 stated “The purpose of the provision is to save a cause of action for someone to whom it has accrued but because of a disability may be unable to pursue it. If so, it is immaterial whether the plaintiff was at the date of the accident of unsound mind or immediately as a result thereof became of unsound mind. Whether or not this is what the Oireachtas intended is not in any event to be decided by presumption. The intention must be determined from the words used. Taking the words ‘on the date’ in their normal meaning, this means at any time on such date. I see no reason for any other construction.”

²⁷⁶ In the case of a supervening incapacity it will be necessary to prove that the incapacity occurred before the expiry of the limitation period, as opposed to the present situation, where it is necessary to show that the incapacity existed before the commencement of the limitation period.

²⁷⁷ Alberta *Limitations Act, 1996* s.5(1); Newfoundland *Limitations Act, 1995* s.5(3); South Australia *Limitation of Actions Act, 1936* s 45(1); Northern Territory *Limitation Act, 1981* s.36(1); Manitoba *Limitation of Actions Act, 1987* s.7(2); British Columbia *Limitation Act, 1979* s. 7(3).

²⁷⁸ English Law Commission, *Consultation Paper on Limitation of Actions* (No. 151, 1997) at para. 12.128.

²⁷⁹ Such a provision was recommended by the Ontario Law Reform Commission *Report on Limitation of Actions* (No. 97, 1969) and the Newfoundland Law Reform Commission, *Report on Limitation of Actions*(1986) and the Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions* (No. 36, Part II 1997).



7.20 *The Commission recommends that the legislation should be changed to allow a supervening legal incapacity to suspend the accrual and the proposed discoverability limitation periods.*

(ii) *Should there be a Long-Stop?*

7.21 At present, where the plaintiff is under an incapacity, the limitation period does not start to run until that incapacity ceases. Thus, there is a possibility that the claim will not be litigated for an unlimited number of years after the event. As already discussed in Chapter Four, the possibility of a long and indefinite limitation period can cause problems for a defendant. Where he could be liable for an indefinite period of time, he would have to insure against such claims long into retirement. This extra cost to the defendant will ultimately be passed on to the consumer. Furthermore, there is the danger that the relevant evidence will have deteriorated to the extent that a fair trial is no longer possible. Alongside these factors is the likelihood that the interests of a minor or a person of unsound mind are looked after by a parent or guardian who could take an action on their behalf. Based on these arguments, the Commission concludes that there should be an ultimate fixed limitation period within which all such claims must be brought.

7.22 For reasons similar to those above, many Law Reform Commissions in other jurisdictions have recommended that legal incapacity be subject to a long-stop. The

British Columbia Law Reform Commission;²⁸⁰ the Newfoundland Law Reform Commission;²⁸¹ the New Zealand Law Reform Commission²⁸² and the English Law Commission²⁸³ recommended that the long-stop should apply to adult disability but not minority.

7.23 The length of the limitation period remains to be determined and must be considered separately, according to whether the plaintiff is of unsound mind or a minor. First we consider the plaintiff who is of “unsound mind”. Plainly, to apply the 10 year long-stop which we recommend as a cap on the discoverability limitation period would ignore the fact that those who suffer from an incapacity are different to those who do not. It is noteworthy that there is at present in s.49(1)(d) a 30 year limit on the extension of the limitation period for disability in relation to actions for the recovery of land or an interest charged on that land. The Commission is of the view that a 30 year ultimate limitation period strikes a reasonable balance between the rights of a plaintiff and the inconvenience caused to a defendant. It also achieves a degree of uniformity in the application of s.49.

7.24 *The Commission recommends that in cases where either the accrual or the discoverability limitation period is postponed under s.49 because the plaintiff is of unsound mind, there should be a 30 year long-stop for claims in respect of physical damage.*

7.25 The position is different where the plaintiff is a minor. The fundamental difference between “unsoundness of mind” and “minority” is that the latter has a fixed and ascertainable duration. Consequently, there are circumstances where a 30 year long-stop might be overly generous to the infant plaintiff. For instance in a situation where damage occurred only one year before the plaintiff reached 18, there would be a further 29 years for the damage to become discoverable before the expiry of the long-stop. Accordingly, we recommend that a special limitation period be provided for postponement due to minority under s.49. Having considered the numerous options, the Commission came down in favour of a 10 year long-stop commencing at the age of majority. In cases where this limitation period is excessive, and a large element of it has been allowed to expire before the plaintiff commences proceedings, the courts may use their inherent jurisdiction to strike out an action in the interests of justice.²⁸⁴

²⁸⁰ Law Reform Commission of British Columbia, *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (1990) at 36-42.

²⁸¹ Newfoundland Law Reform Commission, *Working Paper on Limitation Actions* (WP1 1985) at 323.

²⁸² New Zealand Law Commission, *Report on Limitation Defences in Civil Proceedings* (NZLC No.6 1988) at para. 307.

²⁸³ English Law Commission, *Consultation Paper on Limitation of Actions* (No. 151,1997).

²⁸⁴ See chap. 4. para.4.11. In *O Domhnail v. Merrick* [1984] IR 151. In 1961 the plaintiff suffered severe personal injuries in a motor car accident when she was three years old. The action was commenced in 1977, however the statement of claim was not delivered until 1982. Although the action was commenced within the limitation period, it was dismissed because of the inordinate and inexcusable delay in delivering the statement of claim.

7.26 *The Commission recommends that in cases where either the accrual or the discoverability limitation period is postponed due to minority there should be a long-stop of 10 years commencing when the plaintiff reaches the age of majority.*

"Custody of a Parent or Guardian or other Carer" Rule

7.27 In many cases where there is postponement due to incapacity under s.49, the plaintiff will have a parent or a guardian who could bring an action for him.

7.28 In this jurisdiction, the *Guardianship of Infants Act, 1964*, s.6, ensures that in most cases a minor will have a guardian.²⁸⁵

7.29 In respect of adults under a legal incapacity, unfortunately there is as yet no equivalent to the *Guardianship of Infants Act, 1996*. While there are certain situations where an incapacitated adult may be made a ward of court, there is no general procedure whereby a guardian can be appointed to take care of the affairs of an incapacitated adult. Clearly legislation is needed in this area. In Alberta, such legislation takes the form of the *Dependent Adults Act, 1980*. This Act permits any interested person to apply to the court for an order appointing a guardian in respect of an adult. Before a guardian can be appointed, the court must be satisfied that the person is "(a) an adult, and (b) repeatedly or continuously unable (i) to care for himself, and (ii) to make reasonable judgments in respect of matters relating to his person." The court then decides the particular powers which should be given to the guardian, for instance whether he should be allowed "to commence, compromise or settle any legal proceeding that does not relate to the estate of the dependent adult and to compromise or settle any proceedings taken against the dependent adult that does not relate to his estate".²⁸⁶ In Western Australia there is a similar law; the *Guardianship and Administration Act, 1990*.

7.30 *The Commission recommends that legislation along the lines of the Dependent Adults Act, 1980 in Alberta, or the Guardianship and Administration Act, 1990 in Australia be enacted in this jurisdiction.*

7.31 The fact that an action may be brought on behalf of the plaintiff by a guardian is not currently taken into account by s.49. In cases where this is possible it appears unnecessary to subject a defendant to a long and indefinite period of liability in situations where there is a guardian who could take the action within the limitation period. The Commission is of the view that this is unduly unfair to the defendant.

7.32 *Thus the Commission recommends that the limitation period should not be postponed unless the person under a legal incapacity can show that at the time of the incapacity he was not in the custody of a parent or guardian. At present and until the*

²⁸⁵ Parents are automatically the legal guardians of their minor children. Testamentary guardians can be appointed by both parents so that a minor will have a replacement guardian after the death of a parent. In circumstances where a minor has no guardian, the court on the application of any person or persons may appoint a legal guardian.

²⁸⁶ S.10 (2)(g).

appropriate legislation concerning incapacitated adults is enacted, this recommendation can only be applied to minors.

7.33 Other jurisdictions have adopted a similar approach.²⁸⁷ In fact there was originally a provision to this effect concerning minors in the *Statute of Limitations, 1957*. However, in *O'Brien v. Keogh*, it was declared unconstitutional.²⁸⁸ The court held that because a parent or guardian could be the potential defendant, the provision did not adequately vindicate the rights of the minor. As a result it was removed by the *Statute of Limitations (Amendment) Act, 1991*. A question-mark was raised over the correctness of this decision by O'Higgins CJ in the subsequent case of *Moynihan v. Greensmyth*.²⁸⁹

7.34 The Commission is of the view that the difficulty highlighted in *O'Brien v. Keogh* can be avoided by providing that the limitation period will be postponed where the claimant is actually taking an action against the parent or guardian. Such a provision was inserted in the *Alberta Limitations Act, 1996*, at s.5(2).

7.35 *The Commission recommends that the limitation period should be suspended where an action is brought by the claimant against the claimants parent's or guardian, for a cause of action which occurred when the claimant was a minor.*

Notice to Proceed

7.36 Another device, which has been adopted to meet the same problem, is a provision allowing a defendant to start the limitation period running against the plaintiff under disability by either serving notice to proceed on the plaintiff²⁹⁰ or by applying to the court to appoint a litigation guardian for this plaintiff.²⁹¹ This would ensure the plaintiff's interests are safeguarded. The Commission is of the view that such a provision does not really solve any problem because the onus is on the defendant to trigger the limitation period and a defendant is likely to be reluctant to do this as it may encourage a plaintiff to take an action against him and may even be interpreted as an admission of liability on his part.

²⁸⁷ For example: the Tasmanian *Limitation Act, 1974* applies this rule to minors; and the Saskatchewan *Limitation of Actions Act, 1878* as amended applies the provision to persons suffering from a mental disorder; and the *Alberta Limitations Act, 1996* applies the rule to minors though prior to the 1996 Act, the rule also applied to adults where a plenary or partial guardian with the capacity to commence legal actions had been appointed under the *Dependent Adults Act, 1980*. Both the Western Australian Law Commission and the Newfoundland Law Reform Commission recommend the adoption of a similar provision in relation to minority and adult incapacity: *Report on Limitation and Notice of Actions* (Project No. 36 Part II, 1997) para. 17.64; and Newfoundland *Report on Limitation of Actions* (NLRC R1 1986).

²⁸⁸ [1972] IR 144.

²⁸⁹ [1977] IR 55.

²⁹⁰ New South Wales, the Australian Capital Territory, Tasmania, the Northern Territory, British Columbia, and Manitoba.

²⁹¹ Ontario.

II. Fraud and Mistake

A. *The Present Position*

7.37 When a cause of action is in peril of being statute-barred, it is generally not a defence to plead ignorance of the statute. However at present where the action is for fraud, fraudulent concealment or relief from the consequences of mistake, the normal limitation period provided for in s.11 of the *Statute of Limitations, 1957* can be postponed indefinitely, under ss.71 and 72 of the *Statute of Limitations, 1957*. These are considered below.

7.38 However these exceptions are subject to the limitation that a further transaction with a bona fide purchaser will not be set aside.²⁹² As a matter of policy the Commission is of the view that this is the correct approach and accordingly does not recommend any change in respect of this limitation.

7.39 We need to consider two positions here. Firstly, s.71 of the *Statute of Limitations, 1957* provides that:

“(a) Where in the case of any action based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or

(b) the right of action is concealed by the fraud of any such person,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it.”

In other words, where there is fraud or fraudulent concealment, the limitation period will not begin to run until the fraud or the concealment thereof, as opposed to the damage, is discovered or is reasonably discoverable. In respect of (a) above, it follows from the wording that the fraud and not just some ancillary event must be the basis of the action; “fraud must be proved for the claim to succeed”.²⁹³ Similarly in respect of (b), for the plaintiff to benefit from postponement under this section, it is essential that an element fundamental to the right of action is concealed by fraud, that is either: (i) the damage; (ii) the fact the damage is significant; or (iii) the identity of the defendant.

7.40 Secondly, s.72 provides that where:

“[T]he action is for relief from the consequences of mistake, the period of limitation shall not begin to run until the plaintiff has discovered the mistake or could with reasonable diligence have discovered it.”

²⁹² See ss. 71(2) and 72(2).

²⁹³ Per Somervell LJ in *Beaman v. ARTS Ltd.* [1949] 1 KB 550.

In circumstances where the mistake is an essential²⁹⁴ element of the cause of action, the limitation period will not begin to run until the actual mistake is discovered or is with reasonable diligence²⁹⁵ discoverable. S.72 applies to all mistakes whether of fact or law.²⁹⁶

B. The Impact of the Discoverability Provision in the Context of ss.71 and 72

7.41 In the majority of cases the introduction of the new discoverability limitation period would swallow up and make redundant ss.71 and 72. This stems from the similarity between it and ss.71 and 72. These sections essentially provide for the application of a discoverability test in cases of fraud and mistake. Indeed, the New Zealand Law Commission in its Report²⁹⁷ entitled “*Tidying the Limitation Act*” recommends in light of the proposed discoverability provision, that the equivalent of ss.71 and 72 in relation to mistake and fraud, though not fraudulent concealment, be deleted from the Act. This simplifies the law by removing two of the exceptions to the general regime.

7.42 However, while admittedly, the date a mistake becomes discoverable under s. 72 would coincide with the date on which the resulting loss becomes discoverable under the discoverability test, this is not necessarily the case where fraud and concealment by fraud are concerned. In these instances, because, unlike mistake, fraud is essentially linked to the defendant’s state of mind, it is quite conceivable that the plaintiff might discover the loss and then only at some later stage discover the fraud or fraudulent concealment. Another point of difference is that below we recommend ultimate limitation periods which diverge from the 10 year long-stop to be applied to the discoverability limitation period.

7.43 *The Commission recommends for the reasons outlined above that ss.71 and 72 of the Statute of Limitations 1957 be retained.*

C. Supervening Fraudulent Concealment

7.44 The interpretation of the phrase “the limitation period will not begin to run” contained in both ss.71 and 72 has caused difficulty in relation to supervening fraudulent concealment.

²⁹⁴ *Phillips-Higgins v. Harper* [1954] 1 QB 411. Brady and Kerr, *The Limitation of Actions* (2nd ed., 1994) at 198 refer to the possibility that s.72 of the *Statute of Limitations, 1957* could be interpreted generously so as to allow postponement of the limitation period in any circumstances where law or equity would grant relief from mistake.

²⁹⁵ *Peco Arts Inc v. Hazlitt Gallery Ltd* [1983] 1 WLR 1315.

²⁹⁶ *Kleinwort Ltd v. Lincoln Council* [1998] 4 All ER 513. In this case it was held that there was no principle of English law that payments made under a settled understanding of the law which was subsequently departed from by judicial decision were not recoverable in restitution on the ground of mistake of law. And it was also held that s.32(1) of the 1980 Act applies to mistakes of fact and law.

²⁹⁷ (No.61, 2000) at para. 26.

7.45 In respect of ss.71(1)(a) and 72(1), which deal respectively with actions based on fraud and mistake, all the relevant circumstances will be in place at the date of accrual, that is the fraud or the mistake will already have occurred, thus the statutory wording "the limitation period will not begin to run" is entirely apt. However, this is not so in relation to fraudulent concealment, which can take place either before or after the date of accrual. Both of these possibilities are covered by the terms of s.71(b). Therefore, the question arises here whether, in a case where time has already started to run, a supervening fraudulent concealment should suspend the limitation period. If this is so, a further question arises, as to whether the entire limitation period or just the remaining limitation period should be available to the plaintiff when he discovers the fraudulent concealment.

7.46 First, the question as to whether a supervening fraudulent concealment should suspend the limitation period is examined. A comparison of the wording of s.71(1)(b) with s.49(1)(a), the provision dealing with the postponement of the limitation period in respect of a legal incapacity, is useful in this respect. S.49(1)(a) provides specifically that "If, *on the date when any right of action accrued* for which a limitation period is fixed by this Act, the person to whom it accrued was under a disability" [our emphasis] the limitation period will be postponed. This makes it clear that the section does not apply to a case where the legal incapacity occurs after the date of accrual. On the other hand s.71 does not contain such a specification. It could perhaps be deduced from this marked difference in language, that s.71 was intended to apply to fraudulent concealment which occurs both contemporaneously with or subsequent to the date of accrual.

7.47 There does not appear to be any Irish case which turns on this point. However, in *Morgan v. Park Developments*²⁹⁸ (when Carroll J dismissed the s.71(b) defence due to the absence of a special relationship between the plaintiff and the foreman), no reference was made at all to the fact that the fraudulent concealment, by the foreman, took place after the damage was done and the limitation period had started to run. In the English case of *Sheldon v. Outhwaite*²⁹⁹ the majority of the House of Lords took the view that fraudulent concealment which took place after time had commenced to run would in fact postpone the running of time under s.32(1) of the 1980 Act³⁰⁰ - the English equivalent of, and with wording identical to, s.71(1)(b). In other words, time would stop running and commence to run, anew, from the time of discovery of the fraudulent concealment. Megarry VC in *Tito v. Waddell(No.2)*,³⁰¹ when interpreting the identical provision³⁰² in an earlier Act, had reached the opposite conclusion stating: "If time has already begun to run, I do not think that a supervening fraudulent concealment

²⁹⁸ [1983] ILRM 156.

²⁹⁹ [1996] 1 AC 102.

³⁰⁰ S.32 refers to "any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant".

³⁰¹ [1977] 1 Ch 106, 245.

³⁰² *Limitation Act, 1939*, s. 26.

will start time running again". In the later case of *Sheldon*, the House of Lords noted that the decision of Megarry VC on the legislation, as it had earlier stood, was *obiter*. Lord Nichols of Birkenhead giving one of the majority speeches stated that:

"[I]f a plaintiff is aware of all facts relevant to his right of action, there cannot be subsequent concealment of them from the plaintiff. He already knows the position. But if he does not, and the defendant takes steps deliberately aimed at keeping the plaintiff in the dark, there is as much need to prevent that defendant from gaining a limitation advantage as with the defendant who conceals the position from the outset."³⁰³

He held that "the purpose of s.32(1)(b) is clear; a defendant is not to obtain an advantage from deliberately concealing a fact relevant to the plaintiff's right of action."³⁰⁴

7.48 The second question to be examined is whether the entire limitation period or just the remainder of the limitation period, should be available to the plaintiff after he discovers the fraudulent concealment. It is clear from the judgment in *Sheldon v. Outhwaite*³⁰⁵ that, while the preferred solution of the majority was to make the remainder of the limitation period available to the plaintiff when he discovered the fraudulent concealment, the majority felt constrained by the wording of s.32 of the 1980 Act to allow the limitation period recommence at this point.

7.49 The Commission is of the view that recommencing the full limitation period is overly kind to the plaintiff. Therefore we recommend that s.71 be amended to clearly indicate, that where there is a supervening fraudulent concealment, the remainder of the limitation period, and not the entire limitation period, will start to run against the plaintiff from when the fraudulent concealment is discovered or discoverable.

7.50 *The Commission recommends that a supervening fraudulent concealment should suspend only the remainder of the limitation period, until the fraudulent concealment becomes discoverable.*

D. *Should there be a Long-Stop?*

7.51 At present under ss.71 and 72 the limitation period can be postponed indefinitely until the plaintiff has or could with reasonable diligence discover the fraud or mistake; there is no ultimate limitation period or long-stop, after the expiry of which no further claim can be brought. It is clear that while the purpose of a limitations scheme is to benefit defendants who may be unfairly prejudiced by an excessive delay in bringing an action, it is not intended to allow fraudulent defendants to escape the consequences of their conduct. The introduction of a long-stop to s.71 would in certain

³⁰³ [1996] 1 AC 102, 152.

³⁰⁴ *Ibid.* at 154.

³⁰⁵ [1996] 1 AC 102.

cases allow the wrongdoer to benefit from his own wrong. The Commission is of the view that the Statutes of Limitations is not intended nor should it be used as an instrument of fraud. Therefore there should be no long-stop provision. Some Law Reform Commissions³⁰⁶ have adopted a similar position, others have simply extended³⁰⁷ the length of the long-stop. In this regard we see no reason to distinguish between fraud and the concealment of fraud by the defendant.³⁰⁸ An ancillary point here is that because a defendant cannot and is not in the future likely to be able to insure against fraud committed by him, the absence of a long-stop is unlikely to have any cost ramifications for the consumer.

7.52 *The Commission recommends that a long-stop should not be applicable to ss.71(a) or (b).*

7.53 Different factors arise when considering the long-stop in the context of postponement due to mistake under s.72, in that there is no requirement of any wrong doing on the part of the defendant. Essentially it is necessary to balance the need to achieve a fixed and determinable limitation period against the interests of the parties to the agreement entered into under a mistake. The Commission is of the opinion that a reasonable balance would be achieved by applying a 30 year long-stop to all actions postponed under s.72. The Commission reasoned that there will be very few meritorious claims after 30 years, and furthermore it is unlikely that after 30 years the quality of evidence would allow a proper determination of the issues involved in such claims.

7.54 *The Commission recommends that a long-stop of 30 years be applied to the postponement of the primary limitation period under s.72.*

E. The Meaning of 'Fraud' and 'Concealed by Fraud'

7.55 The word 'fraud' as used in ss.71(1)(a) and 71(1)(b) has two different meanings. Fraud in this section is given its common law meaning, in other words the tort of deceit.³⁰⁹ Traditionally it has been regarded as involving "some element of moral turpitude, such as deliberate untruth or some dishonesty."³¹⁰

³⁰⁶ New Zealand Law Commission, *Limitation Defences in Civil Proceedings*, NZLC-R6 (No. 6, 1988) at para. 303,306.

³⁰⁷ Law Reform Commission of British Columbia, *Report on the Ultimate Limitation Period: Limitation Act, s.8* (1990) chap.4 at 43-44.

³⁰⁸ Some Law Reform Commissions suspend the long-stop for actions of fraudulent concealment but not for actions based on fraud: the Alberta Law Reform Institute, *Report on Limitations* (No. 55 1989) at 40; and the Ontario Limitations Act Consultation Group, see s.15(7)(b) of the Ontario *Limitations (Bill), 1992*. The main reason for such a distinction is that unlike fraud, fraudulent concealment effectively makes the date of discoverability later. Consequently if the fraud is well concealed there is an increased possibility that the long-stop limitation period will have expired.

³⁰⁹ McMahon and Binchy, *Irish Law of Torts* (2nd ed., 2000) at paras.35.01-35.02

³¹⁰ *Beaman v. ARTS Ltd* [1948] 2 All ER 89, 94 *per* Lord Denning.

7.56 On the other hand s. 71 (b) refers to a “right of action concealed by fraud”. The case-law interpreting this term shows that ‘fraud’ in this section is not given its common law meaning but is used in the wider equitable sense.³¹¹ Lord Evershed M.R. when interpreting the English provision³¹² equivalent to s.71(b), in *Kitchen v. Royal Air Force Association*³¹³ stated that it covered conduct “[w]hich having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other.”³¹⁴ Subsequent cases latched on to this reference to a ‘special relationship’ and in circumstances where active concealment was absent it was regarded as a condition precedent to the application of the section. However, the later cases no longer appear to attach as much significance to the existence of a special relationship preferring to examine the actual circumstances of the case at hand. Thus this liberal interpretation of the phrase ‘fraudulent concealment’ effectively covers any unconscionable failure to reveal. Lord Denning’s comments in *King v. Victor Parsons & Co.*³¹⁵ illustrate this point well:

“In order to show that he concealed the right of action ‘by fraud’ it is not necessary to show that he took active steps to conceal his wrongdoing or breach of contract. It is sufficient that he knowingly committed it and did not tell the owner anything about it. He did the wrong or committed the breach secretly. By saying nothing he kept it secret. He conceals the right of action. He conceals it by ‘fraud’ as those words have been interpreted in the cases. To this word ‘knowingly’ must be added ‘recklessly’.”³¹⁶

7.57 The Irish courts also appear willing to adopt this liberal approach. Morris J in *McDonald v McBain*³¹⁷ expressed approval of Lord Denning’s wide interpretation though on the facts of that case, this approach was not necessary as the plaintiff had knowledge of all the necessary facts to take the action. However, since Carroll J’s judgment in *Morgan v. Park Developments Ltd.*³¹⁸ there is doubt as to whether this liberal interpretation is contingent on the existence of a ‘special relationship’. In this case the foreman (the defendant’s agent) advised the plaintiff that the cracks in the building, which turned out to be symptoms of severe structural problems, were mere settlement cracks. Carroll J relied on the absence of a ‘special relationship’ between the parties in holding there was no fraudulent concealment. This may not be a departure from the liberal approach pioneered by Lord Denning. For an alternative interpretation is suggested by Brady and Kerr,³¹⁹ namely, it may simply be a pragmatic solution to a

³¹¹ See *Kitchen v. Royal Air Force Association* [1958] 1 WLR 563.

³¹² *Limitation Act, 1939* s. 26(b).

³¹³ [1958] 1 WLR 563.

³¹⁴ *Ibid.* at 572-573.

³¹⁵ [1973] 1 WLR 29.

³¹⁶ *Ibid.* at 569.

³¹⁷ [1991] ILRM 764.

³¹⁸ [1983] ILRM 156.

³¹⁹ Brady and Kerr, *The Limitation of Actions*, (2nd ed., The Law Society, 1994) at 190-191.

situation which did not reveal any behaviour on the defendant's part amounting to 'unconscionable conduct'. It is clear from some construction cases³²⁰ that covering up of a defect which occurs in the course of the succeeding work is not sufficient to qualify as fraudulent concealment; some further evidence of knowledge of concealment is necessary.

7.58 The English *Limitation Act, 1980* on the recommendation of the Orr Committee³²¹ replaced "fraudulent concealment" in s.32 (1)(b) with "deliberate concealment" to make it clear that the section was not referring to fraud at common law but rather to the wider equitable meaning of the word. The English initiative was also followed in New South Wales.³²²

7.59 *The Commission recommends that in section 71(1) (b) that the words "concealed by fraud" should be replaced with the words "deliberately concealed", so that the section would read: "the plaintiff's right of action is deliberately concealed by the defendant"*.

III. Survival of Actions

A. *Survival of Certain Causes of Action Vested in the Deceased*

Present Position

7.60 Under the present law any cause of action which is vested in a person before his death is transmitted to his estate and his personal representatives may take an action on behalf of the estate.³²³ S.7.1 of the *Civil Liability Act, 1961* provides that:

"On the death of a person on or after the date of the passing of this Act all causes of actions (other than excepted causes of action) vested in him shall survive for the benefit of his estate."

Since there is no provision for a special limitation period for actions surviving for the benefit of the deceased's estate, the ordinary limitation period starting at the date of accrual applies. In circumstances where the six year accrual limitation period is still running at the date of death, the remainder will continue to run against the personal representative.

7.61 A practical problem may arise where there is a delay in appointing the personal representative and most of the limitation period has already run at the date of death. However, any exception in this situation would be open to abuse, as it would enable a

³²⁰ *William Hill Organisation Ltd v. Bernard Sunley & Sons Ltd* (1983) 22 Build LR 1.

³²¹ Orr Committee Report (1977) paras. 2.23-2.24.

³²² *Limitation Act, 1985* ss. 33-34.

³²³ The damages which can be claimed on behalf of the estate exclude exemplary damages, or damages for any pain and suffering or personal injury or for loss or diminution of expectation of life or happiness.

plaintiff to postpone the limitation period indefinitely simply by not appointing a personal representative. The Commission does not recommend that any exception be made in this situation.

Impact of the Discoverability Test

7.62 In this regard three possible situations present themselves for consideration:

- (a) The discoverability limitation period expires before the death of the person with a cause of action, and there have been no proceedings instituted.

This first possibility does not present any real difficulty, as the cause of action would be statute-barred before his death and should remain barred after his death.

- (b) The discoverability limitation period is still running at the date of the death of the person who has suffered the loss.

In this situation the personal representative will acquire the claim with the limitation period already running against him. The knowledge of the deceased is imputed to the personal representative.³²⁴ This particular situation is also dealt with in our *Personal Injury Report*, where the recommendation, (adopted in the *Statute of Limitations (Amendment) Act, 1991*), is very favourable towards the deceased's estate:

“We consider that, where a person injured dies before the expiration of the limitation period the period applicable in both ‘discoverability’ and ‘non-discoverability’ cases as respects the cause of action surviving for the benefit of his estate by virtue of s.7 of the *Civil Liability Act, 1961* should be three years from the date of death or the date of discoverability by the personal representative, whichever is the later.”³²⁵

However, the Commission is of the opinion that where physical damage as opposed to personal injury is the basis of the action, such a generous provision is much less justifiable.³²⁶ Therefore the Commission does not recommend any change in the law in this regard.

³²⁴ Just as in the case of subsequent purchasers the knowledge of the predecessor owner is imputed to the successor owner. See Chap.6.

³²⁵ Law Reform Commission, *Report on The Statute of Limitations: Claims in Respect of Latent Personal Injuries* (No. 21, 1987) at 50.

³²⁶ Both the Alberta Law Reform Institute in its *Report on Limitations* (No. 55, 1989) at 63 and the Western Australia Law Reform Commission in its *Report on Limitations and Notice of Actions* (No. 36 Part II, 1997) at para. 22.24 aim to give either the deceased or the personal representative a full discovery period. In cases where the limitation period has not expired before the death of the deceased, the full limitation period will not start to run against the personal representative until the cause of action becomes discoverable by him, but in cases where he had knowledge of it before his appointment time will run from the date of his appointment.

- (c) The discoverability limitation period has not started to run at the date of death.

The only way this situation can be dealt with is by providing that the discoverability limitation period will run against the plaintiff's personal representative from when it becomes discoverable to him. This would be subject to the 10 year long-stop.

B. Survival of Certain Causes of Action Subsisting against the Deceased

Present Position

7.63 S. 8 of the *Civil Liability Act, 1961* provides that, on the death of a person, all causes of action subsisting against him shall subsist against his estate. S.9 (2) contains an express provision concerning limitation periods in relation to such claims:

“No proceedings shall be maintainable in respect of any cause of action whatsoever which has survived against the estate of a deceased person unless either

- (a) proceedings against him in respect of that cause of action were commenced within the relevant period and were pending at the date of his death, or
- (b) proceedings are commenced in respect of that cause of action within the relevant period or within the period of two years after his death whichever period first expires.”

Impact of Discoverability

7.64 Since it is concerned with the perspective of the plaintiff, discoverability, does not affect the provision, except that the 'relevant period' referred to in (b) above, will now also refer to the 3 year discoverability period.

7.65 In summary, we recommend no change in the limitations law as regards either causes of action vested in the deceased which are taken by his estate, or causes of action subsisting against the deceased and taken against his estate.

CHAPTER EIGHT: SUMMARY OF RECOMMENDATIONS

Chapter Two: The Discoverability Test

The Commission recommends that the discoverability limitation period commence when the claimant first knew or in the circumstances ought reasonably to have known of the elements listed in the discoverability formula. (*para. 2.29*)

The Commission recommends that the discoverability limitation period should be applicable to all actions for breach of duty whether the breach occurs in tort, contract, statute or independent of any such provision, except that this should not include libel, slander, and injurious falsehood. (*para. 2.40*)

The Commission recommends that the Alberta Limitations Act, 1996 model, be taken as the model for the drafting of the discoverability test. See Appendix 1. (*para. 2.54*)

Thus the Statutes of Limitations 1957-2000 should be amended to include the following:

"An action claiming damage in respect of loss or damage (other than personal injury) caused by a breach of duty whether the duty exists in tort, contract, statute, or independent of any such provision, shall not be brought after the later of either the expiration of:

- (a) six years from the date on which the cause of action accrued; or
- (b) three years from the date on which the person first knew or in the circumstances ought reasonably to have known:
 - (i) that the loss for which the person seeks a remedy had occurred;
 - (ii) that the damage was attributable to the conduct of the defendant; and
 - (iii) that the loss, assuming liability on the part of the defendant, warrants bringing proceedings."

The Commission also recommends that the clause set out below be included in the interpretations section of the draft legislation.

"The Law Reform Commission Report (LRC-64, 2001) may be considered by

any court when interpreting any provision of this Act and shall be given such weight as the court considers appropriated in the circumstances." (See paras. 2.53-2.54)

Chapter Three: Discoverability Combined with the Present Accrual Law

The Commission recommends the following test: the plaintiff may take action within either six years from the accrual of the cause of action (present position) or three years from the date the cause of action is or ought to be discoverable to the plaintiff, whichever expires later. (*para. 3.05*)

Chapter Four: The Long-Stop Period

The Commission recommends that the length of the long-stop should be 10 years. (*para.4.16*)

The Commission recommends that the long-stop start at the date of accrual of the cause of action. (*para. 4.21*)

Chapter Five: Consequences of a Discoverability Test

Separate Incidents of Damage

The Commission is of the opinion that the general rule to be applied should be that the limitation period will start to run from the time the first item of loss resulting from the wrongful act becomes discoverable, and that any other damage which becomes discoverable after that date is part of the original cause of action. The exceptions to the general rule which apply in the context of accrual should also apply here to the extent that they are accepted by the Irish courts. (*para.5.13*)

Successive Purchasers

It appears that there is no substantive rule in Irish law which prevents a claim in tort for damage to property where the plaintiff had no interest in the property at the time of the damage being inflicted. Nonetheless, the Commission is of the view that in order to put the matter beyond doubt there should be legislation to this effect. (*para.5.20*)

The Commission recommends that the limitation period should start to run against a successor owner of a claim when it is or ought to be discoverable by either a predecessor or the successor owner of the claim. (*para.5.34*)

Discoverability and Equitable Reliefs

The Commission does not recommend any change to the existing statutory legislation which excludes specific performance, injunctions and other equitable reliefs from the purview of the Statute of Limitations. (*para.5.37*)

Burden of Proof

In summary, it is established at common law that when there is joinder of issue the burden of proving that proceedings in respect of a cause of action were brought within the limitation period³²⁷ is on the plaintiff. The Commission is of the view that this is and should remain the position in this jurisdiction. However, because the incidence of the burden of proof is an area of law better left to development by the courts and one where a degree of flexibility in the law is necessary, we do not recommend legislation. (para.5.45)

In respect of the provisions relating to postponement of the limitation period due to legal incapacity, fraud or mistake, the onus is on the plaintiff in each case to prove that the limitation period has been postponed because of the existence of one of these factors. The Commission is of the view that this is the correct approach and does not recommend any change in the law. (para.5.46-5.47)

The Commission recommends that the burden of proving that proceedings in respect of a cause of action were brought within the discoverability limitation period should be on the plaintiff. The Commission is of the view that legislation to this effect is not required. (para.5.49)

Transitional Provisions

The Commission recommends that the proposed law in relation to latent damage should apply to actions which accrue only after it comes into force. (para.5.59)

Chapter Six: Accrual of Causes of Action- Starting Point for the Long-Stop

Construction Industry Claims

The Commission recommends that in construction liability claims, a cause of action in contract should accrue for all the participants in the construction process at the date of completion or purported completion. (para.6.18)

The Commission also recommends that in construction liability claims,³²⁸ the starting point of the long-stop for construction liability claims in both tort and contract should be the date of completion or purported completion. (para 6.41.)

The Commission also recommends that construction liability claims be defined as follows:

Construction liability claims are claims arising from all construction operations. Construction operation means, an operation of any of the following descriptions-

³²⁷ In limitation cases even where the plaintiff does not deliver a reply to a limitations defence, there is an implied joinder of issue. See the Rules of the Superior Courts: Order 19 rule 18; Order 23 rule 1; Order 27 rule 14.

³²⁸ See definition at para.6.44.

- (a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form part of the land (whether permanent or not);
- (b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land including (without prejudice to the foregoing) walls, roadworks, tunnels, bridges, power-lines, telecommunications apparatus, aircraft runways, docks and harbours, railways, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;
- (c) installation in any building or structure of fittings or structures forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;
- (d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;
- (e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works. (*para.6.44*)

Chapter Seven: Special Cases

Legal Incapacity

The Commission recommends that s.48(1)(c) should be removed from the *Statute of Limitations, 1957*. (*para.7.04*)

The Commission recommends that the term “disability” in s.49 should be replaced with the term “legal incapacity”. (*para.7.07*)

The Commission is of the view that unsoundness of mind should be replaced with a definition of disability along the lines of the Canadian model. Thus s.48(1)b should be amended to read “where a person is incapable of the management of his affairs because of disease or impairment of physical or mental condition.” (*para.7.13*)

The Commission recommends that if on the date when any right of action for which a limitation period is fixed by this act, became discoverable, and the person to whom it became discoverable was under a legal incapacity, the action may be brought at any time before the expiration of three years after the legal incapacity has

ceased. (para. 7.15)

The Commission recommends that the legislation should be changed to allow a supervening legal incapacity to suspend the accrual and the proposed discoverability limitation periods. (para. 7.20)

The Commission recommends that in cases where either the accrual or the discoverability limitation period is postponed under s.49 due to 'unsoundness of mind'; there should be a 30 year long-stop for physical damage claims. (para. 7.24)

The Commission recommends that in cases where either the accrual or the discoverability limitation period is postponed due to minority, there should be a long-stop of 10 years commencing when the plaintiff reaches the age of majority. (para. 7.26)

The Commission recommends that legislation along the lines of the *Dependent Adults Act, 1980* in Alberta, or the *Guardianship and Administration Act, 1990* in Australia be enacted in this jurisdiction. (para. 7.30)

The Commission recommends that the limitation period should not be postponed unless the person under a legal incapacity can show that at the time of the incapacity he was not in the custody of a parent or guardian. However, until the appropriate legislation concerning incapacitated adults is enacted, this recommendation can only apply to minors. (para. 7.32)

The Commission recommends that the limitation period should be suspended where an action is brought by the claimant against the claimants parent's or guardian, for a cause of action which occurred when the claimant was a minor. (para. 7.35)

Fraud and Mistake

The Commission recommends that ss.71 and 72 of the *Statute of Limitations, 1957* be retained. (para. 7.43)

The Commission recommends that a supervening fraudulent concealment should suspend only the remainder of the limitation period, until the fraudulent concealment becomes discoverable. (para. 7.50)

The Commission recommends that a long-stop should not be applicable to s.71(a) or (b). (para. 7.52)

The Commission recommends that a long-stop of 30 years be applied to the postponement of the primary limitation period under s.72. (para. 7.54)

The Commission recommends that in s.71(1) (b), the words "concealed by fraud" should be replaced with the words "deliberately concealed", so that the section would read: "the plaintiff's right of action has been deliberately concealed by the defendant". (para. 7.59)

In summary, we recommend no change in the limitations law as regards either causes of action vested in the deceased which are taken by his estate, or causes of action subsisting against the deceased and taken against his estate. (*para.7.65*)

APPENDIX 1: DRAFT LEGISLATION

STATUTE OF LIMITATIONS (AMENDMENT) ACT

An Act to amend and extend the Statute of Limitations, 1957, by making new provisions as regards the date from which the period of limitations is to run in respect of actions for certain loss and damage (not being loss and damage for personal injuries), and to amend related provisions in other statutes, and to provide for other matters connected therewith.

Be it enacted by the Oireachtas as follows:

PART I

PRELIMINARY AND GENERAL

1. (1) This Act may be cited as the Statute of Limitations (Amendment) Act 2001.
(2) This Act shall not apply to any cause of action accruing before its passing.
(3) The Principal Act, the 1991 Act, the 2000 Act and this Act shall be construed as one, and may be cited together as the Statutes of Limitations.

2. (1) In this Act -

"The Principal Act" means the Statute of Limitations, 1957.

"The 1991 Act" means the Statute of Limitations (Amendment), Act 1991.

"The 2000 Act" means the Statute of Limitations (Amendment) Act, 2000.

"Damage" in Part I and II of this Act means loss or damage caused by a breach of duty, whether the duty exists in tort, contract, statute or independent of any such provisions, except that it does not include loss or damage caused by libel, slander or injurious falsehood.

"Personal representative" includes any person who is or has been a personal representative of the deceased, including an executor who has not proved the will (whether or not that person has renounced probate).

"Construction claim" means a claim for damages for loss or damage arising from all construction operations which include:

- (a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form part of the land (whether permanent or not);

- (b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land including (without prejudice to the foregoing) walls, roadworks, tunnels, bridges, power-lines, telecommunications apparatus, aircraft runways, docks and harbours, railways, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;
- (c) installation in any building or structure of fittings or structures forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;
- (d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;
- (e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works.

(2) For the purposes of this Act a construction claim in contract accrues on the date of the issue of the certificate of practical completion, or on the date of purported completion of the building work where no such certificate is issued.

(3) The Law Reform Commission Report (LRC-64, 2001) may be considered by any court when interpreting any provision of this Act and shall be given such weight as the court considers appropriate in the circumstances.

PART II

PERIODS OF LIMITATION FOR NON-PERSONAL INJURY ACTIONS

3. (1) An action claiming damage in respect of loss or damage (other than personal injury) caused by a breach of duty whether the duty exists in tort, contract, statute, or independent of any such provision, shall not be brought after the later of either the expiration of:
- (a) six years from the date on which the cause of action accrued; or
 - (b) three years from the date on which the person first knew or in the circumstances ought reasonably to have known:
 - (i) that the loss for which the person seeks a remedy had occurred;
 - (ii) that the damage was attributable to the conduct of the defendant; and
 - (iii) that the loss, assuming liability on the part of the defendant, warrants bringing proceedings.

- (2) Notwithstanding subsection (1), no claim to which subsection (1) applies shall be brought later than 10 years after the date on which the cause of action accrued.
- (3) Notwithstanding subsections (1) and (2), a construction claim cannot be brought more than 10 years after the date of issue of the certificate of practical completion in respect of the construction operation or, the date of purported completion of the construction operation in cases where no certificate of practical completion is issued.
- (4) Section 11(2) of the Principal Act as amended by the 1991 Act is hereby amended by the substitution of the following paragraph for paragraph (a):

" Subject to section 3(1) of the Statute of Limitations (Amendment) Act, 1991, and to sections 3 (1), (2), and (3) of the Statute of Limitations (Amendment) Act, 2001, an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."
4. (1) Notwithstanding section 11 (2)(d) (inserted by section 13(8) of the Sale of Goods and Supply of Services Act, 1980) of the Principal Act, an action for damages under section 13(7) of the Sale of Goods and Supply of Services Act 1980, shall not be brought after the expiration of two years from the date on which the cause of action accrued, or the appropriate date in section 3(b), whichever is later.

(2) The reference in section 21(4) of the Control of Dogs Act 1986, to section 11(2) (b) of the Principal Act as amended by the 1991 Act shall be construed in actions for damage as a reference to subsection (1) of this section.
5. It shall not be a bar to an action for damage to property that the plaintiff had no interest in the property at the time at which the damage occurred or became discoverable.
6. The limitation period provided by section 3(1)(b) begins
 - (a) against a successor owner of a claim when either a predecessor owner or the successor owner of the claim first knew or ought reasonably to have known, the matters set out in subparagraphs (i)-(iii) of section 3(1)(b), whichever is the earlier
 - (b) against a personal representative of a deceased person as a successor owner of a claim, when either the deceased or the personal representative first knew or in the circumstances ought reasonably have known, of the matters set out in subparagraphs (i)-(iii) of section 3(1)(b), whichever is the earlier.

PART III

EXTENSION OF LIMITATION PERIODS IN CASE OF LEGAL INCAPACITY, FRAUD AND MISTAKE

7. The term 'disability' as it appears in the Statutes of Limitation 1957, 1991 and 2000, is replaced by the term 'legal incapacity'.
8. Section 48 of the Principal Act is hereby amended by the substitution of the following subsection for subsection (1):

"(1) For the purposes of this Act, a person shall be under a disability while-

(a) s/he is a minor who is not under the actual custody of a parent or guardian, or

(b) s/he is incapable of the management of his/her affairs because of disease or impairment of his/her physical or mental condition."

9. Section 49(1) of the Principal Act is hereby amended by the substitution of the following paragraph for paragraph (a) :

"(a)(i) If on or after the date when a limitation period fixed by this Act commences, the plaintiff is under a legal incapacity, subject to the subsequent provisions of this section, the limitation period, or in circumstances where it has already commenced, the remainder of the limitation period, is suspended until such time as the legal incapacity ceases or the plaintiff dies.

(ii) Notwithstanding subparagraph (1), no claim to which subparagraph (1) applies may be brought after 30 years from the date the cause of action accrued.

(iii) Where the limitation period is suspended under subsection (i) because the plaintiff is a minor who is not under the actual custody of a parent or guardian, no claim may be brought later than 10 years from the date the cause of action accrued.

(iv) Where an action is brought by the plaintiff against the plaintiff's parent or guardian, and the claim arose while the plaintiff was a minor, the operation of the limitation period fixed by this Act shall, subject to subparagraph (iii), be suspended during the period that the plaintiff is a minor."

10. Section 71 of the Principal Act shall be amended by the substitution of the following subsection for subsection (1):

"(1) Where, in the case of an action for which a period of limitation is fixed by this Act, either-

- (a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agents, or
- (b) the plaintiff's right of action has been deliberately concealed by any such person,

the period of limitation shall not begin to run until the person has discovered the fraud or could with reasonable diligence have discovered it."

11. Section 72 of the Principal Act is hereby amended by the substitution for that section of the following section:

"72(1) Where, in the case of any action for which a period of limitation is fixed by this Act, the action is for relief from the consequences of mistake, the period of limitation shall not begin to run until the plaintiff has discovered the mistake or could with reasonable diligence have discovered it.

(2) Notwithstanding subsection (1), no action shall be brought after the expiry of 30 years from the date the cause of action accrued."

(3) Nothing in subsection (1) or (2) of this section shall enable any action to be brought to recover, or enforce any charge against, or, set aside any transaction affecting, any property which has been purchased for valuable consideration, subsequent to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake was made."

APPENDIX 2: ACKNOWLEDGEMENTS

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Persons who forwarded submissions:

Eoin Quill
University of Limerick

Fiona Barry
William Fry Solrs.

Elma Lynch
Solicitors' Mutual Defence Fund Ltd

Des Byrne
Irish Mortgage & Savings Association (IMSA)

Charles Lysaght
Barrister -at- Law

John Graby
Royal Institute of the Architects of Ireland (RIAI)

Mike Jones
Construction Industry Federation (CIF)

Daniel B. McCrystal
Consultant Quantity Surveyor

Denise O'Connor
McCann FitzGerald Solrs.

Michael McCarthy
Department of the Environment and Local Government

Irene McMahon

**Persons present at the Seminar on 23rd of March 1999: The Statutes of Limitation:
Claims in Contract and Tort in Respect of Latent Damage (other than Personal
Injury)**

Michael Green
Construction Industry Federation

Eimer O' Rourke
Irish Mortgage and Savings Association

Dan McCrystal
Architects' and Surveyors' Institute

David Keane
Architects' and Surveyors' Institute

Eoin Quill
University of Limerick

Dr Gerard Quinn
University College Galway

Eoin O' Dell
Trinity College, Dublin

Michael Foster
Law Reform Advisory Committee for Northern Ireland

Michael O' Reilly
McCann FitzGerald Solicitors

Helen Collins
McCann FitzGerald Solicitors

Elizabeth Crilly
McCann FitzGerald Solicitors

Denise O' Connor
McCann FitzGerald Solicitors

John Molloy
Solicitor

Greg O' Neill
Brophy Solicitors

Hugh O'Neill
Solicitor

Elma Lynch
The Solicitors' Defence Fund

Fiona Barry
William Fry Solicitors

Imelda Tierney
Arthur Cox Solicitors

Peggy O' Rourke
Arthur Cox Solicitors

Tony Williams
Matheson Ormsby Prentice Solicitors

Owen McIntyre
Law Society of Ireland

The Hon Mr Justice Budd
High Court

Her Honour Judge Yvonne Murphy
Circuit Court

Rex Mackey
Senior Counsel

Charles Lysaght
Barrister -at- Law

Persons who assisted the Commission on other Occasions

Anthony Kerr
Barrister -at- Law, University College Dublin



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