SOUTH AUSTRALIA

TWELFTH REPORT

of the

LAW REFORM COMMITTEE
of
SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

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LAW RELATING TO LIMITATION OF TIME FOR BRINGING ACTIONS

1970

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The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The Members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*
S. J. JACOBS, Q.C.
K. P. LYNCH.
J. F. KEELER.

The Secretary of the Committee is Mr. H. G. Edwards, c/o Adelaide Magistrates' Court, Adelaide, South Australia.

TWELFTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA

To:

The Honourable L. J. King, Q.C., M.P.,
Attorney-General for South Australia.

Sir,

In consequence of a direction from your predecessor we have considered the question of the reform of the law in South Australia relating to the desirability of amending the law relating to limitation of actions to provide for extension of time for bringing actions. This inevitably involved the consideration of allied topics such as notices of action and disabilities due to infancy or lunacy.

We have already reported on portion of the topic assigned to us in the Third Report of the Committee relating to the extension of time for bringing actions for Testator's Family Maintenance. This Report deals with the balance of the topic assigned to us.

Since the topic was assigned to us, section 69 of the Workmen's Compensation Act, 1932-1969, has been partially amended. We have considered the topic further as we feel that further reform of this section is necessary, but it may be that as a matter of general policy the Government will prefer to see this dealt with in a comprehensive workmen's compensation statute rather than in a Limitation of Actions Act Amendment Bill and we have simply included our observations on this topic in case they may be of some assistance when this part of the workmen's compensation law comes to be considered.

The position is that at present in South Australia there is no general Act relating to the extension of time for bringing actions.

In England the law was altered in 1963 by the Limitation Act, 1963, Chapter 47 to grant powers to the Courts to extend the time for bringing actions in certain classes of actions but not in others.

We feel that this reform does not go far enough and in any case has already been productive of considerable litigation and some of the decisions, without analysing them in detail, have been rather restrictive in their application, such as *Goodchild v. Greatness Timber Company Limited* 1968 2 *Q.B.* 372. Accordingly we feel that a wider approach would be more beneficial and that is the approach which is adopted in the recommendations which follow hereunder. In those recommendations we deal first with the question of a general power to extend actions and then with specific problems arising as a result of specific situations.

A. With regard to the general power to extend the time for bringing actions, we recommend that a section be inserted in the Limitation of Actions Act, 1936-1959, generally in the terms of sections 1, 2 and 3 of the English Act, but with the following alterations:—

(*a*) As to section 1, we recommend that the power to extend time be given in relation to any cause of action arising in any jurisdiction of the Court (other than conferred Federal jurisdiction);

(*b*) That the words "of a decisive character" in subsection (3) of the English section 1 be deleted and the words "relating to the cause of action" be inserted;

(*c*) That the words "(actual or constructive)" be deleted from subsection (3) and the word "actual" inserted.

B. In section 2 the words "(actual or constructive)" in subsection (3) should again be deleted and the word "actual" inserted. The reason for the proposed deletion in both cases is that "constructive notice" would include the knowledge of the party's solicitor whereas it is quite frequently the mistake of the solicitor against which the proposed plaintiff wishes to be relieved in making an application for extension of time.

C. Section 3 will require modification both as to the references as to the statutory provisions and also to include references to claims for solatium which are of course not available in England.

Consequential alterations will need to be made also in subsequent sections of the English Act.

We turn now to specific Statutes and parties.

(1) *The Crown.* At present actions against the Crown fall into four classes—

(i) those which have to be brought by petition of right;

(ii) those which can be brought by action against a Minister of the Crown incorporated under the Ministers Titles Act, 1944, or against a body corporate representing the Crown;

(iii) actions against the public servant alleged to be responsible in cases where there is no body corporate to be sued;

(iv) those which are brought against any of the multifarious instrumentalities of the Crown.

As far as petitions of right are concerned, we are of the opinion that these are outmoded today and that the Crown in right of the State of South Australia should be sued simply as "The State of South Australia" in the same way as an action between subject and subject, and as now obtains in actions against the State based on a cause of action arising under sections 75 and 76 of the Commonwealth Constitution.

We do not recommend any alteration in the incorporation sections of the Ministers Titles Act as these serve purposes other than litigation. However, we would like to suggest that at some convenient time the whole question of suing incorporated bodies representing the Crown (including Ministers incorporated as corporations sole) should be reviewed. We think it would be better if the defendant in every such case was simply sued as "The State of South Australia".

The rights of action given against Ministers or public servants where the activities of a particular Government Department are involved and those given against many governmental and semi-governmental bodies are contained in a wide variety of Statutes with a wide variety of provisions. Most of them (but not all) provide for notice of action to be given within a short period of the accrual of the cause of action followed

by another short period of limitation of actions. Many of these are copied from the various English Public Authorities Protection Acts which have now been swept away in England by the Crown Proceedings Act, 1947.

The present position in this State with regard to notices of action and limitations of action in this field is contained in the Act No. 33 of 1959 No. 2 which inserts a new section 47 into the Limitation of Actions Act providing for a general provision requiring notice of action to be given within six months and action to be taken within twelve months with a proviso excusing the not giving notice of action within six months in certain well known contingencies.

In our opinion, all of this ought to be swept away. The Crown does not need notice of action today. The whole of this concept relates back to a time when an inferior servant of the Crown could not plead the ~~supervisor's~~ orders and when the Crown did not indemnify its servants against judgments given against them. The Crown normally has perfectly good information on the subject at issue and certainly has the best means in the State of obtaining it through the Police Force. Notices of action simply act as a trap for the unwary and the badly injured. As far as concerns the time within which actions are to be brought against the Crown or any instrumentality of the Crown we are of opinion that these should simply be assimilated to the normal times for bringing actions against a subject for the same cause of action.

The same considerations apply to procedure under section 719 of the Local Government Act. We see no reason why local governing bodies should not be sued within the same time limits as apply to an action against any other person and we doubt if it was ever the intention of Parliament to provide otherwise but the Full Court decided in *Wignell v. The Beachport District Council* 1911 *S.A.S.R.* 110 that "person" in the relevant section included a council which can only be described as a remarkable piece of statutory interpretation and this interpretation has survived two re-enactments of the Act in 1915 and again in 1934. We recommend that in the case of local governing bodies as in the case of the Crown and instrumentalities of the Crown notices of action be abolished and that the limitation of time for bringing actions against a local governing body be the same as for actions against a subject.

(2) *The Workmen's Compensation Act.* Section 69 of the Workmen's Compensation Act has, as we have said, been amended to sweep away some of the anomalies which were previously inherent in the section but we think that the reform does not go far enough. In our opinion, the notice provision should be swept away entirely as the employer usually knows of the accident as soon as it has happened. If the accident is not reported within a reasonable time, that goes to the credibility of the workman's claim. The limitation on bringing an action should be amended to provide that the workman be given the normal time in which to bring his action (subject to the general leave to extend referred to in paragraph A above) and that what he has received in the meantime for workmen's compensation should be set off against the amount of the judgment obtained in the action. If he fails at common law, then, as at present, the costs of the common law action are set off against his entitlement to redemption or schedule payment as the case may be.

(3) *Actions under sections* 112, 115 *and* 116 *of the Motor Vehicles Act*. Here because of the specific difficulties inherent in these actions particularly in actions against the Nominal Defendant under section 115, we think that notices of action should be retained but that they should not be made a condition precedent to the cause of action. It is our opinion that provision should be enacted that if no notice is given and the plaintiff in evidence fails satisfactorily to explain why he did not give notice as soon as possible after the happening of the event or in any case within such time as would avoid prejudice to the insurer, an inference adverse to the credibility of the plaintiff may be drawn by the Court hearing the action.

(4) *Actions by infants*. At present the position is anomalous in that the only occasion where time does not run against an infant until he attains his majority is where the cause of action is one of those provided for in the Limitation of Actions Act. If the action is brought under the Wrongs Act or under any special Act then time runs against an infant notwithstanding his infancy. This is an absurd result and we recommend that the infancy provisions now in the Limitation of Actions Act should be extended to apply to all causes of action cognoscible by the Courts. We are reinforced in that view by the belief that the age of majority will shortly be reduced in any case to eighteen years so that infants who are really able to look after themselves will no longer be infants for the purpose of the operation of such a section.

We think that disability provisions relating to infancy should relate not only for the time for bringing actions but where notice of action is still retained they should also apply to the notice of action provisions.

(5) *Actions for contribution*. At present there are two difficulties in this field, one arising from the decision of the House of Lords in *George Wimpey & Company Limited v. British Overseas Airways Corporation* 1955 *A.C.* 169 and the second from the well meant attempts to overcome that decision.

We recommend that section 25 (1) of the Wrongs Act be repealed and in lieu thereof the following provisions be inserted.—

That where damage is suffered by any person as a result of a tort (whether a crime or not)—

(*a*) judgment recovered against any tort feasor liable in respect of that damage shall not be a bar to an action against any other tort feasor;

(*b*) if all tort feasors are not joined in the same action and separate actions are brought against different tort feasors the Court shall have a discretion as to whether or not it will allow costs of the second or subsequent actions;

(*c*) any tort feasor who has been adjudged by a Court to be liable to pay damages to any person as a result of the tort and any tort feasor who has settled any claim by such a person out of Court may recover contribution from any other person from whom the plaintiff could at any time have claimed the whole or any part of such damages (including in the relevant cases an insurance company or the Nominal Defendant);

(*d*) any such action for contribution may be brought either—

(i) in the proceedings by the plaintiff against one tort feasor;

(ii) by contribution notice between tort feasors where the plaintiff sues two or more of them in the same action;

(iii) by separate action by one tort feasor claiming contribution from another. Such an action shall be brought within two years after the date of judgment or settlement as the case may be.

(*e*) "tort feasor" should be defined to include joint, several, concurrent and independent tort-feasors and also to include the Crown, any instrumentality of the Crown, any local governing body, the Nominal Defendant and an insurance company sued under Part IV of the Motor Vehicles Act;

(*f*) no claim for contribution shall be liable to be defeated by the operation of the rules of the common law relating to the unity of the spouses during marriage.

Since writing this report as a draft we have had the advantage of reading a report by the learned Solicitor-General on this matter. We agree with his conclusions and suggest that a new subparagraph iv be added to subclause (*d*) reading—

"(iv) by a tort feasor against whom no claim has been made by the plaintiff applying to be joined as a defendant or third party as the case may require in the original action so that the question of contribution can be determined in that action."

(6) *Actions under the Survival of Causes of Action Act*, 1940. This swept away some very ancient learning coming from the time of Edward I but we feel it did not go far enough. Actions by the executor or administrator of a deceased person should be brought within the normal time for bringing actions except that the time for taking action should be suspended from the date of death to the date of the grant of probate or letters of administration as the case may be. Actions against the estate of a deceased person should again be brought within the normal times for bringing actions subject to the fact that they will only bind such assets as were in the hands of the executor or administrator at the time when he received notice of the defendant's claim. This will not hamper the administration of estates because if a trustee wants to compel a plaintiff to either proceed with or abandon his claim he has only to follow the procedure set out in section 29 (2) of the Trustee Act, 1936-1968.

(7) *Lunacy (which for this purpose includes all forms of unsoundness of mind whether so found by inquisition—a rare procedure today—or not)*. Lunacy provides special problems of its own:—first because the person must have been a lunatic at the time when the cause of action arose to stop the time running and secondly because of the confusion for purposes of representation of the lunatic between orders of incompetency and orders of hospitalization. These are dealt with in detail in a study commissioned by the American Bar Association Foundation known as "The Mentally Disabled and the Law" edited by Lindman & McIntyre and the relevant passages which are at pages 219 and 228 of that publication are annexed as an appendix to this Report.

Difficulties arise in relation to lunatics not only in relation to their incompetency to bring actions or to instruct solicitors to bring actions on their behalf but sometimes in relation to their incompetency to make decisions in relation to offers of settlement and the like due either to a defect in reasoning as to the future which is not a general defect in reasoning, or by reason of their suffering from the mental condition known as euphoria as actually happened in this State in the case of *Black v. Mount and Hancock* 1965 *S.A.S.R.* 167. We recommend that in the case of mental disability:—

1. That time shall not run whilst a person is under mental disability whether that mental disability was present at the time when the cause of action accrued or arose during the limitation period.

2. That the same considerations should apply where notices of action have to be given as where actions have to be brought.

3. That lunacy for this purpose be defined as including any state of mind which disables the person concerned from reasoning with normal ability either as to his right to bring an action or to give notice of action, to take any step in connection with an action or to appreciate the considerations involved in accepting or rejecting any offer of settlement.

4. That the rule in *Yonge v. Toynbee* 1910 1 *K.B.* 215 be abrogated by Statute and that in lieu thereof it be enacted that a solicitor's authority to conduct litigation on behalf of a person who becomes mentally infirm although sane at the time when the instructions were given shall continue and shall extend to the doing of all acts beneficial to the person of unsound mind in relation to the action until either Public Trustee by Statute or a next friend by order of the Court has been appointed to represent the person of unsound mind.

Before concluding this Report we desire to express our gratitude and appreciation to the Honourable Mr. Justice Walters and to you Sir as Mr. King Q.C., before you were elevated to your present high office, for the assistance given us by your acting as commentators in relation to this matter.

We have the honour to be

HOWARD ZELLING.
S. J. JACOBS.
K. P. LYNCH.
JOHN KEELER.

Law Reform Committee of South Australia.

CHAPTER EIGHT—INCOMPETENCY, GUARDIANSHIP AND RESTORATION

III. Orders of Incompetency and of Hospitalization Compared

Incompetency and hospitalization are two distinct legal concepts determining separate issues and leading to different results. An order of incompetency and an order for hospitalization in a mental institution fulfil different purposes, but their functions are often confused. The involuntary hospitalization of a mentally disabled individual is usually ordered for one or more of the following reasons: (1) to protect the public against acts of violence: (2) to protect the individual from self-inflicted injury or peril: or, (3) to provide therapeutic measures in order to alleviate his condition. The main purpose of an incompetency determination, on the other hand, is to safeguard the assets of an individual incapable of managing his affairs and to protect his person by methods short of hospitalization when he is unable to care for himself. The confusion between the two legal concepts arose because old cases and statutes used the term "insanity" indiscriminately to describe both concepts.

Even today when the laws speak of an "insane" person, it is often difficult to determine whether the reference is to persons in need of hospitalization or those requiring a guardian to protect their person and property. As long as the statutes continue to designate both classes of persons with the same nomenclature—whether that designation be *"non compos mentis", "mentally ill"* or *"person of unsound mind"*—the confusion will remain. Even separate designations are not adequate unless functional definitions are provided to distinguish the classes to whom the two concepts apply.

One factor tending to cause the merger of the two concepts is that both adjudications result in the loss of rights. In incompetency these lost rights in the main, relate to personal property and, to a limited extent, rights for the protection of the public, *e.g.*, the right to enter into a contract and to drive an automobile. In hospitalization the rights are withdrawn primarily to protect the public and help treat the individual, *e.g.*, the right to be unconfined and to object to standard medical treatment.

Although it has been alleged that incompetency is entirely for the benefit of the individual and the protection of his estate, and that hospitalization is intended for the protection of the public, this distinction does not withstand analysis. Incompetency and guardianship are intended not only to protect the assets of the ward for his own sake but also to prevent him from becoming a financial burden on the public. This is the admitted primary purpose of guardianship in cases of spendthrifts. In other cases of incompetency, it also appears that the State is acting to protect its treasury as well as to protect the assets of the individual. Furthermore, the public has a direct interest in other phases of incompetency. Incompetency not only deprives the individual of power to dispose of his property but also curtails other rights which may be of direct concern to the public, such as that of driving an automobile. At the same time, it is questionable whether the public interest still is the dominant influence in hospitalization. Recent emphasis upon the therapeutic rather than the protective aspect of hospitalization has tended to make this procedure more patient-oriented.

Although there is considerable variation in legislation, in general the main differences between incompetency and hospitalization may be summarized as follows:—

	Incompetency	Hospitalization
Test	Unable to care properly for one's property or person due to one of the following conditions:—	Dangerous to self or others, or in need of treatment due to one of the following conditions:—
Applicable to cases of	Mental illness Mental deficiency Drug addiction Alcoholism Senility Physical disability Spendthrifts	Mental illness Mental deficiency Drug addiction Alcoholism Epilepsy
Purposes	Protect estate from dissipation and provide protection for persons who are unable to care for themselves	Removal from society for protection of the individual or of the society and/or for treatment of the illness
Primary right affected	Civil rights	Freedom to be at large
Comparable to	Legal status of a minor	Person removed from society for a contagious disease

X. Conclusions and Recommendations

1. *The Determination of an Individual's Capacity to Handle His Own Affairs should be Dissociated from the Question of His Need for Hospital Treatment.*

A hospitalized patient may be quite capable of handling certain of his own affairs. Similarly, a person may be incompetent and need a guardian but not be in need of hospitalization. Mental disabilities are of such variety and degree that any automatic connection between incompetency and hospitalization is without justification. Their merger may result in an unnecessary deprivation of personal and property rights. Where necessary, both proceedings may be initiated simultaneously.

2. *In some Jurisdictions the Relationship Between Hospitalization and Incompetency is Unclear.*

There is considerable confusion concerning the competency of hospitalized persons under many State statutes. Where the laws are unclear and the patient's legal status is in doubt, it is difficult for the patient to conduct business and personal affairs.

3. *Alleged Incompetents Should be Represented by Counsel.*

Every alleged incompetent should have the right to be represented by counsel of his own choice. To make this right a realistic one, the court should be required to appoint counsel in the event that the alleged incompetent does not have one. The importance to every citizen of the rights which may be lost as a result of an incompetency determination necessitates the safeguard of representation by counsel.

4. *The relationship Between Discharge and Restoration should be Clarified.*

The confusion between restoration and discharge is largely due to the merger of incompetency and hospitalization. One of the problems is that in many states which merge incompetency with hospitalization the statutes do not clearly state whether restoration automatically results from discharge. Other problems which result when restoration and discharge are merged are: some patients become competent before discharge: conditional discharge does not result in restoration: and some discharged patients may be in fact incompetent even though they have been legally restored to competency.

5. *There should be a Central Statewide Registration of Incompetents.*

At the present time it is difficult for persons to ascertain whether those with whom they intend to transact business have been declared incompetent. To remedy this, each state should establish easily accessible records which list all persons adjudged incompetent by its courts.

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