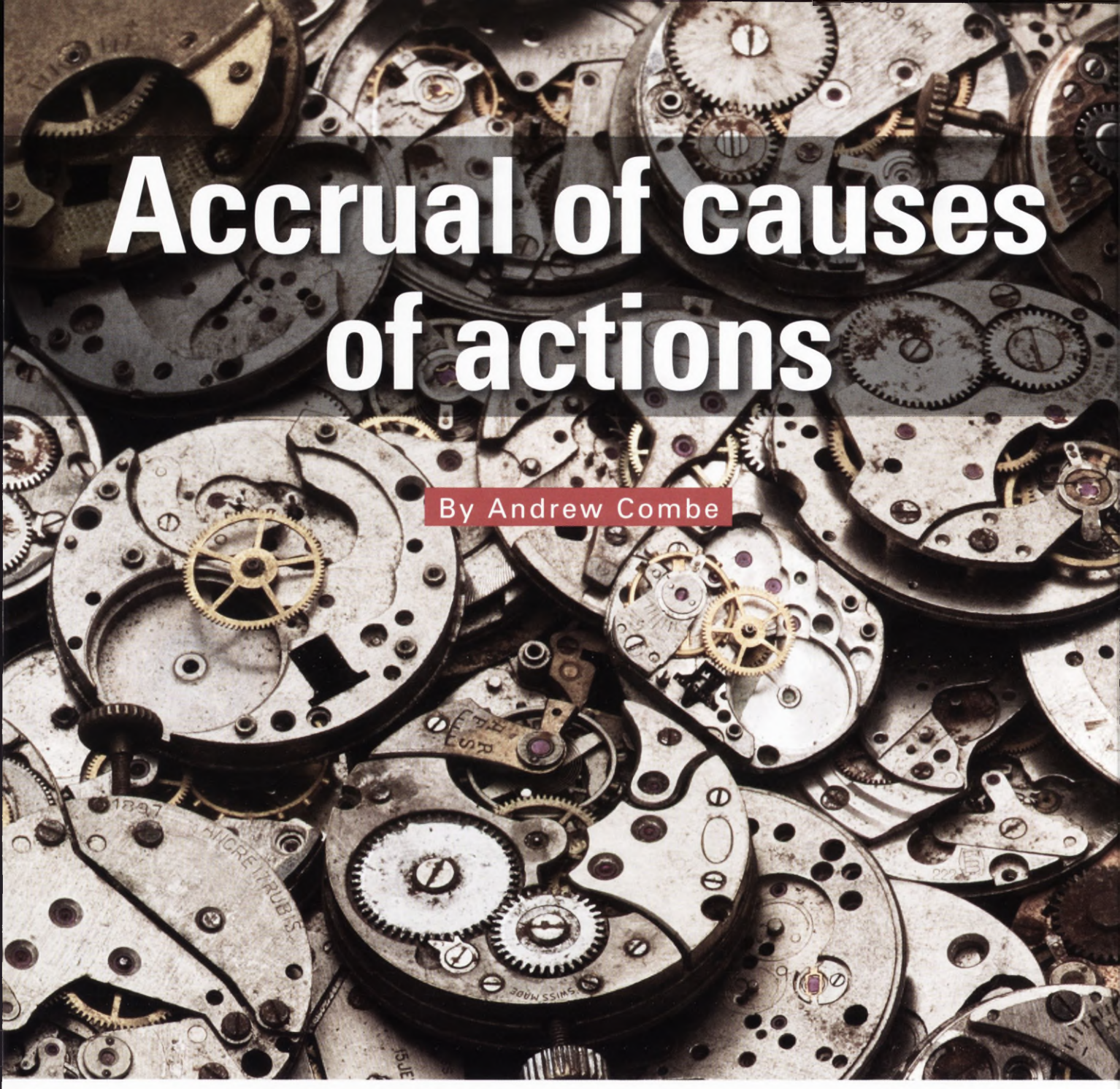

Accrual of causes of actions

By Andrew Combe

Delays in commencing litigation can have a deleterious effect on justice and aggravate the cost of litigation.

As observed by McHugh J of the High Court,[1] there are four broad reasons for imposing time limitations on commencing litigation:

1. Relevant evidence may be lost over time.
2. It may be oppressive to a defendant to allow an action long after the circumstances that gave rise to it have occurred.
3. People, commercial enterprises, insurance companies and public entities have an interest in knowing that their liability will not run beyond a certain time period. That knowledge permits them to 'arrange their affairs and organise their resources on the basis that claims can no longer be made against them'.
4. It is in the public interest that disputes be settled as quickly as possible.

Taking these reasons into account, legislatures have imposed varying limitation periods for the commencement of proceedings.

In NSW, the primary source of limitation periods is the *Limitation Act* 1969 ('the Act'). Each state, the Northern Territory and the ACT have their own equivalents.

LIMITATION PERIODS FOR COMMENCING PROCEEDINGS: 'CAUSES OF ACTION' AND 'ACCRUES'

Section 14(1) of the Act provides a general limitation period for commencing actions founded in contract, tort, recognisance and enactment. This period is six years from 'the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims'. This general limitation may be extended under ss55 and 56 to take into account fraud and mistake, with the limitation period effectively taken to have commenced from the time the plaintiff discovers or should have discovered the fraud or mistake.

Different limitation periods exist for personal injury actions accruing before 1 September 1990; after 1 September 1990 but before 6 December 2002; and after 6 December 2002.

The key to determining which limitation applies is ascertaining when the cause of action first accrues.

'Accrues' is not defined by the Act. 'Action', however, is defined by the Act to include 'any proceeding in a court'. The noun 'action' has been held to be a 'generic' term referring to suits, including those by the Crown.[2] 'Action' therefore encompasses the capacity to bring the proceedings in respect of the relief claimed.

A 'cause of action' has been defined to mean:

> 'every fact which it would have been necessary to prove, if traversed, in order to support [a] right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'[3]

The concept of 'cause of action' does not encompass knowledge of the legal implications of known facts. This knowledge is not a fact forming part of a cause of action.[4] The court, in determining when an action accrues, is concerned with the existence of the facts giving rise to the entitlement to commence proceedings. Neither the knowledge nor the belief of the plaintiff as to an entitlement to bring proceedings is relevant to the question of when a cause of action accrues. Therefore, the court does not consider the point in time when a person obtained legal advice.

WHEN DOES THE CAUSE OF ACTION ACCRUE FOR CONTRACT AND TORT?

In contract, the cause of action accrues when the contract is breached. An action in tort arises when and if a tortious breach of duty results in damage.[5]

Determining whether a cause of action has accrued for the tort of negligence requires proof of the following facts:

1. the existence of the duty of care;
2. a breach of the duty of care; and
3. that actionable damage is sustained as a consequence of the breach.

A cause of action can accrue even if the plaintiff was not aware of the damage, but there must be damage. In the case of *Cartledge*, for example, a worker commenced proceedings that were held to be statute-barred under s2(1) of the *Limitation Act* 1939 (UK). The worker was exposed to silica dust and developed pneumoconiosis, to which he ultimately succumbed. The House of Lords concluded, reluctantly, that proceedings were commenced more than six years after the date the cause of action accrued because the relevant date was not the date the worker knew or ought to have known he was suffering the pneumoconiosis, but the first date of material damage to his lungs. Because of the insidious nature of the disease, this date was some years prior to the first symptoms and signs.[6]

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The general proposition that a cause of action in the tort of negligence accrues when damage is first suffered is now subject to statutory exceptions. This gives people suffering 'latent' injuries or diseases the prospect of extending the time to commence litigation.[7]

For damage to be actionable, it must be 'measurable'.[8] This concept can be problematic. In a case involving a defect in reinforced concrete, it was held that depassivation and corrosion of the steel reinforcement was not 'significant damage' and was not, therefore, actionable. However, hairline cracks in the concrete caused by the corrosion did constitute 'significant' and therefore actionable damage. The cause of action therefore accrued when the first cracks occurred.[9]

Determining when damage occurred in claims for purely economic loss is further complicated by the need to consider the concepts of 'latent' damages and 'contingent loss'.

'Latent damage' economic loss claims are an exception to the general rule that a cause of action in negligence accrues when damage is first suffered. 'Latent damage' is damage that is not discoverable by 'reasonable diligence'. (When the exercise of reasonable diligence leads to the discovery of a defect, the damage is held to have been sustained.[10]) The effect of this exception is that the date the cause of action accrues can be much later than the date of completion of a contract for sale of property or completion of building works. The rationale behind this exception is that, prior to the discovery of a latent defect, the owner of such property can 'honestly sell for its market value, and if he did, he would suffer no economic loss'.[11]

There is a distinction between 'latent' defects and inherent defects, which are ascertainable by reasonable diligence prior to the purchase of a property. Where a purchaser could readily ascertain apparent defects (such as failure to use a waterproof membrane in a concrete slab or to install drainage to specification) by reasonable inspection but fails to do so, the defects are not 'latent'.[12]

In the instance of an alleged defect in title, the 'latency' of the defect may be in issue. To establish a latent defect in title, >>

it is necessary to show that the defect was not discoverable by 'normal conveyancing procedures'.[13] An example of a latent defect in title not discoverable by normal conveyancing procedures was an easement on the title over a residential property that was not recorded on the certificate of title but was recorded on the certificate of title of a dominant tenement. The easement could be discovered on inspection of the certificate of title of the dominant tenement, but such inspection was not part of normal conveyancing procedures. This was despite the fact that title was taken subject to unregistered easements. The defect became discoverable (and therefore a cause of action) when the easement was registered on the title.[14]

'Contingent loss' occurs when a transaction gives rise to a risk of loss (as opposed to an actual loss). An example is the provision of an indemnity based on a misrepresentation. The risk of the loss is contingent on the indemnity being called upon. In such an instance, the provider of the indemnity suffers 'no actual damage until the contingency is fulfilled and the loss becomes actual. Until that occurs, the loss is prospective and may never actually occur.'[15]

ONGOING AND DISTINCT 'CAUSE OF ACTION' ARISING OUT OF SOLICITOR/CLIENT RELATIONS

In professional relationships, a contractual duty and a duty of care may be ongoing and the breaches similarly ongoing. A new cause of action may arise with each new occurrence of the breach and accrual may be held to occur up until the last occasion of a breach.

For example, a solicitor may be under a contractual duty of retainer and a duty of care to locate the executor of a will and notify him of the contents of the will. Failure of the solicitor to take necessary steps to locate the executor may constitute a breach of those duties. Each day of the failure to take the necessary steps constitutes a new breach of the duties of retainer and of care. The breaches would arguably continue until the date that steps to find the executor are put into place. Damages for the breach are measurable when the Stamp Duties Office imposes a fine for late lodgement of the death duty return.[16]

The cause of action by a client against a solicitor arises where the solicitor fails to act expeditiously on instructions. Where a client has a cause of action, the solicitor is in breach of a duty of retainer and a duty of care for failure to commence proceedings within the limitation period relevant to that cause of action. The client can then claim against the solicitor in both contract and tort with the cause of action in tort accruing when measurable damage is first suffered. The cause of action for a failure to commence proceedings is limited to six years from the date of the last breach of the duty owed by the solicitor.[17] That date is the limit for commencing proceedings in respect of which the client initially instructed the solicitor.

Where the solicitor fails to apply for an extension of a relevant time period for the original cause of action, a new cause of action arises for breach of a duty of retainer and duty of care to apply to extend the limitation period. This new cause of action has its own limitation period.[18] This new cause of action has damages measurable as the 'loss of chances of obtaining an extension of the limitation period and then of recovering damages on the original cause of action'.[19] This new cause of action is particularly clear where a solicitor fails to act on express instructions to apply for an extension of the limitation period, although such express instructions are not 'essential' in a cause of action against the solicitor.[20]

The factual basis for determining whether a fresh cause of action arises from a continuing duty of retainer and a duty of care owed by a solicitor is not settled. In NSW, several judges have concluded that the issue may be determined by considering whether a 'fresh breach causes loss going beyond the loss resulting from the barred cause of action'.[21] In the alternative, the issue may be determined by whether the causes of action arise from 'distinct' factual situations that give rise to separate remedies.[22] Lastly, it may be determined by whether there has been a 'separate breach of a duty of care'.[23]

It is difficult to reconcile these competing judicial views, as they reached the same conclusions, albeit via different processes. Ultimately, whether ongoing breaches of an ongoing duty in contract and tort result in new causes of action requires a complete review of all of the facts of the case, especially the claim for damages.

CONCLUSION

Limitation periods under s14 of the Act commence from the date that the 'cause of action' 'first accrues'. With the pressures of modern commercial life and legal practice, a practical familiarity with limitation periods and the concepts underpinning them is therefore essential. ■

For damage to be actionable, it must be 'measurable'.

Notes: **1** *Brisbane South Regional Authority v Taylor* (1996) 186 CLR 541 at 552-553. **2** *Bradlaugh v Clarke* (1883) 8 App Cas 354. **3** *Coburn College* [1897] 1 QB 702 per Lord Esher MR at 707; see also *Argyropoulos v Layton and Anor* [2002] NSWCA 183 (20 June 2002) per Santow JA at [42]-[43]. **4** *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234 per Wilson J at 245. **5** *Hawkins v Clayton* (1988) 164 CLR 539 per Deane J at 583. **6** *Cartledge (Widow and Administratrix of the Estate of Fred Hector Cartledge (deceased) and Ors v E Jopling and Sons Ltd* [1963] 1 All ER 341. **7** See, for instance, ss60G and 60I within division 3 of the Act. **8** *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 531. **9** *Bromley v LBC v Rush & Tompkins Ltd* (1985) 4 Con LR 44. **10** *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 503-505; *Hawkins v Clayton, ibid* at 588. **11** *Sheldon v McBeath* (1993) Aust Torts Rep 81-209 per Handley JA at 62,083. **12** *Woollahra Council v Sved* (1996) 40 NSLWR 101 per Clarke JA at 133. **13** *Scarcella v Lettice* (2001) Aust Torts Reports 81-589 per Handley JA at 66,479. **14** *Christopoulos v Angelos* (1996) 41 NSWLR 700. **15** *Wardley Australia Ltd v Western Australia, ibid.* **16** *Hawkins v Clayton, ibid* per Deane J at 589. **17** Section 14(1) of the Act; *Argyropoulos v Layton and Anor* [2002] NSWCA 183 (20 June 2002) per Handley JA at [5]. **18** *Argyropoulos v Layton and Anor, ibid* at [6]; see also Santow JA at [58]; see also *Wilson v Rigg* [2002] NSWCA 246 (26 July 2002) per Giles JA. **19** *Argyropoulos v Layton and Anor* per Handley JA at [6].**20** *Wilson v Rigg* per Giles JA at [54]. **21** *Hawkins v Clayton* (1986) 5 NSWLR 109 per Glass JA at 124-125. The decision of the NSW Court of Appeal in *Hawkins v Clayton* was overturned by the High Court, but the principle identified by Glass JA arguably still applies. It was adopted by Handley JA in *Argyropoulos v Layton and Anor.* **22** *Argyropoulos v Layton and Anor* per Santow J at [43], [58]. **23** *Wilson v Rigg* per Giles JA at [48].

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