THE RETROSPECTIVE EFFECT OF *LIMITATION ACT* AMENDMENTS AFFECTING SUBSTANTIVE RIGHTS — OR IS IT PROCEDURE?

by

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It has always been difficult for lawyers to predict judicial reaction to statutes which alter the consequences of the passing of time when those consequences must be related to events which happened before the amending legislation. F. A. R. Bennion's *Statutory Interpretation Codified, with a Critical Commentary*[1] in dealing with the retrospective operation of procedural provisions has a special comment on *Limitation Acts*. It is this. 'Provisions laying down limitation periods fall into a special category. Although *prima facie* procedural, they are capable of effectively depriving persons of accrued rights. From the point of view of retrospectivity, they therefore need to be approached with care.'[2]

In the majority of cases Parliament omits any explicit guidance, and as Sir Owen Dixon C.J. remarked in *Maxwell* v. *Murphy*[3] 'the interpretation can hardly be accomplished by attempting to extract from the terms of that enactment an actual meaning or intention .... the interpretation must depend upon presumption or rules of construction'. Sometimes Parliament will oblige. S. 2 of the *Limitation of Action Act* 1965 (Tasmania) provides

> Nothing in this Section applies to or in relation to a cause of action that arose before the commencement of this Act.

Even a helpful provision of this sort can be inadequate if the Act also repeals existing limitation legislation, because it can have the effect that no limitation whatever applies to certain causes of action. Where the court reaches the same result by the application of the common law rule of construction that accrued rights are not to be interfered with, the problem of what limitation law to apply may become acute. Rights can accrue both to plaintiffs and defendants. When the amending law also repeals all previous relevant limitation provisions, itself becoming the Code of Procedure, this may favour the view that all cases, including those arising from facts prior to the legislation, are intended to be covered even though this construction takes away an existing cause of action. Alternatively, the courts may simply refuse to apply that rule of

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1 Butterworths (1984).

2 Bennion 'Statutory Interpretation Codified, with a Critical Commentary', at p. 447.

3 *Maxwell* v. *Murphy* (1957) 96 C.L.R. 261 at p. 266.

construction. As Lord Campbell C.J. said in *Cornill* v. *Hudson*[4] 'We must here consider the plaintiff, in the contemplation of the enactment, as one who should be entitled to the action, and commencing it after the statute came into operation: he clearly is within the scope of the enactment according to its grammatical and natural construction. The cases cited merely show that we are to find out the intention of the Legislature in each particular Act: that is all which the decisions establish; and by that rule I construe Stat. 19 and 20 Vict. c. 97 e. 10. The intention was to prevent actions thereafter to be brought whether on past or future transactions. Does that tend to injustice? I see none.' Everett J. in *Robertson* v. *Hobart Police and Citizens Youth Club Inc.*[5] reached the same result by holding that the *Limitation Act* 1974 (Tasmania) 'enacted a new code'. In particular His Honour attached significance to s. 39 which is as follows:

'39 (1) Nothing in this Act enables any action to be brought that was barred before the commencement of this Act, except insofar as the cause of action or right of action may be revived by an acknowledgement or part payment made in accordance with the provisions of this Act.

(2) Nothing in this Act affects any action or arbitration commenced before the commencement of this Act or the title to any property that is the subject of any such action or arbitration.'

His Honour's judgment does not mention the common law rule of construction. In both this case and in *Cornill* v. *Hudson*[4] the effect of the amending legislation was to extinguish a cause of action which had not been statute barred at the time the amendment came inio force, *allowing no further time to the plaintiff*. In this respect these decisions are more severe on the plaintiff than *The Ydun*[6] where the Court of Appeal held that the amending legislation dealt with procedure only and therefore applied to all actions whether commenced before or after the passing of the Act, and even in respect of previously accrued rights. At least in *The Ydun*[6] the plaintiff had a further three months after the commencement of the Act in which a Writ could have been issued (see the advice of the Judicial Committee of the Privy Council in *Yew Bon Tew* v. *Kenderaan Bas Mara*).[7] While Their Lordships assumed (without expressing an opinion) the correctness of *The Ydun*[6] on its facts (see page 839), it seems that if the amendment had deprived the plaintiff of its right of action in the same way as it did in *Cornill* v. *Hudson*[4] and in *Robertson* v. *Hobart Police and Citizens Youth Club Inc.*[5] then Their Lordships would have said the case was wrongly decided. What Their Lordships did observe (see page 839) was that whether a statute has retrospective effect cannot in all cases safely be decided by classifying

4 *Cornill* v. *Hudson* (1857) 3 El. and Bl. 430 at p. 436 (120 E.R. 160).

5 *Robertson* v. *Hobart Police and Citizens Youth Club Inc.* Unreported Serial No. 13/1981.

6 *Ydun* (1899) at p. 236.

7 *Yew Bon Tew* v. *Kenderaan Bas Mara* (1982) 3 All E.R. 833 at p. 836.

the statute as procedural or substantive. The test is to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations. Their Lordships continue 'the appellants assert that a *Limitation Act* does not impair existing rights because the cause of action remains, on the basis that all that is effected is the remedy. There is logic in the distinction on the particular facts of *The Ydun*,[6] because the right to sue remained, for a while, totally unimpaired. But in most cases the loss, as distinct from curtailment, of the right to sue is equivalent to the loss of the cause of action. The *Public Authorities Protection Act* 1893 can be regarded as procedural on the facts of *The Ydun*,[6] but a slight alteration to those facts would have made it substantive. A *Limitation Act* may therefore be procedural in the context of one set of facts, but substantive in the context of a different set of facts'.

'In Their Lordships' view, an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an Act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable.'

From the plaintiff's point of view, the right to apply to a court for an extension of time to sue would appear to be sufficient to prevent the defendant from claiming an accrued right — *Australian Iron and Steel Limited* v. *Hoogland*[8] — as would, *a fortiori*, the right to sue on a common law or statutory claim which is still unbarred — *Chang Jeeng* v. *Nuffield (Australia) Pty. Ltd.*[9] Any *enlargement* of plaintiff's rights by subsequent amending legislation is treated as procedural and hence applicable to pre-amendment fact situations.

Perhaps a traditional common law distinction between barring the remedy and barring the right has enabled the courts to do justice in allowing extensions of time to sue in invididual cases, for example *Williams* v. *Australian Newsprint Mills Ltd.*[10] (*on appeal Australian Newsprint Mills Ltd.* v. *Williams*)[11] but it affords only slight help in predicting a result in cases such as *Robertson.*[5] (In that case Mr Justice Everett's judgment was reversed on other grounds and the plaintiff ultimately recovered damages. The Full Court did not give consideration to the correctness or otherwise of the Judge's decision on the retrospective operation of the 1974 Act. Judgment for the plaintiff was achieved by refusing to allow the defendant to amend the defence to plead the statute).[12]

Let us assume a potential plaintiff, born in 1964, in the custody of a parent at the time of suffering injury due to negligence in 1967, reaching

8 *Australian Iron and Steel Limited* v. *Hoogland* (1962) 108 C.L.R. 471.
9 *Chang Jeeng* v. *Nuffield (Australia) Pty. Ltd.* (1959) 101 C.L.R. 629.
10 *Williams* v. *Australian Newsprint Mills Ltd.* (1978) Tas. S.R. 192.
11 *Australian Newsprint Mills Ltd.* v. *Williams* (1979) Tas. S.R. 234.
12 See Unreported Tasmanian Decisions *Robertson* v. *Hobart Police and Citizens Youth Club Inc.* 59/1982 and *Robertson* v. *Hobart Police and Citizens Youth Club Inc.* 8/1984.

majority in 1982, and desiring to sue a defendant and thereby the Motor Accidents Insurance Board. Prior to the commencement of the *Limitation Act* 1974 on 1 January 1975, the plaintiff would have had the benefit of s. 4 of the *Mercantile Law Act* 1935 (Tasmania) (replacing s. 7 of the *Limitation Act* 1623) and therefore could bring her action on attaining the age of majority notwithstanding the fact that the cause of action accrued in 1967; *Whiteway* v. *Fire and All Risks Insurance Co. Ltd.*[13] As at 1 January 1975 that section was repealed, as were all other relevant limitation provisions in force. They were replaced by the provisions of the 1974 Act. This prescribed a limitation period of three years extendable to six. It re-enacted in substance the disability saving provisions of the *Mercantile Law Act* 1935 (see s. 26 of the *Limitation Act* 1974) but that section expressly provided in sub-section 6:

> This section does not apply to such an action as is referred to in Section 5 unless the plaintiff proves that he or (as the case requires) the person under the disability was not, at the time when the right of action accrued to him, in the custody of a parent.

Section 5 dealt with personal injury claims.

The effect of this provision on our potential plaintiff is to destroy the remedy which was not statute barred immediately prior to the commencement of the amending Act. This is exactly the situation which faced the court in *Cornill* v. *Hudson*,[4] and the situation contemplated by the Judicial Committee of the Privy Council in *Yew Bon Tew's*[7] case if the facts in *The Ydun*[6] had been slightly different.

Should the court adopt the approach of cases such as *Jackson* v. *Woolley*?[14] 'It would require words of no ordinary strength in the statute to induce us to say that it takes away such a vested right.... Applying that rule, in which I entirely concur, to the section now in question, I can see nothing on the fact of the enactment which puts it beyond doubt that the Legislature meant it to be retrospective, so as to deprive any person of a right of action vested in him at the time of the passing of the Act. I am therefore clearly of the opinion that the section was not applicable in the present case.' There are also the more recent *dicta* of the High Court and the Judicial Committee of the Privy Council in the cases previously mentioned to the effect that *clear intention* is required before an amendment to a *Limitation Act* will be construed so as to take away a vested right. If the court adopts that rule of construction, what Limitation Law does it apply to the plaintiff's claim? The old limitation provisions have been expressly repealed. Under those provisions the right to sue was still extant.

Had the attention of Parliament been drawn to the matter it is probable that some provision would have been inserted into s. 26 (6) so that the sub-section applied only to cases where the cause of action accrued after 1 January 1975, thus leaving the existing rights of potential plaintiffs to

13 *Whiteway* v. *Fire and All Risks Insurance Co. Ltd.* (1972) Tas. S.R. 5.

14 *Jackson* v. *Woolley* (1858) 3 El. and Bl. 734 (120 E.R. 94).

be governed by the 1974 limitation periods, but without taking away any existing rights. Such a construction would be 'procedural' rather than substantive.

Judges are reluctant to re-write statutes. To hold that the limitation provisions of the 1974 Act did not apply to pre-existing causes of action would be difficult on two counts. Firstly, it would render the provisions of s. 39 (set out above) totally unnecessary. Secondly, it would leave all prior causes of action without any limitation period.

To hold that only s. 26 (6) did not apply to pre-existing causes of action, but the rest of the 1974 Act did so apply, would take considerable judicial aplomb.

An alternative would be to *imply* a provision such as s. 2 (4) of the *Limitation of Actions Act* 1965, so that no part of the 1974 Act, *including the repeals,* would apply to pre-existing causes of action. This again runs into the problem of s. 39 of that Act. The section pre-supposes that the Act applies to *all actions.*

Is that section a provision containing '*words of no ordinary strength*'?

There seems to be no sure guide other than the court's assessment of the merits of the parties. In the case of a large claim by a deserving plaintiff against a defendant with third party insurance cover, a court might be bold enough to apply Sir Owen Dixon's endorsement of princple as it was stated in the Canadian case of *Dixie* v. *Royal Columbian Hospital*:[15]

> Unless the language used plainly manifests in express terms or by clear implication a contrary intention — (a) A statute divesting vested rights is to be construed as prospective. (b) A statute, merely procedural, is to be construed as retrospective. (c) A statute which, while procedural in its character, affects vested rights adversely is to be construed as prospective.

But in *Robertson's*[5] case Mr Justice Everett saw that the defendant was a Police and Citizens Youth Club, and His Honour applied what he considered to be Parliament's purpose in enacting the 1974 Act (see page 6 of his Reasons for Judgment). The language is not unlike that in *Cornill* v. *Hudson*[4] quoted above.

One might say, Ydun it again.

Editor's Note

Mr. Cranswick has pointed out that in *Lockwood* v. *Cummings* an unreported judgment of Nettlefold J. of 24 December 1982, the point was decided the following way. Citing the rule that statutes which change substantive rights and which, although they are largely procedural, limit the right to bring an action should not be interpreted retrospectively, Nettlefold J. held that s. 5 of the *Limitation Act* 1974 should not be interpreted so as to take away rights to bring an action which had accrued before the Act was passed.

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15 *Dixie* v. *Royal Columbrian Hospital* (1941) 2 D.L.R. 138 at pp. 139, 140.

In that case, the plaintiff was injured in a motor accident when she was five years old. At the date of the accident, 1964, the limitation provisions which governed the enforcement of the plaintiff's cause of action were set out in ss. 3 and 4 of the *Mercantile Law Act* 1935. These sections allowed her to bring her action within six years from the date of attaining her majority in 1977. These provisions were repealed by the *Limitation Act* 1974, which took away the right of infants who were in the custody of their parents at the time when the right of action accrued to bring the action after they had attained their majority.

Nettlefold J. refused to interpret the *Limitation Act* 1974 as taking away rights of action which had accrued before the Act was passed. In doing so, he arrived at the apposite conclusion to that of Everett J. in *Robertson's Case*, which was not cited to him. Hence lawyers in Tasmania are now faced with two contradictory judgments on the same point by single judges of the Tasmanian Supreme Court.

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