LAW REFORM COMMISSION

MANITOBA

COMMISSION DE RÉFORME DU DROIT

REPORT

ON

LIMITATION OF ACTIONS: TIME EXTENSIONS FOR CHILDREN, DISABLED PERSONS AND OTHERS

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The Manitoba Law Reform Commission was established by *"The Law Reform Commission Act"* in 1970 and began functioning in 1971.

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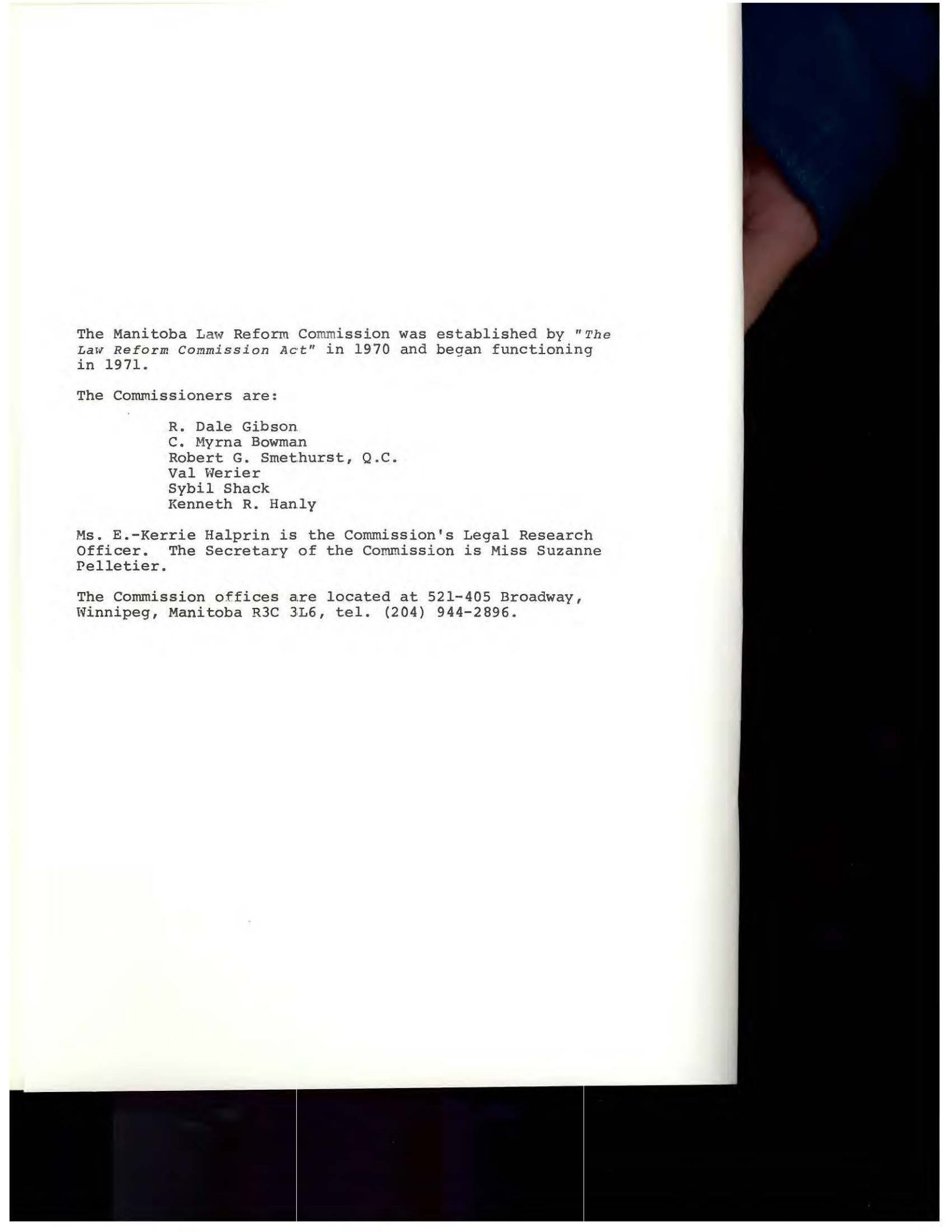

INTRODUCTION

In February 1972 a two year old girl, Anna Marie Mumford, suffering from stomach pains and fever, was twice refused admission to a Winnipeg hospital when brought there by her mother. Five days after the second refusal she was admitted to another hospital and underwent surgery, from which she emerged a blind, mute, spastic, quadraplegic.

It has been alleged on behalf of the child that her condition was caused by medical negligence, although no court has yet had an opportunity to rule on this allegation. The initial reason for the delay was that the child's mother, poorly educated and ignorant of her legal rights, took no steps to pursue possible legal relief until she was persuaded by a relative to do so in February 1975, roughly a year after the lapse of the normal limitation period for any possible legal action against the medical personnel concerned.

There is a provision in *"The Limitation of Actions Act"* (C.C.S.M. cap. L150, Part II) whereby the courts are empowered to extend limitation periods in certain unusual circumstances. An application was made on behalf of Anna Marie Mumford under Part II of the Act, but the courts at both the trial and appeal levels declined to exercise their discretion to extend the period. In the Court of Appeal, Chief Justice Samuel Freedman dissented (*Mumford v. Children's Hospital of Winnipeg et al*, [1977] 1 W.W.R. 666 (Man. C.A.)).

The child's advisers then approached the Legislative Assembly of the Province, seeking a special statute to extend the limitation period in her case. After considerable debate and an equal division of the Assembly on a

free vote, the Speaker cast his deciding vote against granting the relief sought (*Winnipeg Tribune*, June 18, 1977, p. 1). It appeared at that point that Anna Marie Mumford had been conclusively denied the opportunity to have the legal responsibility for her tragic condition judicially determined.

In January 1978 this Commission published a Working Paper, *Limitation of Actions by Children and Disabled Persons*, in which we examined several problems illustrated by the *Mumford* case, suggested tentative solutions, and requested comments from interested members of the public. A number of helpful responses were received; a full list of respondents will be found in Appendix A.

In the meantime the legal advisers of Anna Marie Mumford had not given up their attempts to obtain a judicial hearing for the girl. Section 9 of *"The Limitation of Actions Act"* contains a special provision extending certain limitation periods in the case of children (as well as persons under mental disabilities). Our Working Paper expressed the view that section 9, as presently stated, would not be applicable to the facts of the *Mumford* case. Since it was our view that it *should* be applicable in such circumstances, we recommended certain remedial amendments to the section. Counsel for Anna Marie Mumford did not agree with our interpretation of the existing wording, however, and launched an action on the girl's behalf in December 1977. The defendants applied for an order striking out the statement of claim on the ground that the limitation period had elapsed. Although the learned trial judge, Nitikman J., agreed with the defendants, his order was set aside by the Manitoba Court of Appeal in September 1978. The Court of Appeal held that the special time extension for

children set out in section 9 of the Act is applicable to this type of case (*Mumford et al v. Health Sciences Centre et al*, No. 60/78, Sept. 14, 1978). The *Mumford* case will, at long last, proceed to trial on its merits.

This judicial development, unexpected at the time our Working Paper was published, has removed some of the urgency for legislative solutions to certain of the problems discussed in the Working Paper. Nevertheless, several of our recommendations were entirely unaffected by the *Mumford* decision, and even those that were have not been rendered completely superfluous by it. Accordingly, having profited from both the submissions of our respondents and the learned reasons for judgment of Monnin J.A., for the Court of Appeal in the *Mumford* case, we now offer our final recommendations.

Our report will deal with four problem areas relating to the rights of children and disabled persons under the Manitoba *"Limitation of Actions Act"*:

1. The exclusion of certain types of legal action from the special time extension for children and disabled persons.
2. The duration of the special time extension for children and disabled persons.
3. The position of disabled adults.
4. The uncertainty of some provisions relating to the general time extensions available under Part II of the Act.

1. EXCLUSIONS FROM THE SPECIAL PROTECTIONS FOR CHILDREN AND DISABLED PERSONS

Section 9 of *"The Limitation of Actions Act"* reads as follows:

> 9 Where a person entitled to bring any action mentioned in clauses (c) to (j) inclusive of subsection (1) of section 3 is under disability at the time the cause of action arises, he may bring the action within the time hereinbefore limited with respect to such an action or at any time within two years after he first ceased to be under disability.

The term "disability" is defined by section 2(c) of the Act to mean "disability arising from infancy or mental disorder within the meaning of the Mental Health Act".

It will be noted that the special protection provided to children and disabled persons by section 9 is limited to the case of "any action mentioned in clauses (c) to (j) inclusive of subsection (1) of section 3". The clauses referred to cover most forms of ordinary tort liability, including negligence and trespass to the person. However, there are several exceptions:

(a) Actions for penalties imposed by any statute brought by an informer suing for himself alone or for the Crown as well as himself, or by any person authorized to sue for the same, not being the person aggrieved, . . .

(b) Actions for penalties, damages or sums of money in the nature of penalties, given by any statute to the person aggrieved, . . .

. . .

(k) Actions brought under and by virtue of The Fatal Accidents Act, . . .

(l) Any other action for which provision is not specifically made in this Act, ...

The most important of these exceptions is subsection (k), which denies a time extension to children and disabled persons in claims brought under *"The Fatal Accidents Act"*. Such claims are for recovery of financial expectations lost due to the wrongfully caused death of a parent or other family member upon whom the plaintiff was financially dependent. This is a form of legal action that has special significance for the young and the disabled because of their heavy dependency on others, usually family members, for support. Why it should be among the types of action singled out for exclusion from the special time extension we cannot comprehend. Although the debates of the Legislative Assembly were not recorded verbatim when these exclusions were first made, we have searched the newspaper reports of the debates and have failed to find any reference to the reasons for doing so.

Only one response to our Working Paper suggested a possible justification for excluding *"Fatal Accidents Act"* claims from the protection of section 9. This respondent speculated that perhaps, since every action brought under *"The Fatal Accidents Act"* is required to be on behalf of *all* family members dependent on the deceased (sections 4(1) and 6(2)), a time extension granted to an infant or disabled claimant might also enable *other* claimants to circumvent the limitation period. In the view of the Commission that is not a sufficient reason for denying the protection of section 9 to children and disabled persons in *"Fatal Accidents Act"* claims. The risk of other family members benefitting "on the coat-tails" of the child or disabled claimant could be

easily avoided by specifically stating in section 9 that no claim is thereby authorized other than that of the child or disabled person himself or herself.

The other types of claim expressly excluded from the protection of section 9 are not as important as *"Fatal Accidents Act"* actions. The matters covered by subsections (a), (b) and (1) of section 3 are rarely likely to involve vital rights of children or disabled persons, and no serious social harm would likely arise if they continued to be exempted from the operation of section 9. On the other hand, we cannot see any compelling reason for excluding them. If it is desirable to excuse the young and the disabled from time limitations in all other types of legal action, it is difficult to understand why these few rather exotic matters should be treated differently.

We expressed the opinion in our Working Paper that there is another very important group of exceptions from the protection afforded by section 9 of *"The Limitation of Actions Act"*. There is a list in Schedule A to the Act of 27 other statutes containing special limitation periods. It seemed to us that the wording of section 6 of *"The Limitation of Actions Act"* removed all of these special periods from the protection of section 9. This opinion was supported by a decision of the Ontario Court of Appeal interpreting similar Ontario legislation: *Philippon v. Legate* (1970) 8 D.L.R. (3d) 506. If this interpretation were correct the consequences would be very serious since the special statutes listed deal,among other things, with the legal liability for professional negligence of physicians, dentists, chiropractors, public officers, and many others whose work often affects the well-being of children and disabled persons. We advanced the tentative recommendation therefore that the Act should be

amended to stipulate that these special limitation provisions are covered by section 9.

We received two briefs in opposition to that suggestion: one from the Canadian Medical Protective Association, and one from the Manitoba Medical Association. Both organizations expressed the view that their members should be exempt from the time extensions granted to children and disabled persons under section 9. Three reasons were offered, which we have paraphrased as follows:

1. The passage of time reduces the ability of physicians to recall the events about which a patient may be complaining, due to the innumerable patients with differing ailments seen on a regular daily basis, and thus having to rely almost entirely on documented medical records. The patient, on the other hand, has had plenty of time to brood about the matter and because it was probably his only such experience, he may have a vivid recollection of details that will make his story impressive to a judge. Yet the patient's "recollection" of vital matters may well be coloured by his emotions and by subsequent events. The doctor is at a great disadvantage in this type of "memory" contest. A primary purpose of limitation of actions legislation is to enable courts to determine issues on the best possible evidence, and lengthy time extensions frustrate that goal.

While these observations are centraily true, we would point out that most defendants in most types of legal claim (at least outside the realm of business contracts) are in a similar position. Professionals at least have the opportunity to maintain records of what transpired during treatment. Moreover, a busy doctor's ability to recollect the details of a case independently of his records is likely to be almost as low by the end of the regular two year limitation period as it will be at any later time.

2. To require the retention of medical records indefinitely would present a very major storage problem for the medical profession and increase the costs of medical practice.

We fail to see how section 9 of *"The Limitation of Actions Act"* would have this effect. Part II of the Act makes possible a claim outside the normal limitation period by *any* patient in certain circumstances. Any doctor concerned about his legal liability would therefore have to keep all his records even if section 9 did not exist. Microfilming processes make this possible. In any event, even if section 9 did impose any added burden, it would be a relatively simple filing procedure to set aside the records of children and severely disabled patients for longer than normal storage.

3. If doctors become unduly concerned about possible legal liability they may practice "defensive medicine" making use of unnecessary and wasteful tests and second opinions to corroborate their diagnoses, avoiding innovative measures which might have been more beneficial to the patient. The result of such a trend could be a reduction in the introduction and use of new medical procedures and an increase in the cost of health care.

Though cognizant of these long-range problems, which are now rearing their heads in some parts of the United States, the Commission cannot accept that the modest reform it suggested would contribute materially to a move toward defensive medicine. The incidence of successful legal claims against Canadian medical practitioners is extremely low compared to the United States. There is no reason for a Canadian doctor to employ, on legal grounds, techniques that would not be indicated on medical grounds. To permit children and disabled persons to have the same rights against doctors as they do against everyone else would not alter the situation significantly. We are confident that so minor a change in the law would do nothing to change the responsible manner in

which most Canadian doctors have always practised their profession.

Nothing we have learned since the publication of our Working Paper has caused us to alter the view we expressed then that the protection offered to children and disabled persons by section 9 of *"The Limitation of Actions Act"* should extend to all the special statutes listed in Schedule A. The urgency for a legislative amendment in this regard has been reduced by the decision of the Manitoba Court of Appeal in the *Mumford* case, interpreting the existing legislation to mean that section 9 applies to the statutes covered by Schedule A. Nevertheless, since we are recommending an amendment to accommodate *"Fatal Accidents Act"* claims and certain other matters anyway, it would be wise to include the Schedule A statutes in the same amendment, and thereby preclude the possibility that some future decision of the Supreme Court of Canada might set aside the *Mumford* interpretation.

The amendment required to extend the reach of section 9 to cover the excluded forms of action is very simple. All that will be necessary is to replace the words "any action mentioned in clauses (c) to (j) inclusive of subsection (1) of section 3" with the words: "any action mentioned in subsection (1) of section 3, whether or not the action is subject to any Act mentioned in Schedule A".

2. DURATION OF THE SPECIAL TIME EXTENSION FOR CHILDREN AND DISABLED PERSONS

At the time our Working Paper was issued it appeared that even if section 9 had applied to actions against medical personnel, Anna Marie Mumford might not have been able to take advantage of the section until the year 1988. This is because of the interpretation a Manitoba judge had given to the peculiar wording of section 9:

> Where a person entitled to bring any action . . . is under disability at the time the cause of action arises, he may bring the action within the time hereinbefore limited with respect to such an action or at any time within two years after he first ceased to be under disability. (emphasis added)

This provision, which was derived from section 7 of the English *Limitation Act*, 1623, had long been assumed by most lawyers to mean that a child or disabled person who does not sue within the normal limitation period may do so at any time thereafter until two years after the age of majority or after the disability ends. Both English and Canadian authority supported such an interpretation (see: Franks, *Limitation of Actions*, 1959, p. 213, Preston & Newsom; *Limitation of Actions*, 3rd ed., 1953, p. 218; *Schartner v. Yoshi Yoka* (1957) 9 D.L.R. (2d) 160 (B.C.C.A.); *Williams v. C.N.R.* (1977) 75 D.L.R. (3d) 87 (N.S.S.C.-App.D.)). However, there was also contrary authority, and a 1973 decision of the Manitoba Court of Queen's Bench followed that authority.

In *Gibbino et al v. Barcellona* (1973) 35 D.L.R. (3d) 477, the parents of a young boy brought an action on his behalf with respect to personal injuries sustained in June 1969,

when he was two years of age. The action was not commenced, however, until July 1971, about two weeks after the two year limitation period had elapsed. The boy was then four years of age.

When the defendant objected that the action was statute barred, the plaintiff replied by asserting that section 9 of *"The Limitation of Actions Act"* permitted the action to be brought at any time until the boy's 20th birthday.

Mr. Justice Hunt of the Manitoba Court of Queen's Bench disagreed with the plaintiff's interpretation of section 9, however. His Lordship held, in view of the words: "within two years after he first ceased to be under the disability" (emphasis added), that the boy's cause of action fell into abeyance immediately upon expiration of the normal limitation period, and would not revive until the boy's eighteenth birthday, after which he would again be able to sue for two years. The action was therefore dismissed.

We contended in our Working Paper that while this conclusion may have been dictated by a literal interpretation of the words of section 9, it did not accord with the purpose or spirit of either *"The Limitation of Actions Act"* in general, or the special extension provision in particular. We recommended an amendment that would permit an action to be brought at any time until two years after the disability ends.

The decision of the Court of Appeal in the *Mumford* case has again removed the urgency for legislative reform by rejecting the interpretation propounded by Mr. Justice Hunt, and holding that Anna Marie Mumford may sue at any time up to her twentieth birthday. We continue to recommend, nevertheless,

that the language of section 9 be altered slightly so that the words used will correspond more closely with the interpretation employed, and thus obviate possible confusion on the part of those who read the section without a knowledge of its judicial interpretation. There is also a possibility that the Court of Appeal decision could be overturned by the Supreme Court of Canada in this case or in some future case. In our view the section would be more satisfactory if the word "until" were substituted for the word "within" in the key phrase. The section would then read as follows:

> Where a person entitled to bring any action . . . is under disability at the time the cause of action arises, he may bring the action within the time hereinbefore limited with respect to such an action or at any time until two years after he first ceased to be under disability. (emphasis added)

A similar change would be required in section 59(1), which covers the effect of infancy and disablement on legal actions relating to real property, and is phrased in a manner similar to section 9.

There are some who believe that section 9 remains unsatisfactory even as interpreted in the *Mumford* case because it still requires defendants in some situations to answer claims based on events occurring many years previously. They assert that it is unfair to potential defendants to give infants and disabled plaintiffs an automatic right to a time extension for what might turn out to be a very lengthy period. In their view, therefore, it would be preferable to vest in the court a discretion as to whether the time period should be extended. This would enable the court to take into account such factors as whether the child and his or her advisers have improperly slept on their rights, whether the defendant's position has been unduly jeopardized as a result, etc. The

approach suggested by these critics would be to replace section 9 with a discretionary procedure, similar to one now in effect in England for an even broader range of claims. The English provision will be described later in this Report.

It is the view of the majority of the Commission, however, that this suggested departure from the automatic protection provided by section 9 is not necessary and would not be desirable. The chief difficulty with the discretionary approach is the uncertainty it creates. It is very difficult to predict how a judge would exercise his discretion in a given case, so neither the plaintiff nor the defendant could be confidently advised about their rights until a judge had actually ruled on them. The uncertainty could be reduced somewhat by providing that a time extension should be granted except in "extraordinary" circumstances or where an extension would be "grossly unfair", but even then the outcome of many applications would be far from predictable.

If we were convinced that the automatic right to a time extension granted by section 9 would result in a significant number of abuses or in very lengthy time delays, we might favour the suggested change in approach. However, it appears to us that most cases involving expired limitation periods in actions by children are likely to be ones in which, as in the *Mumford* and *Gibbino* situations, only a relatively short period of time has elapsed since the end of the period. Accordingly, we see no need to recommend a discretionary approach. We are not unanimous in this view, however. A minority of the Commissioners believes that a discretionary extension provision would be a fairer solution because it would enable the court to protect defendants from potential abuse of section 9.

An alternative method of providing some protection to potential defendants against the possible abuse of time extension provisions for children has been adopted by British Columbia. *"The Limitations Act"* of that province provides (S.B.C. 1975, cap. 37, s. 7(7)):

> . . . [W]here a person under a disability has a guardian and anyone against whom that person may have a cause of action causes a notice to proceed to be delivered to the guardian and to the Public Trustee in accordance with this section, time commences to run against that person as if he had ceased to be under a disability on the date the note is delivered.

In our Working Paper the Commission expressed doubt that any such provision would offer significant protection for potential defendants. While it would give them one way of ending the uncertainty, we thought it very unlikely that any defendant would make use of it, since by doing so they would virtually ensure that they would be sued. We thought that most defendants would rather have the sword of Damocles suspended overhead than falling upon them. We pointed out that the provision has seldom if ever been employed in British Columbia. One of our respondents expressed the view that although it may not be often used, the availability of such a procedure would not harm anyone, and it might occasionally be used to forestall abuses of the time extension privilege. We have been persuaded by that argument to recommend the enactment of a provision similar to the British Columbia section quoted above.

Still another method of protecting defendants from prejudice as a result of unjustified extensions of time would

be to restrict the operation of section 9 to children and disabled persons not in the custody of a parent, guardian or trustee who might look after their interests. Alberta has such a provision, for example (R.S.A. 1970, cap. 209, s. 59), and the Ontario Law Reform Commission in its 1969 *"Report on Limitation of Actions"* recommended a similar provision for that province, subject to the right of the child or disabled person himself or herself to sue the parent, guardian or trustee (pp. 98-99).

It is our opinion that it would not be desirable for Manitoba to enact such restrictions. Since there are very few children who are not in the custody of a parent or guardian and few provably mentally incompetent persons who are not under the care of a committee or the Public Trustee, such a provision would virtually nullify the protection given by section 9. We do not think that it would be fair to deprive children or disabled persons of an action simply because parents, guardians or trustees failed to act diligently in the interests of their charges. It is true that under the Ontario proposal a child or disabled person would retain the right to sue the parent, guardian or trustee in such a case, but one has only to recall the circumstances of the *Mumford* case to realize how unrealistic such a re ource would be in most situations. How helpful is it to tell a child that his only recourse is against the parent who already provides his financial support? And what would an action by a child against the parent do to the child's social and emotional development? The English *Limitation Act* used to contain a provision similar to section 59 of the Alberta Act, but it was repealed in 1975. It seems to us that the British Parliament was wise to do so.

3. ARE DISABLED PERSONS ADEQUATELY PROTECTED?

Most of the matters discussed up to this point have been equally applicable to the rights of children and the rights of disabled persons. There are, however, some special considerations affecting the latter group only that require examination.

It is well established that section 9 applies only to disabilities which were in existence at the time the cause of action in question arose. The courts have construed this to include disabilities caused by the wrongful act which gave rise to the action (see, for example, *Kaszyk v. Cloetstra et al* (1977) 71 D.L.R. (3d) 458 (Alta. S.C. -App.)). However, it does not include a disability occurring any time after the day of the events leading to the cause of action - even a day later. If a person injured in a car accident were mentally incompetent at the time, or were rendered immediately incompetent by the accident itself, he would be protected by section 9; yet if the incompetence developed the day after the accident, even as a delayed consequence of it, he would not be protected.

British Columbia has recently amended its legislation to permit a suspension of the limitation period where disability occurs after the cause of action arose (*Limitations Act*, S.B.C. 1975, cap. 37, s. 7(5)(a)(ii)). The Ontario Law Reform Commission report recommended a similar reform in 1969 (p. 97). The English Law Reform Committee tentatively rejected such a change but not without recognizing the unfairness of ignoring supervening disabilities and recommending a different - discretionary - technique to deal with them (Cmnd. 5630 - 1974, para. 94 to 96). (The recommended discretionary remedy was

adopted in the 1975 amendments to the English Act. See section 4 of this Report which discusses this remedy further.) The Alberta Institute of Law Research and Reform (Working Paper on Limitation of Actions, June 1977) agreed with the English Committee's conclusion, but offered no reasons.

Our view is that the British Columbia approach is preferable. As the Ontario Law Reform Commission Report says:

> It seems absurd that time should not run against a person who was of unsound mind when a cause of action accrued to him but that it should run against him if he became unsound of mind the following day (p.97).

None of our respondents disagreed with that conclusion.

Another problem concerning the application of section 9 to disabled persons concerns the type of disability involved. Section 2(c) defines disability as follows:

> "disability" means disability arising from infancy or mental disorders within the meaning of The Mental Health Act".

Section 2(o) of *"The Mental Health Act"* (C.C.S.M. cap. M110) defines "mental disorder" as follows:

> "mental disorder" means mental illness, mental retardation, psychoneurosis, psychopathic disorder, addiction, or any disability of mind caused by disease, senility or otherwise.

There is some uncertainty as to whether this definition is sufficiently wide to cover all situations in which a

person has been effectively deprived of the power to manage his or her affairs. Would it, for example, include a person rendered comatose by an automobile accident? Would it apply to someone like Anna Marie Mumford: blind, mute, spastic and paraplegic? It would probably not cover purely physical incapacity which prevented a person from looking after his own affairs, but did not impair his intellectual powers. In order to remove any doubt about the matter, the Commission recommends adoption of a proposal contained in the Ontario Law Reform Commission's report (p. 100):

> "disability" should be defined in such a way as to extend the meaning . . . to all situations where a person cannot manage his affairs because of any disease or any impairment of his physical or mental condition.

Section 7(5) of the British Columbia *Limitations Act* contains a similarly expanded definition:

> A person is under a disability while he is in fact incapable of or substantially impeded in the management of his affairs.

The Alberta Institute of Law Research and Reform has recommended in its Working Paper (p. 53) that the definition also be expanded in that province, but not so as to include physical conditions. We are of the view that the broader approaches of British Columbia and Ontario are to be preferred to that of Alberta. This conclusion, advanced tentatively in our Working Paper, attracted no disagreement from our respondents.

4. DOES PART II OF *"THE LIMITATION OF ACTIONS ACT"* PROVIDE SUFFICIENT PROTECTION FOR PERSONS WHO FAIL TO SUE ON TIME DUE TO A LACK OF UNDERSTANDING OF THEIR LEGAL RIGHTS?

Does the failure of the application made on behalf of Anna Marie Mumford under Part II of *"The Limitation of Actions Act"* indicate an inadequacy in the provisions of that Part?

Part II was added to *"The Limitation of Actions Act"* in 1966-67 as a consequence of a case that resembled the *Mumford* case in some ways. A woman sought to bring a legal action against a surgeon who, she alleged, had left a surgical sponge in her body many years previously. The existence of the sponge had not been discovered until long after the expiry of the limitation period. She therefore sought a special Act from the Manitoba Legislature permitting her to pursue her claim against the surgeon. After a lengthy debate, surrounded by much publicity, the Legislature defeated the measure (*Debates and Proceedings, Legislative Assembly of Manitoba*, Vol. 9, No. 73, pp. 1986-1993, April 15, 1964). During the course of the debate several members expressed the opinion that some general legislation to permit the extension of limitation periods in situations like this should be considered.

Shortly before this, as a result of a similar *cause célèbre* in England, the English *Limitation Act* had been amended to give the courts the power to extend limitation periods in certain circumstances. This English legislation was studied and finally adopted by the Manitoba Legislature at its 1966-67 Session.

Part II of *"The Limitation of Actions Act"* and its English prototype are quite similar. Both permit limitation periods to be extended by the court in cases where "material facts" relating to the plaintiff's cause of action were outside his knowledge until the limitation period expired or until less than a year before it did so.

It was under these provisions that Anna Marie Mumford initially sought her extension. It was claimed on her behalf that her mother had been unaware until after expiry of the limitation period of the "material fact" that her daughter had a possible legal action. At the trial level Chief Justice A.S. Dewar refused the extension without recorded reasons. On appeal, Chief Justice Freedman would have granted her application. He relied on section 21(7) of the Act:

> . . . for the purpose of this Part a fact shall, at any time, be taken to have been outside the knowledge, actual or constructive, of a person if, but only if,
>
> (a) he did not then know that fact;
> (b) in so far as that fact was capable of being ascertained by him, he had taken all such action, if any, as it was reasonable for him to have taken before that time for the purpose of ascertaining it; and
> (c) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such action, if any, as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances.

Following an English decision to the same effect (*Central*

Asbestos Co. Ltd. v. Dodd [1973] A.C. 518; [1972] 2 All E.R. 1135 (H.L.)) the Chief Justice held that this provision involved a subjective standard. A court should not ask whether a reasonable person in the plaintiff's position would have been aware of his or her legal right, he said; it should, rather, ask whether the actual plaintiff should reasonably have been aware. Having regard to the mother's lack of sophistication and her declared fear that her daughter might be taken away from her if she made trouble, Chief Justice Freedman held that it would not be reasonable to expect her to have been aware of her daughter's legal rights.

The majority of the Court of Appeal agreed with the trial court in rejecting the *Mumford* application, however. Unfortunately, neither the trial judge nor the two majority appeal court judges offered any recorded explanation for doing so. Examination of the factums filed with the Court of Appeal, together with communications from counsel for both sides, indicates that the major area of disagreement among the judges was whether the plaintiff's allegations, if proved, would disclose a reasonable cause of action. There appears also to have been a difference of opinion as to what the mother should reasonably have been expected to know in the circumstances and whether the failure to appreciate one's legal rights should be treated as a "material fact". It is unlikely that the other judges differed from Chief Justice Freedman's view that section 21(7) involves a subjective standard. However, since the absence of express reasons by the majority leaves that possibility open, the Commission is of the view that it is important to clear up the uncertainty.

We are in agreement with Chief Justice Freedman's

opinion that the standard to be considered in relation to section 21(7) is subjective. The court should, we believe, take account of the individual characteristics of the particular plaintiff. After all, the purpose of Part II was to provide an individualized form of relief for those extraordinary cases for which the standardized limitation provisions are not appropriate. The present language of section 21(7), with its recurrent use of the words "he" and "him", is probably adequate to ensure this result. The matter could be put beyond doubt, however, by substituting for the words "reasonable for him" in section 21(7)(c) an expression like: "reasonable for a person of his intelligence, education and experience".

On the more difficult question of whether failure to understand one's legal rights should be treated as a "material fact" for the purposes of a Part II application, the Commission is divided. Some of us are persuaded that since ignorance of one's legal rights can be as fatal to obtaining judicial relief as failure to realize that one has been injured, it should be equally acceptable as a ground for a time extension. Lest Chief Justice Freedman's acceptance of this ground in the *Mumford* case should be thought to have been overruled by the other judges' rejection of the application, the members of the Commission who support this approach would favour amending *"The Limitation of Actions Act"* to remove any doubt. This could be achieved by altering section 21(5) to read as follows:

> 21(5) In this Part any reference to the material facts relating to a cause of action is a reference to any one or more of the following, that is to say:
>
> (a) The fact that personal injuries resulted from

the negligence, nuisance, or breach of duty constituting that cause of action.

(b) The nature or extent of the personal injuries resulting from that negligence, nuisance, or breach of duty.

(c) The fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable.

(d) The fact that the negligence, nuisance, or breach of duty constituted a cause of action.

(Suggested addition is emphasized)

The majority of us do not share this view. It is our opinion that ignorance of the law is easy to feign, and that it would open the door to intolerable abuse if such ignorance were required to be accepted as a ground for relief under Part II. A recent legislative enactment in England lends support to our opinion. Shortly after a Court of Appeal decision that ignorance of one's rights should be taken into account (*Harper v. National Coal Board* [1974] 2 W.L.R. 775; 2 All E.R. 441 (C.A.))*, Parliament passed a contrary provision

> . . . knowledge that any acts or omissions did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant (*Limitation Act*, 1975, s. 2A(b)).

A majority of the Commission recommends that a similar provision be added to the Manitoba legislation. A majority of our respondents who addressed this issue also favoured such an approach.

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*The question had been left unresolved by the House of Lords decision referred to by Chief Justice Freedman in the first *Mumford* appeal: *Central Asbestos Co. Ltd. v. Dodd* [1973] A.C. 418; [1972] 2 All E.R. 1135 (H.L.).

The English legislation does not totally prohibit lack of knowledge of legal rights being taken into consideration however. The above provision applies only to applications for time extensions *as of right* where the plaintiff claims to have been unaware of relevant facts. The 1973 amendments gave the courts an additional *discretionary* power to grant a time extension "if it appears to the court that it would be equitable" to do so, having regard to the interests of both the plaintiff and the defendant (section 2D(1)). In exercising this overriding discretion, the courts are instructed by subsection 2D(3) to take account of a number of specific factors:

> (3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to -
>
> *(a)* the length of, and the reasons for, the delay on the part of the plaintiff;
> *(b)* the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 2A or as the case may be 2B;
> *(c)* the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
> *(d)* the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
> *(e)* the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

It will be noted that clause (f) introduces the possibility of considering the nature and extent of the plaintiff's legal advice. Thus, while knowledge of legal rights is no longer a component of knowledge of "material facts" in England, it remains a factor to be considered in any application for a discretionary time extension.

The Commission is divided equally as to the desirability of a discretionary provision like this for Manitoba. Three of us believe that it would, among other things, permit the failure to understand one's legal rights to be taken into account in those relatively rare cases where it would not be unduly unfair to the defendant to do so. It would also empower the court to extend limitation periods where it appears equitable to both parties to do so in other exceptional situations. Human interactions are much too complex and varied ever to be capable of being fully provided for in advance by legislative draftsmen. These Commissioners believe that justice is more likely to be done more frequently in regard to limitation periods if the courts are left, as in England, with a residual discretion to deal exceptionally with exceptional cases.

The other three Commissioners are of the opinion that to permit an overriding discretion to be exercised by the courts would severely undermine the purpose of "*The Limitation of Actions Act*", and tempt every out-of-time plaintiff to try his luck in obtaining a time extension.

Lacking a Chairman at the time this Report is being written, the Commission is unable to present a majority recommendation on this issue.

CONCLUSIONS

For ease of reference, our recommendations may be summarized as follows:

1. The special time extension provision for children and disabled persons contained in section 9 of *"The Limitation of Actions Act"* should apply to all actions for personal injury, whether covered by section 3(1) of the Act or by the various statutes referred to in Schedule A. It is particularly important that claims under *"The Fatal Accidents Act"* be included. (pages 4 to 9)

2. (a) The special time extension provisions for children and disabled persons contained in sections 9 and 58(1) of *"The Limitation of Actions Act"* should be re-worded to ensure that an action may be commenced at any time during the period of infancy or disability. (pages 10 to 13)

   (b) Although some members of the Commission would prefer that the special time extension provision for children and disabled persons should be discretionary, the majority are of the view that it should remain an absolute right. (page 13)

   (c) Potential defendants should be permitted to demand the commencement of actions during the period of infancy or disability. (pages 13 to 14)

   (d) The special time extension provision for children and disabled persons should not be restricted to cases where the plaintiff is not in the custody of a parent, guardian, committee or trustee. (pages 14 to 15)

3. (a) The special time extension provision for disabled persons under section 9 of *"The Limitation of Actions Act"* should be

available for disabilities occurring during the normal limitation period as well as for those in existence when the cause of action arose. (pages 16 to 17)

(b) The definition of "disability" should be expanded to cover all forms of mental or physical impairment which render persons incapable or substantially impeded in the management of their affairs. (pages 17 to 18)

4. (a) The time extension provisions in Part II of *"The Limitation of Actions Act"* should be clarified to ensure that a subjective standard is applied by the court in determining in accordance with section 21(7) whether material facts were within the knowledge of the plaintiff. (pages 19 to 22)

(b) Although some members of the Commission believe that failure to understand one's legal rights should be treated as a "material fact" for the purpose of an application for a time extension under Part II of *"The Limitation of Actions Act"*, the majority are of the opinion that it should not. (pages 22 to 25)

(c) The Commission is divided equally as to the desirability of adopting additional time extension provisions which would empower a court to grant an extension on a discretionary basis in similar circumstances to those now covered by the English legislation. (pages 24 to 26)

This is a Report pursuant to Section 5(2) of *"The Law Reform Commission Act"* and a subsequent reference from the Honourable the Attorney-General under Section 5(3) of that Act, signed this 8th day of January 1979.

Dale Gibson

R. Dale Gibson, Commissioner

C. Myrna Bowman, Commissioner

Robert G. Smethurst, Commissioner

Val Werier, Commissioner

Sybil Shack, Commissioner

Kenneth R. Hanly, Commissioner

APPENDIX A

LIST OF PERSONS AND ORGANIZATIONS WHO RESPONDED TO OUR WORKING PAPER

Manitoba Medical Association

The Public Trustee

J. Douglas F. Strange, Klein & Co., Barristers & Solicitors

Hugh D. MacIntosh, Consultant, Law Reform Commission of Prince Edward Island

Canadian Medical Protective Association

Ms. Jan Zurcher, Graduate-at-Law, Department of the Attorney-General